

# OPEN GOVERNMENT GUIDE

Access to Public Records  
and Meetings in

ALASKA

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

Sixth Edition  
2011



# OPEN GOVERNMENT GUIDE

## OPEN RECORDS AND MEETINGS LAWS IN

# ALASKA

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Previously Titled  
Tapping Officials' Secrets

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## Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

## User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

*Following the outline.* Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, [www.rcfp.org/ogg](http://www.rcfp.org/ogg). The Internet version of the outlines allows you to search the database and compare the law in different states.

*Updates:* The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at [www.rcfp.org/ogg](http://www.rcfp.org/ogg). This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.





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**FOREWORD**

The Alaska Legislature has adopted statutes assuring access to both public meetings and public records, and the Alaska Supreme Court has liberally construed these statutes to help ensure they accomplish their intended purposes. What is the intent of these laws? The state Supreme Court has noted Alaska's strong commitment to ensuring broad public access to both government records and meetings. It has repeatedly held that the public records act creates a presumption in favor of disclosure and that the act's implicit legislative policy of broad public access requires courts to narrowly construe exceptions to disclosure. The legislative findings to the 1990 amendments to the public records act explain that public access serves as an important "check and balance" that allows citizens to maintain "control of government." And the Supreme Court's decisions have characterized public access to records as a "fundamental right." *Fuller v. City of Homer*, 75 P.3d 1059, 1061-1062 (Alaska 2003) ("Fuller I") (footnotes omitted)

Before 1990, both the text and legislative history of the public records statutes were silent about legislative intent. The public meetings law, however, contains a strong statement of purpose, and the Supreme Court had cited this language in cases dealing with records as well. *See, City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1323 (Alaska 1982). ("There is a strong public interest in disclosure of the affairs of government generally.")

That statute includes the following:

It is the policy of the state that

- (1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;
- (2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;
- (3) the people of this state do not yield their sovereignty to the agencies which serve them;
- (4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;
- (5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

Alaska Stat. (hereinafter "AS") § 44.62.312(a)(1)-(5). In 1990, when the Legislature amended the Public Records Act (primarily to deal with access to electronic products and services), it adopted findings that "public access to government information is a fundamental right that operates to check and balance the actions of elected and appointed officials and to maintain citizen control of government;" and that "to protect the public's right to know, public records must be available at nominal cost." § 1, ch.200, SLA 1990 in the Temporary and Special Acts.

*Legislative History.* The legislative history of the public records law is set out in *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d at 1319-1321.

*Records.* Alaska's public records statute was first enacted by Congress in 1900 for the territorial District of Alaska. The language of the statute initially adopted was similar to sections of Oregon law, which in turn had counterparts in the laws of California, Montana, Utah and Idaho. Enactment of the 1900 law was intended to codify the common law (that every interested person was entitled to inspect public records, including those of municipal corporations), and may also have

been intended to eliminate the requirement that the person seeking inspection have an interest.

The public records statute remained unchanged until 1955, when a reference to public writings in recorder's offices was added. Then in 1957 the law was amended to provide for exceptions relating to medical records, juveniles, and to those records required to be kept confidential by federal or territorial law. (In 1931, Alaska had become an organized territory, and the territorial legislature enacted the forerunner of § .110 that year. It remained essentially unchanged until the past decade, when an eclectic variety of exceptions were added. *See*, AS 40.25.120(d)(7)-(11).) After Alaska became a state in 1959, the public records statutes were repealed and re-enacted (in 1962), codified as AS 09.25.110 *et seq.* (The statute was renumbered in 2000 when the Public Records Act was moved from Title 9 to Title 40 of the Alaska Statutes, but no substantive changes were made). This 1962 re-enactment was part of a comprehensive revision of the entire territorial statutory code of civil procedure. It was intended to delete procedural provisions from the state's statutes, in deference to the judicial branch's power under the new state constitution to make rules governing court procedures. The report of the House Judiciary Committee makes clear that no substantive changes in pre-existing public records law were intended by the code revisions, and no change in the scope of the public records law was affected by the re-codification. In short, the common law presumption of public access to records adopted in 1900 has not been changed since.

However, two subsequent actions by the Alaska Legislature in particular have significantly affected access to public records. First, the Victims Rights Act of 1991 restricted access to records that include the names and addresses of victims of sexual assaults and kidnapping, and certain identifying information about witnesses generally, *see* AS 12.61.100-.150, reproduced in the Appendix. This statute has substantially impaired access to records previously available — in part because of the language of the statute itself, and in part because some law enforcement agencies and others have used the VRA as an excuse for denying and delaying access to documents not necessarily covered by the Act.

Second, revisions to the public records act in 1990 made several changes affecting access to public records generally, but primarily addressed access to electronic products and services. Public records are available regardless of their format — it doesn't matter whether a document is stored on parchment, floppy disk or PC. However, public records laws do not require public officials to create records that don't already exist. Among other things, this means that an agency is not required by traditional public records laws to manipulate data stored in computer databases to suit the needs of a particular citizen's request, even though computer programs might enable public employees to satisfy the request with little trouble. AS 40.25.115 and related provisions were carefully crafted to balance interests of the public and government agencies, and to encourage agencies to make electronically stored information available in ways that are responsive to specific individual needs, and take advantage of evolving capabilities of new technology.

*Meetings.* Alaska's Open Meetings Act ("OMA") was enacted in 1959 as part of the Administrative Procedures Act adopted by the first legislature after statehood. AS 44.62.310. Its broad language was a comprehensive mandate that meetings of public agencies be open to the public. In 1972, the legislature bolstered the OMA by adding to it a strong statement of purpose codified in AS 44.62.312. A contemporaneous amendment clarified the law to underscore that the OMA was intended to cover meetings of the legislature. [This latter change was rendered meaningless by the Court's decision in *Aboud v. League of Women Voters*, 743 P.2d 333 (Alaska 1987), holding that the constitutional separation of powers prevented enforcement of the OMA against the state legislature (*see* Reporters Committee Alaska Open Meetings outline, sec. I.C.2).] The law was also amended in 1985 to expressly provide for teleconference meetings.

Through the years, the Alaska Supreme Court has consistently construed the OMA liberally in order to give full effect to the letter and spirit of the law. However, after years of complaining about certain provisions they found troublesome, a coalition of municipalities and other public agencies were successful in obtaining certain restrictive amendments to the Open Meetings Act as part of significant revisions made by the legislature in 1994. Chief among these was a definition of the number of public officials necessary to constitute a meeting. Until this time, a “meeting” was not defined by statute, and the Alaska Supreme Court, agreeing with arguments made by press interests filing as friends of the court, had refused to require that a quorum was necessary to establish a meeting. It left this issue unresolved, though a 1981 attorney general’s opinion had indicated that any time two or more members of a public body gathered together to conduct public business it was a meeting covered by the Open Meetings Act. Press organizations never challenged the conduct of public officials based on the “two or more” standard. The imprecise definition of a meeting was a troublesome point for many years, however, not only with respect to inappropriate activities of public officials with little concern about following the Open Meetings Act, but also for conscientious public officials who were interested in following the law but needed to know what the law required of them.

The matter came to a head as a result of two or three high profile and costly lawsuits by public employees or public officials against their colleagues or municipalities. One was an employment-related dispute, the other a political dog fight. In neither case was the press a party. Both suits were extraordinarily expensive, and in each case the court adopted as the definition of a meeting a gathering of “two or more” officials. The perceived need to clarify the definition of a meeting after these cases provided the impetus for legislative revision of the Open Meetings Act, and bills addressing this point provided a vehicle for interested parties to deal with other problems that they had with the Open Meetings Act and its liberal construction by the courts.

Among the changes adopted by the legislature in 1994 were imposition of a 180-day time limit for bringing suits to void actions taken in violation of the Open Meetings Act (the Act itself contained no statute of limitations prior to that time, and the Alaska Supreme Court had expressly refused to apply the doctrine of laches), and exemption of certain meetings of bodies of the state university system (including, for example, faculty tenure committee meetings, which the Alaska Supreme Court had ruled were subject to the Open Meetings Act). Also, a much looser definition of what meetings are subject to coverage of the act was applied to groups meeting solely in an advisory

capacity, and violations of the law by advisory groups can no longer be remedied by an action to set aside resulting decisions (reversing the effect of yet another Supreme Court decision). Although the court had previously held that a balancing of interests is required to ensure protection of the public interest, courts are now expressly required to weigh a variety of factors enumerated in the statute before they can invalidate or void action taken by a public body. The list largely codifies factors that have been articulated in Supreme Court decisions, but adds or underscores factors stressing cost or disruption to the bodies that have taken action.

As a result of significant vigilance and involvement in the legislative process by parties attempting to maximize public access, especially the press, the Alaska Newspaper Association, and the League of Women Voters, much more onerous proposed amendments were avoided (*e.g.*, limiting the definition of a meeting to only gatherings of a quorum or more of a public body, and denying coverage of the Open Meetings Act unless a meeting was pre-arranged for the purpose of discussing public business, regardless of the fact that a meeting did occur and that public business was in fact discussed, allowing substantial decisions to be made in an executive session, and removing advisory groups and meetings of any body discussing professional qualifications or discipline). In addition, a few provisions were inserted that improved the law from the perspective of members of the press and public advocating for greater openness. A subtle but perhaps most significant change affecting the overall enforceability of the Open Meetings Act is the language strengthening AS 44.62.312(b), which now reads:

AS 44.62.310(c) [the provision for executive sessions] and (d) [the list of gatherings not covered by the Open Meetings Act at all] shall be construed narrowly in order to effectuate the policy stated in (a) of this section [the statement of policy of the Open Meetings Act] and to avoid exemptions from open meeting requirements and unnecessary executive sessions.

*Future Revisions of this Outline.* Those who use this outline can contribute to its usefulness and accuracy in the future by sending materials to be included in periodic revisions to: D. John McKay, 117 E. Cook Ave., Anchorage, Alaska 99501. Ph. (907) 274-3154; fax (907) 272-5646; e-mail: mckay@alaska.net

Include statutes, regulations or ordinances not noted in this outline, any changes that occur with respect to provisions cited here, and interpretations of these laws by courts or public officials. Also, send court cases you are involved in or know about, and incidents involving access to meetings and records.

# Open Records

## I. STATUTE — BASIC APPLICATION

This outline attempts to comprehensively catalogue those instances in which the Alaska Statutes require that information be kept confidential. There are often additional or complementary requirements of confidentiality in the administrative regulations adopted pursuant to these various statutes. A few of the administrative regulations most significant to news reporters have been addressed in this outline. No attempt has been made to deal with all the administrative regulations of the various state agencies (or likewise, with local government charters, ordinances and policies), but the reader should be aware that they exist and may be asserted as a basis for denying access to records.

[The range of regulatory provisions requiring confidentiality is extremely broad, and a person seeking access to information should check regulations in the pertinent subject area if a question arises. Presumably, the agency would cite any regulation imposing confidentiality as a basis for denying records. Once the legal basis for the denial is established, the regulation can be compared to the statute for consistency and to determine whether there is authority for the regulation. The information kept confidential by these regulatory provisions runs the gamut from student test results, 4 AAC 6.735, to the biological and management data collected by on-board observers from catcher/processor and floating processor vessels that process shell fish, 5 AAC 39.64.5, to employee petitioner interest cards in support of a showing of interest in a union organizing drive, 8 AAC 97.060(d), to applications for concealed handgun permits, 13 AAC 30.800.]

An agency seeking not to disclose a record on the basis of an agency regulation requiring confidentiality might cite as authority AS 40.25.120(4), which provides that “records required to be kept confidential by a federal law or regulation or by a state law” are not subject to public inspection. Note that the statute does not make an exception for records required to be kept confidential by a “federal or state law or regulation.” Only federal regulations, and not state regulations, form the basis for this exception. The legislature apparently intended to reserve to itself the power to make decisions about when documents should be exempt from public disclosure. By not allowing an exception to the public disclosure requirement based on state administrative regulations alone, the legislature refrained from giving administrative agencies carte blanche to keep documents that agency employees decided would be best kept confidential. Although the issue has not squarely been addressed by the Alaska Supreme Court, trial courts in cases brought by the *Anchorage Daily News* concerning access to public records have interpreted the statute this way, and refused to deny access to records on the basis of administrative regulations purporting to make them confidential.

### A. Who can request records?

#### 1. Status of requestor.

Alaska law makes no distinction as to who may request public records.

#### 2. Purpose of request.

Alaska law does not purport to limit access based on why or on whose behalf the records are sought, or based on the use to be made of the records. See AS 40.25.120. However, in certain unique circumstances, the requester’s purpose may have an effect. For example, when public records are sought by a litigant, the litigant’s right of access is governed by court rules concerning discovery rather than by the Public Records Act, AS 40.25.122, and use of records so obtained may be subject to limitations imposed by the court in that context. See *Jones v. Jennings*. [Note that the Alaska Supreme Court has referred to AS 40.25.122’s limitation on disclosure to “litigants,” except through discovery, as “inexplicable,” and said that “an equal protection challenge to this provision “is not, at first blush, implausible.” *Brady v. State*,

965 P.2d 1, 19 (Alaska 1998); *Copeland v. Ballard*, 210 P.3d 1197, 1203 (Alaska 2009). The Court in *Brady*, however, found the State’s claim that the plaintiff in that case had not been treated any differently from any other person “cogent,” and failed to address the equal protection claim because it found that the plaintiff had failed to develop or brief it adequately. Id. at 19-20. It likewise declined to consider these arguments in *Copeland* because *Copeland* and *Ott* failed to raise these arguments.]

Similarly, though it is assumed that the Public Records Act generally does not permit public officials to require citizens to state their reasons for requesting records (the Alaska Supreme Court has not addressed this expressly), the court has stated that in order to overcome a claim of executive or deliberative process privilege, a requester may be required to state reasons for seeking access so that the interests of the parties can be balanced against one another. A similar situation arises in the context of provisions of statutes or ordinances that impose a balancing test (e.g., the right to withhold medical, personnel, payroll or other similar records where disclosure would constitute an “unwarranted invasion of privacy”).

### 3. Use of records.

The Public Records Act does not place any restrictions on the subsequent use of information provided. In the past, the Attorney General had advised that release of names and addresses might involve privacy interests and that such information should only be released where supported by the public’s interest in disclosure. However, in 1990, broad changes to the state’s public records laws were enacted, which included adoption of a statutory definition of “personal information” that specifically excludes names, addresses and listed phone numbers. This definition is an explicit statement by the legislature that it does not consider a person’s name and address to be protected by the right of privacy, and that therefore names and addresses are subject to disclosure even if requested for a merely commercial purpose. As a result, the names and addresses compiled by the Alaska Department of Fish and Game from hunting and fishing licenses are subject to disclosure requirements and must be provided for inspection and copying regardless of the purpose for which they are sought, though unlisted phone numbers may be withheld. July 25, 1995, Attorney General Opinion No. 663-94-0164. See also 2 AAC 96.420(b), prohibiting restrictions on sale, distribution, reformatting or other third party use of “electronic services or products.”

## B. Whose records are and are not subject to the act?

### 1. Executive branch.

#### a. Records of the executives themselves.

The state public records act contains no express exceptions for records of the governor, mayors or other executives. Section .110 refers to “every public officer,” and § .120 similarly directs “every public officer” to make non-exempt records available for inspection and copying. It has been interpreted, however, to exempt at least some records relating to state executive branch decision-making, as noted in the following section.

#### b. Records of certain but not all functions.

The Alaska Supreme Court has firmly established the existence of a deliberative process privilege that exempts qualifying documents of the executive branch from disclosure under the Public Records Act. In *Fuller v. City of Homer*, 75 P.3d 1059, 1065 (Alaska 2003) the Court extended this privilege to the records of municipal governments. The Alaska Supreme Court initially recognized at least a limited “executive” or “deliberative process” privilege that protects communications between the governor and his or her aides about policy matters in *Doe v. Superior Court*, 721 P.2d 617 (Alaska 1986). The qualified privilege recognized in *Doe* was intended to encompass confidential internal communications including advice, opinions and recommendations, in order to protect the deliberative and mental processes of decision-makers. 721 P.2d at 623. The basis for the privilege in *Doe* was the no-



tion of “separation of powers” implicit in Alaska’s constitution. (It was derived by analogy from *United States v. Nixon*, 418 U.S. 683, 1062–65 (1974), in which the U.S. Supreme Court held the executive privilege is “inextricably rooted in the separation of powers under the [federal] Constitution.”) 721 P.2d at 623. The court said the privilege is only “qualified,” not absolute, so that there must be a balancing in each case of the government’s interest in confidentiality against the need for disclosure. *Doe* set out a procedure to be followed in cases where this privilege has been asserted. It requires the government, through sworn testimony of an official who has personally examined the documents, to describe the documents it seeks to protect and to explain why they fall within the scope of executive privilege. The party seeking disclosure then must show that its need for disclosure outweighs the interest in confidentiality. If this is done, the judge will look at the documents in chambers to decide whether the claim of privilege should be honored, or whether to order the production of the documents. 721 P.2d at 626.

The Alaska Supreme Court recognized and explained the deliberative process privilege in greater detail in *Capital Information Group v. Office of the Governor*, 923 P.2d 29 (Alaska 1996) (“*CIG*”), *Gwich’in Steering Committee v. Office of the Governor*, 10 P.3d 572 (Alaska 2000) (“*Gwich’in*”), and *Fuller v. City of Homer*, 75 P.3d 1059 (Alaska 2003) (“*Fuller I*”). The Capital Information Group (“*CIG*”), a news organization that publishes periodicals describing the activities of the Alaska state government, sought two sets of documents that were at issue in the Supreme Court appeal. The first consisted of budget proposals sent from each executive department commissioner to the Office of Management and Budget, and the second, each department’s proposals for new legislation sent to the governor’s legislative liaison. In each case, the requests were denied on the grounds that the documents were protected by the deliberative process privilege. The court required the state to submit the records requested by *CIG* for *in camera* review, and thereafter granted the state’s motion for summary judgment based on the deliberative process privilege.

Until *CIG*, the Alaska Supreme Court had never explicitly adopted the deliberative process privilege by that name, although in *Doe* it had said the “executive privilege” encompassed the same policy concerns. The court said that this privilege recognizes that a chief executive has a qualified power to keep confidential certain internal governmental communications so as to protect the deliberative and mental processes of decision-makers, and said that it considered the terms “executive privilege” and “deliberative process privilege” synonymous for purposes of the case at hand. The court reiterated that its analysis in *Doe* began with the assumption that exceptions to public records statutes disclosure requirements are to be construed narrowly. It noted, however, that unlike the executive privilege in *Nixon*, which was deemed constitutionally required by the separation of powers doctrine, the common law-based deliberative process privilege traced its roots to supreme court decisions protecting the mental processes of government decision-makers, and the need for open and frank discussions among government officials about proposed or contemplated actions.

The court articulated the substantive requirements of the deliberative process privilege, which is designed to protect open and free discourse among governmental decision-makers, as being two-fold: (1) the communication at issue must be “pre-decisional” to be protected; and (2) it must be “deliberative” in nature, reflecting the give and take of the deliberative process and containing opinions, recommendations or advice about agency policies. 923 P.2d at 35–36. Post-decisional communications are not protected; however, a pre-decisional communication does not automatically lose the privilege after the decision has been made, for fear that even disclosure of past communications could harm future deliberations. Each case must be considered independently and on its own merits. *Ibid.*; *Fuller I*, 75 P.3d at 1063. Merely factual material is not protected, and must be disclosed unless the manner of selecting or presenting those facts would reveal the deliberative process, or if the facts are inextricably intertwined with the policy-making process. *CIG*, 923 P.2d at 36. Documents that contain

“opinions and interpretations” of a policy decision already made are not considered deliberative. *Gwich’in*, 10 P.3d at 579.

If a communication is not shown to be both pre-decisional and deliberative, then the public records statute applies and the document will likely be disclosed. However, even if the communication meets the threshold test, the inquiry is not over because the deliberative process privilege is only a qualified privilege. To establish a *prima facie* claim to the deliberative process privilege in any given case, the government must show that the document whose disclosure is sought is an internal communication or one that the government directly solicited, and that the communication is both predecisional and deliberative. If the court reviews the document and finds that it meets these criteria, the privilege presumptively attaches, overriding the public records act’s usual presumption of disclosure. The burden then shifts to the requesting party to demonstrate that the public’s interest in disclosure outweighs the government’s interest in confidentiality. *Fuller I*, 75 P.3d at 1063; *CIG*, 923 P.2d at 36. The court in *CIG* compared its well-established balancing test for resolving disputes over access to public records articulated in *City of Kenai v. Kenai Peninsula Newspapers Inc.*, 642 P.2d 1316 (Alaska 1982) with the balancing test required where the deliberative process privilege is asserted and preliminarily demonstrated. In the *City of Kenai* case, in the face of municipal executive officials’ claims of secrecy, the court said that the balance to be struck between the public interest in disclosure, on the one hand, and the privacy and reputation interests of the affected individuals and the government’s interests in confidentiality, on the other, required a balancing in which “the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference. The citizen’s predominant interest was expressed in terms of the burden applicable in this class of cases, which was cast upon the agency to explain why the records sought should not be furnished.” 923 P.2d at 36, *quoting City of Kenai*, 642 P.2d at 1323, *see also Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 590–91 (Alaska 1990).

This “balancing test” was articulated, the *CIG* court noted, in the absence of any official assertion of a deliberative process privilege.

But the balancing test as described goes a long way toward accomplishing the goals of the qualified privilege. If the government does not make a justifiable claim to confidentiality, then the balance will almost certainly tip in favor of the individual seeking the information. If it does make such a claim, and meets the threshold requirements, then there is a presumptive privilege and the party seeking disclosure must make a sufficient showing that the need for production outweighs the need for secrecy. . . . The deliberative process privilege affects the balance described above primarily by identifying more specifically what interest the government may have in maintaining confidentiality, in the form of a threshold showing that the communication is pre-decisional and deliberative. It also outlines fairly rigid procedural requirements that the government must meet in order to claim the privilege. . . . Thus, the balancing test that a court should perform where a presumptive privilege attaches is that of *City of Kenai*. If the privilege attaches, however, instead of there being a presumption in favor of disclosure, with doubtful cases being resolved by permitting public inspection, *see City of Kenai*, 642 P.2d at 1323, there is a presumption in favor of non-disclosure and the party seeking access to the document must overcome that presumption.

*CIG*, 923 P.2d at 36–37.

In *CIG*, the court found that the legislative proposals at issue were exempt from disclosure pursuant to the deliberative process privilege. It said they were pre-decisional, and that arguments that they were not, because they were a one-way communication, were without merit because this did not mean that they were not deliberative. The court said that the privilege is meant to further candor and the giving of advice or opinion to the chief executive, and the governor need not respond to a document for candor to be desirable.

By contrast, the court said that the budget impact memoranda that CIG sought, which were documents required by a specific state statute to be sent to the Office of Management and Budget, were not exempt from disclosure under the deliberative process privilege. The statute provides that these documents and other related documents are “public information” after the date they are forwarded. AS 37.07.050(g). Nonetheless, the court found that the budget impact memoranda met the threshold requirements for the deliberative process privilege. They were pre-decisional because they were submitted before the governor made his final determinations as to his proposed budget. They were deliberative because they were meant to be, and clearly were, a direct part of the deliberative process, allowing the governor to hear the needs and opinions of each of the agencies that needed to be accommodated in the budget. The court said that since the documents were pre-decisional and deliberative, it would normally proceed to question whether the demonstrated need for disclosure outweighed the government’s interest in confidentiality. However, it found that in this case the legislature had already weighed those interests and resolved them in favor of public disclosure.

The court rejected the state’s argument that the legislature cannot override a constitutionally based deliberative process privilege. Noting that the privilege is commonly accepted as having both common law and constitutional roots, the court assumed for purposes of this argument the constitutional underpinnings of the doctrine. It observed, however, that the deliberative process privilege has never been held to be absolute. It may be outweighed by the legitimate needs of a coordinate branch. In this specific case, the court found particularly compelling the fact that the document itself was created as a result of a legislative requirement, and that in mandating that the report be made and submitted to the OMB, the legislature had declared that the report should be public, implicitly determining that the need for public disclosure outweighed any risk to candor on the agency’s part. It said that this determination was entitled to significant weight, given the legislature’s constitutional power to allocate executive department functions and duties among the offices, departments and agencies of the state government.

It is noteworthy that the Alaska Supreme Court stated in a footnote that “we consider cases dealing with the Freedom of Information Act, 5 U.S.C. § 552, and its ‘exemption 5’ instructive as they relate to the deliberative process privilege.” The case law interpreting exemption 5 of the federal Freedom of Information Act is generally quite favorable to administrative agencies and decision-makers seeking to withhold documents they claim are pre-decisional and deliberative, pursuant to a deliberative process privilege or related privilege. While the court’s opinion in *CIG* reflects its willingness to make independent decisions, and indeed to distinguish specific cases decided under FOIA Exemption 5, *see* 923 P.2d at 40 n.8, its willingness to rely substantially on the federal case law may foreshadow a substantial deference to agency assertions of privilege. 923 P.2d at 35, n.4.

In *Gwich’in*, the Court solidified the establishment of a deliberative process privilege for state officials. In *Gwich’in*, the Governor’s office sought to protect documents relating to lobbying and public relations efforts with respect to potential opening of the Arctic National Wildlife Refuge to oil exploration and drilling from disclosure to a group representing the interests of Native inhabitants of the affected area. In an expansive ruling, the Court firmly recognized a common law basis for the privilege. It said this deliberative process privilege is a judicially recognized “state law,” which, when invoked by public officials, triggered the exemption in section .120(a)(4) of the Public Records Act for “documents required to be kept confidential by federal law or regulation or state law.” 10 P.3d at 578. It rejected the argument that the privilege only protects communications relating to constitutionally prescribed executive powers and duties. The Court said that the deliberative process privilege is not synonymous with the executive privilege, but instead is a “branch” of a broader group of governmental privileges, with its roots in the common law, and is intended to protect the mental processes of governmental decision-makers from interference, not constitutional notions of separation of powers. The ques-

tion, therefore, is whether the communication sought would affect the quality of governmental decision-making. *Id.* at 578-579. The Court noted that predecisional communications are protected because the quality of the communications received by the decision maker clearly affects the quality of the decision-making process, and that predecisional communications do not automatically lose the privilege after a decision has been made. *Id.* at 579. The Court allowed the Governor to withhold documents provided by an outside consultant, saying the privilege applies to communications that are either internal or “directly solicited” by a government official. The Court also refused to require that the documents at issue be clearly tied to a particular, identified decision. Instead, it held that no specific decision need be identified for a document to be predecisional. “The privilege protects the give-and-take deliberative process, not final decisions; no ultimate conclusion needs to be identified, or even reached, for the privilege to attach.” *Id.* at 581.

While the Court did not say the privilege attaches in perpetuity, it made clear that the question of when, if ever, the privilege “evaporates” does not depend simply on whether a decision has been implemented, or whether sufficient time has passed. Instead, the question is whether disclosure of these preliminary proposals would harm the agency’s future decision-making by chilling either the submission of such proposals or their forthright consideration. *Id.* at 583. The Court also rejected the argument that the privilege protects only essential, constitutionally mandated executive functions, and said that instead it protects any governmental decision-making function. *Id.* Finally, with respect to the balancing test required when a government official invokes the privilege and establishes that a document is predecisional and deliberative, the Court observed that “generally, it is difficult for a requester to override the presumptive privilege.” The court said that relevant factors include “the degree of confidentiality and sensitivity of the communication; the time elapsed after deliberation concluded and after communications were made; and whether deliberation is ongoing.” *Id.* at 584. In *Fuller I*, for example, the court rejected Homer’s claim of deliberative process privilege, finding that while the city manager certainly might have had “compelling reasons to protect internal staff discussions from outside intrusion while his staff was actually deliberating the issues, the legitimacy of the city’s interest in stifling disclosure after discussion ended seem[ed] far less obvious.” 75 P.3d at 1064. “In contrast to the city’s attenuated interest in confidentiality, the public’s interest in disclosure of all potentially relevant government records grew strong and specific once the council filed the annexation petition,” and the court saw “no realistic danger that post-petition disclosure would have any appreciable chilling effect on the city’s future deliberative process.” 75 P.3d at 1065.

In 1988, a superior court judge ruled that the mayor of Anchorage could not assert an executive or deliberative process privilege. That court held that no municipal privilege is expressed or implied in the state constitution, so that any privilege applicable to local government executives would have to be based on a municipal charter or other local law. However, the judge said, the state’s broad public records law controls over local law, and contains no exception for a deliberative process privilege for local officials. The judge said arguments for recognition of such a privilege should be addressed to the state legislature. *Anchorage Daily News v. Municipality of Anchorage*, Case No. 3AN -85-1254 Civ. (supplemental proceedings in 1988 on motion to enforce previously entered injunction). On appeal the Alaska Supreme Court affirmed the trial court’s decision that documents at issue had to be disclosed, but on other grounds, and did not rule on the question of a municipal deliberative process privilege. *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 593 (Alaska 1990) (report of Mayor’s Blue Ribbon Panel on Fiscal Policy not privileged). The Court did note, however, that the policies underpinning qualified executive privilege were not implicated in that case, since the committee meetings leading up to the report were open, and the fiscal report was to go to the assembly, as well as the mayor, and was intended for public dissemination. Since *CIG* and *Gwich’in*, however, three superior court judges, including the trial court in the *City of Homer* case, had

recognized a deliberative process privilege applicable to municipal officials, either in the context of a public records request or an assertion of evidentiary privilege. In *Fuller I*, 75 P.3d at 1065, the Court affirmed that this privilege extends to the records of municipal governments.

## 2. Legislative bodies.

Subordinate legislative bodies such as school boards and municipal assemblies are clearly covered by the public records law. Records of the Alaska Legislature itself are also public by virtue of legislative rules and statutes. It is possible that legislators would argue the laws and rules are not judicially enforceable, citing *Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987). In that case, the Alaska Supreme Court held that violations by the state legislature of the Alaska Open Meetings Act were “nonjusticiable,” even though the OMA and legislative rules expressly required the legislature to meet publicly in accordance with the law. This means the court simply will not entertain disputes over such violations, because of the need to respect the relationship between coordinate branches of government established by the constitution.

Would the same reasoning be applied by the courts to duck problems with legislative violations of public records laws? Possibly, though there are good arguments to the contrary. The *Abood* decision rests on two constitutional provisions. First, the Alaska constitution provides, in Article II, Section 12: “Rules. The houses of each legislature shall adopt uniform rules of procedure.” This, the Court says, “specifically and exclusively authorizes the legislature to adopt its own rules of procedure.” Further, the court found that when, where and how legislators meet and deliberate is a question of legislative rules and that only the legislature can decide whether and how the law should apply to it. This reasoning could be applied to records, as well, since the premise of the court’s opinion is that “out of respect owed to a coordinate branch of state government, [the court must] defer to the wisdom of the legislature concerning violations of legislative rules which govern the internal workings of the legislature.” 743 P.2d at 337. In this context, however, records and meetings present very different issues. It is less obvious that access to records involves procedural rules. Also, there is no provision in the records laws comparable to AS 44.62.312(f) in the OMA, which — as it was written at the time — would have voided legislation enacted as the result of a process involving open meetings law violations.

A different problem is posed by the other ground for the Court’s decision — Article II, Section 6, of the Alaska Constitution, dealing with legislative immunity. In essence, it would prevent questioning a legislator, and many legislative aides, about alleged violations of public records laws whether in depositions or in court. This should not be such a major stumbling block in the records context, however, since there will normally be records custodians other than the legislators or their aides. It is different from the situation of a meeting of legislators, when only they know what was said, or who attended. Further discussion of the interesting constitutional issues raised by access to legislative records is beyond the scope of this outline. Reporters should assume legislative records are generally open to the public unless and until it is determined otherwise.

## 3. Courts.

Access to both case-specific judicial documents and administrative records of the court system is primarily governed by Administrative Rules 37.5 through 37.8 of the Alaska Rules of Court, which state that they are “adopted pursuant to the inherent authority of the Alaska Supreme Court.” Case law from other jurisdictions suggests there is also a constitutional and a common law right of access to judicial records, but the issue has not been addressed by the Alaska appellate courts. It is possible that the application of the general public records statute to the court system might be limited by the separation of powers doctrine. In one 1988 superior court case involving access to search warrant records, the issue was raised, but not resolved. See, *State v. Sackett*, 1JU -587-1036 Cr. (Alaska Super. Ct. 1st Jud. Dist.), and as noted in connection with the open meetings law, a 1994 revision to the OMA

expressly excludes the court system and legislative branch from the scope of that Act. However, the Public Records Act contains no such exclusion, and instead has several sections that assume it encompasses access to legislative and judicial records.

Administrative Rule 37.5, which previously governed access to judicial records, was substantially revised, effective October 2006. Although the new rules apply to all court records, court personnel were not required to redact or restrict information that otherwise was public in case records and administrative records created before October 15, 2006. Adm.R.37.5(a)(2).

According to Rule 37.5, the purposes of these rules is to provide access to court records in a manner that maximizes accessibility to court records; supports the role of the judiciary; promotes government accountability; contributes to public safety; minimizes risk of injury to individuals; protects individual privacy rights and interests; protects proprietary business information; minimizes reluctance to use the courts to resolve disputes; makes most effective use of court personnel; provides excellent customer service; and does not unduly burden the ongoing business of the judiciary. Adm.R.37.5(a)(1).

- *General Access to Court Records.* Court records are accessible to the public, except as provided in Admin.R. 37.5(e). The rules provide that all members of the public will have the same access to court records under the rules, with a couple not-generally-applicable exceptions. No distinction is made between the press and other “members of the public.” Adm.R. 37.5(b). Court records that are accessible to the public shall be open to inspection at all times during the regular office hours of the courts. The administrative director of the court system is responsible for establishing written guidelines to insure reasonable access and opportunity to inspect public court records and to insure their preservation and safekeeping. Adm.R. 37.5(d)(1), (f). The general right of access applies to all court records, regardless of the manner of creation, method of collection, form of storage, or the form in which the record is maintained. Adm.R. 37.5(d)(2). If a court record, or portion thereof, is excluded from public access, there must be a publicly accessible indication of the fact of exclusion but not the content of the exclusion except for records that are confidential (as opposed to sealed), according to Adm.R. 37.5(d)(3). However, Administrative Rule 40 requires the clerk of court to list a case on the public case index even though the case file has been sealed or made confidential under this rule. Only the presiding judge of the judicial district has the power to remove a party’s name from the public case index, and this action may be taken only in very limited circumstances. Adm.R. 40(b) and (c).

- *Definitions.* Adm.R.37.5(c) sets out definitions for purposes of the rules governing access to court documents:

- (1) “Court record” means both case records and administrative records, but does not include records that may be in the court’s possession that do not relate to the conduct of the court’s business.

- (2) “Case record” means any document, information, data, or other item created, collected, received, or maintained by the court system in connection with a particular case.

- (3) “Administrative record” means any document, information, data, or other item created, collected, received, or maintained by the court system pertaining to the administration of the judicial branch of government and not associated with any particular case.

The rules distinguish between “sealed” records, meaning “access to the record is restricted to the judge and persons authorized by written order of the court,” Adm.R.37.5(c)(5), and “confidential” records, meaning access to the record is restricted to the parties to the case, counsel of record, individuals with a written order from the court authorizing access, and court personnel for case processing purposes only. Adm.R.37.5(c)(4).

“In electronic form” means any information in a court record in a form that is readable through an electronic device, Adm.R.37.8(c)(7),



and “remote access” means the ability of a person to inspect and copy information in a court record in electronic form through an electronic means. Adm.R.37.8(c)(6).

- *Court Records Excluded from Public Access.* As provided in Adm.R.37.5(e):

(1) *Case Records.* The following case records and case-related documents are not accessible to the public:

(A) memoranda, notes, or preliminary drafts prepared by or under the direction of any judicial officer of the Alaska Court System that relate to the adjudication, resolution, or disposition of any past, present, or future case, controversy, or legal issue;

(B) legal research and analysis prepared or circulated by judges or law clerks regardless of whether it relates to a particular case and written discussions relating to procedural, administrative, or legal issues that are or may be before the court; and

(C) documents, information, data, or other items sealed or confidential pursuant to statute, court rule, case law, or court order.

(2) *Administrative Records.* The following administrative records are not accessible to the public:

(A) personal information, performance evaluations, and disciplinary matters relating to any past or present employee of the Alaska Court System or any other person who has applied for employment with the Alaska Court System, and personnel records that are confidential under Alaska Court System Personnel Rules C1.07 and PX1.08;

(B) the work product of any attorney or law clerk employed by or representing the Alaska Court System if the work product is produced in the regular course of business or representation of the Alaska Court System;

(C) individual direct work access telephone numbers and email addresses of judges and law clerks;

(D) documents or information that could compromise the safety of judges, court staff, jurors, or the public, or jeopardize the integrity of the court’s facilities or the court’s information technology or recordkeeping systems;

(E) records or information collected and notes, drafts, and work product generated during the process of developing policy relating to the court’s administration of justice and its operations;

(F) email messages that are created primarily for the informal communication of information and that do not set policy, establish guidelines or procedures, memorialize transactions, or establish receipts; and

(G) records that are confidential, privileged, or otherwise protected by law, rule, or order from disclosure.

- *Prohibiting Access to Public Case Records.* Adm.R. 37.6 provides for limiting access to otherwise public records in case files as follows.

*Limiting Access.* Notwithstanding any other rule to the contrary, the court may, by order, limit access to public information in an individual case record by sealing or making confidential the case file, individual documents in the case file, log notes, the audio recording of proceedings in the case, the transcript of proceedings, or portions thereof. A request to limit access may be made by any person affected by the release of the information or on the court’s own motion. Adm.R. 37.6(a).

*Standard.* The court may limit public access as described above if the court finds that the public interest in disclosure is outweighed by a legitimate interest in confidentiality, including but not limited to (1) risk of injury to individuals, (2) individual privacy rights and interests, (3) proprietary business information, (4) the deliberative process, or (5) public safety. Adm.R. 37.6(b).

*Least Restrictive Alternative.* In limiting public access the court must use the least restrictive means that will achieve the purposes of these public access rules and the reasonable needs as set out as the basis for the request, without unduly burdening the court. Adm.R. 37.6(c).

*Procedure.* Any request to limit access must be made in writing to the court and served on all parties to the case unless otherwise ordered. A request to limit access, the response to such a request, and the order ruling on such a request must be written in a manner that does not disclose non-public information, are public records, and shall not themselves be sealed or made confidential. Adm.R. 37.6(d).

- *Obtaining Access to Non-Public Court Records.* Adm.R. 37.7 provides for obtaining access to otherwise non-public information in court records as follows:

*Allowing Access to Non-Public Records.* The court may, by order, allow access to non-public information in a case or administrative record if the court finds that the requestor’s interest in disclosure outweighs the potential harm to the person or interests being protected, including but not limited to: (1) risk of injury to individuals, (2) individual privacy rights and interests, (3) proprietary business information, (4) the deliberative process, or (5) public safety. Non-public information includes information designated as confidential or sealed by statute or court rule and public information to which access has been limited by court order in a particular case. Adm.R.37.7(a).

*Procedure.* Any request by any person to allow access must be made in writing to the court and served on all parties to the case unless otherwise ordered. The court shall also require service on other individuals or entities that could be affected by disclosure of the information. A request to allow access, the response to such a request, and the order ruling on such a request must be written in a manner that does not disclose non-public information, are public records, and shall not themselves be sealed or made confidential. Adm.R.37.7(b).

- *Electronic Case Information.* The following case-related information maintained in the court system’s electronic case management systems will not be published on the court system’s website or otherwise made available to the public in electronic form: (1) addresses, phone numbers, and other contact information for parties and witnesses; (2) names, addresses, phone numbers, and other contact information for victims in criminal cases; (3) social security numbers; (4) driver and vehicle license numbers; (5) account numbers of specific assets, liabilities, accounts, credit cards, and PINs (Personal Identification Numbers); (6) names of minor children in domestic relations cases, including paternity actions, domestic violence cases, emancipation cases, and minor settlements under Civil Rule 90.3; (7) juror information; (8) party names protected under Administrative Rule 40(b) and (c); and (9) information that is confidential or sealed in its written form. Adm.R.37.8(a).

- *Bulk Distribution of Electronic Case Information and Distribution of Compiled Information.* Bulk distribution—defined as the distribution of all or a significant subset of the case information in the court system’s electronic case management systems, as is, and without modification or compilation—of case information is permitted, unless the information is not publicly available in electronic form under Adm.R.37.8(a), and of imaged case records is not allowed, unless the records are already remotely accessible to the public on the court system’s website. Adm.R. 37.8(b). The administrative director of the court system may allow bulk distribution of case information that not publicly available and of publicly available imaged case records for scholarly or governmental purposes, pursuant to procedures to protect the security of information and records so released. Adm.R.37.7(b)(4).

Compiled information, defined as information that is derived from the selection, aggregation, or reformulation of case information in the court system’s electronic case management systems, may be made available unless the compiled information is privileged or reveals information that is confidential, sealed, or not available to the public under Adm.R.37.8(a). Access to other compiled information may be

approved by the administrative director if resources are available to compile the information and if it is an appropriate use of public resources, such as for scholarly, governmental, or any other purpose in the public interest. Adm.R.37.8(c).

#### 4. Nongovernmental bodies.

##### a. Bodies receiving public funds or benefits.

Records that are “developed or received . . . by a public contractor for a public agency” are “public records” available for inspection and copying. AS 40.25.220(6). Even before 1990 amendments to the public records act, some local governments had specifically provided for access by ordinance to records of private parties dealing with public business. *See, e.g., Anchorage Municipal Code (AMC) 3.90.020* (right of access extends to public records defined to include “any document, whether in draft or final form, containing information relating to the conduct of the people’s business which is prepared, owned, used or retained by a municipal agency or an agency under contract with the municipality, regardless of the physical form or characteristic of the document.” AMC 3.90.020(C). “Municipal agency” is defined to include any private contractor that has custody of public records. AMC 3.90.020(B)). Now, all local governments and their contractors are subject to the same requirements, since the public records law applies to local as well as state government. The public records act does not address whether records of nongovernmental bodies that are not public contractors, but that receive public funds or benefits, are subject to the act. Most likely they are not, as a general rule, and certainly not with respect to matters not involving use of public funds.

##### b. Bodies whose members include governmental officials.

The records in the possession or control of the government members of the groups, participating as such, should be subject to the Act. The Alaska courts have not decided the question. However, the court has pointed out that the legislature chose to cover “every public writing or record in the state” instead of covering only records “of the state.” *See City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d at 1322.

#### 5. Multi-state or regional bodies.

The records in the possession or control of the government members of the groups, participating as such, should be subject to the Act. The Alaska courts have not decided the question. However, the court has pointed out that the legislature chose to cover “every public writing or record in the state” instead of covering only records “of the state.” *See City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d at 1322.

#### 6. Advisory boards and commissions, quasi-governmental entities.

Alaska’s public records law covers every “public agency,” which is defined broadly to include boards, commissions, authorities, public corporations, and other instrumentalities of the state or a municipality. AS 40.25.220(2). A number of statutes governing public authorities contain specific reference to this. For example, the Alaska Municipal Bond Bank Authority is subject by law to the general provisions requiring public access to records contained in AS 40.25.110 to -.120, *see* AS 44.85.400. The Alaska Supreme Court has held that even a critical performance evaluation from an advisory board concerning an agency head is a matter of public record. *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 (Alaska 1990). It also held that the report of an *ad hoc* “Blue Ribbon Fiscal Panel” created by the mayor to advise him about fiscal policy was public, because the committee served a governmental function, dealt with matters of public concern, and was a public agency or instrumentality. The report was the product of a public process and was intended for public dissemination. *Id.*, 794 P.2d at 592. A superior court held that an Exchange Carrier’s Association, created by the telephone industry at the direction of the state public utilities commission, was a public entity. *See, General Communications Inc., v. APUC and Alaska Exchange Carrier’s Ass’n*, Case No. 3AN -90-1105 Civ. (Superior Ct., 3rd Jud. Dist. at Anchorage).

#### C. What records are and are not subject to the act?

The scope and coverage of the Public Records Act was intended by the legislature to be very broad, and the Supreme Court has interpreted it this way. The statute was amended in 1990 to expand the definition of public records, most significantly to reaffirm that it includes drafts, memorializations of conversations, and records “developed or received by a public agency or by a public contractor for a public agency.” AS 40.25.220(6). The state has adopted regulations interpreting and implementing the public records law. *See* 2 Alaska Administrative Code [hereinafter “AAC “] .96.100 to -.900. These apply to state executive branch agencies.

The Supreme Court has held that parties cannot immunize otherwise public documents from disclosure by entering into a confidentiality agreement. *Anchorage School Dist. v. Anchorage Daily News*, 779 P.2d 1191, 1193 (Alaska 1989) (school district required to disclose settlement of asbestos litigation despite agreement to keep it confidential). The Attorney General has noted that in light of the Supreme Court’s repeated holdings that “exceptions” to the disclosure requirements of Alaska’s public records laws are not favored, and will be narrowly construed, agencies should be cautious about the use of language on forms or in agreements that may create an expectation of “confidentiality” among members of the public as to information being gathered from them, since such language quite likely may not be sufficient to create an enforceable exception to the explicit terms of the state’s public records statutes. March 16, 1995, Attorney General Opinion No. 663-95-0424. With respect to law enforcement documents based on information obtained through express or implicit confidentiality agreements. *See* 1994 Police Records Attorney General Opinion, § A.3(a)(ii).

One section of the Public Records Act underscores that public records must still be made available even if they are involved in litigation or law enforcement proceedings, but provides that parties to litigation should obtain copies through court discovery rules, while everyone else can get copies through normal public records act requests. “A public record that is subject to disclosure and copying under AS 40.25.110—40.25.120 remains a public record subject to disclosure and copying even if the record is used for, included in, or relevant to litigation, including law enforcement proceedings, involving a public agency, except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with the rules of procedure applicable in a court or an administrative adjudication. In this section, ‘involved in litigation’ means a party to litigation or representing a party to litigation, including obtaining public records for the party.” AS 40.25.122. This provision was added to the law at the suggestion of news organizations when the Public Records Act was revised in 1990, in response to a situation in which a reporter investigating alleged misconduct by the Governor was denied access to important documents concerning leasing of state office space. The documents sought were public records that would have been available except that when a criminal investigation of the governor was begun, the state argued they could not be released because they were being used in an ongoing criminal investigation. Section .122 was added to clarify that withholding otherwise public documents in such circumstances is improper. Representatives of the Department of Law persuaded the legislature to qualify this provision by adding the exception with respect to persons involved in litigation. The reason for this language was to ensure that attorneys representing public agencies in litigation were not blindsided by finding that their own clients’ documents, which they might not have seen or been aware of, had been obtained from the agency through a public records request rather than through the normal “discovery” channels for exchanging documents and information in lawsuits. Given the limited nature of the exception, there would be no reason for a public agency to withhold public records simply because a requestor is litigating with different agency, or on another matter. In *Doubleday v. Alaska, Commercial Fisheries Entry Commission*, 238 P.3d 100 (Alaska 2010), *e.g.*, in the context of denying a commercial fishing permit for lack of evidentiary support, the court noted that documents sought by the appellant that were relevant



to his dispute with the State's Commercial Fisheries Entry Commission could have been obtained from a separate agency and should have been pursued using the federal FOIA.

### 1. What kind of records are covered?

The law provides access to all records that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency, but does not include proprietary software programs. AS 40.25.220(3). The regulations governing access to records maintained by state agencies further elaborates upon this by providing coverage for any record developed or received under law or in connection with the transaction of official business by any agency and preserved as evidence of the organization, function, policies, decisions, procedures, operations or other activities of the agency or because of the informational value in them; it also includes staff manuals and instructions to staff that directly or indirectly affect the public.

### 2. What physical form of records are covered?

"Public records" are defined in the statute to include "books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics. Records are further defined in 2 AAC 96.900(4) to include:

any existing document, paper, memorandum, book, letter, drawing, map, plat, photo, photographic file, motion picture, film, microfilm, microphotograph, exhibit, magnetic or paper tape, punched card or other item or any other material, regardless of physical form or characteristic.

### 3. Are certain records available for inspection but not copying?

The statute provides that all public records must be made available during regular office hours for inspection *and* copying. AS § 40.25.110 and -.120. Records should be made available for inspection without copying if the requester chooses, and any records available for inspection are available for copying.

#### D. Fee provisions or practices.

The 1990 amendments to the public records statute specifically address the question of fees, which previously was dealt with only in regulations. See AS 40.25.110(b)-(h). As a general rule, if you want a copy of a public record you can be required to pay for it, but fees can be waived. Note that the public records act distinguishes between regular public records and "electronic products and services." The full definition of electronic products and services is contained in AS 40.25.220(1). In short, and somewhat oversimplified, "electronic products and services" includes access to information in a form or manner not ordinarily maintained as a record by the public agency. One significance of this label is that an enhanced fee can be charged, to cover building and maintaining the database. Also, as a general rule, the decision whether to make electronic products and services available at all is within the discretion of the agency. AS 40.25.115. Electronic services and products are discussed in more detail in section III below.

Personnel costs passed on to requesters may not exceed the actual salary and benefit costs for the personnel time required to perform the search and copying tasks. The requester must pay the fee before the records are disclosed. AS 40.25.110(c). The 1990 revisions to the Public Records Act allow the University of Alaska, the Alaska Railroad Corporation, and the judicial branch to separately establish reasonable fees for inspection and copying of public records, including record searches. AS 40.25.110(f), (g), (h). The Bureau of Vital Statistics, the library archives in the Department of Education, the District Recorder and the Division of Banking Securities and Corporations in the Department of Commerce, Community, and Economic Development (all of which are agencies with primary functions of performing record

searches and that have customarily charged a fee for such searches) may continue to charge such search fees. Payment for searches can be required in advance. AS 40.25.110(c). Reviewing records for disclosability is not a production task for which the records requester can be charged. *Fuller v. City of Homer*, 113 P.3d 659, 666 (Alaska 2005) (*Fuller II*).

### 1. Levels or limitations on fees.

Copying charges are limited to the "standard unit cost of duplication" established by the agency. AS 40.25.110(b). The fee for duplicating a public record in the electronic form kept by a public agency may not exceed the actual incremental costs of the public agency. AS 40.25.115(c). In addition, if the production of records for one "requester" in a calendar month exceeds five person-hours, the public agency shall require the requester to pay the personnel costs required during the month to complete the search and copying tasks. Legislative history indicates that the term "requester" refers to a single individual, not to a news organization as a whole, so that each reporter at a paper or station is entitled to five hours in a month from an agency without charge. "Production" does not include a privilege review — e.g., the time spent by a clerk or agency official to determine if some of the requested documents may be nondisclosable because they are subject to a deliberative process privilege or some other claim of privilege — and privilege review time consequently cannot be charged to the party requesting the records. *Fuller v. City of Homer (Fuller II)*, 113 P.3d at 666. Production efforts by an agency for which time spent can be charged to a records requester are those that are those clerical, ministerial functions inherent and necessary in a records search, not executive functions implicating the exercise of professional expertise and judgment *Fuller II*, 113 P.3d at 665-666. (insofar as any portion of the amount the citizen was required to prepay as a condition of obtaining access to requested documents was attributable to a privilege review, this was improper — even if the review were conducted efficiently — and city was required to repay any such amounts). *Id.* At 668. If there were good reason to think that the agency was intentionally inefficient in retaining or producing disputed documents the court would be compelled to reduce the recoverable time spent in production. *Id.* at 667-668. In the event of a dispute, it is for the fact finder to decide whether the amount charged was incurred appropriately, but as a matter of law, the agency cannot charge for time spent on tasks other than searching for and copying the records, and in particular cannot charge for reviewing the documents to determine what might be withheld. *Id.* at 668.

As of the time of the 2011 revision of this outline, it appears that some agencies have begun to erroneously charge for the initial five hours of time spent on searching and copying tasks in a calendar month, if the total time spent exceeds five hours, rather than only charging for the incremental amount of time by which the total exceeds the first five, supposedly free, hours. To date, this practice has not been challenged or clarified, but it is contrary to the intent of the legislators who implemented this provision in 1990.

### 2. Particular fee specifications or provisions.

#### a. Search.

The law authorizes public agencies to charge for search time, as well as other time involved in the production of requested public records, but only to the extent that the time spent in producing records for any one requester exceed five person-hours in a calendar month. If it does, and to the extent that it does, the agency can require the requester to pay the personnel costs required during the month to complete the search and copying tasks, but the personnel costs that are charged may not exceed the actual salary and benefit costs for the personnel time required to perform the search and copying tasks. AS 40.25.110(c). So, for example, if the actual salary and benefit costs for the records clerk satisfying your request amount to \$15 and six hours are spent in a calendar month searching for and producing the document that you have requested, the total amount you may be charged for personnel costs is \$15, not \$90. If fewer than five hours are spent in the one calendar

month on search and copying tasks to produce requested documents, no fees can be imposed. *Id.*, and see *Fuller v. City of Homer (Fuller II)*, 113 P.3d at 666.

Note, however, that as of the time of the 2011 revision of this outline, it appears that some agencies have begun to erroneously charge for the initial five hours of time spent on searching and copying tasks in a calendar month, if the total time spent exceeds five hours, rather than only charging for the incremental amount of time by which the total exceeds the first five, supposedly free, hours. To date, this practice has not been challenged or clarified, but it is contrary to the intent of the legislators who implemented this provision in 1990.

#### **b. Duplication.**

Unless otherwise provided by law, the fee for copying public records may not exceed the standard unit cost of duplication established by the public agency. AS 40.25.110(b). This includes public records obtained in electronic form. The fee for duplicating these may not exceed the “actual incremental costs” of the public agency. AS 40.25.115(c).

### **3. Provisions for fee waivers.**

There are no longer specific exemptions or waivers for journalists, but the statute provides that public agencies can reduce or waive a fee when the agencies determine that is in the public interest. AS 40.25.110(d). Fee reductions and waivers must be uniformly applied among persons who are similarly situated. AS 40.25.110(d). Copying charges of \$5 or less may be waived if the cost to the agency of contacting the requester to arrange payment exceeds the copying charges. AS 40.25.110(d). Veterans are entitled to documents needed to determine their eligibility at no charge.

### **4. Requirements or prohibitions regarding advance payment.**

Unless fees are waived, the requester must pay before the records are disclosed, and may be required to pay in advance of a search. AS 40.25.110(c). Regulations governing records requests made to state agencies address the matter of advance payment in more detail. Except in the case of news organizations, fees must be paid before the records are disclosed. A public agency may require payment in advance of a search for a public record if the agency reasonably believes that the search will generate a fee under AS 40.25.110 (which allows charges for production of records only to the extent that the personnel costs required to complete the search and copying tasks for any one requester in a calendar month exceeds five person hours). If the request is from a news organization or an employee or agent of a news organization and the state agency reasonably believes that the requested records search will require more than five hours to complete, the agency head may require payment in advance of the search by the news organization only when the request is unreasonable or in bad faith, the news organization has failed to pay for previous requests, or the request requires extraordinary expenditures of state resources. 2 AAC 96.400(c). Any estimate of anticipated costs for search and copying cannot include time likely to be spent reviewing the documents to see if they can or should be withheld due to a claim of privilege. *Fuller v. City of Homer*, 113 P.3d. 659, 666 (Alaska 2005)

### **5. Have agencies imposed prohibitive fees to discourage requesters?**

Although there have been infrequent and isolated reports of apparently abusive charges, or the threats of such charges, there is no apparent ongoing or recurring problem with abusive imposition of the fee requirements. A reviewing court should determine whether the amount charged by the public entity was appropriately incurred, and if there were good reason to think that an agency was intentionally inefficient in retaining or producing disputed documents the court would be compelled to reduce the time spent in production for which the agency could recover fees. *Fuller v. City of Homer (Fuller II)*, 113 P.3d 659, 667-68. (Alaska 2005).

One controversial and high profile situation involves requests in 2008 by multiple news media for all e-mails to and from Sarah Palin during her tenure as Alaska governor. Initial estimates were that compliance with the request would result in search and copying fees amounting in the neighborhood of \$15 million dollars, in part based on the need to search the e-mail accounts of all 16,000 state employees. (See, e.g., Bill Dedman, msnbc.com October 16, 2008, “Want Palin’s e-mails? That’ll be \$15 million,” [http://www.msnbc.msn.com/id/27228287/ns/politics-decision\\_08/t/want-palins-e-mails-thatll-be-million/](http://www.msnbc.msn.com/id/27228287/ns/politics-decision_08/t/want-palins-e-mails-thatll-be-million/).) Eventually, the parties agreed to limit the search to the accounts of the fifty employees most likely to contain relevant documents. (This netted 22,000 pages of documents from the relevant period, made available for copying charges of \$725 per set.)

### **E. Who enforces the act?**

There is no provision in the act for the Department of Law or any other state entity to enforce the public’s right of access to records. The state ombudsman, and municipal or agency counterparts, can be helpful in pursuing disputed documents. In general, requesters are on their own to pursue access to public records.

#### **1. Attorney General’s role.**

There is no provision in the act for the Department of Law or any other state entity to enforce the public’s right of access to records.

#### **2. Availability of an ombudsman.**

The state ombudsman, a legislative employee, may be a source of help for citizens denied access to public records by state agencies. AS 24.55.200. Similarly, a municipal ombudsman, such as the Municipality of Anchorage’s, 2 AMC 60.160 et seq., may be helpful for those dealing with the city of Anchorage and its employees and contractors.

#### **3. Commission or agency enforcement.**

The public records act provides no specific provision for enforcement of the act within the affected commission or agency, other than to direct compliance with the law.

### **F. Are there sanctions for noncompliance?**

The Public Records Act provides no sanctions for noncompliance, but it does provide, in AS 40.25.125, for injunctive relief against anyone keeping you from getting public records: “A person having custody or control of a public record who denies, obstructs, or attempts to obstruct, or a person not having custody or control who aids or abets another person in denying, obstructing, or attempting to obstruct, the inspection of a public record subject to inspection under AS 40.25.110 or 40.25.120 may be enjoined by the superior court from denying, obstructing, or attempting to obstruct, the inspection of public records subject to inspection under AS 40.25.110 or 40.25.120. A person may seek injunctive relief under this section without exhausting the person’s remedies under AS 40.25.123 - 40.25.124.” In exceptional cases, in addition to adverse publicity, other remedies such as recalls or criminal prosecution, or contempt citations for failure to abide by a court injunction or other order, are theoretically possible. See [Open Records] §V.D.10-.11, below, for discussion of certain other potentially applicable penalties, fines and sanctions. Traditionally, a significant deterrent against noncompliance has been that fact that full attorney fees have been available to the prevailing plaintiff in a public interest suit, which a suit asserting a right of public access to government information most normally would be. However, in 2003, the Alaska Legislature largely eliminated the public interest litigant exception to the general rule in Alaska that prevailing parties can recover a portion of their fees from the other side. And, in 2007, the Alaska Supreme Court rejected legal challenges seeking to overturn this law. See generally, [Open Records] §V.D.9(a), below. Between the “loser pays” prevailing party fee rule applicable to all Alaska litigants, and elimination of the public interest exception, Alaska has become the only state that would presumptively impose fees and costs on news media and

other public interest litigants who unsuccessfully pursue non-frivolous claims. This change has had and is likely to have a significant adverse effect on the press.

## II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

### A. Exemptions in the open records statute.

#### 1. Character of exemptions.

##### a. General or specific?

The exemptions to disclosure are specific, except that AS 40.25.120(4) is a “catch-all” exemption that closes “records required to be kept confidential by federal law or regulation or by state law.”

##### b. Mandatory or discretionary?

Whether these exemptions are discretionary or mandatory varies depending on the nature of the specific exemption.

##### c. Patterned after federal Freedom of Information Act?

The state public records act itself predates the Federal FOIA and is not patterned after it, although the administrative regulations adopted by the state resemble the federal procedures. While the Alaska courts have not routinely, or even often, relied on federal FOIA precedent, the Alaska Supreme Court has in 1996 specifically endorsed reliance on FOIA precedent for purposes of interpreting the deliberative process privilege. *See Capital Information Group v. Office of the Governor*, 923 P.2d 29, 35 n. 4 (Alaska 1996).

#### 2. Discussion of each exemption.

The public records statute, in A.S. 40.25.120, specifically exempts from disclosure:

1. records of vital statistics and adoption proceedings which shall be treated as required by AS 18.50.
2. records pertaining to juveniles unless disclosure is authorized by law.
3. medical and related public health records.
4. records required to be kept confidential by federal law or regulation or by state law.
5. records the state is required to keep confidential in order to secure or retain federal assistance.
6. certain records compiled for law enforcement purposes. [For more specific description of the law enforcement record exemption, see AS 40.25.120(a)(6)(A) to (G).]
7. names, addresses and other information identifying a person as a participant in the Alaska Higher Education Savings Trust under AS 14.40.802 or the advance college tuition savings program under AS 14.40.803 - 14.40.817;
8. public records containing information that would disclose or might lead to the disclosure of a component in the process used to execute or adopt an electronic signature if the disclosure would or might cause the electronic signature to cease being under the sole control of the person using it;
9. [See delayed repeal note]. reports submitted under AS 05.25.030 concerning certain collisions, accidents or other casualties involving boats;
10. records or information pertaining to a plan, program or procedures for establishing, maintaining or restoring security in the state, or to a detailed description or evaluation of systems, facilities or infrastructure in the state, but only to the extent that the production of the records or information

(A) could reasonably be expected to interfere with the implementation or enforcement of the security plan, program or procedures;

(B) would disclose confidential guidelines for investigations or enforcement and the disclosure could reasonably be expected to risk circumvention of the law; or

(C) could reasonably be expected to endanger the life or physical safety of an individual or to present a real and substantial risk to the public health and welfare;

11. the written notification regarding a proposed regulation provided under AS 24.20.105 to the Department of Law and the affected state agency and communications between the Legislative Affairs Agency, the Department of Law, and the affected state agency under AS 24.20.105.

In a number of instances, a statute or regulation states that an agency “may keep confidential” certain data. A reporter seeking such information should note that this law only *authorizes*, but does not *require* nondisclosure. It could be argued that because of this, the general public record disclosure provision of A.S. 40.25.120 controls, and requires disclosure, since the only applicable exemption is for “records required to be kept confidential by a federal law or regulation or by a state law.” The Alaska appellate courts have not addressed this issue, but the argument is plausible and should be asserted. If nothing else, a balancing test should be required in cases where nondisclosure is permissive rather than mandatory, so that in each case the court must weigh the need for disclosure against the need for confidentiality.

### B. Other statutory exclusions.

The following statutes allow or require public officials to keep records confidential. Note that the descriptions of the statutes authorizing or requiring confidentiality contained in this outline are, for the most part, summaries and paraphrases, not verbatim. Those who want the specific language of the statute, or more detailed information, should consult the Alaska Statute provisions cited in the outline.

1. *Agriculture and Conservation Board*. The Board of Agriculture and Conservation may, by regulation, classify loan and marketing information and make some classes of loan or marketing information confidential. AS 03.09.040. Those records specified as confidential are found at 11 AAC 39.061.

2. *Alcoholic Beverages*. The Alcoholic Beverage Control Board, after consulting with package store licensees, must create and maintain a statewide database that contains a monthly record of the alcohol purchased by, and shipped to, a person who resides in a municipality or established village that has restricted the sale of alcoholic beverages under local option provisions. Except for authorized disclosures to law enforcement, the Board, and liquor sellers and purchasers the information contained in the database is confidential and is not subject to inspection or copying under the Public Records Act. Information in the database must be purged one year after entry unless it is needed for criminal investigation or prosecution. AS 04.06.095.

3. *Banking*. Bank examiners are prohibited from disclosing information they obtain about banks’ assets and liabilities, except to the Department of Commerce, Community, and Economic Development, AS 06.01.015. Records of the Department obtained through the administration of laws governing examinations of financial institutions is confidential, not subject to subpoena, and may be revealed only with the consent of the Department. AS 06.01.025. Bank records pertaining to depositors and customers are confidential, with certain exceptions, including when disclosure is required by court order, or by federal or state law or regulation, or authorized by the customer. AS 06.01.028.

Similarly, trust company records relating to customers are confidential, with certain exception including when disclosure is compelled by a court or administrative order, or required by federal or state law,



or authorized by the customer. AS 06.26.610. An application for acquisition of control of a trust company is supposed to be published by the department promptly upon filing, but publication can be deferred for a month if the proposed transferee requests confidential treatment and represents that a public announcement of the tender offer and the filing of appropriate forms with the United States Securities and Exchange Commission or the appropriate federal banking agency, as applicable, will occur within the period of deferral; and the department determines that public interest will not be harmed by the requested confidential treatment. AS 06.26.460.

#### 4. *Businesses and professions.*

a. **Disclosure of Mental Health Information.** Licensed professionals may disclose otherwise confidential patient mental health information, communications and records to the Department of Health and Social Services for a variety of purposes when disclosure is authorized by law. Such information, communications and records in the possession of the department are confidential medical records of patients and are not open to public inspection and copying under the public records act. AS 08.02.040.

b. **Accountants.** The Board of Public Accountancy may require that applicants for issuance or renewal of permits to practice public accounting, either on a uniform or random basis, undergo a quality review. A quality review report is confidential, and not a public record, unless the report becomes part of the record of a disciplinary hearing. AS 08.04.426(e). Information communicated by a client to a licensed accountant about a matter concerning which the client has employed the licensee in a professional capacity is confidential and not a public record when obtained by the Board of Public Accountancy in the course of a quality review, ethical investigations, or as discovery or evidence in administrative proceedings. AS 08.04.662(b).

c. **Professional Counselors.** Licensed professional counselors generally may not reveal to another person a communication from a client. This prohibition does not apply to disclosures authorized by the client, or information released to the licensing board during the investigation of a complaint or as part of a disciplinary or other proceeding. Information so obtained by the board is confidential and is not subject to disclosure under the public records act. AS 08.29.200.

d. **Chiropractor Peer Review Committees.** The Board of Chiropractic Examiners may establish a peer review committee to review complaints concerning the reasonableness or appropriateness of care, or fees or costs for services. Patient records presented to a review committee that were confidential before remain confidential. AS 08.20.185.

e. **Collection Agencies.** Information that collection agencies are required by law to file in order to be licensed is confidential. AS 08.24.250.

f. **Architects, Engineers and Land Surveyors.** A wide range of documents relating to architects, engineers and land surveyors is confidential, including investigation files if an investigation is still pending, exams and exam keys, letters of inquiry and reference concerning applicants, and other documents. AS 08.48.071(d).

g. **Guide-Outfitters and Transporters.** AS 08.54.760 exempts records of guided hunts, collected and maintained by the Department of Commerce, Community, and Economic Development, from public disclosure. Guide-outfitters and transporters may not provide big game hunting or transportation services without a written contract with the client. The contract must include such information identification of the registered guide-outfitter or transporter, name of the client, the big game to be hunted, approximate time and dates of the hunt, and the amount to be paid for the big game hunting services provided. Except as necessary for disciplinary proceedings conducted by the board and as necessary for law enforcement purposes, a copy of a contract provided to the department is confidential. AS 08.54.680(c).

h. **Family Therapists.** Information communicated to a licensed marital or family therapist by a client about a matter concerning which the client has employed the therapist in a professional capacity is generally confidential. When confidential information is obtained by the Board of Marital and Family Therapy as a part of disciplinary or other proceedings, it remains confidential and does not become public record. AS 08.63.200(c).

i. **Pharmacist Records.** Information concerning patients in pharmacist records is confidential. AS 08.80.315.

j. **Psychologists, Clinical Social Workers.** Communications made to psychologists or psychological associates in their professional capacity are confidential, AS 08.86.200, as are client communications to clinical social workers. AS 08.95.900. Otherwise confidential communications disclosed to the Board of Psychologists and Psychological Associate Examiners in order to enable a health professional to defend against accusations of wrongdoing remain confidential, and do not become public record. AS 08.86.200(a)(5).

5. *Environmental Audits/Confidential Self-Evaluations.* Owners and operators of a facility, operation or property that is regulated under an environmental law may disclose the part of an environmental audit report or information consisting of a confidential self-evaluation or analysis without waiving the privilege generally applicable to such documents and information if the disclosure is made under a written claim of confidentiality to a government official or agency by the owner or operator who prepared the audit report or who caused the audit report to be prepared. Documents received in this context are to be kept confidential, and are not subject to disclosure under the public records act. AS 09.25.455.

#### 6. *Corporations.*

a. **Investigations of corporate law violations.** The commissioner of Commerce, Community, and Economic Development has authority to require corporations to answer under oath questions about whether the company is violating corporation laws. The answers are not open to public inspection except when they contain evidence to be used in criminal or other enforcement proceedings. AS 10.06.818 - .820 (for profit corporations); AS 10.20.655 to -.660 (nonprofit corporations).

b. **Bidcos (business and industrial development corporations).** The commissioner and employees of the Department of Commerce, Community, and Economic Development may not disclose information acquired by them in the course of regulating Bidcos, except as required by law, unless the Department determines disclosure (of information other than an examination of a licensed corporation) is necessary to promote the public interest. AS 10.13.930.

#### 7. *Courts; Criminal Justice Information; Medical Death Examinations and Reviews*

a. **Criminal Justice Information Systems.** Alaska has amended its statutes and regulations governing access to criminal justice information stored or processed in computers. *See* AS 12.62. *et seq.* (Criminal Justice Information Systems ["CJIS"] Privacy and Security Act), effective July 1, 1995, (set out in full in the appendix to this outline), and 13 AAC 68.005 -.905, effective January 10, 1997. Similar statutes and regulations were adopted by virtually all states, as requirements of receiving Law Enforcement Assistance Administration (LEAA) grant money. They were often originally limited to systems funded in whole or in part by LEAA. These statutes purport to place off limits virtually all criminal justice information stored or processed by computer, and a few agencies have occasionally gone so far as to deny access to any information accessible through computer.

Access to information in criminal justice information systems is generally available only to qualified law enforcement agencies. The law imposes obligations on criminal justice agencies with respect to collecting, reporting, completeness, accuracy, security, updating, correcting, sealing and purging of criminal justice information, AS

12.62.110-.190, and the regulations provide detailed guidance on how these provisions are to be implemented. In general, the law applies to any “criminal justice information system,” which is defined to mean “an automated data processing system used to collect, store, display or transmit criminal justice information, and that permits information within the system, without action by the agency maintaining the information, to be directly accessed by another principal department of the state, another branch of state government, an agency of another state, or the federal government, or by a political subdivision of a state or the federal government.” AS 12.62.900(13). The CJIS statute provides that “criminal justice information and the identity of recipients of criminal justice information is confidential and exempt from disclosure under AS 40.25. The existence or non-existence of criminal justice information may not be released to or confirmed to any person except as specifically provided in the CJIS statutes.” AS 12.62.160(a).

To understand the scope of Alaska’s CJIS law and its application to particular records requires careful reading of an inter-related set of definitions. First, one must parse the definition of “criminal justice information,” which itself includes several other terms with their own technical definitions, including “criminal history record information,” “non-conviction information,” and “correctional treatment information.” The breadth of these definitions should already be evident, but looking, *e.g.*, at “non-conviction information” one finds that it includes any “information that an identifiable person was arrested or that criminal charges were filed or considered against the person” when a prosecutor or grand jury decided more than a year ago not to initiate criminal proceedings or when criminal charges against the person have been dismissed, or the person has been acquitted and at least a year has lapsed since that action, or, if after a year since the arrest, filing of charges, or referral to a prosecutor for review, there is no indication of the disposition of the criminal charges or arrest.

The term “criminal history record information” is even more comprehensive, and contains “past conviction information” (which in turn encompasses any information showing that an identifiable person who has been unconditionally discharged has previously been convicted of a crime, including the terms of any sentence, probation, suspended imposition of sentence, or parole, and any information that a criminal conviction or sentence has been reversed, vacated, set aside, or been the subject of executive clemency), “current offender information” (which in turn includes any information showing that an identifiable person is currently under arrest for or charged with a crime, and prosecution is under review or has been deferred by written or oral agreement, a warrant exists for the person’s arrest, or less than a year has elapsed since the date of the arrest or filing of the charges), and “criminal identification information” (which in turn includes fingerprints, photographs and other information or descriptions that identify a person as having been the subject of a criminal arrest or prosecution).

While a respect for and concern about privacy is obviously an important value, placing all of the foregoing information off limits would be intolerable given the traditions and experience of our society, if for no other reason than that maintenance of a system of secret arrests and incarcerations is unthinkable, a point that Americans often refer to with pride to distinguish themselves from dictatorships and other totalitarian regimes. In fact, it is not all kept secret. The key to understanding why the CJIS statute does not go as far as it might seem at first blush is found in the definition of “information” in AS 12.62.900(17), which states that unless the context clearly indicates otherwise, information means “data compiled within a criminal justice information system.” As a result, the term “criminal justice information” and all other terms throughout the statute that incorporate the term “information” are restricted to data “compiled within a criminal justice information system.” That term, in turn, means “an automatic data processing system” that is used for certain purposes and that permits direct access by various government agencies. AS 12.62.900(13). In short, government computer systems dealing with criminal justice information. [The term “automatic data processing” is defined in a different statute, AS 44.21.170, to mean “those methods of processing data by using electrical accounting machinery (EAM) or electronic

data processing equipment (EDP), and data communications devices and those systems used with automatic data processing equipment and the transmission and reception of data.”]

Records maintained in other forms simply are not subject to the comprehensive confidentiality provisions of the CJIS security and privacy statute. These other records would obviously include, but not be limited to, information maintained in written and typed paper records, microfiche and microfilm, video and every other medium of storing information other than the electrical accounting machinery or electronic data processing equipment and the data communications devices used in connection with them.

There are other important exceptions to the general confidentiality requirements, even with respect to information that might otherwise be defined as criminal justice information under the CJIS statute. First, “criminal justice information” is defined to exclude any court record, record of traffic offenses maintained for the purpose of regulating drivers’ licenses, or record of a juvenile subject to the jurisdiction of a court under AS 47.12. *See* AS 12.62.900(12). In addition, aside from the disclosures that may be made under the statute to law enforcement personnel and other officials for law enforcement and other government reasons, “current offender information” may be provided to a person for any purpose unless its release would unreasonably compromise the privacy of a minor or vulnerable adult. AS 12.62.160(b)(8). “Current offender information” is defined as information showing that an identifiable person:

(A) is currently under arrest for or is charged with a crime, and prosecution is under review or has been deferred by agreement, a warrant exists for the person’s arrest, or less than a year has elapsed since the date of the arrest or filing of the charges;

(B) is currently released on bail or on other conditions imposed by a court in a criminal case, either before or after trial, including the conditions of release;

(C) is currently serving a criminal sentence or is under the custody of the Commissioner of Corrections, which includes the terms and conditions of sentence, probation, suspended imposition of sentence, discretionary or mandatory parole, furlough, executive clemency or other release, and the location of any place of incarceration, half-way house, restitution center or other correctional placement to which the person is assigned; and

(D) has had a criminal conviction or sentence reversed, vacated, set aside or has been the subject of executive clemency. These items, then, are all generally available from the computerized criminal justice information systems of various governmental units.

AS 12.62.900(14).

Past conviction information may be provided to a person for any purpose if less than ten years has elapsed since the date of unconditional discharge to the date of the request. AS 12.62.160(b)(9). “Past conviction information,” as noted above, is information showing that an identifiable person who has been unconditionally discharged, has previously been convicted of a crime, and includes the terms of any sentence, probation, suspended imposition of sentence or parole, and information that a conviction of sentence has been reversed, vacated, set aside or been the subject of executive clemency. AS 12.62.900(20).

Criminal justice information may be provided if the information also is “commonly or traditionally provided by criminal justice agencies in order to identify, locate or apprehend fugitives or wanted persons or to recover stolen property, or for public reporting of recent arrests, charges and other criminal justice activity. AS 12.62.160(b)(3), and may be provided to the person who is the subject of the information. AS 12.62.160(b)(10). Notwithstanding the Public Records Act, a criminal justice agency may charge fees for processing requests for records. The nature of these fees, and certain other issues relating to access to information which is permitted by law is set forth in AS 12.62.170(c) and (d).

A person whose criminal justice information has been released or used in knowing violation of the CJIS statute or a regulation adopted pursuant to it may bring an action for damages in the superior court. In a civil or criminal action based on violation of the CJIS statute, or regulations adopted pursuant to it, it is a defense if the person relied in good faith upon the provisions of the CJIS statute or of other laws or regulations governing maintenance, release or use of criminal justice information, or upon policies or procedures established by a criminal justice agency. AS 12.62.200. Depending upon how broadly or literally the term “criminal justice information” is interpreted, the Public Records Act, and particularly that portion of it dealing with records or information compiled for law enforcement purposes, AS 40.25.120(6), would constitute an “other law governing maintenance, release or use of criminal justice information.”

b. Continuing Access to Criminal Record Information. “Although setting aside a conviction limits the consequences of the conviction itself, it does not change the fact that an individual was previously found guilty of committing a crime. ... [W]here a conviction is set aside it ‘does not mean that the crime, and the events surrounding the crime, never occurred.’ Setting aside a conviction does not expunge the conviction from the individual’s criminal record, which means that “[b]oth the conviction and the judgment setting it aside consequently remain in the public record.” Thus, although the set aside indicates that the defendant has made a “substantial showing of rehabilitation,” it does not erase the fact of conviction. *State Board of Nursing v. Platt*, 169 P.3d 595, 599 (Alaska 2007) (citing *Journey v. State*, 895 P.2d 955, 962 (Alaska 1995), add’l cites omitted). The only instance in which Alaska law provides that an adult may have a conviction removed from his or her criminal record is where he or she is able to show that “beyond a reasonable doubt, [the conviction] resulted from mistaken identity or false accusation.” *Id.*, citing AS 12.62.180(b). In *Farmer v. State*, 235 P.3d 1012 (Alaska 2010), while acknowledging that it is an open question whether Alaska courts have limited inherent authority to expunge criminal records, as federal courts do, the Supreme Court affirmed a superior court ruling that the petitioner in that case would not qualify for expungement even if such authority exists, because any such inherent judicial authority to expunge criminal records should be an exceptional or extraordinary remedy rather than a generally available one. [B]ecause the fact of conviction remains part of an individual’s criminal record after a conviction is set aside, “[m]embers of the public, such as potential employers inquiring into a job applicant’s criminal record, can learn of the existence of a conviction that has been set aside.” *Platt*, 895 P.2d at 600. The court added that it was “cognizant of the fact that criminal records, even those containing convictions that have been set aside, often have ‘pernicious effects.’ We observed in *Journey v. State* that ‘a person with a criminal record is often burdened by social stigma, subjected to additional investigation, prejudiced in future criminal proceedings, and discriminated against by prospective employers.’ These consequences may be harsh... (b)ut they appear to be within the contemplation of the legislature that enacted (the statute regarding grounds for denial, suspension or revocation of a nursing license).” *Id.* “Members of the public, such as potential employers inquiring into a job applicant’s criminal record, can learn of the existence of a conviction that has been set aside. They can do this by researching court records or by requiring a person applying for employment or housing to divulge the fact of a prior conviction even if it has been set aside.” *Doe v. State*, 92 P.3d 398, 407 (Alaska 2004).

Similarly, in *Johnson v. State*, 50 P.3d 404 (Ak. App. 2002), a man convicted of kidnapping and rape, after serving his time and no longer on supervised probation and parole, moved to have the court seal the records of his criminal convictions. At the time he filed his motion in 2001, Johnson was not required to register as a sex offender because he committed his sexual offense in 1980, prior to the legislature’s 1994 enactment of the Alaska Sex Offender Registration Act, and *Doe v. Otte*, 259 F.3d 979, 995 (9th Cir. 2001), holding that the Alaska Sex Offender Registration Act violates the Ex Post Facto Clause of the United States Constitution when applied to defendants whose crimes were committed before enactment of the law, was still on appeal to

and had not been reversed by the United States Supreme Court. The Court of Appeals affirmed the superior court’s finding that the public policy reasons for allowing criminal records to remain open to the public outweigh the reasons that Johnson proffered for sealing his records. The appellate court recited the strong state policy and history favoring open access to public records at common law and pursuant to the state’s public records act, and also noted more specifically that AS 12.62.160(b)(8) provides for the use and release of this sort of criminal justice information, 50 P.3d at 405-406, and that Adm. Rule 37.5 dealing with records of the court system directed disclosure, with no applicable exemption. In cases where there is no express exception to the state’s disclosure laws, we balance “the public interest in disclosure on the one hand, and the privacy and reputation interests of the affected individuals together with the government’s interest in confidentiality, on the other.” We also recognize the legislature’s expressed bias in favor of public disclosure and that “doubtful cases should be resolved by permitting public inspection.” In a case involving criminal records, we balance the public’s right to know about an individual’s past crimes against the convicted individual’s right to privacy. Johnson’s case is no different than any number of felons who are successfully rehabilitated yet who can point to negative events in their lives and blame the events on the disclosure of criminal records. “Courts, commentators and legislatures have recognized that a person with a criminal record is often burdened by social stigma, subjected to additional investigation, prejudiced in future criminal proceedings, and discriminated against by prospective employers.” The court found that state law and the court rules express a clear preference for public records to remain accessible.

c. Commission on Judicial Conduct. A Commission on Judicial Conduct has been established to inquire into various allegations about judges involving criminal misconduct, disabilities that interfere with performance of judicial duties, misconduct in office, failure to perform judicial duties, and other similar problems. The commission may, after a hearing, decide to exonerate the judge of the charges, reprimand the judge publicly or privately, or refer the matter to the Supreme Court with recommendations that the judge be suspended, removed or retired from office or publicly or privately censured by the Supreme Court. If the commission decides to reprimand a judge privately, the private reprimand is confidential by law. If the commission exonerates a judge, a copy of the proceedings and report of the commission may be made public on the request of the judge. AS 22.30.011. The statute further provides that all proceedings, records, files and reports of the Commission on Judicial Conduct are confidential and may not be publicly disclosed except upon written waiver of the judge in question, or upon filing of formal charges in which case only the charges, the subsequent formal hearing, and the Commission’s ultimate decision and minority report, if any, shall become public. AS 22.30.060. That section further provides that if the subject matter or the fact of the filing of charges has become public, the commission may issue a statement in order to confirm the pendency of the investigation, to clarify the procedural aspects of the proceedings, to explain the right of the judge to a fair hearing, or to state that the judge denies the allegations. Except as stated above, proceedings and records pertaining to proceedings that occur before the Commission holds a hearing are confidential, AS 22.30.011(b), and even after formal charges are filed, the deliberations of the Commission concerning the case are confidential. AS 22.30.060(b)(3).

d. Jury Box and Computer List. The “jury box” (with named or numbered pieces of paper corresponding to the jury list), or the computer list (a randomly generated list of prospective jurors that may be used in place of the jury box) to be used for jury selection “may be examined by the parties or by an attorney authorized to practice law in the state within limitations and under conditions prescribed by the court.” By negative implication, these records pertaining to potential jurors are not available to the press or public generally. This question would most likely be answered by reference to constitutional or common law concerning access to judicial records and juror privacy. AS 09.20.060.

e. Opening or Publishing Contents of Sealed Letters. It is a crime



for one to willfully and without authorization open or read a sealed letter not addressed to him or her, or to publish any portion of a letter knowing it was opened without authority of the writer or addressee. AS 11.76.120.

f. **Intercepted Private Communications.** Upon proper application, and for specified reasons, authorities may obtain judicial approval for intercepting private communications. AS 12.37.010-.130. Tapes or other recordings, and any records made during the interception, and all applications made and all orders authorizing interception are sealed, and maintained as the court directs, for at least ten years. AS 12.37.070-.080.

g. **Medical Death Examinations; Child Fatality Review Teams.** When the state medical examiner issues an investigative report containing the examiner's findings and conclusions after an investigation or inquiry is completed, the report is a privileged and confidential document, not subject to public disclosure under AS 40.25. It may be disclosed to public officers and employees for a public purpose and, when doing so will not interfere with an ongoing investigation or prosecution, to a person who is related to the deceased or who has a financial or personal interest in the estate of the deceased person. AS 12.65.020(b).

A state child fatality review team assists the state medical examiner by performing a variety of functions, including determining the cause and manner of the deaths of children under 18, and, unless the child's death is currently being investigated by a law enforcement agency, promptly reviewing the medical examiner's reports of a death of a child if the child is under 10, or the deceased child, a sibling, or a member of the deceased child's household was in the legal or physical custody of the state, or has been the subject of a report of harm or a child abuse or neglect investigation, or if a protective order has been in effect during the previous year in the deceased child's immediate family or household, or the child's death occurred in a mental health institution, mental health treatment facility, foster home, or other residential or child care facility, including a day care facility. Further, the team must review records concerning abuse or neglect of the deceased child or another child in the deceased child's household, and the criminal history or juvenile delinquency of a person who may have caused the death of the child and of persons in the deceased child's household, and concerning a history of domestic violence involving a person who may have caused the death of the child or involving persons in the deceased child's household, including records in the central registry of protective orders. AS 12.65.130.

The state child fatality review team may (1) collect data and analyze and interpret information regarding deaths of children in this state; (2) develop state and local databases on deaths; (3) develop a model protocol for the investigation of deaths of children; and (4) periodically issue reports to the public containing statistical data and other information that does not violate federal or state law concerning confidentiality of the children and their families involved in the reviews. These reports may include identification of trends, patterns and risk factors in deaths of the children; analyses of the incidence and causes of deaths of children in this state; recommendations for improving the coordination of government services and investigations; and recommendations for prevention of future deaths of children. AS 12.65.130(b).

The child fatality review teams and their members shall have access to all information and records to which the state medical examiner has access, and must maintain the confidentiality of such information and records concerning deaths under review, except when disclosures may be necessary to enable the team to carry out its duties. However, the team and its members may not disclose a record that is confidential under federal or state law. AS 12.65.140(a). Except for public reports issued by the team, records and other information collected by the team or a member of the team related to duties are confidential and not subject to public disclosure under the public records act. AS 12.65.140(b). The state medical examiner is directed to help form local, regional, or district child fatality review teams to assist local, re-

gional and district medical examiners in determining the cause and manner of deaths of children under 18 years of age. Any such teams have the same access to information and confidentiality requirements as the state child fatality review teams. AS 12.65.015.

h. **Reports on Outcome of Civil Litigation.** Civil litigants whose cases are resolved by trial, dismissal, summary judgment, settlement, or otherwise must report to the Alaska Judicial Council information about the terms of the resolution or settlement, including the name, number and general description of the case, the dollar amounts and nonmonetary terms payable and the party and/or attorney to whom the amounts were paid as damages, attorney fees or otherwise. The information so received by the council is confidential. This restriction does not prevent the disclosure of summaries and statistics in a manner that does not allow the identification of particular cases or parties. AS 09.68.130

i. **Restitution.** When restitution is ordered as part of criminal sentencing, the Department of Law is authorized to collect restitution on behalf of the recipient unless the recipient doesn't want that. Information forwarded by the court to facilitate this collection is confidential and is not open to inspection as a public record. The Department of Law or its agents may not disclose the information except as necessary to collect on the restitution. AS 12.55.051(f).

## 8. Education.

a. **Drug Testing for Bus Drivers.** Drivers of motor vehicles used to transport school children must submit to tests for use of drugs and alcohol, and the testing program must include random testing. For a driver who is not required to have a commercial driver's license, an employer shall keep and maintain records of the testing for improper use of drugs or alcohol on a confidential basis. AS 14.09.025. This would seem to imply that records of those bus drivers who are required to have commercial licenses are not confidential.

b. **Employee Evaluations.** School boards must adopt certified employee evaluation systems for evaluation and improvement of the performance of the district's teachers and administrators. Information provided to a school district under the school's evaluation system concerning the performance of an individual being evaluated is not a public record but the person being evaluated is entitled to a copy and can waive confidentiality. AS 14.20.149(h).

c. **Student Financial Aid.** All information submitted in connection with a determination by educational institutions of financial need is confidential; applicants can authorize release. AS 14.43.910.

d. **Collective Bargaining.** In collective bargaining sessions between post-secondary institutions that are public employers, and representatives of bargaining units of faculty or other employees, student representatives of those institutions may:

(1) attend and observe all meetings between the public employer and the representative of the bargaining unit which are involved with collective bargaining; and

(2) have access to all documents pertaining to collective bargaining exchanged by the employer and the representative of the bargaining unit, including copies of transcripts of the meetings.

AS 23.40.245. The statute specifically states that student representatives may not disclose information concerning the substance of collective bargaining obtained in the course of their activities as observers or participants in these meetings, unless said information is released by the employer or the representative of the bargaining unit. At least by implication, therefore, the law makes confidential the information and records maintained by the institution in the course of those same collective bargaining negotiations during the time they are underway.

e. **University Board of Regents.** All records of meetings and proceedings of the University of Alaska Board of Regents must be open to inspection by the public and press, and findings of an executive session must be made part of the record of proceedings. AS 14.40.160(a).

f. **Information About University Lands.** Notwithstanding the public records act, on a determination that it is in the best interest of the University of Alaska, or on the request of the person who has provided the information, the president of the university may keep the following confidential: (1) the name of a person applying for the sale, lease or other disposal of university land or an interest in university land; (2) before the issuance of a notice of intent to award a contract relating to a sale, lease or disposal of university land or an interest in university land, the names of the participants and the terms of their offers; (3) all geological, well, geophysical, engineering, architectural, sales, market, cost, appraisal, timber cruise, gross receipts, net receipts or other financial information relating to university land or an interest in university land and considered for, offered for or currently subject to disposal or a contract; (4) cost data and financial information submitted by an applicant in support of applications for bonds, leases or other information in offerings and ongoing operations relating to management of university land; (5) applications for rights-of-way or easements across university land; and (6) requests for information about or applications by public agencies for university land that is being considered for use for a public purpose. AS 14.40.367

g. **Confidentiality of Research.** The public records inspection requirements of AS 40.25.110 - 40.25.121 do not apply to writings or records that consist of intellectual property or proprietary information received, generated, learned or discovered during research conducted by the University of Alaska or its agents or employees until publicly released, copyrighted or patented, or until the research is terminated, except that the university shall make available the title and a description of all research projects, the name of the researcher, and the amount and source of funding provided for each project. AS 14.40.453.

h. **Alaska Aerospace Corporation.** The Legislature in 1991 created the Alaska Aerospace Corporation as a public corporation, located for administrative purposes in the Department of Commerce, Community, and Economic Development and affiliated with the University of Alaska, but with a separate and independent legal existence. Records of the corporation are generally public, but trade secrets or other proprietary technical information supplied to the corporation is confidential unless the owner of the trade secret authorizes its release or a court orders it. AS 14.40.881.

9. **Elections; Voter Registration Records.** The following information set out in state voter registration records is confidential and is not open to public inspection: the voter's age or date of birth; Social Security number, driver's license number; voter identification number; place of birth and signature. In addition a voter may elect in writing to keep the voter's residential address confidential and not open to public inspection if the voter provides a separate mailing address. Information may be released with consent of the voter, pursuant to court order, or in certain other limited cases. AS 15.07.195.

#### 10. *Fish and Game.*

a. **Fish Tickets.** Records required by Fish and Game to be filed concerning the landings of fish, shellfish or fishery products, and annual statistical reports of buyers and processors required by regulation of the Alaska Department of Fish and Game are confidential. Records or reports received by the department that do not identify individual fishermen, buyers or processors or the specific locations where fish have been taken are public information. AS 16.05.815.

b. **Crab Surveys.** Crab stock abundance survey information that reveals crab catch for sampling locations is confidential until the close of the season. AS 16.05.815(c).

c. **Wildlife Information.** Except as specified, the Department of Fish and Game must keep confidential for 25 years (1) personal information contained in fish and wildlife harvest and usage data; and (2) department records concerning (A) telemetry radio frequencies of monitored species, (B) denning sites, (C) nest locations of raptors that require special attention, (D) specific capture sites used for wildlife

research and management, and (E) the specific location of fish and wildlife species. AS 16.05.815(d).

d. **Commercial Fishing Loan Information.** Information supplied by individuals to secure state loans for commercial fishing gear or vessels can be released with authorization of the borrower; by negative implication, it is confidential. AS 16.10.353.

e. **Aquaculture Records.** Records concerning aquatic farm stocks or production, prices, and harvests of aquatic farm products and wild stocks, and annual statistical reports of individual aquatic farms or hatcheries required by statute or by a regulation adopted by the department are confidential and may not be released by the department, except that the department may release the records and reports, with limited exceptions. AS 16.40.155.

f. **Sport Fishing Data.** Information collected by the Department of Fish and Game from sport fishing guides, including identification of vessels used in providing sport fishing guide services; the amount of fishing effort, catch and harvest by clients of a sport fishing guide; the locations fished; and other information that the department or board requires by regulation is confidential to the extent provided under AS 16.05.815. AS 16.40.280

g. **Limited Entry Permit Holder Information.** Documents submitted to the Limited Entry Commission containing information relating to an individual's personal finances and information supplied by individuals for research purposes, produced in response to requests by the commission, are not subject to public disclosure. AS 16.43.975.

11. **Food and Drugs — Controlled Substances.** AS 17.30.155 prohibits disclosure by medical practitioners or medical researchers of the name or identity of a patient or research subject. While the language of this subsection is very broad, the context clearly indicates it applies to dispensing controlled substances and research and education to prevent and deter abuse of controlled substances. AS 17.30.100 prohibits the Department of Public Safety, which enforces this chapter, from releasing the same information.

#### 12. *Decedents' Estates, Guardianships, Transfers, Trusts and Health Care*

a. **Establishment of Wills and Trusts Validity Before Death.** A person with requisite interest can petition the court to determine before a testator's death that a will is valid will subject only to subsequent revocation or modification, or to determine before a settlor's death that a trust is valid and enforceable under its terms. AS 13.12.530, 13.12.535A notice of the filing of such a petition, a summary of all formal proceedings on the petition, and a dispositional order or a modification or termination of a dispositional order relating to such proceeding shall be available for public inspection. AS 13.12.585(a). With limited exceptions provided in section (b) of the statute, all other information contained in the court records relating to a proceeding is confidential, although for good cause shown, the court may order confidential records to be made available to a person who is not listed in section (b). AS 13.12.585(c).

b. **Guardianships.** There are laws that provide for appointment of a guardian for someone who is incompetent to handle his or her own affairs, for a variety of reasons. Parts of the record in such proceedings are open, and parts are closed. Specifically, a notice of the filing of the petition, a summary of all formal proceedings, and a "dispositional order" or an order modifying or terminating a "dispositional order," all must be open to public inspection. All other information in the court files relating to such proceedings is confidential, and not open to public inspection. If a court finds that a petition was filed maliciously, frivolously or without just cause, the entire record can be sealed, including those items otherwise open to public inspection. In such a case, the information may be disclosed only "for good cause shown." AS 13.26.013.

Statements of wards, or respondents in cases seeking appointment of a guardian, made in the course of evaluations, examinations and



treatment, are confidential. AS 13.26.109.

*Public Guardian.* The public guardian has the same powers and duties with respect to the public guardian's wards and protected persons as a private guardian or conservator. 13.26.380(a). The records required to be kept and maintained in connection with the public guardian's duties under the statute section are confidential and are not subject to inspection or copying under the public records act unless the records are relevant to an investigation or proceeding involving the public guardian or a case in which the public guardian provided guardianship or conservatorship services. 13.26.380(c).

c. *Wills.* By law, individuals may deposit their wills with the superior court for safekeeping, and these wills remain confidential. AS 13.12.515.

### 13. *Health, Safety, Social Services.*

a. *Access to health care records.* The Department of Health and Social Services may inspect health care records that would identify cancers, birth defects or infectious disease required to be reported, and may conduct research using such health care data. Data obtained or a records inspected under this section that identify a particular individual are confidential, and are not subject to inspection or copying under the public records act. AS 18.05.042.

b. *Disclosure of Medical Records.* Limited disclosure of medical records for purposes of providing or evaluating emergency medical care may be made so long as disclosure is limited to that considered necessary for these purposes, and no further disclosure of confidential records is made to unauthorized persons. AS 18.08.087.

c. *Blood Testing of Sex Offenders.* Blood tests for HIV and other sexually transmitted diseases that a court orders an alleged sex offender to undergo are to be maintained as confidential, except by the test subject, and except for disclosures to the victim as necessary to obtain medical or psychological care or advice, ensure health or safety of relatives and associates, or to pursue civil remedies. AS 18.15.310.

d. *Medical Information Security Safeguards.* The Department of Health and Social Services collects information concerning a variety of reportable diseases, contagious and otherwise, and epidemiological information, and is required to acquire, use, disclose and store identifiable health information in a confidential manner that safeguards the security of the information, and maintain the information in a physically and technologically secure environment. AS 18.15.365. Bloodborne pathogens test results of an adult or juvenile offender or a prisoner are confidential and may not be disclosed except as provided by law and as needed for the treatment or medical care of an adult or juvenile offender or a prisoner specific to a bloodborne pathogen-related illness. AS 18.15.440.

e. *Judicial Bypass for Minor Seeking Abortion.* A pregnant, unmarried, unemancipated woman under 17 years of age, who wishes to have an abortion without the consent of a parent, guardian or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to consent to the abortion without such consent. This judicial bypass hearing, and all related proceedings, must be conducted in a manner that preserves the anonymity of the complainant. The complaint and all other papers and records relating to the action or any related appeal are confidential, and not disclosable as public records. AS 18.16.030.

f. *Hospitals.* AS 18.20.090, concerning confidentiality of information obtained by the Department of Health and Social Services in connection with licensing hospitals and other health care facilities in a manner that identifies an individual or hospital was repealed. Related issues are addressed in AS 47.32.180, see subsection II.B.32(s) below.

g. *Health Care Review.* State law establishes certain "review organizations," including the State Medical Board, hospital governing bodies and others, that are to gather and review information relating to the care and treatment of patients. The purposes for doing this

include, among others, evaluating and improving health care, reducing morbidity or mortality, work or cost controls, develop professional standards and norms of care, and ruling on controversies and disputes involving insurance carriers, licensing boards and others. All data and information acquired by a review organization must be held by it in confidence. However, information, documents or records otherwise available from original sources are not immune because they were presented during proceedings of a review organization. AS 18.23.030.

h. *Vital Statistics.* It is unlawful for a person to permit inspection of, or disclose information contained in, vital statistics records, or to copy or issue a copy of all or part of such records, except as authorized by the statute or regulations. Notwithstanding AS 40.25.120, when 100 years have elapsed from the date of birth, or 50 years after a death, marriage, divorce, dissolution or annulment, these records become public. AS 18.50.310(a), (f).

i. *Adoptions, Legitimations.* The name and address of a biological parent of an adopted person are not disclosable to the public, AS 18.50.500(b), and the original birth certificate (which can be superseded by a new certificate in adoption or legitimation proceedings) and evidence of adoption are not subject to public inspection. AS 18.50.220(b)(1). In the case of legitimation, the original certificate and evidence of legitimation are not subject to public inspection. AS 18.50.220(b)(1).

j. *Workplace Safety Inspections.* State law provides for an employee or employee representative to accompany a Department of Labor and Workplace Development representative during a physical inspection of a work place. The law further makes confidential any comments made by an employee or employee representative, to the labor department representative, during an inspection relating to an employer's compliance with occupational health and safety laws. It also keeps the name of any such employee or employee representative confidential. AS 18.60.087. Likewise, the law provides for an employee who believes that a health or safety violation exists that threatens physical harm or imminent danger to request a special inspection by giving notice to the labor department. The department must keep the complaining employee's name, and the names of employees referred to in the notice, confidential unless expressly agreed otherwise by the employee giving notice. AS 18.60.088. Information obtained by the labor department, in connection with health or safety inspections, that contain or might reveal trade secrets, must be kept confidential. AS 18.60.099.

k. *Radiation Protection.* The Department of Health and Social Services is given broad powers to "develop comprehensive policies and programs for the evaluation and determination of hazards associated with radiation sources and their amelioration;" and to gather information, conduct investigations and review records relating to possible radiation hazards and related problems. The law provides that the department "may keep confidential" data obtained as a result of registration or investigation. AS 18.60.475(b).

l. *Sex Offender Registration.* The Alaska Sex Offender Registration Act (ASORA) requires persons convicted of sex offenses or child kidnapping to register and periodically re-register with the Alaska Department of Corrections, the Alaska State Troopers, or local police, and to disclose detailed personal information, including that specified in AS 12.63.010, some of which is not otherwise public. The Department of Public Safety is required to maintain a central registry of sex offenders and child kidnappers. AS 18.65.087. Most of the disclosed information is publicly disseminated and is published by the state on the internet. Specifically, AS 18.65.087(b) provides that information about a sex offender or child kidnapper that is contained in the central registry, including sets of fingerprints, is confidential and not subject to public disclosure except as to the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court

of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements for reporting residency and other information, or cannot be located. The department, at least quarterly, shall compile a list of those persons with a duty to register under who have failed to register, whose addresses cannot be verified, or who otherwise cannot be located. The department shall post this list on the Internet and request the public's assistance in locating these persons. 18.65.087(g). The name, address, and other identifying information of a member of the public who makes an information request under this section is not a public record under the Public Records Act. AS 18.65.087(e). In general, courts have upheld ASORA against legal challenges, although courts have found the registration requirement unconstitutional with respect to two classes of convicted offenders, those convicted and sentenced before the effective date of ASORA, and those whose convictions had been set aside pursuant to a suspended imposition of sentencing, before the effective date of the act. These decisions are discussed in more detail in [Open Records] §IV.N.12, *infra*.

m. Concealed Handgun Permits. The list of concealed handgun permittees, and all applications, permits and renewals are not public records, and may only be used for law enforcement purposes. AS 18.65.770.

n. Domestic Violence Fatality Review Teams. Domestic violence fatality review teams established by the commissioner of public safety in various areas of the state, or by a municipality, investigate fatal incidents of domestic violence, and incidents of domestic violence involving serious physical injury. The review may include a review of the confidential and other records of a department or agency of the state or a municipality relating to the domestic violence incident. The team and each member of it must preserve the confidentiality of any records examined. AS 18.66.400(a). Except for a public report issued by a domestic violence fatality review team that does not contain confidential information, records or other information collected by a team or any member of a team related to duties is confidential and not subject to public disclosure under the public records act. AS 18.66.400(d).

o. Violent Crimes Compensation. An application for compensation from the Violent Crimes Compensation Board, and personally identifying information relating to an applicant for compensation, are confidential records and may not be released by the board. 18.67.030(c).

p. Public Defender Records. Although AS 18, chapter 85, establishing the Public Defender Agency, does not expressly address confidentiality, it is implicit that information communicated to Public Defender Agency employees is confidential in the same manner as if they were made to private attorneys. *Compare* AS 18.85.100(a); AS 18.85.120(d).

q. Medical Marijuana Registry. The confidential registry of patients who have applied for and are entitled to receive a registry identification card according to the criteria set out in this statute. The registry and the information contained within it are not subject to disclosure under the public records act. AS 17.37.010.

14. *Human Rights Commission*. Laws governing the State Commission for Human Rights require confidentiality of records of investigation, and information obtained during an investigation, into alleged violation of anti-discrimination laws. Also, the Commission may not make public the name of a person initiating a complaint or of a person alleged to have committed the unlawful practice or act. There are provisions for disclosure of information, through the parties, when and if the matter proceeds to administrative or judicial hearings. AS 18.80.115.

The state, employers, labor organizations and employment agencies must maintain records on age, sex and race to assist Human Rights Agencies in administering civil rights laws and regulations. These records themselves are confidential, but statistical information compiled from records on age, sex and race are available for public disclosure. AS 18.80.220(b).

## 15. Insurance.

The records and insurance filings in the office of the director of insurance, which include, among others, records of official transactions, examinations, investigations and proceedings, are open to public inspection except as provided in the insurance code. AS 21.06.060(a). Among the documents and information submitted to or obtained by the director that are deemed confidential are personally identifiable consumer information, information or records shown to be trade secrets or proprietary business information, certain analysis ratios and examination synopses. Documents designated as confidential are exempt from disclosure under the public records act. However, the director of insurance may release otherwise confidential information and records for public inspection if the person who provided the information consents or releases incomplete or misleading information on the same topic to the public. AS 21.06.060(b)(4). The director may withhold information or records from public inspection for as long as the director finds the withholding is necessary to protect a person against unwarranted injury, or is in the public interest. AS 21.06.060(g).

a. Examinations. The state insurance code provides for examinations of insurance companies and agents, managers, brokers, producers, adjusters and promoters. Those examined and their employees and officers must produce or provide the insurance director with free access to their books, accounts, records, documents, files, information, assets and other matters in their possession or control relating to the subject of the examination, including all computer and other recordings relating to the property, assets, business and affairs of the person being examined. The process allows the one being examined to seek extensions and file rebuttals, provides for review by the director of the entire package, and prohibits disclosure of a preliminary examination report. Information and records obtained by the director under the statutes providing for examinations are confidential. The director may publish an examination report or a summary of it in a newspaper or electronic media in the state if the director determines that the publication is in the public interest. AS 21.06.150(g). Comparing 1992 and 1990 amendments to AS 21.06.150, and AS 21.06.060 (which makes insurance records presumptively public), it appears that the insurance director no longer has the discretion to withhold disclosure of investigation (as opposed to examination) reports.

b. Managed Care Insurance Plans. Covered persons are required to provide information for various purposes relating to managed care health insurance plans, including to secure treatment or resolve disputes. Medical and financial information in the possession of a managed care entity (which, under AS 21.07.250 is defined to include HMOs) regarding an applicant or a current or former person covered by a managed care plan is confidential and is not subject to public disclosure. The prohibition against disclosure does not apply in certain situations, including when the individual whose identity is disclosed gives oral, electronic or written consent to the disclosure, when the information is disclosed at the written consent of the covered person, or when disclosure is required by law. AS 21.07.040.

c. Reports Concerning Material Transactions. Domestic insurers must file reports with the director disclosing material acquisitions and dispositions of assets and material nonrenewals, cancellations or revisions of ceded reinsurance agreements as defined by the statute. Such reports obtained by or disclosed to the director are generally confidential, not disclosable without consent of the submitting insurer. However, the director may publish all or any part of such reports upon a determination, after notice to the insurer, that the interest of policyholders, shareholders or the public will be served by publication. AS 21.09.300.

d. Reports About Remedying Concerns With Risk-Based Capital. Insurers operating in the state must submit to the Director of Insurance a report of their risk-based capital covering the previous calendar year, if required by the director. Also, certain events (variously prioritized under the categories of "company action level event," "regulatory action level event," "authorized control level event," and "mandatory

control level event”) may trigger an obligation of the insurer to file a plan containing specified information identifying the conditions that contribute to the level event, proposals for corrective action, financial projections, and other information. These reports and plans, the results or report of an examination or analysis of an insurer performed under this chapter, and a corrective order issued by the director are confidential. They may not be made public by the director or another person without the prior written consent of the insurer who is the subject of the report, plan, analysis or order. If the director, after giving the insurer and its affiliates who would be affected by publication of the information notice and opportunity to be heard, determines that the interests of policy holders, shareholders, or the public will be served by the publication of the information, a director may publish all or part of the information in the manner the director considers appropriate. AS 21.14.090.

e. Assets and liabilities of insurers. A life insurer doing business in the state must annually submit to the director an opinion of a qualified actuary as to whether the reserves and related actuarial items held in support of a policy or contract are computed appropriately, are based on assumptions that satisfy contractual provisions, are consistent with prior reported amounts, and comply with the applicable laws of the state. A memorandum in support of an actuarial opinion and other supporting material provided by an insurer to the director are confidential and may not be made public. Once a portion of the memorandum or other material is cited by the insurer in its marketing, is cited before a governmental agency other than the state insurance department, or is released by the company to the news media, the remainder of the confidential memorandum or other material is no longer confidential. AS 21.18.110(m), (s).

f. Insurance Holding Companies. Certain filings must be made before a person can attempt to acquire or merge with an insurance company. This filing must contain detailed information about the proposed transaction, including a description of the consideration to be used to accomplish the merger or acquisition of control, and the identity of persons furnishing the consideration. However, if the source of the consideration is a loan made in the lender’s ordinary course of business, the director of insurance must keep the identity of the lender confidential, if the person filing the statement asks that this be done. AS 21.22.020.

At various times, events have raised questions about the solvency and conduct of certain insurance companies doing business in Alaska, and of the oversight responsibilities of the Division of Insurance. In fact, state law requires disclosure by insurance companies to the Director of Insurance of a great deal of information. AS 21.22.060 requires every insurer that is authorized to do business in Alaska and that is a member of an insurance holding company system to register with the director and to provide current information about its capital structure, general financial condition, ownership and management, the identity of every member of the insurance holding company system, and information about various agreements, relationships and transactions concerning loans, investments, purchases, sales or exchanges of securities, purchases, sales, transactions not in the ordinary course of business, guaranties, management and service contracts, cost sharing arrangements, and reinsurance agreements, with exceptions for certain insubstantial transactions. AS 21.22.060. The Director of Insurance also has the power under certain circumstances to order a registered insurer to produce records, books or other information or papers in the possession of the insurer or its affiliates necessary to ascertain the financial condition or legality of conduct to the insurer. AS 21.22.110. The law provides that all information and documents obtained by or disclosed to the director in the course of an examination or investigation made under AS 21.22.110, all information reported under AS 21.22.060, and all information required to be provided before an acquisition of control is approved under AS 21.22.065, shall be “given confidential treatment” and not made public, without prior written consent of the insurer to which it pertains. AS 21.22.120. However, the law also allows the director to determine that the interests of the public (or policyholders or shareholders) would be best served by publication

of the information, and in such case to do so in any manner in which the director considers appropriate after giving the insurer that would be affected by publication notice and the opportunity to be heard on the question. *Id.* Any reporter who is working on a story involving the insurance industry and needs this kind of detailed information about insurance companies might do well to make a pitch to the director of insurance asking that the information be disclosed in the public interest.

g. Records of Licensees. Licensees of the Division of Insurance must keep detailed records of insurance transactions, including records of all insurance contracts, commissions, investigations and adjustments. AS 21.27.350(a). In addition, they must keep current accounting and financial records. AS 21.27.350(d). The director of the Division of Insurance can review any of these records. AS 21.27.350(e) provides that “accounting and financial records inspected or examined under this section are confidential when in the possession of the division.” By negative implication, the records of insurance transactions are not confidential, and this reading is supported by a comparison of the 1987 and 1992 amendments to section .350. Insurance producers, agents, administrators, brokers, adjusters and managers are generally required to be licensed. Appointments of insurance producers, managing general agents and reinsurance intermediary managers representing companies continue until such appointments are terminated in writing, and when someone is accused of engaging in licensed activities after termination, the termination must be submitted to the director. The statement of reasons for termination is confidential and not subject to inspection as a public record. AS 21.27.110(f). Third-party administrators representing insurers are required to maintain separate records for each insurer. The director has access to all books, bank accounts, and records of third-party administrators, but any trade secrets contained in these books and records, including identities and addresses of policyholders and certificate holders, are confidential. AS 21.27.650(a)(5)(F).

h. Surplus Lines Insurance. In many instances, insurance brokers will go to carriers outside the state and not admitted to transact insurance in the state, in order to place insurance where the funds of the primary carrier would not be sufficient for it to write the insurance. Such surplus lines insurance brokers must file regular written reports that include various information including the name and address of the insurer, the identity of each insurer and percentage of coverage, description of the subject and location of risk, and so forth. These reports are confidential, although the brokers must also file monthly affidavits, open to public inspection, regarding efforts to place the coverage with “admitted insurers” and the results of those efforts. AS 21.34.080. These affidavits must state that the insured was informed before surplus lines insurance was placed that the surplus lines insurer is not licensed in Alaska, is not subject to the state’s supervision, and that in the event of insolvency losses will not be covered under the Alaska Insurance Guaranty Association Act. *Id.* The insurance code also provides for the formation of a surplus lines association of surplus lines brokers to provide, among other things, verification of taxes and fees paid and of all surplus lines coverages written by its members to determine whether the coverages comply with state laws and regulations. A provision that examinations to accomplish those functions are confidential was deleted in 1992. AS 21.34.090. There is a further provision for the Director of Insurance to examine the surplus lines association at least every three years, and to examine its books, records, accounts, documents and agreements governing its operation. There is no provision in the statute that makes the Director of Insurance’s examination confidential.

i. Insurance Fraud. Alaska law frowns on insurance fraud. Among other things, the state requires insurance carriers who have reason to believe that a fraudulent claim has been made against them to send a report to the Director of Insurance disclosing information about that. Any papers, reports, documents, and evidence received under this law, or an investigation arising out of information received under this law, are not subject to public inspection “for so long as the director considers confidentiality to be in the public interest or reasonably necessary



to complete an investigation or protect the person investigated from unwarranted injury.” AS 21.36.400.

j. **Rating Organizations.** One of those “invisible hands” that controls such things as our insurance premiums is a thing called the “rating organization.” It is an organization that exists to provide information about the rates to insurance companies to help determine what the appropriate rates for premiums should be, and is supported primarily if not entirely by insurance companies that are members of the organization. The insurance code states that a rating organization can provide for the examination of policies, daily reports, binders, renewal certificates, endorsements or other evidences of insurance, or the cancellation thereof, and may make reasonable rules governing their submission. All information submitted for examination by the rating organization is confidential. AS 21.39.060(f). (Note, however, that AS 21.39.090, entitled “Rights of Insureds,” allows insureds affected by a rate made by the rating organization to “all pertinent information concerning the rate.”)

k. **Small Employer Health Insurance Plans.** A small employer insurer is required to maintain a complete and detailed description of its rating practices and renewal underwriting practices. The information is available to the director of insurance, but is otherwise confidential. AS 21.56.120(c).

l. **Title Insurance Company Rates.** Statements of title insurance companies making a rate filing, setting out the basis on which the rate was determined, and justifications for the rate filing, are open to public inspection; however, information that can be used to identify the experience of a particular title insurance limited producer is confidential. AS 21.66.380(b).

m. **Reinsurance Agreements.** Domestic stock insurers and domestic mutual insurers may reinsure all or part of their insurance in force with another insurer by a reinsurance agreement. Such reinsurance agreements are confidential per AS 21.060.060. *See* AS 21.69.610, AS 21.69.620.

n. **Life and Health Insurance Guarantee Association.** The director of insurance is required to present to the Board of Governors of the Alaska Life and Health Insurance Guarantee Association certain ratios and listings of companies that the Board may use to carry out its duties and responsibilities under provisions relating to prevention of insolvencies. This information must be kept confidential by the Board until it is made public by the director. AS 21.79.100(d). The Board may make reports and recommendations to the director relating to the solvency, liquidation, rehabilitation or conservation of a member insurer or the solvency of insurers who apply to transact insurance business in the state; the director and the board shall keep the reports and recommendations confidential. The Association is required to keep records of meetings relating to its activities, and meetings or records of the Association may be open to the public upon a majority vote of the Board. AS 21.79.040(b). Absent a court order, these records may only be made public under AS 21.70.040(b) after termination of a liquidation, rehabilitation or conservation proceeding that involves the impaired or insolvent insurer, or after the insurer is no longer impaired or insolvent. AS 21.79.110(b).

o. **Alaska Insurance Guaranty Association Act.** Alaska has created a nonprofit incorporated legal entity known as the Alaska Insurance Guaranty Association, the purpose of which is to provide a mechanism for payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurance company, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of this protection among insurers. The association has a board of directors that is selected by member insurers subject to approval of the commissioner of insurance. The board is under a legal duty to notify the commissioner of Commerce, Community, and Economic Development of information indicating that a member insurer may be insolvent or in a financial condition hazardous to the policyholders or to the public. The majority of the board of di-

rectors may request the commissioner to order an examination of such an insurance company. The law provides that the examination report under this section is to be treated like other examination reports. It also provides that in no event may the examination report be released to the board of directors before it is released to the public, and that the request for an examination shall be kept on file by the commissioner but it shall not be open to public inspection before the release of the examination report to the public. AS 21.80.110.

p. **Fraternal Benefit Societies.** Provisions concerning annual statements, annual valuation certificates, and examinations or investigations of a fraternal benefit society, including public disclosure of related statements and reports by the director of insurance previously found in AS 21.84.340-390 have been repealed, apparently without being relocated elsewhere in the statutes.

q. **Health Maintenance Organizations.** “Health maintenance organizations,” which undertake to provide or arrange for basic health care services to enrollees on a prepaid basis, come within the definition of “managed care” entities under AS 21.07.250. Records concerning these HMOs are public except for trade secrets, privileged, confidential commercial or financial information as determined by the director, and information required on annual reports showing the number, amount and disposition of malpractice claims settled during the year by the HMO, AS 21.86.270, and information concerning malpractice claims settled. AS 21.86.100(b). AS 21.86.280, providing that data or information provided to an HMO pertaining to the diagnosis, treatment or health of an enrollee or applicant is generally confidential, was repealed. It is not clear to what extent this was intended to make available information previously confidential; note that medical and financial information in the possession of a managed care entity regarding an applicant or a current or former person covered by a managed care plan is confidential and is not subject to public disclosure. AS 21.07.040(a).

r. **Provision of Prepaid Hospital and Medical Services.** Detailed rate justifications, including a rate formula, filed by hospital and medical service corporations providing prepaid services to subscribers. AS 21.087.190(b).

s. **Arson.** AS 21.96.050(f)(1) appears to allow fire departments or other law enforcement agencies to keep confidential certain information regarding ongoing arson investigations.

## 16. *Labor and Employment.*

a. **Drug testing.** Test results and related communications relevant to an employer’s drug or alcohol impairment testing program are confidential, with limited exceptions including one affording access by the tested employee or prospective employee. AS 23.10.660.

b. **Employment Security Act Data.** The Department of Labor and Workplace Development obtains information from employing units and individuals in the course of administering the provisions of Alaska’s Employment Security Act, to determine benefit rights of individuals. This information is confidential and may not be disclosed or made open to public inspection in a manner that reveals the identity of the individual or employing unit, except for disclosures specifically authorized. The exceptions include the release of statistical and other public reports based on information obtained by the Department, so long as the reports do not reveal wage and payroll data for an employing unit or the name or number identifying an individual. The requirements of this section concerning the confidentiality of information obtained in the course of administering this chapter apply to officers and employees of a state or federal agency to whom the Department of Labor and Workplace Development provides information as authorized by this section. AS 23.20.110(a), (g) - (n). The confidentiality requirements of section .110 do not apply to disclosure of decisions and records on appeal in any matter before the department as long as the federal social security number of the claimant and the employer’s federal employer identification number and federal social security number are redacted or removed before disclosure is made. AS 23.20.110(q).

c. **Workers Compensation Records.** Medical or rehabilitation records, and the employee's name, address, social security number, electronic mail address, and telephone number contained on any record, in an employee's file maintained by the Workers Compensation Board are not public records subject to public inspection and copying under AS 40.25. *See* AS 23.30.107. An employee may elect to authorize the disclosure of the employee's name, address, social security number, electronic mail address, and telephone number contained in a record described in (b) of this section by signing a declaration on a form provided by the division. AS 23.30.107(d). The Worker's Compensation Appeals Commission within the Department of Labor and Workforce Development maintains, indexes and makes available for public inspection the final administrative decisions and orders of the commission and of the board. The chair of the commission may review and circulate among the other members of the relevant commission appeal panel the drafts of the panel's formal decisions and decisions upon reconsideration. These drafts are confidential documents, not subject to disclosure. AS 23.30.008(b). Papers, reports, documents and other evidence related to an investigation of fraudulent or misleading acts relating to workers' compensation matters are confidential, and the papers, reports, documents and evidence received in connection with investigations, or otherwise relating to submissions, hearings, or other matters concerning fraud and misleading acts are not subject to inspection so long as the director considers confidentiality to be in the public interest or reasonably necessary to complete an investigation or protect the person investigated from unwarranted injury. AS 23.30.280(g).

d. **Vocational Rehabilitation and Other Labor Department Records.** AS 23.15.190 prohibits most communication of any list of names of, or information concerning, persons applying for or receiving vocational rehabilitation. Chapter 20 of the labor laws governs unemployment compensation and insurance related matters. It requires reporting of a variety of information from both employers and individuals in order to administer the unemployment laws, and provides that information obtained from either the employer or individual as to benefit rights of an individual is confidential and may not be disclosed to the public in a manner that reveals the identity of the individual or employer. AS 23.20.110.

e. **Collective Negotiations By Physicians.**

**Collective Negotiations By Physicians.** Physicians are permitted to engage in collective negotiations of certain terms and conditions with health benefit plans, subject to review of matters and documents relating to the negotiations by the Attorney General. Documents relating to such a collective negotiation described in the relevant statute that are in the possession of the Department of Law are confidential and not open to public inspection. AS 23.50.020(k).

## 16. Legislature.

a. **Legislative Research.** Requests by members of the state legislature for research and bill drafting services of the Legislative Affairs Agency are confidential. AS 24.20.100.

b. **Reports of the Legislative Audit Division.** The Legislative Audit Division has access to the books, accounts, reports and other records of every state agency, whether they are confidential or not. Audit records of the Legislative Audit Division, including audit work papers and other related supporting documentation, are confidential. AS 24.20.301. Audit reports are confidential unless and until the report has been approved for release. *Id.* The Legislative Budget and Audit Committee must approve reports from the audit division by a majority vote of the committee before the release. The committee must file copies of its approved audit reports including any committee recommendations with the governor, the agency concerned, and the legislature. The reports are open for public inspection after their release to the legislature. AS 24.20.311.

c. **Ombudsman.** The ombudsman, a legislative employee, is required to maintain confidentiality with respect to all matters and the

identities of the complainants or witnesses coming before him or her except insofar as disclosures may be necessary to enable him or her to carry out the duties of the job and to support his or her recommendations. The ombudsman may not disclose a confidential record obtained from an agency. AS 24.55.160(b). Before giving an opinion or recommendation that is critical of an agency or person, the ombudsman must consult with that agency or person. The ombudsman may make a preliminary opinion or recommendation available to the agency or person for review, but the preliminary opinion or recommendation is confidential and may not be disclosed to the public by the agency or person. AS 24.55.180. A report of the ombudsman's opinions and recommendations is at least initially confidential. It generally must be given to the agency under investigation, but the agency may not disclose it to the public. AS 24.55.190(c). Once notice is given that the investigation is over (to the agency, and, if the investigation was in response to a complaint, to the complainant), the ombudsman may present the report, with any reply, to the governor, the legislature, a grand jury, the public, or any of these. AS 24.55.200.

d. **Homeland Security.** The Homeland Security and Emergency Management Subcommittee was established as a subcommittee of the Joint Armed Services Committee, to review confidential activities, plans, reports, recommendations and other materials of the Alaska division of homeland security and emergency management established in AS 26.20.025, or of other agencies or persons, relating to matters concerning homeland security and civil defense, emergencies or disasters in the state or to the state's preparedness for or ability to mount a prompt response to matters concerning homeland security and civil defense, emergencies or disasters. AS 24.20.680. Pursuant to section .680, the President of the Senate and the Speaker of the House of Representatives may condition service on the subcommittee by members upon the execution of appropriate confidentiality agreements by the members or by persons assisting those members. Information and documents received by members serving on the subcommittee or persons assisting members under a confidentiality agreement as described in this subsection were not public records and were not subject to public disclosure under the public records act. AS 24.20.680(d). AS 24.20.680 was repealed in 2009. Sec. 23-24, ch. 179 SLA 2004. The adjutant general of the Department of Military and Veterans Affairs was charged with proposing any appropriate legislation relating to this provision; as of the 2011 ed., sec. .680 had not been reinstated.

Note also that a new category of records has been added to exempt from disclosure under the public records act records or information pertaining to a plan, program or procedures for establishing, maintaining or restoring security in the state, or to a detailed description or evaluation of systems, facilities or infrastructure in the state, but only to the extent that the production of the records or information (A) could reasonably be expected to interfere with the implementation or enforcement of the security plan, program or procedures; (B) would disclose confidential guidelines for investigations or enforcement and the disclosure could reasonably be expected to risk circumvention of the law; or (C) could reasonably be expected to endanger the life or physical safety of an individual or to present a real and substantial risk to the public health and welfare. AS 40.25.120(a)(10).

e. **Legislative Ethics.** The Alaska legislature has created a Select Committee on Legislative Ethics, which now includes public members. One of the things that this committee can do is to investigate complaints concerning alleged violations of laws and rules regarding legislative ethics, including violations of "open meetings" requirements. All complaints are investigated on a confidential basis. AS 24.60.170(d). An opinion issued under this section must be issued with sufficient deletions to prevent disclosing the identity of the person or persons involved. Advisory opinion discussions and deliberations are confidential, unless the requester and anyone else named in the request who is covered by this chapter waives confidentiality. The committee's final vote on the advisory opinion is a public record. AS 24.60.160(b). The Select Committee on Legislative Ethics maintains a public online electronic database of advisory opinions interpreting the Legislative Ethics Act. AS 24.60.160(b).

The complaint and all documents produced or disclosed as a result of the committee investigation are confidential and not subject to inspection by the public, although these confidentiality provisions may be waived by the subject of the complaint. AS 24.60.170(l). Proceedings of the ethics committee relating to complaints before it are confidential until the committee determines that there is probable cause to believe that a violation has occurred. Except to the extent that the confidentiality provisions are waived by the subject of the complaint, the person filing an ethics complaint shall keep confidential the fact that the person has filed the ethics complaint as well as the contents of the complaint filed, and if the committee finds that a complainant has violated any confidentiality provision, the committee shall immediately dismiss the complaint. AS 24.60.070(l). If the committee determines that the allegations of an ethics complaint, if proven, would not give rise to a violation, that the complaint is frivolous on its face, that there is insufficient credible information that can be uncovered to warrant further investigation by the committee, or that the committee's lack of jurisdiction is apparent on the face of the complaint, the committee shall dismiss the complaint and shall notify the complainant and the subject of the complaint of the dismissal. A proceeding conducted to make this preliminary decision, documents that are part of such a proceeding, and a dismissal for these reasons are confidential as provided in (l) of this section unless the subject of the complaint waives confidentiality as provided in that subsection. AS 24.60.170(c).

If in the course of an investigation or probable cause determination the committee finds evidence of probable criminal activity, the committee must transmit a statement and factual findings limited to that activity to the appropriate law enforcement agency. If the committee finds evidence of a probable violation of AS 15.13 (governing state election campaigns), the committee must transmit a statement to that effect and factual findings limited to the probable violation to the Alaska Public Offices Commission.

All meetings of the committee before the determination of probable cause are closed to the public. A person charged by the committee with a probable ethics violation after the initial stages of this process may engage in discovery, and the committee may adopt procedures that impose reasonable restrictions on the release of information that the subject of a complaint acquires from the committee in the course of discovery, or on information obtained by use of the committee's authority, in order to protect the privacy of persons not under investigation to whom the information pertains. However, the committee may not impose restrictions on the release of information by the subject of the complaint unless the complainant has agreed to be bound by similar restrictions and has not made public the information contained in the complaint, information about the complaint, or the fact of filing the complaint. AS 24.60.170(i).

If the committee determines after investigation that there is not probable cause to believe that the subject of the complaint has violated the ethics law, the committee shall dismiss the complaint or portions of it as to which there is no probable cause there was a violation. The committee must issue a decision explaining its dismissal. The committee's deliberations and vote on the dismissal order and decision are not open to the public or to the subject of the complaint. A copy of the dismissal order and decision must be sent to the complainant and to the subject of the complaint. Notwithstanding section .170(l), a dismissal order based on lack of probable cause and decision is open to inspection and copying by the public. AS 24.60.170(f).

All documents issued by the committee after a determination of probable cause to believe that the subject of a complaint has violated this chapter, including an opinion recommending corrective action under (g) of the ethics act and a formal charge under (h) of the statute, are subject to public inspection. Hearings of the committee under section (j) are open to the public, and documents presented at a hearing, and motions filed in connection with the hearing, are subject to inspection by the public. Deliberations of the committee following a hearing, deliberations on motions filed by the subject of a charge under subsection (h) of the act, and deliberations concerning appropriate

sanctions are confidential. AS 24.60.170(l) and (m). Notwithstanding subsection (l) of the Ethics Act, a dismissal based on lack of probable cause is open to public inspection.

A legislator or legislative employee may not knowingly make an unauthorized disclosure of information that is made confidential by law and that the person acquired in the course of official duties. A person who violates this section is subject to a proceeding under AS 24.60.170 and may be subject to prosecution under AS 11.56.860 or another law. AS 24.60.060(e).

Legislators and legislative employees can participate in a number of state benefit or loan programs without having to disclose it. However, they are required to disclose information regarding non-qualifying programs. If the person believes that such disclosure would be an invasion of his or her constitutional right of privacy, and the committee so finds, the committee shall publish only the fact that a person participated in the program and the amount of benefit the unnamed person received. The committee shall maintain disclosure of the person's name as confidential, and may only use the disclosure in an Ethics Committee proceeding pursuant to AS 24.60.170. If the disclosure becomes part of the record of such a proceeding, the disclosure may be made public as provided in AS 24.60.170.

Legislators and legislative employees may not receive gifts worth \$250 or more, or solicit, accept or receive gifts with any monetary value from lobbyists during a legislative session. Certain gifts and benefits are not considered violations of this section, but some of them must still be disclosed. One of these categories is gifts that are not connected to the recipient's legislative status. This category of gifts must be disclosed, but the disclosures are maintained confidentially, and may only be used by the Ethics Committee and its employees and contractors in the investigation of a possible violation. If the disclosures become part of the record of an Ethics Committee proceeding under AS 24.60.170, the confidentiality provisions of that section apply to the disclosures. AS 24.60.080(d).

The Ethics Committee is required to annually recommend to the Budget and Audit Committee the programs and loans to be audited by the division of legislative audit during the following year, and the scope of the audit. The report prepared by the division of legislative audit on its findings is confidential until it is released by the Legislative Budget and Audit Committee. AS 24.60.050(f).

f. Victims' Rights Advocate. The legislature has created within the legislative branch an office of victim's rights. Among other things, the victims' advocate may investigate complaints from crime victims that they have been denied their constitutional and other legal rights. Before giving an opinion or recommendation that is critical of a justice agency or person as the result of an investigation, the victims' advocate may make a preliminary opinion or recommendation available to the agency or person for review, but the preliminary opinion or recommendation is confidential and may not be disclosed to the public by the agency or person. AS 24.65.140. After conducting an investigation, the victims' advocate must report its opinion and recommendation to the justice agency being investigated if the advocate finds that the agency has denied the complainant crime victim's rights, with a request for a response concerning actions taken on the recommendations. The report thus provided to the agency is confidential, and may not be disclosed to the public by the agency. AS 24.65.150. Upon notice to the pertinent agency that the investigation has been concluded, and after receiving the written approval of the complainant to release the report, the victims' advocate may present the final opinion and recommendations, along with any reply made by the investigated agency, to the governor, the legislature, a grand jury, the public, or any of these. AS 24.65.160.

#### 14. Library Records.

a. Patron Records. Records showing who checks out what from state, municipal, university, public school or other public libraries are confidential. AS 40.25.140.



b. State Library Distribution and Data Access Center. Within the state library, a state library distribution and data access center exists to promote the establishment of an orderly depository library and data index distribution and access system. Each state agency shall provide for accessibility through the center of all data published or compiled by it at public expense, including automated databases, unless the data is protected by the constitutional right of privacy or is of a type stated by law to be confidential or otherwise prohibited. State agencies are required, and municipal agencies and school districts are permitted, to deposit various other publications and research, subject to the same confidentiality provisions. AS 14.56.120-.130. The center may not engage in general public distribution of state publications or lists of publications, or the index of publications and research data, but shall make its holdings available to any person upon request, pursuant to regulations and payment of fees. AS 14.56.170.

#### 15. *Marital and Domestic Relations.*

a. Child Custody. At any stage of a proceeding involving custody of a child the court may, if it is in the best interests of the child, close the proceeding to the public or order the court records closed to the public temporarily or permanently. The court may modify or vacate such an order at any time. AS 25.20.120. If the court finds in the context of a child custody dispute that a parent or child is a victim of domestic violence, the court may order that the address and telephone number of the parent or child be kept confidential in the proceedings. AS 25.20.060(d).

b. Adoption. The papers and records relating to an adoption or termination of parental rights under Alaska law that are part of the permanent record of a court are subject to inspection only upon consent of the court. The papers and records relating to an adoption or a termination of parental rights on file with the Department of Health and Social Services, an agency, or an individual are subject to inspection only with the consent of all interested persons or by order of a court for good cause shown. AS 25.23.150. Except for this or as otherwise provided in this section of the statutes, adoption records of the Bureau of Vital Statistics are subject to inspection only under the provisions of AS 18.50). Except as otherwise provided by law or as authorized in writing by the adopted child if 14 or more years of age, or by the adoptive parent or upon order of the court for good cause shown, a person may not disclose the identity or address of an adoptive parent, an adopted child, a child who is the subject of a proceeding under AS 25.23.180(c)(3) (providing for relinquishment and termination of parent and child relationships), or a biological parent whose parental rights have been terminated on grounds set out in that statute. *Id.*

c. Paternity; Financial Responsibility. In administrative proceedings by the Child Support Enforcement Agency to determine paternity and financial responsibility, the putative father can be required to provide financial information, and all financial information provided under such order must be held confidential by the agency in accordance with its regulations. AS 25.27.165(b)(2).

d. Communications with Victim Counselors. Confidential communications between a victim of domestic violence or sexual assault and a victim counselor are privileged. *See* AS 09.25.400, AS 18.66.200-.250.

#### 16. *Mining.*

a. Assays. The state provides a public assay office to make assays and analyses of Alaskan ores and minerals. When an assay and analysis are made the person requesting them must state his or her permanent residence address, a description, as precise as possible, of the location where the sample was taken, and other information that the department may require that may be beneficial in evaluating the state's mineral resources. Information received and assay results shall be kept confidential for a period of two years. At the end of that period, the information results are open to public inspection and may be published by the department. AS 27.05.090.

b. Mining Loan Fund. A person who requests a loan pursuant to statute setting up the Mining Loan Fund must prepare and submit an

operating plan describing the amount of the loan requested, the nature and location of the advanced mineral exploration, development, or mining for which the loan is requested, other resources and equipment available to the person and similar information. Information acquired by the state under this section is confidential. AS 27.09.030.

c. Mine Operations. Chapter 20 of the Alaska Statutes relating to mining requires various reports to be filed in order to ensure uniform safety standards, proper working conditions for mine employees, to provide for conservation of natural resources and other public interest issues relating to mining operations. AS 27.20.041 provides that the Department of Natural Resources shall keep confidential, upon the request of the person supplying the information, all reports and information required to be filed by regulations adopted under this chapter and all information deducible from filed information. The information may also be made available to the public in the form of statistical reports if the identity of any particular person or mine operator is not revealed by the reports.

d. Alaska Surface Coal Mining Control and Reclamation Act. Alaska law requires those engaged in coal mining to file various applications and reports. Copies of records, permits, inspection materials or other information obtained under this chapter relating to a surface coal mining and reclamation operation must be made "immediately and conveniently available to the public" except for information that is allowed to be kept confidential. AS 27.21.100. The information that may be kept confidential is in two categories. First, information gathered from the proposed permit area pertaining to coal seams, test boring, and so forth must be made available, except that information which relates only to the analysis of the chemical and physical properties of the coal, other than information regarding the mineral or elemental content that is potentially toxic in the environment, must be kept confidential. Second, information in the applicant's reclamation plan relating to competitive rights of the applicant, including but not limited to trade secrets, commercial or financial information, and geologic information specifically identified as confidential by the applicant and determined by the commissioner to be nonessential for public review must be kept confidential. *Id.* AS 27.21.200(c) also provides that the commissioner shall keep certain trade secret or other competitive information confidential when it is submitted by an applicant for a coal exploration permit.

e. Exploration Incentive Credits. The Commissioner of Natural Resources must grant exploration incentive credits to eligible entities, and those seeking to obtain a credit must provide a variety of information concerning their business activities. The exploration activity data provided for this purpose is confidential for 36 months after it is received by the Department, and the Department can be held liable in damages to those providing the exploration activity data if it is disclosed in violation of the statute. AS 27.30.090.

#### 17. *Motor Vehicles.*

a. Vehicle Registration Records. The Department of Motor Vehicles is required to register vehicles and keep a record of all registrations. The DMV is permitted to make statistical data available to the public for a fee as prescribed in regulations, and "may also provide vehicle registration lists to the public for a fee as an electronic service or product under AS 40.25.115." By adding this latter provision in 1993, the legislature effectively converted motor vehicle registration records from being public records, which must be disclosed, to an electronic service or product, whose disclosure is permissive and may be conditioned upon payment of enhanced fees. AS 28.10.071.

b. Personal Information Contained in Motor Vehicle Records. A 1996 amendment to the Motor Vehicle Code generally prohibits the disclosure of personal information contained in motor vehicle records maintained by the DMV. Personal information means information that identifies a person, including a name, address, telephone number, and medical or disability information, but does not include information on vehicular accidents, driving- or equipment-related violations, driver's license or registration status, or a zip code. The prohibition

is subject to numerous exceptions for particular uses, or by specified individuals. AS 28.10.505. One principle exception provides that personal information contained in an individual record may be disclosed, without regard to the intended use of the personal information. Disclosure is authorized if the Department provides in a clear and conspicuous manner on forms for issuance for or renewal of registrations, titles, or identification documents, notice that personal information collected by the Department may be disclosed to a person making a request for an individual record, and has provided in a clear and conspicuous manner on the form an opportunity for a person who is the subject of a record to prohibit disclosure. AS 28.10.505(e).

c. **Driver's Licenses.** Information and records maintained by the Department of Motor Vehicles, including driver's license applications, records of suspensions, revocations, cancellations, restrictions or denials of driver's licenses, accident reports and traffic court convictions, driver and traffic offenses, and other similar information, are confidential. AS 28.15.151(f). But an attorney general's opinion states that most, but not all, information pertaining to motor vehicles contained in Department of Transportation and Public Facilities files or the computer database is public information and should be released on request, except information on particular accidents including individual names and specific driver's license information, which must remain confidential. March 30, 1988, Op. Att'y Gen.

d. **Intoxicated Operators.** Information regarding the condition and treatment of persons who are required by the court system to report for treatment programs as a result of operating a motor vehicle, aircraft or watercraft while intoxicated, and that is forwarded to the court system, is confidential and may be used only for purposes of sentencing persons convicted of such offenses. AS 28.35.030(d). The same rule applies to persons who are required by the court to undergo treatment as the result of other drunk driving related offenses such as refusal to submit to chemical testing for blood alcohol content. *See* AS 28.35.032(h).

18. **Oil and Gas Wells.** The state requires various information to be filed concerning oil and gas wells. Most of the reports and information required to be filed under these laws are confidential for 24 months following the filing period set forth in the statute. (Reports and information required by the law must be filed within 30 days after the completion, abandonment, or suspension of a well.) The owner of the well can give permission to release the reports and information at an earlier date. Engineering, geologic and other information that is voluntarily filed with the commission must also be kept confidential if the person filing the information so requests. This confidentiality requirement is not applicable to information submitted with or as part of a petition for a commission order or to information submitted for or as part of a hearing before the commission. AS 31.05.035.

Certain information is considered to be public, including well surface and bottom hole locations, well depth, well status and production data and production reports required after the initial 30-day filing period referred to above. Production data includes volume, gravity and gas-oil ratio of all production of oil or gas after the well begins regular production. AS 31.05.035. Also certain information that is required to be disclosed under federal law, and that is disclosed to the state under state statutes governing well production and safety, may not be kept confidential. AS 31.05.035(e).

#### 19. *Prisons and Prisoners.*

a. **Pre-parole Reports.** In order to determine whether a prisoner is suitable for discretionary parole, the parole board must consider a pre-parole report. This report includes the pre-sentence report to the sentencing court, recommendations made by the sentencing court, by the prosecuting attorney, by the defense attorney, and statements made by the victim or the prisoner at sentencing, the prisoner's institutional history, recommendations of the correctional facilities staff, and other things. The pre-parole report for the most part is available to pretty much everyone but the public: It may be disclosed to the parole board, the sentencing judge, the prosecuting and defense attor-

neys, the prisoner, the prisoner's attorney, the attorney for the parole board, the staff of the board, and others who have access to parole board information. Otherwise, however, it is confidential. It is possible that a reporter might argue the pre-parole reports should be available notwithstanding the confidentiality provision of AS 33.16.170, in light of the Ninth Circuit's decision recognizing a constitutional right of access to pre-sentence reports prepared for a judge before sentencing. *See United States v. Schlette*, 842 F.2d 1574 (9th Cir. 1988). However, this will not necessarily be the case since pre-sentence reports are prepared by employees of the judicial branch, and solely for use by the sentencing judge, and the right of access analysis has been applied generally to judicial proceedings and documents. The parole board is an executive branch agency, and the reports and records of such agencies are traditionally analyzed in terms of public records laws where such confidentiality provisions are recognized and honored as exceptions to the extent the legislature provides. If the question arises, it will probably need to be answered by the courts.

b. **Convict Photographs.** A victim is entitled upon request to a photograph of an offender who is released or escapes from incarceration, but must keep it for personal use only and cannot distribute it. AS 33.30.013(e).

c. **Prisoner Data.** AS 33.30.211 provides that the commissioner of Department of Corrections shall adopt regulations providing for the confidentiality of documents that are transmitted to the correctional facility with a prisoner, including the pre-sentence report, and other information of the probation office or of the court that may affect the person's rehabilitation. Presumably, this confidentiality provision cannot supersede the right of the public to have access to documents that are otherwise public, pursuant to the *Schlette* case or other provisions of law.

d. **Monitored Phone Calls.** Prison officials may monitor prisoners' telephone calls to preserve security and order, and to protect the public, if they post a warning informing the prisoner that this may be done. Recordings of prisoners' telephone calls are confidential. AS 33.20.231(c).

#### 20. *Property.*

**Unclaimed Property.** Persons holding personal property of others that is presumed to be abandoned are supposed to report this to the state. The Department of Revenue has the authority to examine the records of those it has reason to believe have not complied with these reporting provisions. In the course of doing this, particularly with banks and insurance companies, the Department of Revenue may obtain information that is otherwise confidential under state or federal law or regulation, and in such event this information may not be publicly disclosed. AS 34.45.290(d).

#### 21. *Public Contracts.*

a. **Employment Preferences.** An employer obligated to meet resident hire requirements under Alaska law must comply with reporting provisions that the commissioner of labor determines are reasonably necessary to implement the local hire laws. Except for statistical data, all information regarding specific employees is confidential and may not be released by the Department of Labor and Workplace Development. AS 36.10.190.

b. **State Procurement Code.** Procurement information is public except as otherwise provided by law. AS 36.30.530. The state's procurement code requires the commissioner of administration to adopt regulations providing among other things for confidentiality of technical data and trade secrets submitted by actual or prospective bidders or offerors. AS 36.30.040(b)(6).

When competitive sealed bids are opened the amount of each bid and other relevant information specified by regulations, together with the name of each bidder is recorded, and this information must be open to public inspection as soon as practicable before the notice of intent to award a contract is given. The bids themselves, however,



are not open for public inspection until after the notice of intent to award a contract is given. To the extent the bidder designates and the procurement officer concurs, trade secrets and other proprietary data contained in a bid document are confidential. AS 36.30.140. If the commissioner of transportation and public facilities makes a written finding that the release of the estimated cost of a construction contract would adversely affect the state's ability to obtain the best competitive bid, the estimated cost is confidential information and may not be released to the public before bid opening. AS 36.30.110(c).

Similarly, in the code provisions for competitive sealed proposals, the procurement officer must open proposals so as to avoid disclosure of contents to competing offerors before notice of intent to award a contract is issued. A register of proposals containing the name and address of each offeror is to be prepared and the register and proposals are open for public inspection after the notice of intent to award a contract is issued. To the extent the offeror designates and the procurement officer concurs, trade secrets and other proprietary data contained in the proposal documents are confidential. AS 36.30.230. Also, discussions may be conducted with responsible offerors who submit proposals that may be selected for award in order to clarify and to assure full understanding of and responsiveness to the solicitation requirements. All those reasonably eligible to being selected for the award are to be given fair and equal treatment, but in conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors. This process, including the meetings with these offerors, is not public. AS 36.30.240.

c. **Determination of Responsibility.** It is fundamental that public contracts are awarded only to "responsible bidders." The commissioner of administration may require a bidder to show that it is responsible, and information furnished by a bidder or offeror to do so is confidential and may not be disclosed without that person's prior written consent. AS 36.30.360.

## 22. *Public Finance.*

a. **Managing Investments.** The commissioner of revenue or other fiduciary investing and managing investments of state funds may declare records to be confidential and exempt from disclosure under the public records act if the records contain information that discloses the particulars of the business or the affairs of a private enterprise, investor, borrower, advisor, consultant, counsel or manager. AS 37.10.071. The Alaska Retirement Management Board may enter into confidentiality agreements that would exempt records from AS 40.25.110 and 40.25.120 if the records contain information that could affect the value of investment by the board or that could impair the ability of the board to acquire, maintain, or dispose of investments. Sec. 37.10.220(b)(4).

b. **Alaska Permanent Fund.** Similarly, information in the possession of the Alaska Permanent Fund Corporation is a public record, except that information which discloses the particulars of the business or affairs of a private enterprise or investor is confidential. These restrictions do not prohibit the publication of statistics presented in a manner that prevents the identification of particular reports, items, persons or enterprises. AS 37.13.200. Information on each permanent fund dividend application, except the applicant's name, is confidential. The department may only release information that is confidential under this section (1) to a local, state or federal government agency; (2) in compliance with a court order; (3) to the individual who or agency that files an application on behalf of another; (4) to a banking institution to verify the direct deposit of a permanent fund dividend or correct an error in that deposit; (5) as directed to do so by the applicant; and (6) to a contractor who receives, stores or manages the information on behalf of one of these. AS 43.23.017. Notwithstanding the foregoing, the Department of Revenue may release the names and addresses of permanent fund dividend applicants to a legislator of this state and to the legislator's office staff for official legislative purposes.

c. **Exxon Valdez Oil Spill Trust.** In August 1991, the U.S. District Court approved a Memorandum Agreement and Consent Decree en-

tered into between the United States and the State of Alaska in settlement of claims to money received for injury, loss and destruction of the natural resources affected by the March 24, 1989, Exxon Valdez oil spill. Records of the trust in the custody or subject to the control of state officers and agencies are public records. AS 37.14.425.

d. **BIDCOs.** In 1992, the Alaska Legislature created the "BIDCO" Fund within the Alaska Science and Technology Foundation, to assist in the formation and capitalization of certain specially licensed corporations, including risk capital for small and medium sized businesses in rural and distressed areas and minority owned business. AS 37.17.200-.390. In 2004, the Legislature repealed or renumbered the BIDCO provisions, establishing the Alaska BIDCO Fund within the state's general fund. The BIDCO Fund is administered by the Department of Commerce, Community and Economic Development under AS 37.17.500 - 37.17.690.

While a BIDCO loan is outstanding and the obligations of the BIDCO to the foundation remain undischarged, the BIDCO must allow the foundation to have a representative present at all meetings of the BIDCO's board of directors and of the BIDCO's shareholders, to receive all notices and information sent to the board of directors or the shareholders, to have the same access to information about the BIDCO as the directors have and as the shareholders have, and to receive additional reports or information from the BIDCO that the foundation reasonably requests. AS 37.17.610. In order to promote the purposes of AS 37.17.500 - 37.17.690, the department may establish policies under which it will keep confidential proprietary information submitted to the department by an applicant for a loan or other financial assistance under AS 37.17.500 - 37.17.690 and by a BIDCO that has received a loan or other financial assistance under AS 37.17.500 - 37.17.690. The information that is determined to be confidential under this section is not a public record under AS 40.25.110 - 40.25.220. AS 37.17.650.

e. **Alaska Science and Technology Foundation.** In 2004, the Legislature repealed the law creating the Alaska Science and Technology Foundation, which previously had, through its Board, awarded grants for research projects to enhance research capabilities for basic and applied research to the state and other specified purposes. The Board required each grant recipient to provide periodic reports and a final report, and disseminated to the scientific community and to the public, on a regular basis, the results of research sponsored by the Foundation. The Board was authorized to adopt regulations to protect trade secrets and other proprietary information submitted to the Foundation from disclosure under the Public Records Act. Also, upon written request pursuant to regulations adopted by the Board, the Board could allow information developed under a grant to be treated confidentially under the Public Records Act. AS 37.17.090(f). The Alaska Industrial Development and Export Authority, a public corporation created by the legislature within the Department of Commerce, Community, and Economic Development, but with separate and independent legal existence, oversees the administration of outstanding grants awarded by the Alaska Science and Technology Foundation under former AS 37.17.010 - 37.17.110, and also oversees administration of outstanding BIDCO assistance grants and loans made by the Alaska Science and Technology Foundation under former AS 37.17.200 - 37.17.390. AS 44.88.080(28), (29).

## 23. *Public Lands and Resources.*

a. **Alaska Land Act.** The following records and files of the division of lands must be kept confidential upon request of the person supplying the information: (a) the name of the person nominating or applying for the sale, lease or other disposal of land by competitive bidding; (b) before the announced time of opening, the names of the bidders and the amounts of the bids; (c) all geological, geophysical and engineering data supplied, whether or not concerned with the extraction or development of natural resources; (d) cost data and financial information submitted in support of applications, bonds, leases and similar items; (e) the applications for rights of way or easements; (f) requests for

information or applications by public agencies for land which is being considered for use for a public purpose. AS 38.05.035(a)(8).

The Commissioner of Natural Resources is authorized to negotiate the sale of timber for use in the manufacture of high value-added wood products, and upon request of the prospective purchaser of such timber, the Commissioner must keep data provided by the purchaser confidential in accordance with the requirements of AS 38.05.035(a)(8). AS 38.05.123(f).

The Commissioner of Natural Resources may require those applying for an oil and gas exploration license to submit information in addition to that required by the statutes concerning the prospective licensee's proposal. The Commissioner must keep confidential information described in AS 38.05.035(a)(8) that is voluntarily provided if the prospective licensee has made a written request that the information remain confidential. AS 38.05.133(e).

AS 38.05.036(b) provides that when the Department of Natural Resources or Revenue obtains or provides information that is confidential in the course of performing audits relating to royalty and net profits under oil and gas contracts, agreements or leases, it must keep that information confidential to the extent required under these agreements, contracts or leases or otherwise by law, including AS 38.05.035(a)(8), AS 41.09.010 (d) [governing data provided for exploration incentive credits], or AS 43.05.230 [governing taxpayer information]. A lessee of state land is required to provide to the state concerning all non-interpretive data obtained from exploration for, or development or production of, oil or gas on state land is confidential, and this information is confidential. AS 38.05.180(x).

b. Alaska Royalty Oil and Gas Development Advisory Board. AS 38.06.060 gives the Alaska Royalty Oil and Gas Development Advisory Board the authority to provide for confidentiality of those documents and records in its possession or control which contain confidential business or marketing information the protection of which is essential to the person who has submitted them to the board or, in the judgment of the board, is essential to the best interests of the state.

c. Data for Exploration Incentive Credits. The Commissioner of Natural Resources may extend to qualified applicants an exploration credit for certain geophysical work, drawing of stratigraphic test wells, or drilling exploratory wells. This incentive program is distinct from the exploration incentive credit authorized under AS 38.05, in that it is applicable regardless of whether the land is state-owned or not. Data derived from drilling a stratigraphic test well or exploratory well that is provided to the Commissioner in connection with an application for the exploration incentive credit must be kept confidential for 24 months after receipt unless the owner of the well gives written permission to the state to release the well data at an earlier date. Notwithstanding the provisions of AS 31.05.035(c), confidentiality may not be extended beyond 24 months. The provisions of AS 38.05.035(a)(8)(C) apply to other data provided to the Commissioner under this section, except that the Commissioner, under appropriate confidentiality provisions and without preference or discrimination, may display the data to interested third parties, but without giving it to them, if the Commissioner determines that limited disclosure is necessary to further the interest of the state in evaluating or developing its land. AS 41.09.010(d).

d. *Alaska Gasline Inducement Act*. In 2007 the state established a program to encourage construction of an Alaska gasline, and to provide inducements to the entity awarded a license to build the gasline. AS 43.90.100 et seq. At the request of applicant for the license under the Alaska Gasline Inducement Act (AGIA), information submitted by the applicant that the applicant identifies and demonstrates is proprietary or is a trade secret is confidential and not subject to public disclosure under AS 40.25. After a license is awarded, all information submitted by the licensee, retained under AGIA, and not determined by the commissioners to be a proprietary or trade secret shall be made public. AS 43.90.150(a) If the commissioners determine that the information

submitted by the applicant is not proprietary or is not a trade secret, the commissioners shall notify the applicant and return the information at the request of the applicant. AS 43.90.150(b)

After a license has been issued and until commencement of commercial operations of a natural gas pipeline, the AGIA licensee shall allow the state's commissioners or their representatives to be present at all meetings of the licensee's governing body or bodies and equity holders that relate to the project; receive all relevant notices and information when and as sent to the governing body or bodies and equity holders; enjoy the same access to information about the licensee as the governing body members and equity owners receive; and receive relevant reports or information from the licensee that the commissioners reasonably request. All proprietary information, privileged information, and trade secrets received by the commissioners or their representative are not subject to public disclosure under AS 40.25. AS 43.90.220(e).

Applications received by AGIA commissioners from potential are not subject to public disclosure under the Public Records Act until the commissioners publish notice and provide a 60-day period for public review and comment on all applications determined complete. Except as provided under AS 43.90.150 all applications filed under AGIA must be made public, including applications rejected as incomplete. However, information that the commissioners have determined is proprietary or a trade secret may not be made public even after the notice is published, except as otherwise provided in AS 43.90.150. If information is proprietary or a trade secret and is held confidential under that provision, the applicant shall provide a summary of the confidential information that is satisfactory to the commissioners, and the commissioners shall make the summary of the information available to the public. AS 43.90.160(a), (b).

#### 24. *Public Officers and Employees.*

a. State Personnel Act. An amendment slipped into the public employees statutes in 1982 reversed the presumption that state personnel records were open with certain exceptions. Now the law provides that state personnel records are presumptively closed unless specifically provided otherwise. AS 39.25.080 states that state personnel records, including employment applications and examination materials, are confidential and are not open to public inspection except as provided in that section. Specifically, it goes on to designate as information available for public inspection

- 1) the names and position titles of all state employees;
  - 2) the position held by a state employee;
  - 3) prior positions held by a state employee;
  - 4) whether a state employee is in the classified, partially exempt or exempt service;
  - 5) the dates of appointment and separation of a state employee; and
  - 6) the compensation authorized for a state employee.
- (7) whether a state employee has been dismissed or disciplined for a violation of AS 39.25.160 (l) (interference or failure to cooperate with the Legislative Budget and Audit Committee).

A state employee may examine his or her own files and authorize others — including a reporter — to examine those files. AS 39.25.080(c). News media have argued for, and the Supreme Court has adopted, a very restrictive reading of the restrictions in the laws governing access to state personnel records. *See, e.g., Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997), and *International Ass'n of Firefighters, Local 1264 v. Municipality of Anchorage and Anchorage Daily News*, 973 P.2d 1132, 1135 (Alaska 1999), in both of which the Alaska Supreme Court made clear that simply because documents or information may appear in, or be placed in, an employee's personnel file, does not mean they are exempt as "personnel records." The term "personnel record" is defined narrowly to include only information that reveals the details

of an individual's personal life. These and related cases are discussed in more detail in section IVJ of this Open Records Outline, *infra*. The state personnel act provides that this chapter and the rules adopted under it apply to all positions in the classified service, but to the exempt and partially exempt service only as specifically provided. See AS 39.25.090. Therefore, it has been argued that none of the positions specified in AS 39.25.110 (exempt service) or AS 39.25.120 (partially exempt service) are subject to the language stating that personnel records are not open to public inspection except as specifically provided. This interpretation was adopted by the Alaska Supreme Court in *Doe v. Alaska Superior Court*, 721 P.2d at 621-622, with respect to the exempt service. The result is that the general provisions of the Public Records Act, AS 40.25.110 *et seq.* apply, and require public disclosure of such records. Records relating to the following exempt positions therefore are public:

#### AS 39.25.110

- 1) persons elected to public office by popular vote or appointed to fill vacancies in elected offices;
- 2) justices, judges, magistrates and employees of the judicial branch including employees of the Judicial Council;
- 3) employees of the state legislature and its agencies;
- 4) the head of each principal department in the executive branch;
- 5) officers and employees of the University of Alaska;
- 6) certificated teachers and noncertificated employees employed by a regional educational attendance area established and organized under AS 14.08.031-14.08. 041 to teach in, administer, or operate schools under the control of a regional educational attendance area school board;
- (7) certificated teachers employed by the Department of Education and Early Development as correspondence teachers, teachers in skill centers operated by the Department of Education and Early Development or by the Department of Labor and Workforce Development, or in Mt. Edgecumbe School;
- 8) patients and inmates employed in state institutions;
- 9) persons employed in a professional capacity to make a temporary or special inquiry, study or examination as authorized by the governor;
- 10) members of boards, commissions or authorities;
- 11) the officers and employees of the following boards, commissions and authorities; (A) Alaska Gas Pipeline Financing Authority (repealed 1994); (B) Alaska Permanent Fund Corporation; (C) Alaska Industrial Development and Export Authority; (D) Alaska Commercial Fisheries Entry Commission; (E) Alaska Commission on Postsecondary Education; (F) Alaska Aerospace Corporation; (G) Alaska Natural Gas Development Authority;
- 12) the executive secretary and legal counsel of the Alaska Municipal Bond Bank Authority;
- 13) the state medical examiner, deputy medical examiner and assistant medical examiners appointed under AS 12.65.015 and physicians licensed to practice in this state and employed by the division of mental health and developmental disabilities in the Department of Health and Social Services or by the Department of Corrections;
- 14) petroleum engineers and petroleum geologists employed in a professional capacity by the Department of Natural Resources and by the Alaska Oil and Gas Conservation Commission, except for those employed in the division of geological and geophysical surveys in the Department of Natural Resources;
- 15) [Repealed 1999, formerly listed officers, agents and employees of the Alcoholic Beverage Control Board granted limited peace officer powers by the Alcohol Beverage Control Board under AS 04.06.110];
- 16) persons employed by the division of marine transportation as masters and members of the crews of vessels who operate the state ferry system and who are covered by a collective bargaining agreement provided in AS 23.40.040;
- 17) officers and employees of the state who reside in foreign countries;
- 18) employees of the Alaska Seafood Marketing Institute;
- 19) emergency fire-fighting personnel employed by the Department of Natural Resources for a fire emergency or for fire prevention and related activities conducted under AS 41.15.030;
- 20) employees of the Office of the Governor and the office of the lieutenant governor, including the staff of the governor's mansion;
- 21) [Repealed 2004, formerly listed employees of the Citizen's Advisory Commission on Federal Areas in Alaska [AS 41.37.010]];
- 22) youth employed by the Department of Natural Resources under the Youth Employment and Student Intern programs;
- 23) [Repealed 2003, formerly listed the executive director of the Medicaid Rate Advisory Commission];
- 24) students employed by the state institutions in which the students are enrolled;
- 25) [Repealed 2004, formerly listed the executive director and staff of the Alaska Science and Technology Foundation];
- 26) investment officers in the Department of Revenue;
- 27) [Repealed 1999, formerly listed the executive director and other staff of the Alaska Tourism Marketing Council];
- 28) persons engaged in employment or pre-employment training programs operated by the Department of Military and Veterans' Affairs;
- 29) [Repealed 1989, formerly listed employees of the Alaska Amateur Sports Authority];
- 30) a person employed as an actuary or assistant actuary by the Division of Insurance and the Department of Commerce, Community, and Economic Development;
- 31) [Repealed 2004, formerly listed the chief administrative law judge and any other administrative law judge appointed to the office of tax appeals of the Department of Administration under AS 43.05.400-43.05.499];
- 32) a participant in the Alaska Temporary Assistance Program under AS 47.27 who holds a temporary position with the state in order to obtain job training or experience.
- 33) a person employed as a convener under AS 44.62.730 or as a facilitator under AS 44.62.760 related to a negotiated regulation making process under AS 44.62.710 - 44.62.800;
- 34) the chief executive officer and employees of the Alaska Mental Health Trust Authority employed under AS 47.30.026 (b);
- 35) the assistant adjutant general for space and missile defense appointed under AS 26.05.185;
- 36) the victims' advocate established under AS 24.65.010 and the advocate's staff;
- 37) employees of the Alaska mental health trust land unit established under AS 44.37.050;
- 38) the executive director of the Council on Domestic Violence and Sexual Assault established under AS 18.66.010;
- 39) the executive director and employees of the Knik Arm Bridge and Toll Authority under AS 19.75.051 and 19.75.061;



40) the chair of the Workers' Compensation Appeals Commission (AS 23.30.007).

(41) the Alaska Gasline Inducement Act coordinator appointed under AS 43.90.250;

(42) oil and gas audit masters employed in a professional capacity by the Department of Revenue and the Department of Natural Resources to collect oil and gas revenue by developing policy, conducting studies, drafting proposed regulations, enforcing regulations, and directing audits by oil and gas revenue auditors;

(43) the in-state gasline project coordinator appointed under AS 38.34.010.

Only an exempt position was at issue in the *Doe* case. The Court has not specifically addressed whether the requirements of AS 39.25.080 prohibiting access, or AS 40.25.110 *et seq.* allowing access, apply to the partially exempt state service. State regulations governing access to personnel records treat records pertaining to classified and partially exempt employees the same, and asserts confidentiality with respect to the records of applicants and current and former employees in both classes. 2 AAC 7.910. The press argues that Title 9 applies, and requires disclosure, because AS 39.25.090 applies to exempt and partially exempt service "as specifically provided," and AS 39.25.120, governing the partially exempt service, does not specifically provide for nondisclosure. The partially exempt service comprises the following positions:

#### AS 39.25.120

1) deputy and assistant commissioners of the principal departments of the executive branch, including the assistant adjutant general of the Department of Military and Veteran's Affairs;

2) the directors of the major divisions of the principal departments of the executive branch and the regional directors of the Department of Transportation and Public Facilities;

3) attorney members of the staff of the Department of Law, of the public defender agency, and of the office of public advocacy in the Department of Administration;

4) one private secretary for each head of a principal department in the executive branch;

5) employees of councils, boards or commissions established by statute in the Office of the Governor or the office of the lieutenant governor, unless a different classification is provided by statute;

6) not more than two special assistants to the commissioner of each of the principal departments of the executive branch, but the number may be increased if the partially exempt service is extended under AS 39.25.130 to include the additional special assistants;

7) the principal executive officer of the following boards, councils or commissions; (A) Alaska Public Broadcasting Commission; (B) Professional Teaching Practices Commission; (C) Parole Board; (D) Board of Nursing; (E) Real Estate Commission; (F) Alaska Royalty Oil and Gas Development Advisory Board; (G) Alaska State Council on the Arts; (H) Alaska Police Standards Council; (I) Alaskan Commission on Aging; (J) Alaska Mental Health Board; (K) State Medical Board; (L) Governor's Council on Disabilities and Special Education; (M) Advisory Board on Alcoholism and Drug Abuse; (N) Statewide Suicide Prevention Council; (O) State Board of Registration for Architects, Engineers, and Land Surveyors; (P) Alaska Health Care Commission;

8) Alaska Pioneers' Home and Alaska Veterans' Home managers;

9) hearing examiners in the Department of Revenue;

10) the comptroller in the division of treasury, Department of Revenue;

11) airport managers in the Department of Transportation and Public Facilities employed at the Anchorage and Fairbanks Interna-

tional Airports;

12) the deputy director of the division of tourism and the deputy director of the division of insurance in the Department of Commerce, Community, and Economic Development;

13) the executive director and staff of the Alaska Public Offices Commission;

14) the rehabilitation administrator of the Worker's Compensation Board;

15) guards employed by the Department of Public Safety for emergencies;

16) pilot coordinator of the Board of Marine Pilots;

17) guards employed by the Department of Corrections, other than in state correctional facilities, to carry out the responsibility of the Commissioner of Corrections under AS 33.30.071(b);

18) hearing officers and administrative law judges of the Regulatory Commission of Alaska;

19) the compact administrator appointed under AS 33.36.130;

20) the chief administrative law judge and administrative law judges of the office of administrative hearings.

#### b. Executive Branch Ethics Act.

i) Advisory Opinions. Like its legislative analogue, the Alaska Executive Branch Ethics Act provides for advisory opinions upon request of a designated supervisor or a board or a commission. Such a request for advice is confidential. The attorney general, who issues such advisory opinions in interpreting the ethics act, is required to publish any advisory opinions issued under this section that he or she determines to be of major import because of their general applicability to executive branch officers, after making sufficient deletions to prevent disclosure of the persons whose identities are required to be kept confidential. AS 39.52.240.

ii) Reports of Potential Violations. Public employees and members of boards or commissions who are involved in matters that may result in violations of the Executive Branch Ethics Act are required, among other things, to immediately disclose the matter in writing to a designated supervisor. The law also provides that any person may report a public officer's potential violation of the ethics act to that officer's designated supervisor. The designated supervisor is required to submit a report each quarter to the attorney general that states the facts, circumstances and disposition of any disclosure made pursuant to these reporting requirements. This report is confidential unless formal proceedings are initiated pursuant to AS 39.52.350. This is done if the attorney general determines that there is probable cause to believe that a knowing violation of the ethics code, or a violation that cannot be corrected in accordance with provisions of the law, has occurred, or that the subject of the complaint has failed to comply with a recommendation for corrective or preventive action. The proceedings are begun by serving a copy of an accusation upon the subject of the accusation, then when this is done the accusation is a public document. If formal proceedings are initiated, the relevant portions of the report are public documents open to inspection. In addition, the attorney general is required to make available to the public a summary of the quarterly reports received, with sufficient deletions to prevent disclosure of a person's identity. AS 39.52.260.

iii) Dismissal or Resolution Before Formal Proceedings. If the attorney general determines after investigation that there is no probable cause to believe that a violation of the Executive Branch Ethics Act has occurred, she or he shall dismiss the complaint, disposition of the matter promptly to the complainant and subject of the complaint, and prepare and file a confidential summary with the personnel board. AS 39.52.320. If instead, the attorney general determines that the conduct of the complaint does not warrant a hearing but recommends action to correct or prevent a violation of the ethics code, the attorney

general shall communicate the recommended action to the complainant, and to subject of the complaint who is required to comply with the recommendation. AS 39.52.330. Each month the attorney general is required to provide the personnel board with a summary updating the status of pending complaints and resolution of complaints. AS 39.52.335. This summary is confidential unless the dismissal under .320 or resolution agreed to under .330 is public, or a superior court makes the matter public as provided in the statute. If the summary is confidential, comments filed by the complainant are confidential, the personnel board's review of the summary must be in executive session, and any report issued by the personnel board must be confidential except that the board must make public an expurgated copy that does not identify the persons involved. The personnel board, after reviewing the summary, can issue a report on the disposition of the complaint that, among other things, recommends that the subject of the complaint be identified if that is determined to be in the public interest. An interested party can request that the superior court adopt the board's recommendation by making public the complaint, the attorney general's disposition of the complaint, and the personnel board report, and the court can order the matter, or portions of it, public if it determines that (1) the dismissal or resolution of the complaint was clearly contrary to the requirements of this chapter; (2) one or more of the allegations in the information to be released is supported by substantial evidence; (3) the matter concerns the public interest; and (4) release of the information will not infringe on any protected rights or liberties of the subject. AS 39.52.335.

iv) Confidentiality of Investigations. AS 39.52.340 provides that before the initiation of formal proceedings, information regarding the investigation conducted under the Executive Branch Ethics Act, or obtained by the attorney general during the investigation, is confidential, except as provided in AS 39.52.335 as outlined in the preceding subsection. The attorney general and all persons contacted during the course of an investigation are required to maintain confidentiality regarding the existence of the investigation, and violations of this provision constitute a Class A misdemeanor. The subject of the complaint may, in writing, waive the confidentiality protection of this section. AS 39.52.340(c).

v) Personnel Board Review. Formal proceedings are initially conducted before a hearing officer who makes reports and findings and recommendations to the personnel board. The personnel board can conduct a further hearing or oral argument, and must review each report submitted by a hearing officer and decide whether to adopt or amend the findings of fact, conclusions of law, and recommendations of the officer. Deliberations of the personnel board must be conducted in sessions not open to the public. AS 39.52.370.

c. Conflict of Interest Statements. Sworn statements giving income sources and business interests must be filed by judicial officers, and most significant elected and appointed state and municipal officers and employees and former public officials, and candidates for public office. These conflict of interest statements are all public. AS 39.50.020-.030.

d. Confidentiality of Retirement Records. Public records, including electronic services and products involving public records, containing information about a person and maintained under the laws governing the public employees' retirement systems, are confidential and not subject to inspection or copying under the public records act. AS 40.25.151.

## 25. Public Utilities and Carriers.

a. Alaska Public Utilities Commission Act. The Alaska Public Utilities Commission Act provides for public access to records in the possession of the commission. The commission may, by regulation, classify records submitted to it by regulated utilities as privileged records, not open to inspection by the public. However, if a record involves an application or tariff filing pending before the commission, the commission shall release the record for the purpose of preparing for or making a presentation to the commission in the proceeding if the record or information derived from the record will be used by the

commission in the proceeding. A person objecting to public disclosure of information contained in a record submitted under the Public Utilities Act or of information obtained by the commission under the provisions of the Act must do so in writing and state the grounds for the objection. When an objection is made the commission may not order the information withheld from the public unless the information adversely affects the interest of the person making the written objection and disclosure is not required in the interest of the public. AS 42.05.671. The APUC in 1992 adopted new regulations governing access to records. 3 AAC 48.040-.100. The Alaska Supreme Court has stated that, while the requirement of the statute that information not be withheld if "required in the interest of the public" will normally prevent a conflict with constitutional due process requirements, if a conflict nevertheless occurs, the privilege of access afforded by the statute must be narrowly construed so that the constitutional due process rights of the utilities control.

b. Pipeline Commission. Records in the possession of the Alaska Pipeline Commission are presumptively open to the public. One who objects to the public disclosure of information contained in a record filed pursuant to the pipeline act or to disclosure of information obtained by the commission under the provisions of the act must do so in writing, stating the grounds for the objection. When an objection is made, the commission shall order the information withheld from public disclosure if the information adversely affects the interest of the person making written objection and disclosure is not required in the interest of the public. The commission may, by regulation, classify records submitted to it by regulated pipeline carriers or pipelines as privileged records that are not open to public inspection, provided that records that would be used in proceedings concerning tariffs must be made available. In such a case, the person who filed the otherwise confidential record must be given notice and an opportunity to object before it is released. AS 42.06.445.

c. Alaska Railroad Corporation. Information in the possession of the Alaska Railroad Corporation is presumptively public and open to inspection and copying at reasonable times. AS 42.40.220. Matters of a privileged or proprietary nature may be designated by rule to be withheld from public disclosure. Those matters include personnel records, communications with and work product of legal counsel, and, consistent with the standards and practices of the United States Surface Transportation Board for the protection of these matters, other information including proprietary information associated with specific shippers, divisions and contract rate agreements. (Note: On at least one occasion, the ARR took an unreasonable position in refusing to disclose public documents, claiming attorney-client communications or work product. A specific issue was access to a consent decree and related documents entered into between the attorney general's office and the railroad. Threatened with a court suit to compel access, the railroad "became reasonable" and provided the documents.) The Alaska Railroad Corporation is exempt from the normal oversight of the governor with respect to its regulations governing access to electronic products and services, and inspection and copying of public records. AS 40.25.110(g) - .115(g), - .123(a).

d. Alaska Natural Gas Development Authority. Information in the possession of the Alaska Natural Gas Development Authority, a public corporation established to facilitate bringing natural gas from the North Slope to market is a public record, except that information that discloses the particulars of the business or affairs of a private enterprise or investor is confidential and is not subject to disclosure under the public records act. Confidential information may be disclosed only for the purposes of an official law enforcement investigation or when its production is required in a court proceeding, publication of statistics presented in a manner that prevents the identification of particular reports, items, persons or enterprises is permitted. AS 41.41.150.

## 26. Revenue and Taxation.

a. Tax Information. Information in the possession of the Department of Revenue that discloses the particulars of the business or affairs

of a taxpayer or other person is not public record. It is confidential, except that tax lists showing the names of delinquent tax payers may be published, and taxpayer information may be presented in statistical form that does not identify particular reports or items. AS 40.25.100.

b. Tax Returns and Reports. It is against the law for current or former officers, agents or employees of the state to divulge the amount of income or the particulars set out or disclosed in a report or return made under the state revenue code. Nothing in this section prohibits the publication of statistics so classified as to prevent the identification of particular returns or reports or the publication of delinquent lists showing the names of taxpayers who have failed to pay their taxes at the time and in the manner provided by law, together with other relevant information which in the opinion of the department may assist in the collection of delinquent taxes. AS 43.05.230.

c. Tax Appeals. A 1983 Attorney General's Opinion states that when a taxpayer files a notice of appeal, the Department of Revenue hearing decision may be made public because the taxpayer is, in effect, waiving any right to confidentiality the taxpayer may have had. Also, the AG concluded that the Department can publish decisions that have not been appealed or for which confidentiality was not voluntarily waived if it establishes guidelines for publication to protect the taxpayer's identity. Absent an appeal, hearing decisions need not be published, even though they are technically orders of the Commissioner because of other statutory provisions which prohibit disclosure of the "particulars" of the business of a taxpayer except when in connection with investigations or court proceedings. A 1996 statute established the Office of Tax Appeals within the Department of Revenue. Records, proceedings and decisions under this statute are confidential, except that they become public records and open to the public when the final administrative decision is issued and becomes final. AS 43.05.470(a). Upon a showing of good cause, an administrative law judge must issue a protective order requiring that specified parts of the records, proceeding or decision shall be kept confidential in a particular appeal, in which case the final administrative decision is made public after redacting by deletion or substitution of information as required by the protective order. AS 43.05.470(b). To promote consistency among legal determinations issued under AS 43.05.400 - 43.05.499, the chief administrative law judge may review and circulate among the other administrative law judges the drafts of formal decisions, decisions upon reconsideration, and other legal opinions of the other administrative law judges in the office. The drafts are confidential documents, not subject to disclosure under the public records act or under .470(a). AS 43.05.475(b).

d. Election of Administrative Law Judges. The business of the Office of Tax Appeals is to be conducted by an administrative law judge selected as set forth in AS 43.05.410. The Alaska Judicial Council forwards nominations for this position to the governor after reviewing the qualifications of applicants and information sufficient to thoroughly evaluate each applicant. Comments, references or survey responses that request confidentiality, or for which the Judicial Council promises confidentiality, shall be kept confidential, but the Judicial Council shall provide the applicant for appointment or re-appointment as administrative law judge a summary of the concerns raised and the comments, references and survey responses that are kept confidential. Also, in this process, the Judicial Council has the authority to review confidential Alaska Bar Association files on applicants, but must maintain the confidentiality of these files. The Judicial Council must forward to the governor with its nominees all non-confidential materials on the applicants, but provide the governor with summaries of the concerns raised in the comments, references and survey responses that are kept confidential. *Id.*

e. Oil and Gas Production Tax Credits. To qualify for a production tax credit based on oil and gas or gas exploration, an explorer shall agree, in writing, to submit information and evidence about the claimed exploration necessary to evaluate the validity of the explorer's claim. Notwithstanding any provision of AS 38, information provid-

ed under this paragraph will be held confidential by the Department of Natural Resources for 10 years following the completion date, at which time that department will release the information after 30 days' public notice AS 43.55.025(f).

f. Multistate Tax Compact. Information obtained by any audit pursuant to the Multistate Tax Compact is confidential. AS 43.19.010. Fish processors engaged in selling canned salmon must semi-annually report to the Department of Revenue the prices received for the sale of canned salmon. Information in these reports and price averages calculated by the department from the information in the reports, are public information except that information that identifies or could be used to identify a particular fish processor is confidential. AS 43.80.065.

g. Stranded Gas Development Act. The Stranded Gas Development Act provides for contracts for payments in lieu of other taxes to encourage new investment to develop the state's stranded gas resources. The commissioner of revenue determines whether proposals for new investment qualify based on information and evidence submitted under this chapter. An applicant may request confidential treatment of information it provides by clearly identifying the information and the reasons supporting the request for confidential treatment. If the commissioner does not approve the request, the information is returned, the review ceases unless the returned information is deemed unnecessary. The information that is subject to the request is to be kept confidential if the applicant shows that (1) it is a trade secret or other proprietary research, development or commercial information that the applicant treats as confidential; (2) affects the applicant's competitive position; and (3) has commercial value that may be significantly diminished by public disclosure or that public disclosure is not in the long-term fiscal interests of the state. Information thus determined to be confidential is confidential only so long as is necessary to protect the competitive position of the applicant, to prevent the significant diminution of the commercial value of the information, or to protect the long-term fiscal interests of the state. The commissioner may not release information that the commissioner has previously determined to be confidential under AS 43.82.310(b) without providing the applicant notice and an opportunity to be heard. AS 43.82.310.

If the commissioner of revenue chooses to develop a contract under AS 43.82.020, the portions of the records and files of the various state and municipal agencies involved that reflect, incorporate or analyze information that is relevant to the development of the position or strategy of the commissioner of revenue, the commissioner of natural resources, or the attorney general with respect to a particular provision that may be incorporated into the contract are not public records until the commissioner of revenue gives public notice of the commissioner's preliminary findings and determination. AS 43.82.310(f). Nothing in this subsection makes a record or file of the Department of Revenue, the Department of Natural Resources, or the Department of Law a public record that otherwise would not be a public record under AS 40.25.100 - 40.25.220, affects the confidentiality of other provisions of AS 43.82.310; or abridges a privilege recognized under the laws of this state. Information that can be disclosed confidentially to other state or municipal agencies for purposes of this chapter does not become public when received by these public agencies. The confidential status of information must be maintained when copies of proposed contracts and the commissioner's preliminary finding and determination are publicly noticed, and confidential information cannot be released during the public portion of legislative committee meetings reviewing the proposed contracts and supporting data. AS 43.82.410.

## 27. State Government/Miscellaneous.

a. Permanent Dividend Applications. Information on each permanent fund dividend application, except the applicant's name, is confidential. The department may only release information that is confidential under this section (1) to a local, state or federal government agency; (2) in compliance with a court order; (3) to the individual who or agency that files an application on behalf of another; (4) to a banking institution to verify the direct deposit of a permanent fund divi-



dend or correct an error in that deposit; (5) as directed to do so by the applicant; and (6) to a contractor who receives, stores, or manages the information on behalf of one of these. AS 43.23.017. In addition, a 2008 amendment allows the department to release the names and addresses of permanent fund dividend applicants to an Alaska legislator and to the legislator's office staff for official legislative purposes.

b. Cigarette Importation Records. A person that imports into Alaska for sale or distribution here cigarettes manufactured outside of the United States must file quarterly statements identifying the brand and brand styles of the cigarettes, the quantity of each brand style of cigarettes, and the person or persons to whom the cigarettes have been shipped. These statements are confidential and not disclosable under the public records act. AS 43.50.410.

c. Office of Management and Budget. The office of management and budget provides technical assistance to the governor and legislature on a variety of governmental matters including identifying long range goals and objectives, preparing a state comprehensive development plan and assisting with coordination in preparation of agency plans and programs, reviewing planning within state government as necessary for receipt of federal and other funds, and other functions. OMB must keep a complete file of internal audit reports resulting from its audits, and a complete file of the internal audit work papers and other related supportive material. Internal audit work papers and other related supportive material are confidential, and internal audit reports are confidential until released by the governor. However, internal audit work papers and other related supportive material containing information, data, estimates, and statistics obtained during the course of an audit may be kept confidential only to the extent required by law applicable to the agency from which the material is or was obtained. AS 44.19.147.

d. Equal Employment Opportunity Program. The director of the division of personnel within the Department of Administration is responsible for administering the equal employment opportunity program of the executive branch. The director may not make records of a complaint or investigation public. AS 39.28.060(c). Also, the director may not make public records designated as confidential by AS 39.25.080 or otherwise that it obtains in carrying out its functions, except that it may make public statistical information compiled from confidential records. AS 39.25.080.

e. Tourism Data. A qualified trade association must provide the Department of Commerce, Community, and Economic Development, on request, materials produced and marketing information and tourism related data generated by it under a contract awarded under AS 44.33.125, and the information and tourism related data so provided are not public records. AS 44.33.125(g). Tourism mailing lists sold or leased by the qualified trade association must be sold or leased without discrimination to any individual or business for the purpose of promoting an Alaska tourism product or service, but can surcharge those not participants in the tourism association's marketing program. AS 44.33.125(f).

f. DNA Identification System. A DNA identification registration system established by the Department of Public Safety to support criminal justice services is confidential, and not a public record, and may only be used for purposes specified in the statute. AS 44.41.035(f).

g. Notaries Public. An address, telephone number and e-mail address submitted to the lieutenant governor by a notary public or applicant for a notary public commission is confidential if so designated by the notary public or applicant, though a notary public must provide a nonconfidential address and phone number at which he or she can be contacted. AS 45.50.071(a). Even though compilations and databases of such confidential addresses, phone numbers and e-mail addresses are also confidential, the lieutenant governor may disclose such compilations and databases if the lieutenant governor determines that disclosure is in the public interest. AS 45.50.071(b). Complaints about misconduct by a notary public can lead to action by the lieutenant gov-

ernor suspending or revoking a notary public's commission, or reprimanding a notary public. Such complaints are confidential unless the lieutenant governor determines that the complaint alleges sufficient facts to constitute good cause for disciplinary action. AS 44.50.071(c).

h. Negotiated Regulation Making. AS 44.62.710 - 44.62.800 establishes a framework for the conduct of negotiated regulation making to supplement normal administrative procedures to permit the direct participation of affected interests in the development of new regulations or the amendment or repeal of existing regulations. Notwithstanding AS 40.25.100 - 40.25.220, records from private persons that are requested or used by a negotiated regulation making committee and working documents prepared by the committee that analyze or incorporate information from the records shall be kept confidential if the records or working documents contain proprietary information and the owner of the records or working documents requests that the records or working documents be kept confidential. AS 44.62.710.

i. Commercial Fishing and Agricultural Bank. CFAB is a bank that is a hybrid creature of the legislature. It is exempt from the banking code (AS 06.05) and generally subject to the provisions of the Alaska Cooperative Corporation Act (AS 10.15). Records of the bank that are identified with, or identifiable as being derived from the records of, a specific borrower, member of the bank, or applicant for a loan are confidential and may not be disclosed except under circumstances specified in the statute (including for example, pursuant to court order, or to another lender or bank checking credit). Other bank records "may be kept confidential by the bank." AS 44.81.260. Legislative auditors may not disclose information acquired during the course of an audit of the bank concerning the particulars of the business or affairs of a borrower of the bank or another person. AS 44.81.270(b).

j. The Alaska Gas Pipeline Financing Authority. The statute creating the Alaska Gas Pipeline Financing Authority, since repealed, does not specify whether its records are public or not. Reporters should simply argue that the authority is subject to the general provisions of AS 40.25.110 to -120, since the membership of the authority consists of three individuals — each commissioners of different departments in the state government. The authority is "an instrumentality of the state within the Department of Revenue, but has a legal existence independent of and separate from the state." It is a public corporation of the state. There is no prior authority regarding the status of its records.

28. *Alaska Industrial Development Authority*. The Alaska Industrial Development Authority is a public corporation of the state and "a body corporate and politic constituting a political subdivision within the Department of Commerce, Community, and Economic Development, but with separate and independent legal existence." AS 44.88.020. The statute does not specifically spell out whether the records of the AIDA are public, but it appears that they are subject to the general provisions of AS 40.25.110 *et seq.* AIDA is generally subject to the open meetings law, *cf.* AS 44.88.190, and there is a specific exemption for the confidentiality of certain information, giving rise to the implication that its records are otherwise public. In order to promote the purposes of this chapter, unless the records or information were a matter of public record before submittal to the authority, the following records and information must be kept confidential if the person supplying the records or information or the project, bond, loan, or guarantee applicant or borrower requests confidentiality and makes an adequate showing to the executive director of the authority that the records or information are (1) income tax returns; (2) financial statements, profit-and-loss statements, and cash flow projections, except the information required by the authority to calculate debt service coverage on the loan; (3) financial business plans; (4) credit reports from consumer reporting agencies and other credit information obtained from banks, creditors, or other credit reporting entities; (5) trade secrets, including confidential proprietary information and confidential information about products, pricing, or manufacturing or business processes; (6) appraisals, except the name of the appraiser, the date of the appraisal, and the fair market value determined

for the property appraised; (7) market surveys and marketing strategy information; or (8) any information required to be kept confidential by a federal law or regulation or by state law. AS 44.88.215(a). Information compiled by the authority from information described in (a) of this section shall be kept confidential unless disclosure is authorized by the person supplying the information and by the project, bond, loan, or guarantee applicant or borrower. AS 44.88.215(b). The records and information that the executive director of the authority determines to be confidential under AS 44.88.215(a) or (b) are not public records under the Public Records Act. AS 44.88.215(c). Legislators can review information otherwise confidential under this section if they have a valid legislative purpose for reviewing the information and agree to maintain the confidentiality of the information. AS 44.88.215(d).

#### 29. *Trade and Commerce.*

a. **Unfair Trade Practices.** Unfair Trade Practices and Consumer Protection Act gives the attorney general broad powers to investigate a broad range of unlawful acts and practices specified in the Alaska statutes. See AS 45.50.471 *et seq.* The attorney general may not make public the name of a person alleged to have committed an act or practice that is listed in the unfair trade practices statutes during an investigation conducted by her or him, nor are the records of the investigation or intelligence information obtained by the attorney general considered public records. They are not available for inspection by the general public. The attorney is allowed to issue public statements describing or warning of a course of conduct or a conspiracy which constitutes or will constitute an unlawful act or practice. AS 45.50.521.

b. **Securities Act of 1959.** Certain unspecified information is apparently allowed to be kept confidential pursuant to the Alaska Securities Act of 1959. See AS 45.55.905(b).

c. **Trade Secrets Litigation.** In 1988, the legislature adopted the Alaska Uniform Trade Secrets Act. AS 45.50.910 - 45.50.945. In actions brought under this Act, a court must preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval. AS 45.50.920.

d. **Sale of Business Opportunities.** A person may not sell or offer to sell a business opportunity unless the person is appropriately registered as a seller with the Department of Commerce. AS 45.66.010 *et seq.* Except for testimony and records related to an investigation by the Department of Commerce under this chapter, the registration application form, registration renewal form, disclosure statement, bond, contract, and other documents required to be prepared or filed with the department are public records available for public inspection and copying under the Public Records Act. AS 45.66.190.

30. **Vital Statistics.** The general public records law specifically exempts vital statistics records, and says these “shall be treated in the manner required by AS 18.50.” That chapter of the statutes, in turn, says that the state registrar shall issue instructions concerning the keeping, disclosure and copying of such records. AS 18.50.100. This had led to regulations found in 7 AAC 05.010 to .990 that govern in detail questions about creation, maintenance, dissemination and preservation of records concerning births, deaths, burial permits, divorces and adoptions. Notwithstanding AS 40.25.120, when 100 years have elapsed after the date of a birth, or 50 years have elapsed after the date of a death, marriage, divorce, dissolution of a marriage or annulment, the records of these events become public and subject to inspection and copying. AS 18.50.310.

#### 31. *Water, Air, Energy and Environmental Conservation.*

a. **Inspections.** The state Department of Environmental Conservation is authorized, among other things, to enter and inspect premises with consent of the owner to investigate actual or suspected sources of pollution or contamination or to ascertain compliance with regulations; information relating to secret processes or methods of

manufacture discovered during an investigation are confidential. AS 46.03.020(6).

b. **Hazardous Waste.** A person must obtain a permit to treat, transport, store or dispose of hazardous waste. Permits, permit applications, records, reports and information obtained by the department under laws relating to this are available to the public for inspection and copying. However if the commissioner is satisfied that disclosure of such a document would divulge methods or processes entitled to protection as trade secrets, he or she shall treat the information or document as confidential. AS 46.03.311.

c. **Underground Storage Tanks.** Financial records submitted to the Department of Environmental Conservation or Board of Storage Tank Assessment by the owner or operator of an underground petroleum storage tank system are confidential. DEC is to determine, in consultation with affected owners and operators, which information is confidential. Statistical information about the number, capacity and location of underground petroleum storage tank systems in the state is not confidential. AS 46.03.440.

d. **Oil Pollution Control.** AS 46.04.025 authorizes the Department of Environmental Conservation to maintain the confidentiality of a manufacturer's proprietary technical information relating to chemical and biological agents used to control or mitigate the effects of an oil discharge. The department may require other state and federal agencies that request the information to receive it on the condition that they also maintain its confidentiality.

e. **Air Quality Control.** The laws governing air pollution control provide that all or parts of records, reports and information, other than emission data, in the possession of the Department of Environmental Conservation are considered confidential records, if the owner and operator involved certifies that their public disclosure would tend to adversely affect the party's competitive position, and that they would divulge production figures, sales figures, processes, production techniques, or financial data that are entitled to protection under the Alaska Uniform Trade Secrets Act. AS 46.14.520. For a thorough analysis of this section (formerly AS 46.03.180) in the context of records concerning the Anchorage tank farms, see Dec. 4, 1991 Attorney General Opinion, 663-92-0227.

#### 32. *Welfare, Social Services and Institutions.*

a. **Public Assistance Records.** When names and addresses of recipients of public assistance are furnished to or held by other government agencies or departments they are required to adopt regulations necessary to prevent the publication of the lists or their use for purposes not directly connected with the administration of public assistance, AS 47.05.020, except pursuant to regulations of the Department and for purposes directly connected with the administration of general assistance, adult public assistance, day care assistance programs, or aid to families with dependent children. No one may disclose, receive, make use of, or acquiesce in the use of a list of, or names of, or information concerning, persons applying for or receiving public assistance directly or indirectly derived from the records, papers, files or communications of the department or subdivisions or agencies of the department, or acquired in the course of the performance of official duties. AS 47.05.030. It is not a violation of this section for the Department or an employee to disclose to a state legislator financial information concerning an eligibility determination of a person applying for public assistance if the disclosure, solicitation, receipt and use are for official purposes in connection with the legislator's official functions and related to the administration of the program consistent with federal law provided that the information shall remain confidential and not further disclosed. A legislator who was not notified that the material was confidential at the time it was provided is not subject to penalty for further disclosure. AS 47.05.032. The Department of Law determined that the *Anchorage Daily News* was entitled to obtain from the Child Support Enforcement Division a list of child support obligors in arrears, so



long as the agency, in releasing this information, does not identify AFDC-related cases. May 30, 1989, Op. Att’y Gen. No. 661-89-0405.

b. **Centralized Registry of Service Providers.** The Department of Health and Social Services is required to provide by regulation for a centralized registry to facilitate the licensing or certification of entities and individual service providers, the authorization of payments to entities or individual service providers by the department, and the employment of individuals by entities and individual service providers. Covered are individuals or entities required by statute or regulation to be licensed or certified by the Department of Health and Social Services or that are eligible to receive payments, in whole or in part, from the department to provide for the health, safety and welfare of persons who are served by the programs administered by the department. More specifically, covered “entities” include shelters, clinics, medical and psychiatric facilities, foster, maternity and assisted living homes, hospices, child care facilities, birth centers, and a host of others providing social and medical services listed in AS 47.05.010(b) and owners, officers, directors, members or partners of these entities. “Individual service providers” include (1) public home care providers described in AS 47.05.017 (providing health care benefits); (2) providers of home and community-based waiver services financed under AS 47.07.030(c) (medical and related services); and (3) case managers to coordinate community mental health services under AS 47.30.530. The registry consists of the following information, with names of victims redacted, for an entity or individual service provider, an applicant on behalf of an entity or individual service provider, or an employee or unsupervised volunteer of an entity or individual service provider: (1) decisions, orders, judgments and adjudications finding that the applicant, employee or unsupervised volunteer committed (A) abuse, neglect or exploitation under AS 47.10, AS 47.24, AS 47.62, or a substantially similar provision in another jurisdiction; or (B) medical assistance fraud under AS 47.05.210 or a substantially similar provision in another jurisdiction; and (2) orders under a state statute or a substantially similar provision in another jurisdiction that a license or certification of the entity or individual service provider to provide services related to the health, safety and welfare of persons was denied, suspended, revoked or conditioned. Information contained in the registry is confidential and is not subject to public inspection and copying under the public records act. AS 47.05.330(h).

c. **Medical Assistance for Needy Students.** Payments by the Department of Health and Social Services to assist needy persons eligible for medical care at public expense can be made to a school district on behalf of an eligible child with a disability for rehabilitative and other mandatory and optional services covered under the law that are furnished or paid for by the school district. Notwithstanding any contrary provision of state law, the school district must allow the department access to medical, financial and other records of the child that are in the possession of the school district in order to verify eligibility for services under this chapter, and the department must keep information received under this subsection confidential to the same extent as the school district is required to keep the information confidential under law. AS 47.07.063(b).

d. **Children In Need of Aid.** The court system and executive branch agencies deal with the problems of children in two significantly different contexts — simplistically thought of as situations in which young people are in the system because they are accused of causing trouble, as alleged juvenile delinquents, and situations in which the system is trying to ensure that a child in need of aid receives the care, guidance, treatment and control that will promote that child’s welfare. AS 47.10.005 - 47.10.990. The latter is addressed in this section, the former (AS 47.12.010 - AS 47.12.990) in the next. Proceedings relating to a child under 18 who is or is alleged to be in need of aid can arise for a variety of reasons, e.g., because the child has been abandoned, sexually abused, otherwise physically or mentally harmed, left alone or uncared for due to the parent’s incarceration or substance abuse, engaging in conduct harmful to him or herself, exposed to criminal or abusive conduct by a parent or other member of the household.

AS 47.10.011. Whenever circumstances subject a child to the jurisdiction of the court under AS 47.10.005 - 47.10.142, the court appoints a person or agency to determine whether the best interests of the child require that further action be taken. Depending on the outcome, further informal or formal hearings or proceedings may be conducted. Child in need of aid (CINA) hearings are presumptively open, subject to significant exceptions and unless otherwise prohibited by federal or state law, court order or court rule. Records regarding a parent who chooses to surrender a child under circumstances constituting voluntary abandonment extinguishing parental rights are confidential. AS 47.10.013(f).

The court is required to make and keep records of all cases brought before it. Within 30 days after the date of the child’s 18th birthday (or after any later date on which the court releases jurisdiction over the child) the court must order all the court’s official records pertaining to that child in a proceeding under this chapter sealed. These sealed records may not be used unless authorized by order of the court upon a finding of good cause. AS 47.10.090(c). The name or picture of a child under the jurisdiction of the court pursuant to the CINA statute may not be made public in connection with the child’s status as a child in need of aid, in a way that identifies any particular person, unless authorized by a court order or unless to implement a permanency plan after all parental rights of custody have been terminated. AS 47.10.090(d). The court’s official records under the CINA statute may be inspected only with the court’s permission and only by persons having a legitimate interest in them. AS 47.10.090(e).

Agency records are likewise presumptively privileged and confidential. With certain specified exceptions for various non-public disclosures, all information and social records pertaining to a child who is subject to the CINA statute prepared by or in the possession of a federal, state or municipal agency or employee in the discharge of the agency’s or employee’s official duty may not be disclosed directly or indirectly to anyone without a court order. AS 47.10.093(a). The Department of Health and Social Services may release confidential information relating to children not subject to the jurisdiction of the court to a person with a legitimate interest. AS 47.10.093(f). The CINA statute directs the Department to adopt and implement regulations governing release of confidential information and identifying a “sufficient legitimate interest” under subsection .093(f).

The commissioners of health and social services or administration, or their representatives, may disclose to the public, upon request, confidential information of the type related to the determination, if any, made by the department regarding the validity of a report of harm under AS 47.17 and the department’s activities arising from the department’s investigation of the report, when (1) the parent or guardian of a child who is the subject of a report of harm under AS 47.17 has made a public disclosure concerning the department’s involvement with the family; (2) the alleged perpetrator named in the report of harm under AS 47.17 has been charged with a crime concerning the alleged abuse or neglect; or (3) a report of harm under AS 47.17 has resulted in the fatality or near fatality of that child. AS 47.10.093(i). Disclosures made pursuant to subsection .093(i) are not subject to the general prohibitions against further disclosure or publication of such previously confidential information. In making such disclosure, the agency must (1) withhold disclosure of the child’s name, picture or other information that would readily lead to the identification of the child if the department determines that the disclosure would be contrary to the best interests of the child, the child’s siblings, or other children in the child’s household, or (2) after consultation with a prosecuting attorney, withhold disclosure of information that would reasonably be expected to interfere with a criminal investigation or proceeding or a criminal defendant’s right to a fair trial in a criminal proceeding. AS 47.10.093(j).

e. **Delinquent Minors.** Most matters involving minors are handled in a special division of the court system. The children’s court, dealing with offenses by minors, generally operates outside of the public eye in order to implement public policies designed to protect minors by allowing them to bury youthful mistakes. The law concerning juve-

nile delinquency, AS 47.12, has been amended significantly to reflect evolving public attitudes on this subject. The legislature has specifically declared that making the juvenile justice system more open, accessible and accountable to the public is one of the purposes of the juvenile delinquency statute. AS 47.12.010.

Certain offenses are not handled in this juvenile justice system. Since the AS 47.12 and the related Alaska Delinquency Rules of the court system do not apply to these offenses, the minor is charged, held, released on bail, prosecuted, sentenced and incarcerated in the same manner as an adult in such cases, which means that judicial records and court proceedings in such cases are open as they would be in any other adult case. Specifically, this occurs when a minor who was at least 16 when one of the following offenses is charged by complaint: (1) an unclassified felony or a class A felony and the felony is a crime against the person, (2) arson in the first degree, (3) a class B felony that is a crime against a person in which the minor is alleged to have used a deadly weapon in the commission of the offense and the minor was previously adjudicated as a delinquent or convicted as an adult, as a result of an offense that involved used of a deadly weapon in the commission of a crime against a person, or (4) misconduct involving a weapon in the first degree under AS 11.62.190(a)(1), or AS 11.62.190(a)(2) when the firearm was discharged under circumstances manifesting substantial and unjustifiable risk of physical injury to a person. AS 47.12.030(a).

There are other offenses that also are handled outside the juvenile delinquency statute, so that records and proceedings are open to the extent they would be if adults were involved. With respect to these following alleged offenses, minors are treated as adults regardless of their age and must have their parent or guardian present at all proceedings: violations of (1) a traffic statute or regulation, or a traffic ordinance or regulation of a municipality, (2) AS 11.76.105, relating to underage possession of tobacco, (3) a fish and game statute or regulation under AS 16, (4) a parks and recreational facilities statute or regulation under AS 41.21, (5) AS 04.16.050, relating to possession, control or consumption of alcohol, except for conduct constituting habitual minor consuming or in possession or control under AS 04.16.050(d), and (6) a municipal curfew ordinance, whether adopted under AS 29.35.085 or otherwise, unless the municipality provides for enforcement of its ordinance under AS 29.25.070(b) by the municipality. AS 47.12.030(b). Similarly, minors involved in driver's license proceedings under AS 28.15.185 are treated as adults, except that their parents or legal guardian must be present at all proceedings. AS 47.12.030(c). Also, if a court finds at a hearing that there is probable cause for believing that a minor is delinquent but not amenable to treatment under AS 47.12, it will order the case closed and the minor may be prosecuted as an adult. AS 47.12.100.

An order entered by the court under AS 47.12.120 that a minor or minor's parent must pay restitution is a civil judgment that remains enforceable after expiration of the court's jurisdiction over the minor. Information relating to a restitution order, including information about the minor and the recipient of the order, may be forwarded to the Department of Law for assistance in enforcing it. This information is confidential, and not subject to inspection as a public record. AS 47.12.170(c).

Court dealing with juvenile delinquency records must keep records of all cases. Except when disclosure of the name of a minor is authorized or required by AS 47.12, the name or picture of a minor under the jurisdiction of the court may not be made public in connection with the minor's status as a delinquent unless authorized by the court, AS 47.12.300(c). In the past, there have been isolated threats to employ this statute against the news media when broadcasters or print reporters have run the name or a picture of individuals involved in court proceedings who are juveniles. The statute makes violation of this provision a misdemeanor, punishable by fine or imprisonment. Any such attempt to apply the statute to prohibit or punish the news media's publication of names or pictures they have obtained is almost certainly unconstitutional. Under the First Amendment, there can be

no civil or criminal liability for the publication of truthful information lawfully obtained. A practical effect of the statute is that it operates as a restraint on court officials or public employees who may be asked to provide the information or photo at issue. As noted herein, juveniles are treated as adults in connection with a variety of offenses, so the prohibitions of AS 47.12.300 against releasing names and photos do not apply on such cases.

An exception to the general rule against nondisclosure provides that when a district attorney has elected to seek imposition of a dual sentence and a petition has been filed under AS 47.12.065, or when a minor agrees as part of a plea agreement to be subject to dual sentencing, all court records must be open to the public except for predisposition reports, psychiatric and psychological reports, and other documents that the court orders to be kept confidential because the release of the documents could be harmful to the minor or could violate the constitutional rights of the victim or other persons. AS 47.12.300(g).

Agency records pertaining to juvenile delinquency matters are also generally confidential. With certain exceptions, all information and social records pertaining to a minor who is subject to AS 47.12 or AS 47.17 prepared by or in the possession of a federal, state or municipal agency or employee in the discharge of the agency's or employee's official duty, including driver's license actions under AS 28.15.185, are privileged and may not be disclosed directly or indirectly to anyone without a court order. AS 47.12.310. A state or municipal law enforcement agency may disclose to the public information regarding a criminal offense in which the minor is a suspect, victim or witness if the minor is not identified by the disclosure, AS 47.12.310(c)(2), and may disclose to the public information regarding a case as may be necessary to protect the safety of the public. AS 47.12.310(c)(4). The department may release to a person with a legitimate interest information relating to minors not subject to the jurisdiction of the court under AS 47.12, and is required to adopt regulations governing such release and identifying sufficient legitimate interest. AS 47.12.310(f). Also, a state or municipal agency other than a law enforcement agency may disclose to the public information regarding a case as may be necessary to protect the safety of the public provided the disclosure is authorized by regulations adopted by the department. AS 47.12.310(i).

The law provides that the department may take, or be ordered to take, appropriate action to adjust matters relating to alleged juvenile delinquencies without a court hearing under circumstances set forth in AS 47.12.040(a)(1) and AS 47.12.040(a)(2), notwithstanding AS 47.12.310. In such cases, the agency shall, for a minor who is at least 13 years old at the time of the commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents or guardian of the minor, the action required by the agency to be taken to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent minor on the basis of the minor's commission of at least one offense and, on the basis of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a preliminary inquiry to determine if any action on that matter is appropriate, and, if the minor is alleged to be a delinquent minor on the basis of the minor's commission of another offense, exercise of agency jurisdiction is based on the minor's alleged commission of that other offense, and that other offense is one of the following: [A] a crime against a person punishable as a felony; [B] a crime in which the minor employed a deadly weapon in committing the crime; [C] arson; [D] burglary; [E] distribution of child pornography; [F] promoting prostitution; [G] certain misconduct involving a controlled substance. AS 47.12.315(a).

The law also provides that the department shall publicly disclose the name of a minor and the minor's parent(s) or guardian, the alleged offense exclusive of information identifying the victim, and the outcome of any delinquency proceedings before the court if the department files with the court a petition seeking adjudication of the minor as a delinquent based on one of three circumstances: [1] the minor's alleged commission of an offense, when 13 or older, and the minor has know-

ingly failed to comply with all terms and conditions required by the department or imposed by court order; [2] the minor's alleged commission, when 13 or older, of an offense of one of the following: [A] a crime against a person punishable as a felony; [B] a crime in which the minor employed a deadly weapon in committing the crime; [C] arson; [D] burglary; [E] distribution of child pornography; [F] promoting prostitution; [G] certain misconduct involving a controlled substance, AS 47.12.315(b); or [3] the minor's alleged commission of a felony when 16 or older, when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's commission of an offense that is a felony. AS 47.12.315(c).

If an agency or the court determines pursuant to AS 47.12 that delinquency proceedings should be dismissed and that the minor is not a delinquent, the minor may request the Department of Health and Social Services to disclose information about the matter or the case to the public. If the minor makes such a request, the agency shall disclose to the public information about the disposition of the matter or case without identifying the victim of the alleged offense. AS 47.12.315(c).

When the department or other agency discloses information as required by AS 47.12.315, it may not disclose the name of any foster parent or other out-of-home provider with whom the minor was living at the time the alleged offense was committed. AS 47.12.315(d)(1). If the information to be disclosed is maintained by electronic means that can be recovered from a computer database, the disclosing department or agency may disclose the information in that medium. AS 47.12.315(d)(2).

Subsections (e) and (g) of AS 47.12.315 address limitations on release of information based on when predicate offenses occurred, and what previous convictions or delinquency adjudications can be considered, based on passage of time, and subject to certain conduct of the minor. Subsection (f) permits the department to petition the court for an order prohibiting otherwise required disclosure based on a finding that the crime was an isolated incident and that the minor does not present any further danger to the public, or that the victim agrees that disclosure is inappropriate.

f. Records Pertaining to Runaways. Records of a licensed program for runaway minors that identify a minor who has been admitted to or has sought assistance from the program are confidential and are not subject to inspection or copying under the public records act, unless (1) after being informed of the minor's right to privacy, the minor consents in writing to the disclosure of the records; (2) the records are relevant to an investigation or proceeding involving child abuse or neglect or a child in need of aid petition; or (3) disclosure of the records is necessary to protect the life or health of the minor. AS 47.10.340. If the Department of Health and Social Services requires record keeping by a shelter for runaways or by a corporation that is licensed to designate shelters for runaways, records of the shelter and the corporation that identify a runaway minor who has been sheltered in a shelter for runaways or has sought assistance from a shelter for runaways are confidential and are not subject to inspection or copying under the public records act, subject to the same three exceptions, including the minor's informed written consent. AS 47.10.396.

g. Community Dispute Resolution Centers. Memoranda, work notes or products, or case files of community dispute resolution centers for matters involving minors, established under AS 47.12.450, are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding unless the court or administrative tribunal determines that the materials were submitted by a participant to the center for the purpose of avoiding discovery of the material in a subsequent proceeding. AS 47.12.450(e).

h. Standardized Forms Used For Detained Juveniles. For the purpose of collecting statistics, the Department of Health and Social Services requires state and local agencies that operate a jail or other detention facility to use a standardized form established by the Department to keep a record and report the admission of a minor. The record must be limited to the name of the minor admitted, the minor's

date of birth, the specific offense for which the minor was admitted, the date and time admitted, the date and time released, the sex of the minor, the ethnic origin of the minor, and other information required by federal law. Except for the notation of the date and time of the minor's release, the record shall be prepared at the time of the minor's admission. Unless otherwise provided by law, information and records obtained under this section are confidential and are not public records. They may be disclosed only for the purpose of compiling statistics and in a manner that does not reveal the identity of the minor. AS 47.14.030.

i. Child Protection. The law requires various reports to be filed and investigations to be made when there is indication that harm is being done to children by parents or others. Such investigation reports and reports of harm are confidential. AS 47.17.040.

j. Multidisciplinary Child Protection Teams. The Department of Health and Social Services has created multidisciplinary child protection teams to assist in the evaluation and investigation of reports made under AS 47.17 and to provide consultation and coordination for agencies involved in child protection cases under AS 47.10. Except for a public report issued by a team that does not contain confidential information, records or other information collected by the team or a member of the team related to duties under this section are confidential and not subject to public disclosure under the public records act. AS 47.14.300(d).

k. Services for Developmentally Delayed or Disabled Children. Services are provided for developmentally delayed or disabled children under AS 47.20.060 - 47.20.290. The Department of Health and Social Services has established a system for compiling data on the numbers of children and their families in the state who need early intervention services, the numbers being served, the types of services provided, and other information as required under federal law for this program. Personally identifiable information obtained under this chapter is confidential for purposes of the public records act. AS 47.20.110(b).

l. Protection of the Elderly. Similarly, investigation reports and reports of abandonment, exploitation, abuse, neglect or self-neglect of a vulnerable adult filed pursuant to this law are confidential, except that the Department of Health and Social Services must disclose a report of such harm if the vulnerable adult who is the subject of it consents in writing. Also, the department must upon request disclose the number of verified reports of abandonment, exploitation, abuse, neglect or self-neglect of vulnerable adults that occurred at an institution that provides care for vulnerable adults, or were the result of the actions or inactions of a public home care provider. AS 47.24.050.

m. Temporary Assistance Programs. The Department of Health and Social Services administers a temporary assistance program providing cash assistance, diversion payments, and self-sufficiency services to needy children and their families, establishing regional public assistance programs, establishing program standards for incentives to work, and engaging in related activities. Information received from an applicant for or participant in the Alaska temporary assistance program shall be treated as confidential by all state agencies that share the information under this section and is not open to public inspection or copying under the public records act. AS 47.27.055(b).

n. Alaska Native Family Assistance Grants. The Department of Health and Social Services may award and administer Alaska Native family assistance grants in accordance with this AS 47.27.200. Records pertaining to recipients of assistance from an Alaska Native family assistance grant awarded under this section are confidential public assistance records under AS 47.05.020 and regulations adopted under AS 47.05.020. Use and misuse of these records are subject to the provisions of AS 47.05.030. AS 47.27.200(g). Regional public assistance programs can also serve eligible state residents not already covered by a federally approved tribal family assistance plan in that region. AS 47.27.300. Records pertaining to recipients of state public assistance under a contract awarded for such regional public assistance programs



have the same confidential protections as are provided to recipients of assistance from Alaska Native family assistance grants under AS 47.27.200. AS 47.27.300(d).

o. **Mentally Ill and Insane Persons.** The Department of Social Services is required to adopt regulations to ensure patient rights and to safeguard the confidential nature of records and information about recipients for state services for mentally ill and insane persons. Local community entities working with these individuals through the state are also required to develop and submit for approval a plan that adequately safeguards confidential information about these individuals. AS 47.30.660 - .915 are the Alaska civil commitment statutes, governing the legal rights of persons suffering from mental illness. These statutes cover both voluntary and involuntary admissions for treatment. AS 47.30.840 describes rights to privacy and personal possessions of individuals receiving such treatment. In part, it states that a person undergoing evaluation or treatment may not be photographed without the person's consent and that of the person's guardian if a minor. The person may be photographed upon admission to a facility for identification and for administrative purposes of the facility, but all such photographs are confidential and may only be released by the facility to the patient or pursuant to court order.

p. **Patient Records.** Information and records obtained in the course of a screening investigation, evaluation, examination or treatment of patients under the state civil commitment statute are confidential. The patient or an individual to whom the patient has given written consent can obtain these records. AS 47.30.845. Also, a person doing research may obtain the records if anonymity of the patient is assured and the facility recognizes the project as a "bona fide research or statistical undertaking." Whether in particular circumstances a newspaper article might ever qualify for such treatment is probably a subject for negotiation with the facility or conceivably for resolution by the courts. The law also provides for either expungement or sealing of all court records pertaining to proceedings following the discharge of a person from a treatment facility or the issuance of a court order denying a petition for commitment, if the court finds that such action is appropriate. AS 47.30.850.

q. **Community Mental Health Services.** The Department of Health and Social Services is authorized to review, obtain and copy confidential and other records and information about the clients of services requested or furnished under the Community Mental Health Services Act to evaluate compliance with the act. The department may obtain the records and information regarding clients from the client or directly from an entity furnishing those services. Records so obtained are confidential medical records, exempt from public inspection and copying under the public records act. AS 47.30.590.

r. **Mental Health Treatment Assistance.** The Department of Health and Social Services is required to provide financial assistance to qualified needy patients who have received mental health evaluation or treatment at an evaluation facility or a designated treatment facility that is not a state-operated hospital. The department is authorized to review, obtain and copy confidential and other records and information about the patients who were eligible for or were provided financial assistance to evaluate compliance with the law, from the patient or directly from the evaluation facility or the designated treatment facility. Records so obtained by the department are medical records, to be handled confidentially, and are exempt from public inspection and copying under the public records act. AS 47.31.032.

s. **Centralized Licensing and Related Administrative Procedures for Social Service Entities.** The Legislature has established centralized licensing and related administrative procedures for the delivery of services by a host of social service entities, including shelters, clinics, medical and psychiatric facilities, foster, maternity and assisted living homes, hospices, child care facilities, birth centers and others, and addresses requirements for obtaining and keeping licenses, non-renewals or denials of or conditions on licenses, complaints against and investigations of licensees, for hearings, for reports on the results of inves-

tigations and inspections, and for enforcement actions. AS 47.32.010 - 47.32.900. Except as otherwise provided by law, complaints, investigations and inspections relating to licensed entities or other subject, or records related to a complaint, investigation or inspection, and the identity of a complainant and of individuals receiving services from an entity, are confidential and can't be disclosed to the public without a court order. With the exception of information that identifies a complainant or a recipient of services from an entity, a copy of the Department of Health and Social Services' report of investigation or inspection under AS 47.32.120, an entity's written response to the report, and information regarding any department imposition of an enforcement action under AS 47.32.130 or 47.32.140 are public records under AS 40.25. The department shall make this information available to the public for inspection and copying after the (1) entity receives its copy of the report of investigation under AS 47.32.120, if the department has determined that an enforcement action under AS 47.32.130 or 47.32.140 will not be taken regarding the entity; (2) department's notice of enforcement action under AS 47.32.130 or 47.32.140 becomes a final administrative order without a hearing under AS 47.32.130 (c) or 47.32.140(i); or (3) issuance of a decision following a hearing under AS 47.32.150. AS 47.32.180.

t. **Newborn and Infant Hearing Screening, Tracking, and Intervention Program.** The Department of Health and Social Services is required to develop and implement a reporting and tracking system for newborns and infants screened for hearing loss. The information reported under this program must be compiled and maintained by the department in the tracking system, and must be kept confidential in accordance with the applicable provisions of 20 U.S.C. 1439 (Individuals with Disabilities Education Act), as amended by P.L. 105-17. Data collected by the department that was obtained from the medical records of the newborn or infant shall be for the confidential use of the department and are not public records subject to disclosure under Alaska's Public Records Act. Aggregate statistical data without identifying information compiled from the information received is public information. AS 47.20.320(a), (c).

u. **Alcoholism, Intoxication and Drug Treatment.** The laws providing for temporary protective custody of people who are intoxicated or incapacitated by alcohol state that this detention does not constitute an arrest and no entry or other record may be made to indicate that the person detained has been arrested or charged with a crime, except that a confidential record may be made which is necessary for the administrative purposes of the facility to which the person has been taken, or which is necessary for statistical purposes where the person's name may not be disclosed. AS 47.37.170. Likewise the registration and other records of treatment facilities are confidential. AS 47.37.210.

v. **Long Term Care Ombudsman.** Records obtained or maintained by the office of the "long term care ombudsman," now under the Alaska Mental Health Trust Authority, are confidential and not subject to disclosure under the public records act, but may be disclosed at the discretion of the ombudsman provided that the identity of a complainant or an older Alaskan on whose behalf a complaint is made may not be disclosed without the consent of the identified person or the person's legal guardian, unless required by court order. AS 47.62.030.

### **C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.**

The Supreme Court has recognized an "executive privilege," in *Doe v. Superior Court*, 721 P.2d 617 (Alaska 1986), and a "deliberative process privilege," in *Capital Information Group v. Office of the Governor*, 923 P.2d 29 (Alaska 1996), and *Gwich'in Steering Committee v. Office of the Governor*, 10 P.3d 572 (Alaska 2000) ("*Gwich'in*"). The court has ruled that these privileges are qualified, rather than absolute, and that a balancing of interests between the government and the parties seeking disclosure must be conducted. However, the court has noted that once the government has met the threshold requirements for invoking the deliberative process privilege, the burden is cast on the party seeking the records to overcome a presumption of confidentiality, and

that this burden is difficult to meet. *Gwich'in*, 10 P.3d at 584. Also, the Court has held that the exception in AS 40.25.120(4) for records otherwise exempt from disclosure under “state law” encompasses both the state constitution and common law. In particular, the Court, and attorney general and agency rulings, have recognized that nondisclosure may be warranted in a number of circumstances due to individuals’ rights under the privacy clause of the Alaska Constitution. Article I, Section 22. The AG has ruled that the privacy clause, construed together with a 1990 statute governing privacy considerations in public records, does not preclude access to the names and addresses of applicants for permanent fund dividends, even for commercial purposes. April 1, 1992, AG Op. No. 663-92-0163. The AG has suggested that the privacy clause may support establishing procedures in the Department of Labor and Workplace Development to allow individuals whose worker’s compensation medical files are requested by the public to apply for a protective order. [The governor in 1991 vetoed a bill containing a provision that would have made worker’s compensation medical files confidential.]

#### **D. Are segregable portions of records containing exempt material available?**

Segregable, non-exempt portions of records containing exempt material are available, unless the disclosable portions cannot reasonably be segregated from nondisclosable portions in a manner that will allow meaningful information to be disclosed. *Cf.* 2 AAC 96.325(a)(1), - .210(d), - .330. If an electronic file or database contains both non-disclosable and disclosable records, a public agency must either delete or mask the non-disclosable information before releasing the requested record, or write a program to extract the requested disclosable public records from the electronic file or database. Masking or deleting non-disclosable information does not constitute providing an electronic service or product. 2 AAC 96.330(b)(c).

#### **E. Homeland Security Measures.**

The Homeland Security and Emergency Management Subcommittee was established as a subcommittee of the Joint Armed Services Committee, to review confidential activities, plans, reports, recommendations and other materials of the Alaska division of homeland security and emergency management established in AS 26.20.025, or of other agencies or persons, relating to matters concerning homeland security and civil defense, emergencies or disasters in the state or to the state’s preparedness for or ability to mount a prompt response to matters concerning homeland security and civil defense, emergencies or disasters. AS 24.20.680. Pursuant to section .680, the President of the Senate and the Speaker of the House of Representatives may condition service on the subcommittee by members upon the execution of appropriate confidentiality agreements by the members or by persons assisting those members. Information and documents received by members serving on the subcommittee or persons assisting members under a confidentiality agreement as described in this subsection were not public records and were not subject to public disclosure under the public records act. AS 24.20.680(d). AS 24.20.680 was repealed in 2009. Sec. 23-24, ch. 179 SLA 2004. The adjutant general of the Department of Military and Veterans Affairs was charged with proposing any appropriate legislation relating to this provision; as of the 2011 ed., sec. .680 had not been reinstated.

Note also that a new category of records has been added to exempt from disclosure under the public records act records or information pertaining to a plan, program or procedures for establishing, maintaining or restoring security in the state, or to a detailed description or evaluation of systems, facilities or infrastructure in the state, but only to the extent that the production of the records or information (A) could reasonably be expected to interfere with the implementation or enforcement of the security plan, program or procedures; (B) would disclose confidential guidelines for investigations or enforcement and the disclosure could reasonably be expected to risk circumvention of the law; or (C) could reasonably be expected to endanger the life or physical safety of an individual or to present a real and substantial risk

to the public health and welfare. AS 40.25.120(a)(10).

### **III. STATE LAW ON ELECTRONIC RECORDS**

The definition of public records encompasses electronic records, though it does not refer to them specifically as such. It includes all items “regardless of format or physical characteristics” with the specific exception of “proprietary software programs.” The law also provides for dissemination through a state-maintained Internet site of postings by state agencies called the Alaska Online Public Notice System.

#### **A. Can the requester choose a format for receiving records?**

The statute allows citizens access to information in whatever form it is kept by the government “regardless of format or physical characteristics.” AS 40.25.220(3). The assumption, and the practice, is that a requester can obtain documents in the format of his or her choosing, if the agency keeps them in that format. Otherwise, it is not clear that the requester has a right to require the agency to create documents in a format in which it does not ordinarily keep the information.

For example, if a document is stored electronically using one word processing program such as Word Perfect, or a video document is stored as a Beta tape, the requester would not have the right to require the state to supply these records as Microsoft Word documents or VHS tapes. The public records law specifically provides that agencies are entitled to exercise their discretion about whether to provide duplication of public records in an alternative format not used by a public agency, and to charge an enhanced fee if they choose to do so. AS 40.25.220(1)(A). Certain agencies have attempted at times to provide electronically stored information only in a less usable paper “printout” format, but have ultimately provided information on disk in response to objections from media organizations without the need for litigation.

One notable exception is the June 2011 production of 22,000 pages of e-mails pursuant to media requests—following the 2008 selection of former governor Sarah Palin as Republican presidential nominee John McCain’s running mate—for virtually all of the e-mails to or from Palin during her tenure as governor. In the end, these e-mails were produced in hard copy, in sets of six banker boxes of documents. It is likely that this was a unique situation, resulting from a number of factors that included: 1) the unprecedented volume of documents sought, 2) the number of requestors, 3) the number of employees/computers whose records were to be searched and analyzed to comply with the requests, 4) the state’s need to be able to review the documents to remove or redact privileged matters, and 5) the state’s assertion of practical infeasibility with respect to carrying out these responsibilities with the document management software it used at the time. Software now in use by the state should permit the state obtain, review, redact as necessary, and produce electronic documents in their native format. While a requestor may not be able to require that a public record be produced in a format other than that in which it is maintained, agreements to produce records in alternate formats can be and have been negotiated for the convenience of either the requestor or the agency or both, and there is no harm in asking for such accommodation.

#### **B. Can the requester obtain a customized search of computer databases to fit particular needs?**

As a general rule, public records laws do not require agencies to create records that do not exist. Pursuant to, or consistent with, this principle, the Alaska legislature in 1990 added AS 40.25.115, dealing with requests for “electronic services and products.” This provision was an attempt to accommodate the interests of citizens seeking access to information more usefully tailored to their specific needs, and to balance these with the interests of agencies being asked to provide specially-tailored information. Among these electronic services and products, as defined by AS 29.25.220(1)(A)-(G), are electronic manipulations of data contained in public records in order to tailor the data to the person’s request or to develop a product that meets the person’s request.

In contrast to the generally non-discretionary duty of public officials to provide public access to public records, a public agency may choose to provide or not provide “electronic services and products involving public records” to members of the public. The legislature has stated that agencies are “encouraged to make information available in usable electronic formats to the greatest extent feasible,” but that doing so “may not take priority over the primary responsibilities of a public agency.” AS 40.25.115(a). Agencies are allowed to charge an enhanced fee for electronic services and products, including customized searches of computer databases tailored to the requesters’ needs. Specifically, the fee for electronic services and products must be based on recovery of the actual incremental costs of providing them, but may also include a “reasonable portion of the cost associated with building and maintaining the information system of the public agency.” These may be reduced or waived if the electronic services and products are to be used for a public purpose, including journalism and other categories, so long as fee reductions and waivers are uniformly applied among persons who are similarly situated. AS 40.25.115(b).

### C. Does the existence of information in electronic format affect its openness?

For the most part, experience to date seems to indicate no unusual problems with obtaining or utilizing information in electronic format. It is treated like other information. One notable exception is the June 2011 production of 22,000 pages of e-mails pursuant to media requests—following the 2008 selection of former governor Sarah Palin as Republican presidential nominee John McCain’s running mate—for virtually all of the e-mails to or from Palin during her tenure as governor. In the end, these e-mails were produced in hard copy, in sets of six banker boxes of documents. It is likely that this was a unique situation, resulting from a number of factors that included: 1) the unprecedented volume of documents sought, 2) the number of requestors, 3) the number of employees/computers whose records were to be searched and analyzed to comply with the requests, 4) the state’s need to be able to review the documents to remove or redact privileged matters, and 5) the state’s assertion of practical infeasibility with respect to carrying out these responsibilities with the document management software it used at the time. Software now in use by the state should permit the state obtain, review, redact as necessary, and produce electronic documents in their native format.

### D. How is e-mail treated?

The public records law does not specifically identify or address “e-mail” as such, but there is no apparent argument that would exempt e-mail from disclosure under the public records law.

#### 1. Does e-mail constitute a record?

The Public Records Act defines the term “public records” in part to mean “books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics,” which clearly encompasses records in the form of e-mails. AS 40.25.220(3). While there may be issues about whether e-mails concern public or private matters, or are privileged, or about the logistics of producing them, there is no real question whether e-mails are public records. A dramatic (and embarrassing) illustration of this was the production by the State of Alaska on June 10, 2011, of 24,000 pages of e-mails from the first 18 months of Sarah Palin’s term as governor. See, “Trove of Palin E-Mails Draws Press to Alaska,” <http://www.nytimes.com/2011/06/10/us/10palin.html?pagewanted=all>. The documents, first requested in 2008 shortly after Palin was selected by John McCain as his vice-presidential running mate, were made available to the press in hard copy, with 2,000 pages withheld, and many other pages redacted, due to assertions of various privileges. *Id.*

#### 2. Public matter on government e-mail or government hardware

The Public Records Act defines the term “public records” to mean “books, papers, files, accounts, writings, including drafts and memo-

rializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; ‘public records’ does not include proprietary software programs.” AS 40.25.220(3). Public matter on government-email or government hardware obviously falls squarely within this definition as a general rule.

### 3. Private matter on government e-mail or government hardware

In the context of interpreting the state’s ethics laws, the AG advised that “as a general rule, a public officer may not use state equipment for personal benefit, regardless of whether there is financial gain.” However, the AG’s opinion concludes that personal e-mails and call records are not public records and public disclosure of such personal information would likely run afoul of the individual’s right to privacy under the Alaska Constitution. However, it states, because business related calls and business related email messages would also be generated through these personal devices, it is possible that a state official or a court could be required to review all call records and messages in order to locate the calls and email messages that concern state business and thus are public records.

State laws, policies and practices contemplate that there will be some, insignificant use of government equipment for personal business, so that it can reasonably be anticipated there will be private matter on government hardware or found in government e-mail programs. For example, an August 21, 2008, opinion (to Annette Kreitzer, Commissioner, Department of Administration) of the Alaska Attorney General regarding “Personal Use of Electronic Equipment,” AGO File No. 661-08-0388, issued in the context of a request for guidance concerning applicability of state ethics laws, states: “We assume that cell phones and PDAs are issued to state officers to ensure out-of-office accessibility, during the day but particularly after hours and on weekends. PDAs may also be needed when public officers travel and require access to email. ...Generally, state equipment is not a substitute for an officer’s personal equipment and personal use should be collateral or incidental to the performance of official duties. Personal calls or contacts during the work day should be of short duration as reasonably necessary to tend to family and individual matters, such as child care, medical appointments or social appointments, or to address matters relating to personal or financial interests, similar to the permitted use of a desk telephone. No use of state equipment may be made for partisan political purposes....” After reviewing applicable ethics laws and particularly focusing on the line between substantial and material conflicts or potential conflicts excused as minor and inconsequential, or having insignificant or conjectural effect, the Attorney General advised state employees, in summary (and declared plans to develop regulations accordingly), that personal use of state-issued cell phones and PDAs will be presumed insignificant if the amount of use does not exceed the greater of 30 minutes per month or five percent of the monthly minute allowance and all extra charges attributable to personal use are reimbursed. Personal use of this equipment is presumed to violate the Ethics Act if the personal use exceeds the allowed usage or the officer fails to reimburse charges incurred for personal use. The AG’s advisory opinion also notes that “portable computers may be provided to employees to facilitate state business when the employees must work out of the office and when on travel. Portable computers may also be provided to members of boards and commissions in connection with official meetings and other state business. These public officers may make reasonable incidental personal use of portable computers, including use for private email or personal entertainment, so long as there is no cost to the state and any use is acceptable under the State of Alaska’s Personal Use of State Office Technologies Policy (SP-017).”

The 2008 Attorney General’s opinion states that from the definition of public records, it appears that personal emails and call records from a personal cell phone or a PDA are not “accounts” or “writings”



“developed or received by a public agency,” and are not “preserved for their informational value or as evidence of the organization or operation of the public agency.” Instead, they are writings developed or received by people in their personal, non-employee capacities and preserved for personal reasons. The personal emails and call records thus do not fit the definition of public records. Additionally, the Alaska Constitution provides, in article I, section 22, that the right of the people to privacy is recognized and shall not be infringed.

This provision of the constitution, according to the AG’s opinion, “provides additional protection from public disclosure by the government of personal emails and call records. ...[H]owever, a state official or a court could be required to review personal call records and emails while seeking to locate and identify the business related

calls or business related emails sent or received through the personally owned devices. Thus, again, although generally personal call records and emails would not be disclosed to the public, they could be reviewed by a state official or court in the limited circumstances described to comply with the Public Records Act.”

#### 4. Public matter on private e-mail

State business records generated on a personal cell phone or PDA are public records subject to review and disclosure, unless the Public Records Act permits them to be withheld for other reasons. See August 21, 2008, opinion (to Annette Kreitzer, Commissioner, Department of Administration) of the Alaska Attorney General regarding “Personal Use of Electronic Equipment,” AGO File No. 661-08-0388. The AG’s opinion makes clear that when an employee uses personally owned devices for business related calls, the employee has to expect that a state official or a court could be required to review all messages on these personal devices while seeking to locate and identify business related calls or emails. *Id.* at 13.

What is or is not “state business” or “public records” can still be subject to debate. In a case filed against former governor Sarah Palin in state superior court, a Republican party activist sought access to communications to or from Palin, including communications found on personal accounts and devices. The case began as a complaint for declaratory and injunctive relief seeking preservation of public records, alleging that defendants Palin and the Officer of the Governor had a nondiscretionary duty under the Public Records Act and the Records Management Act to preserve as public records all e-mails—whether from state or private accounts—that pertain to official state business. The plaintiff moved for summary judgment, asking for a ruling that e-mails whose contents involve state business that the governor sent from or received on her private e-mail account are public records regardless of whether the emails have been captured on a state computer server. She also asked the court to enjoin the use of private email accounts to conduct official government business. *McLeod v. Palin*, Superior Court Case No. 3AN-08-10869 Civ.

The court ruled that not all emails relating to state business are necessarily “public records” under Alaska law. The court noted that in AS 40.25.220(3), the Legislature chose to define public records as those items “that are developed or received by a public agency” and “that are preserved for their informational value or as evidence of the organization or operation of the public agency.” The court acknowledged that the plaintiff could be correct that this reading might allow government employees to transform public records into non-public records simply by not preserving them as required, hindering government transparency and hiding decisions from public view. Nonetheless, the judge said, it was not the court’s role to rewrite a statute with plain language.

The plaintiff also argued that a provision in the state public records law making it illegal to obstruct access to public records should be construed to prohibit the use by a state employee of a private email account to transact official business of the State of Alaska, particularly if the emails the employee sends or receives are not captured on a state computer server. (A policy memorandum from Governor Palin’s chief of staff attempted to address the situation by requiring state employees

who use their person devices to conduct state business to send a copy to their government e-mail accounts to ensure that a copy resides on the state’s server; evidence concerning compliance with this is unavailable.)

The superior court rejected this argument, finding that “there is simply no current statute that forbids the use of private email accounts to conduct state business.” “The Legislature is free to take up the matter,” the court wrote, “but as the statutes are currently written, private e-mail accounts may be used to conduct state business, subject to the same laws and regulations related to preservation as e-mails originating from state servers.” On appeal, McLeod argued that this construction of the definition of “public records” improperly delegates to the Office of the Governor and all other state agencies unfettered discretion to decide whether to “preserve” a writing or other document, including, but not limited to, the emails that were the subject of her action. This issue is on appeal, *See McLeod v. Parnell*, Alaska Supreme Ct. Case No. S13861 (appeal from *McLeod v. Palin*, Superior Court Case No. 3AN-08-10869 Civ). As the 2011 edition of the OGG went to press, the appeal had been argued, and the court’s draft opinion was being circulated.

#### 5. Private matter on private e-mail

The Public Records Act defines the term “public records” to mean “books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; ‘public records’ does not include proprietary software programs.” AS 40.25.220(3). It is not apparent why private matters contained in private e-mail would come within the ambit of laws providing access to public records.

#### E. How are text messages and instant messages treated?

##### 1. Do text messages and/or instant messages constitute a record?

The Public Records Act defines the term “public records” to mean “books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, *regardless of format or physical characteristics.*” AS 40.25.220(3). There are no reported cases at this time dealing with text messages and/or instant messages, but there is no reason to believe they would be treated differently than e-mails, *see* [State Law on Electronic Records] section III.D above.

##### 2. Public matter message on government hardware.

The Public Records Act defines the term “public records” to mean “books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, *regardless of format or physical characteristics.*” AS 40.25.220(3). There are no reported cases at this time dealing with text messages and/or instant messages, but there is no reason to believe they would be treated differently than e-mails, *see* [State Law on Electronic Records] section III.D above.

##### 3. Private matter message on government hardware.

The Public Records Act defines the term “public records” to mean “books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, *regardless of format or physical characteristics.*” AS 40.25.220(3). There are no reported cases at this time dealing with text messages and/or instant messages, but there is no reason to believe they would be treated differently than e-mails, *see* [State Law on Electronic Records] section III.D above.

##### 4. Public matter message on private hardware.

The Public Records Act defines the term “public records” to mean “books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, *regardless of format or physical characteristics.*” AS 40.25.220(3). There are no reported cases

at this time dealing with text messages and/or instant messages, but there is no reason to believe they would be treated differently than e-mails, *see* [State Law on Electronic Records] section III.D above.

### 5. Private matter message on private hardware.

The Public Records Act defines the term “public records” to mean “books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, *regardless of format or physical characteristics.*” AS 40.25.220(3). There are no reported cases at this time dealing with text messages and/or instant messages, but there is no reason to believe they would be treated differently than e-mails, *see* [State Law on Electronic Records] section III.D above.

### F. How are social media postings and messages treated?

The Public Records Act defines the term “public records” to mean “books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, *regardless of format or physical characteristics.* ...” AS 40.25.220(3). There are no reported cases at this time dealing with social media postings and messages, but there is no reason to believe they would be treated differently than e-mails, *see* section [State Law on Electronic Records] III.D above. Whether they are public records should depend primarily on whether they relate to public business and more specifically, whether they are records “developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency.” AS 40.25.220(3).

### G. How are online discussion board posts treated?

The Public Records Act defines the term “public records” to mean “books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, *regardless of format or physical characteristics.* ...” AS 40.25.220(3). There are no reported cases at this time dealing with online discussion board posts, but there is no reason to believe they would be treated differently than e-mails, *see* section [State Law on Electronic Records] III.D above. Whether they are public records should depend primarily on whether they relate to public business and more specifically, whether they are records “developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency.” AS 40.25.220(3).

### H. Computer software

#### 1. Is software public?

The Public Records Act expressly defines the term “public records” as excluding “proprietary software programs.” AS 40.25.220(3). While by negative inference it would appear that nonproprietary software may be available as a “public record,” it should be noted that the Public Records Act expressly includes within its definition of “electronic products and services,” for which different rules apply with respect to accessibility and fees, “providing software developed by a public agency or developed by a private contractor for a public agency.” AS 40.25.220(1)(F).

#### 2. Is software and/or file metadata public?

The Public Records Act defines the term “public records” to mean “books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, *regardless of format or physical characteristics.* ...” AS 40.25.220(3). There are no reported cases at this time dealing with metadata specifically. It does not appear the state has asserted a privilege with respect to metadata in producing e-mails generated during a former governor’s term in office, *see* section III.D above, but it is also not apparent that the issue was addressed at all. Whether metadata are public records is likely to depend primarily on whether they relate to public business and more specifically, whether they are “developed or received by a public agency, or by a

private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency.” AS 40.25.220(3). It is expected that a related issue involving interpretation of this portion of the Public Records Act will be addressed in a case that was briefed and argued before the Alaska Supreme Court, in a decision under advisement at the time the 2011 OGG was published. *See* McLeod v. Parnell, Alaska Supreme Ct. Case No. S13861 (appeal from McLeod v. Palin, Superior Court Case No. 3AN-08-10869 Civ).

### I. How are fees for electronic records assessed?

Fees that can be charged for access to public records, including records stored in electronic formats, and “electronic products and services” are governed primarily by AS 40.25.110(b)-(h) (public records) and AS 40.25.115(b) (electronic products and services), and discussed in detail in [Open Records] §I.D above. As a general rule, if you want a copy of a public record you can be required to pay for it. Public agencies can reduce or waive a fee when the agencies determine that is in the public interest. AS 40.25.110(d). Fee reductions and waivers must be uniformly applied among persons who are similarly situated. AS 40.25.110(d). Copying charges of \$5 or less may be waived if the cost to the agency of contacting the requester to arrange payment exceeds the copying charges. AS 40.25.110(d). Veterans are entitled to documents needed to determine their eligibility at no charge. AS 40.25.121.

Unless otherwise provided by law, the fee for copying public records may not exceed the standard unit cost of duplication established by the public agency. AS 40.25.110(b). This includes public records obtained in electronic form. The fee for duplicating these may not exceed the “actual incremental costs” of the public agency. AS 40.25.115(c). Enhanced fees can be charged for electronic products and services to cover incremental costs of providing such services, and costs associated with building and maintaining the information services.

The law authorizes public agencies to charge for search time, as well as other time involved in the production of requested public records, but only to the extent that the time spent in producing records for any one requester exceed five person-hours in a calendar month. If it does, and to the extent that it does, the agency can require the requester to pay the personnel costs required during the month to complete the search and copying tasks, but the personnel costs that are charged may not exceed the actual salary and benefit costs for the personnel time required to perform the search and copying tasks. AS 40.25.110(c). If fewer than five hours are spent in the one calendar month on search and copying tasks to produce requested documents, no fees should be imposed for search and copying time. (Note, however, that as of the time of the 2011 revision of this outline, it appears that some agencies have begun to erroneously charge for the initial five hours of time spent on searching and copying tasks in a calendar month, if the total time spent exceeds five hours, rather than only charging for the incremental amount of time by which the total exceeds the first five, supposedly free, hours. To date, this practice has not been challenged or clarified, but it is contrary to the intent of the legislators who implemented this provision in 1990.)

### J. Money-making schemes.

#### 1. Revenues.

As a general rule, public records laws do not require agencies to create records that do not exist. Pursuant to, or consistent with, this principle, the Alaska legislature in 1990 added AS 40.25.115, dealing with requests for “electronic services and products.” This provision was an attempt to accommodate the interests of citizens seeking access to information more usefully tailored to their specific needs, and to balance these with the interests of agencies being asked to provide specially-tailored information. Among these electronic services and products, as defined by AS 29.25.220(1)(A)-(G), are electronic manipulations of data contained in public records in order to tailor the data to the person’s request or to develop a product that meets the person’s request.

In contrast to the generally non-discretionary duty of public officials to provide public access to public records, a public agency may choose to provide or not provide “electronic services and products involving public records” to members of the public. The legislature has stated that agencies are “encouraged to make information available in usable electronic formats to the greatest extent feasible,” but that doing so “may not take priority over the primary responsibilities of a public agency.” AS 40.25.115(a). Agencies are allowed to charge an enhanced fee for electronic services and products, including customized searches of computer databases tailored to the requesters’ needs. Specifically, the fee for electronic services and products must be based on recovery of the actual incremental costs of providing them, but may also include a “reasonable portion of the cost associated with building and maintaining the information system of the public agency.” These may be reduced or waived if the electronic services and products are to be used for a public purpose, including journalism and other categories, so long as fee reductions and waivers are uniformly applied among persons who are similarly situated. AS 40.25.115(b).

## 2. Geographic Information Systems.

Access to and creation of geographic information systems in adapted usable formats are encompassed by electronic products and services, as discussed in the preceding subsection.

### K. On-line dissemination.

The state public records laws encourage public agencies to provide access to information in a variety of ways that go beyond what the agencies are required to produce as basic “public records,” called “electronic products and services.” AS 40.25.115. Among the various categories of electronic products and services contemplated by the state is on-line access to electronic files and databases. The statute provides that fees for such access, as is the case with access to other electronic products and services providing more than just access to public records, can take into account the need to recover actual incremental costs of providing such electronic services and products, and a reasonable portion of the costs associated with building and maintaining the information system of the public agency. AS 40.25.115(b). See generally, [State Law on Electronic Records] §III.I above. When offering on-line access to an electronic file or database, a public agency also must provide without charge on-line access to the electronic file or database through one or more public terminals. AS 40.25.115(f). See also, 2 AAC 96.450

## IV. RECORD CATEGORIES — OPEN OR CLOSED

### A. Autopsy reports.

AS 12.65.020 provides that the state medical examiner may perform a post-mortem examination, including an autopsy, necessary to make a proper determination of the cause of death and to complete the death certificate, when a death occurs in any of a variety of enumerated circumstances, or when the medical examiner feels the circumstances warrant investigation. The medical examiner must prepare a report of findings and conclusions to the coroner, to assist in determining whether to order an inquest. The medical examiner’s investigative report is privileged and confidential, and not subject to disclosure pursuant to AS 40.25.

### B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

#### 1. Rules for active investigations.

Agencies are permitted by the Public Records Act to withhold records or information compiled for law enforcement purposes only to the extent that the production of the law enforcement records or information could reasonably be expected to interfere with enforcement proceedings, AS 40.25.120(a)(6)(A), or otherwise comes within the exemptions specified by the Act. This exemption would often preclude access to records of ongoing investigations. Due process consider-

ations, or other rules governing specific investigations, may provide a person or entity engaged in an ongoing dispute or investigation with a public agency a right to obtain records. This may implicate AS 40.25.122, which provides that access to records of an agency by one who is engaged in litigation or enforcement proceedings involving the agency should seek disclosure in accordance with the rules of procedure applicable in a court or an administrative adjudication. But see, *Copeland v. Ballard*, 210 P.3d 1197 (Alaska 2009) (DEC held to have violated intervenor appellants’ due process rights under Alaska Const. art. I, §7, by predicating their request for relevant records on completion of those records by the agency, and by dismissing them from the appeal when they did not pay preparation costs for the agency’s record).

#### 2. Rules for closed investigations.

Agency records are presumptively open unless subject to an exemption as suggested in the preceding section, and if the justification for withholding is no longer present—for example, if the risk of interfering with an ongoing investigation is eliminated or minimized once an investigation is closed—the records should be made available absent another applicable privilege or exemption.

### C. Bank records.

Bank examiners are prohibited from disclosing information they obtain about banks’ assets and liabilities, except to the Department of Commerce, Community, and Economic Development, AS 06.01.015. Records of the Department of Commerce, Community, and Economic Development obtained through the administration of laws governing examinations of financial institutions is confidential, not subject to subpoena, and may be revealed only with the consent of the Department. AS 06.01.025. Bank records pertaining to depositors and customers are confidential, with certain exceptions, including when disclosure is required by court order, or by federal or state law or regulation, or authorized by the customer. AS 06.01.028. Similarly, trust company records relating to customers are confidential, with certain exception including when disclosure is compelled by a court or administrative order, or required by federal or state law, or authorized by the customer. AS 06.26.610.

Records of the Commercial Fishing and Agricultural Bank (CFAB) that are identified with, or identifiable as being derived from the records of, a specific borrower, member of the bank, or applicant for a loan are confidential and may not be disclosed except under circumstances specified in the statute (including for example, pursuant to court order, or to another lender or bank checking credit). Other bank records “may be kept confidential by the bank.” AS 44.81.260. Legislative auditors may not disclose information acquired during the course of an audit of the bank concerning the particulars of the business or affairs of a borrower of the bank or another person. AS 44.81.280.

### D. Budgets.

There is no exception in the Public Records Act restricting access to budgets, and the budgets of various governmental units will often be among the documents the public is most interest in seeing. Certain documents generated in the budget process, however, may be privileged. In *Capital Information Group v. Office of the Governor*, 923 P.2d 29 (Alaska 1996), the Alaska Supreme Court dealt with the trial court’s denial of two sets of documents sought by the Capital Information Group (“CIG”), a news organization that publishes periodicals describing the activities of the Alaska state government. The first consisted of budget proposals sent from each executive department commissioner to the Office of Management and Budget, and the second, each department’s proposals for new legislation sent to the governor’s legislative liaison. In each case, the requests were denied on the grounds that the documents were protected by the deliberative process privilege. The trial court required the state to submit the records requested by CIG for *in camera* review, and thereafter granted the state’s motion for summary judgment based on the deliberative process privilege.



In *CIG*, the Alaska Supreme Court found that the legislative proposals at issue were exempt from disclosure pursuant to the deliberative process privilege. The deliberative process privilege is discussed in more detail in section (Open Records) I.B.1.b. It said they were pre-decisional, and that arguments that they were not, because they were a one-way communication, were without merit because this did not mean that they were not deliberative. The court said that the privilege is meant to further candor and the giving of advice or opinion to the chief executive, and the governor need not respond to a document for candor to be desirable.

By contrast, the court said that the budget impact memoranda that CIG sought, which were documents required by a specific state statute to be sent to the Office of Management and Budget, were not exempt from disclosure under the deliberative process privilege. The statute provides that these documents and other related documents are “public information” after the date they are forwarded. AS 37.07.050(g). Nonetheless, the court found that the budget impact memoranda met the threshold requirements for the deliberative process privilege. They were pre-decisional because they were submitted before the governor made his final determinations as to his proposed budget. They were deliberative because they were meant to be, and clearly were, a direct part of the deliberative process, allowing the governor to hear the needs and opinions of each of the agencies that needed to be accommodated in the budget. The court said that since the documents were pre-decisional and deliberative, it would normally proceed to question whether the demonstrated need for disclosure outweighed the government’s interest in confidentiality. However, it found that in this case the legislature had already weighed those interests and resolved them in favor of public disclosure. The court found particularly compelling the fact that the document itself was created as a result of a legislative requirement, and that in mandating that the report be made and submitted to the OMB, the legislature had declared that the report should be public, implicitly determining that the need for public disclosure outweighed any risk to candor on the agency’s part. It said that this determination was entitled to significant weight, given the legislature’s constitutional power to allocate executive department functions and duties among the offices, departments and agencies of the state government.

Related to this, the Office of Management and Budget provides technical assistance to the governor and legislature on a variety of governmental matters including identifying long range goals and objectives, preparing a state comprehensive development plan and assisting with coordination in preparation of agency plans and programs, reviewing planning within state government as necessary for receipt of federal and other funds, and other functions. OMB must keep a complete file of internal audit reports resulting from its audits, and a complete file of the internal audit work papers and other related supportive material. Internal audit work papers and other related supportive material are confidential, and internal audit reports are confidential until released by the governor. However, internal audit work papers and other related supportive material containing information, data, estimates, and statistics obtained during the course of an audit may be kept confidential only to the extent required by law applicable to the agency from which the material is or was obtained. AS 44.19.147.

#### **E. Business records, financial data, trade secrets.**

The records and financial data of private businesses are, like other documents and information maintained by private entities, not covered by the Public Records Act, with rare exceptions. However, when documents and information are submitted by private entities and individuals to government agencies, or for use in official proceedings, they are presumptively public to the extent they form part of the records of that agency. In a number of instances, the law provides for confidentiality of such documents and information submitted by private entities, particularly where such filings are required by law for purposes of regulatory oversight. Similarly, court rules provide for information and documents submitted for use in litigation to be exchanged confidentially, and at times used in court proceedings subject to protective

orders to permit their use under seal, where the court finds disclosure under the circumstances would be unnecessarily burdensome, disclose trade secrets, or otherwise meet the criteria specified by law. *See e.g.*, Alaska Civil Rule of Procedure 26(c)(7); Federal Civil Rule of Procedure 26(c)(7).

Virtually all information maintained by the Department of Revenue concerning charitable gaming operations is open to the public, given the public’s strong interest in this subject, and the need to keep watch over an industry historically the target of criminal elements. March 4, 1966 Op. Att’y Gen. No. 663-95-0496. The records of certain businesses are generally public because of the *quasi*- public or other unique status of the companies. For example, the books and records of electric and telephone utility cooperatives are generally open to members, but may be withheld when they concern specific matters that were prepared for or during an executive session and not subsequently made public by the cooperative. AS 10.25.235. Also, the definition of “public records” under Alaska law includes books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, that are developed or received by a private contractor for a public agency.

There are a number of specific statutory provisions authorizing confidentiality of data and documents submitted by businesses to regulators or other government agencies. Some of the more significant of these include information supplied to the Commissioner of Commerce, Community, and Economic Development by companies suspected of violating corporation laws, AS 10.06.818-.820 (for-profit corporations); and AS 10.20.655-.660 (non-profit corporations); information acquired by the Department of Community and Economic Development in the course of regulating Bidcos, AS 10.13.930 (and *see generally* AS 37.17.200-.390) (except where the Department determines that disclosure of non-examination information is “necessary to promote the public interest,” AS 10.13.930(a); various documents and information acquired by the state insurance director in connection with the examinations of insurance companies and agents, managers and promoters, AS 21.06.150(g); insurance holding companies, AS 21.22.020; various records of insurance contracts, commissions, investigations and adjustments, and other records required to be kept concerning licensees of the Division of Insurance, AS 21.27.350(e); reports concerning surplus lines insurance, AS 21.34.080; or concerning insurance fraud, AS 21.36.400; information submitted for examination by ratings organizations, AS 21.39.060(f); and examination reports and certain related information provided to the Alaska Insurance Guarantee Association, AS 21.80.110. A variety of documents and information concerning mining operations, as well as loans for mining operations, are confidential pursuant to AS 27.05.090, 27.09.030, 27.20.041, and 27.21.100. The availability or confidentiality of various information required to be filed concerning oil and gas wells, and related production and safety issues, is addressed in AS 31.05.035. Procurement information in connection with public contracting is generally public, AS 36.30.530, except as provided by law, such as allowances for confidentiality of technical data, proprietary data and trade secrets submitted by actual or prospective bidders or offerors, AS 36.30.040(b)(6), AS 36.30.140, and AS 36.30.230. Information in the possession of the Alaska Permanent Fund Corporation is public except that information which discloses the particulars of the business or affairs of a private enterprise or investor. AS 37.13.200. Confidentiality is provided for information obtained by the Department of Revenue in the course of performing audits relating to royalty and net profits under oil and gas contracts, agreements or leases, AS 38.05.036, and certain other information relating to exploration for development of oil and gas and other public resources, AS 38.05.180(x), AS 38.05.035(a)(9), AS 38.06.060. While information in the possession of the Alaska Railroad Corporation is presumptively public and open to inspection and copying at reasonable times, AS 42.40.220, matters of a privileged or proprietary nature may be withheld from public disclosure, including proprietary information associated with specific shippers, divisions and contract rate agreements. Certain documents and information submitted by regulated utilities through the Alaska Public Utilities

Commission or the Alaska Pipeline Commission, in connection with tariff filings or otherwise, may be privileged or confidential under certain circumstances, although the public generally has a presumptive right of access to records in the possession of these regulatory agencies. AS 42.05.671, AS 42.06.445. Tax returns and reports of businesses required to pay state taxes are generally confidential, but may be disclosed in connection with delinquencies. AS 43.05.230. Information submitted by tourism-related businesses to the State Department of Commerce, Community, and Economic Development that discloses the particulars of an individual business is confidential. AS 44.33.020(a)(36). Records of the Commercial Fishing and Agricultural Bank that are identified with, or identifiable as being derived from the records from a specific borrower, member of the Bank, or applicant for a loan are confidential and may not be disclosed except under certain circumstances specified in the statute, as are other specified CFAB bank records. AS 44.81.260. Information in the possession of the Department of Revenue that discloses the particulars of the business or affairs of a taxpayer is not a public record. AS 40.25.100. Information relating to secret processes or methods of manufacture discovered during investigations of actual or suspected pollution or contamination conducted by the State Department of Environmental Conservation are confidential. AS 46.03.020(6). Also, records of the DEC concerning air quality control, hazardous wastes, air pollution control and underground storage tanks, to the extent that they reveal trade secrets, production figures, sales figures, processes, production techniques and financial data that are entitled to protection under the Alaska Uniform Trade Secrets Act, or financial records submitted for purposes of regulation, are generally confidential. Alaska's Trade Secrets Act requires courts in actions brought under that statute to preserve the secrecy of alleged trade secrets by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding *in camera* hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval. AS 45.50.920.

Certain information submitted in connection with an application to the Department of Commerce, Division of Community and Business Development, for a loan from the Bulk Fuel Bridge Loan Revolving Fund is not confidential, and is available for public inspection upon request, including (1) a document that is already a public record, including deeds of trust, financing statements, warranty deeds, bills of sale, mortgages, liens, and vehicle titles; (2) general information regarding loans, including the original loan amount, loan terms, personal guarantees, and disbursement and repayment schedules; (3) insurance matters, including title insurance policies and correspondence with insurance companies or borrowers regarding losses, accident reports, and nonpayment of premiums; and (4) foreclosure and default proceedings. 3 AAC 161.090(a). Other information submitted is confidential and not subject to public disclosure: (1) personal and financial information, including income tax returns, financial statements, business income statements, pro forma profit and loss statements, credit information obtained directly from banks and other creditors, and reports obtained from consumer reporting agencies; (2) loan review staff notes containing information relating to creditworthiness of an applicant; (3) the payment history on a loan, unless the loan is in default. 3 AAC 161.090(b). Information not described in (a) or (b) may be subject to public disclosure. A request for disclosure must be made, and disclosure will be determined in accordance with 2 AAC 96. Upon receipt of a request for disclosure, the department will notify the loan applicant and other persons with a privacy interest in the request, to permit them to present reasons why the requested information should not be disclosed. 3 AAC 161.090(c).

The same is true with respect to information submitted to the Department of Commerce, Division of Investments for a Capstone Avionics Loan. 3 AAC 75.075(a), (b), (c).

A renewable energy grant application and other materials submitted to the Alaska Energy Authority under AS 42.45.045 and 3 AAC 107.600—3 AAC 107.695 are subject to disclosure under AS 40.25.100—40.25.295, the Alaska Public Records Act, and 2 AAC 96, unless the

Authority determines that the material is protected from disclosure under AS 40.25.120. 3 AAC 107.630(a). A person submitting a grant application may request that the Authority keep certain information confidential. The request must (1) clearly designate the specific information to be kept confidential; and (2) specifically describe the basis for asserting that the information is protected from disclosure under AS 40.25.120; if the person believes the information is protected as a trade secret or business proprietary information, the description must include analysis of whether the person's commercial privacy interest in protecting the information from disclosure outweighs the public interest in obtaining the information. 3 AAC 107.630(b). If the Authority receives a public records request and determines the information requested is protected from disclosure under AS 40.25.120, the authority will not release the information except to Energy Authority personnel and contractors for purposes of evaluating the person's application. If the Authority determines the information may not be protected from disclosure under AS 40.25.120, the Authority will notify the person submitting the information, who is responsible at the person's own expense for seeking judicial relief or taking other action necessary to protect the material from disclosure under AS 40.25.100—40.25.295.

### **F. Contracts, proposals and bids.**

The State Procurement Code provides that procurement information is public except as otherwise provided by law, AS 36.30.050, and provides instructions concerning the confidentiality of certain data and documents submitted in connection with bids, as well as provisions governing the timing of release of information submitted in connection with bids and proposals, AS 36.30.040(b)(6), AS 36.30.140, AS 36.30.240, information that a bidder or offeror may be required to supply to show that it qualifies as a "responsible bidder." AS 36.30.360. The Alaska Land Act provides that the Division of Lands must keep confidential, upon request of the person supplying it, certain specified information supplied in connection with a sale, lease or other disposal of land by competitive bidding, and other related information. *See* AS 38.05.035(a)(9). Contracting by the Alaska Railroad Corporation is governed largely by its own regulations, and while information in possession of the Alaska Railroad Corporation is presumptively public and open to inspection and copying at reasonable times, matters of a privileged or proprietary nature may be designated by rule to be withheld from public disclosure. AS 42.40.220.

### **G. Collective bargaining records.**

Certain records relating to collective bargaining between public school districts and public school teachers must be made available to the public, including initial proposals, last-best-offer proposals, tentative agreements before ratification, and final agreements reached by the parties. AS 23.40.235.

### **H. Coroners reports.**

The coroner, upon receiving the report of a medical examiner, can either order an inquest, or enter an order dispensing with an inquest and record the death certificate. When it appears, from whatever source, that a death was by suicide or resulted from criminal conduct, the coroner must conduct an inquest by jury (unless a grand jury is looking into the death). The coroner's jury, after a hearing, must give a written verdict, signed and setting out the name of the deceased, when, where and by what means the deceased died, and, if the person died as a result of criminal conduct, who the jury believes is guilty. AS 09.55.062-.069. The statute does not address whether the coroner's inquest is confidential or public, so presumably it is public pursuant to AS 40.25.110-.125.

### **I. Economic development records.**

Various programs exist to promote economic development through government agencies. Provisions concerning access to or confidentiality of documents submitted to or generated by such agencies in connection with these programs is addressed in a number of sections of this outline. Among these are, e.g., sections II. B 6(b) and II. B. 23(d),

addressing Bidcos (business and industrial development corporations), sections II.B.28, addressing the Alaska Industrial Development Authority, and section II.B.27(e), addressing tourism data.

## J. Election records.

### 1. Voter registration records.

A master register of all those registered to vote must be maintained by the director of the Division of Elections, AS 15.07.120, and in addition official registration lists must be prepared before each election showing those eligible to vote in each precinct at the election. AS 15.07.125. The register must be updated periodically to delete those who have died or not voted recently, AS 15.07.130, and to add information supplied by municipalities showing who has voted. AS 15.07.137. All of these records are presumptively public and are in fact available. However, the following information set out in state voter registration records is confidential and is not open to public inspection: the voter's age or date of birth; Social Security number, driver's license number; voter identification number; place of birth and signature. In addition a voter may elect in writing to keep the voter's residential address confidential and not open to public inspection if the voter provides a separate mailing address. Information may be released with consent of the voter, pursuant to court order, or in certain other limited cases. AS 15.07.195.

### 2. Voting results.

When the count of ballots is completed, and in no event later than the day after the election, the election board shall make a certificate in duplicate of the results. To assure adequate protection the director shall prescribe the manner in which the ballots, registers, and all other election records and materials are thereafter preserved, transferred, and destroyed. AS 15.15.370. Upon completion of the state ballot counting review the director shall certify the results of that review. AS 15.15.450. If it is determined by recount that the plurality of votes was cast for a candidate, the director shall issue a certificate of election or nomination to the elected or nominated candidate as determined by the recount. If it is determined by the recount that a proposition or question should be certified as having received the required vote, the director shall so certify except that the lieutenant governor shall so certify if the proposition or question involves an initiative, a referendum, or a constitutional amendment. AS 15.20.490. The director of elections shall preserve all precinct election certificates, tallies, and registers for four years after the election. All ballots and stubs for elections other than national elections may be destroyed 30 days after the certification of the state ballot counting review unless an application for recount has been filed and not completed, or unless their destruction is stayed by an order of the court. All ballots for national elections may be destroyed in accordance with federal law. The director may permit the inspection of election materials upon call by the Congress, the state legislature, or a court of competent jurisdiction. AS 15.15.470.

## K. Gun permits.

Concealed Handgun Permits. The list of concealed handgun permittees, and all applications, permits and renewals are not public records, and may only be used for law enforcement purposes. AS 18.65.770.

## L. Hospital reports.

Confidentiality of licensing and administrative proceedings by the Department of Health and Social Services in connection with hospitals and other health care facilities is governed generally by AS 47.32.180. Also, state law establishes certain health care "review organizations," including the State Medical Board, hospital governing bodies and others, that are to gather and review information relating to the care and treatment of patients. The purposes for doing this include, among others, evaluating and improving health care, reducing morbidity or mortality, work or cost controls, developing professional standards and norms of care, and ruling on controversies and disputes

involving insurance carriers, licensing boards and others. All data and information acquired by a review organization must be held by it in confidence. However, information, documents or records otherwise available from original sources are not immune because they were presented during proceedings of a review organization. AS 18.23.030. Information and records obtained in the course of a screening investigation, evaluation, examination or treatment of patients under the state civil commitment statute are confidential. The patient or an individual to whom the patient has given written consent can obtain these records. AS 47.30.845. A statute enacted in 1990 governs "health maintenance organizations" that undertake to provide or arrange for basic health care services to enrollees on a prepaid basis. Records concerning these HMOs are public except for trade secrets, privileged, confidential commercial, or financial information as determined by the director, and information required on annual reports showing the number, amount and disposition of malpractice claims settled during the year by the HMO, AS 21.86.270, and information concerning malpractice claims settled. AS 21.86.100(b). Also, data or information provided to an HMO pertaining to the diagnosis, treatment or health of an enrollee or applicant is generally confidential. AS 21.86.280. Examination reports for HMOs are to be handled like others under this chapter.

## M. Personnel records.

Access to the personnel records of public employees is generally governed either by the basic public records act, AS 40.25.110 *et seq.*, subject to arguments based on constitutional privacy rights or local ordinances, or, for certain classes of state employees, by AS 39.25.080. AS 39 was amended in 1982. It previously provided that all information concerning public employees of the state was disclosable unless specifically exempted. The 1982 amendment reversed the presumption, and prohibits disclosure of personnel records of certain classes of employees except for their name, salary, job classification, and history. Applications are not disclosable.

Who is covered by AS 39.25.080? The question is important because the press has taken the position that if the employee is not specifically covered by the public employee act limitations referred to above, their records are presumptively subject to disclosure pursuant to the general public records law. Specifically, the press has argued that the limitations on access apply only to classified employees, and not to the exempt and partially exempt employees identified in other subsections of the law, as a matter of statutory construction. In 1986, the Supreme Court endorsed this position in *Doe v. Superior Court*, 721 P.2d 617 (Alaska).

Note that AS 39 only applies to state employees. Records concerning municipal employees are not exempt under Title 39, and courts have rejected attempts to apply the restrictions of Title 39 by analogy, or on equal protection grounds. See, e.g., *Anchorage Daily News v. Municipality of Anchorage, and Jack Chapman, Intervenor*, Case No. 3AN-85-1254 Civ. (Superior Court, 3rd Jud. Dist. at Anchorage) (1990 proceedings seeking access to personnel records of police officer who falsified employment application. Court ordered officer's entire personnel file turned over to newspaper, due to the circumstances of the case. Chapman's appeal was dismissed).

At least one superior court judge has held, in a civil suit against a state classified employee law enforcement officer who fatally shot a juvenile after a high speed chase, that AS 39.25.080 did not bar disclosure of personnel records to the plaintiff through the pretrial discovery process, and, given this, that press access to the records should also be allowed. *Estate of Jason P. Daniel v. Gressett, Anchorage Daily News, Intervenor*, Case No. 3AN-90-8291 Civ. (Superior Court, 3rd Jud. Dist. at Anchorage, Memorandum and Decision dated June 17, 1991). In both the *Chapman* and *Gressett* cases, the court allowed access to "personnel"-related information in the files of the Anchorage Police Standards Council, over objections that the regulations governing the Council specifically provide for confidentiality of such records. The *Daily News* argued that AS 40.25.120 provides for nondisclosure



based on other legal requirements only in the case of federal law and regulations, and state laws — not “state laws or regulation.” If it were otherwise, administrative agencies, and not the state legislature, would determine what should or should not be public. The courts concurred and ordered disclosure.

In *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976 (Alaska 1997), the Alaska Supreme Court upheld a ruling denying disclosure to a wildlife group of the names of employees and contractors involved in a wolf control program. The Court found that, under the circumstances, the presumptive right of access pursuant to the Public Records Act must yield to Alaska’s constitutional privacy provision, Art. I, sec. 22. It said the workers had a legitimate expectation that their names would not be revealed after they received credible threats of death or bodily injury from opponents of the program, and those seeking the records had not provided justification for overcoming this concern. 948 P.2d at 980. The Court noted that the agency might well have had to “bear a significant burden to show that the threats are both real and credible” if the group requesting the records had contested the existence or credibility of such threats, but it did not. *Id.* n. 5. The wildlife group also sought timesheets. The Court noted that the question whether time sheets are “state personnel records,” exempt from disclosure pursuant to AS 39.25.080 had not been considered before, and it construed the statute narrowly to mean that information, even in the personnel file, that tells little about the individual’s personal life, but instead simply describes employment status, does not fall within the exemption. *Id.* Since time sheets indicate merely the hours worked for a public employer, they are not subject to the confidentiality provisions of AS 39.25.080.

Significantly, in both *Rue* and *International Ass’n of Firefighters, Local 1264 v. Municipality of Anchorage and Anchorage Daily News*, 973 P.2d 1132, 1135 (Alaska 1999), the Court made clear that simply because documents or information may appear in, or be placed in, an employee’s personnel file, does not mean they are exempt as “personnel records.” The term “personnel record” is defined narrowly to include only information that reveals the details of an individual’s personal life.

Other decisions of the Alaska Supreme Court and superior courts have also liberally construed the right of access to records in various contexts to permit or require disclosure of personnel records in connection with alleged wrongdoing by public employees. See, for example, *Jones v. Jennings*, 788 P.2d 732 (Alaska 1990) (personnel file of police officer being sued by *pro se* litigant was required to be disclosed, subject to *in camera* inspection for redaction of sensitive personal information not needed by the plaintiff) and see *Ericson v. University of Alaska and Anchorage Daily News*, 23 Media Law Rptr. 1724 (Ak. Super. Ct., 3rd Jud. Dist. at Anchorage, 1994) (university required to disclose documents relating to termination of employment relationship with former athletic training arising from misconduct allegations, notwithstanding the university employee’s assertions of constitutional privacy interests and claiming the protection of AS 39.25.80, among other things). See also *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 595, n.13 (Alaska 1990) (Alaska Supreme Court stated that performance evaluations of public officials who exercise discretion in their duties are, as a matter of law, subject to release as public records).

### 1. Salary.

In *International Ass’n of Firefighters, Local 1264 v. Municipality of Anchorage and Anchorage Daily News*, 973 P.2d 1132 (Alaska 1999), the Alaska Supreme Court found that public employment salary information is not information of a personal nature and its disclosure is justified by the public interest. The union argued that municipal employees have a legitimate expectation of privacy in their names and salaries because that information is contained in their personnel files, and is intimate and sensitive information that reveals their financial status. The court said that even if salary information is included in employees’ personnel records, it is not sensitive or personal, and that in addition, as public employees, they have a reduced expectation of privacy in their salaries, which are clearly of legitimate public concern.

Because disclosure of their names and salaries does not violate their constitutional right to privacy, it also would not violate a municipal ordinance that allows disclosure that would not constitute an “unwarranted invasion of privacy,” like AMC 3.90.040(B). It rejected the argument that disclosure of salary information, including disclosure of employees’ names in conjunction with their salaries, violated employees’ constitutional or statutory rights to privacy, and held specifically that municipal employees do not have a reasonable expectation of privacy in their names and salaries. In *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997), the Supreme Court had noted that allowing access to “compensation authorized” for an employees “tells little about the individual’s personal life, but instead simply describes employment status.” It also noted that “courts in other states have found that payroll records, vacation, and sick leave attendance records are disclosable because they are not ‘private facts of a personal nature.’” *Id.*

### 2. Disciplinary records.

In *Alaska Dispatch v. Fairbanks North Star Borough and Joseph Miller*, 4FA-10-2886 Civ. (unpub. op., Super. Ct., 4th Jud. Dist., Fairbanks, Oct. 23, 2010), the Superior Court granted the press access under the state public records law to discipline-related records of a former borough attorney running for U.S. Senate who the records revealed snuck onto the computers of his public law office co-workers in order to rig a political poll, then lied about what he had done and attempted to cover it up. The borough’s ordinances prohibit release of material from employees’ personnel files, or disciplinary records, but the judge agreed with the Alaska Dispatch’s arguments that state law supersedes local ordinances if there is a conflict, and that state law requires a balancing of the public’s interest in disclosure against any government or individual privacy interests in secrecy. The Dispatch cited earlier decisions of the Alaska Supreme Court holding that a “personnel records” exception should be construed narrowly, and that those engaged in public service or seeking high office have diminished expectations of privacy. Miller argued that whether a document is or is not a public record should be determined only by the nature of the document, and its status at the time it is created, without regard to whether someone identified in the document later runs for Senate or otherwise becomes the subject of public interest. The court agreed with the Dispatch that the fundamental interest in having an informed electorate makes it appropriate to consider the individual’s present status, when a balancing of public and private interests is permissible. “Individuals who run for office expect that their past will be researched and revealed,” the judge stated, “and thereby lose their previously established expectation of privacy in those documents.”

### 3. Applications.

The state public records act contains no exception for job applications, so they would be presumptively open, like all other public records. However, the public records act exempts from its disclosure requirements documents made non-disclosable by other statutes. At least one statute exempts employment applications for certain state jobs, as discussed more fully in section II.B(24), makes employment applications and examination materials confidential, except as to the following information: 1) the names and position titles of all state employees; 2) the position held by a state employee; 3) prior positions held by a state employee; 4) whether a state employee is in the classified, partially exempt or exempt service; 5) the dates of appointment and separation of a state employee; and 6) the compensation authorized for a state employee. Supreme Court rulings in cases involving public records suggest support for provisions precluding access to employment applications and examination materials that constitute intimate details about work history. *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990), cited in *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997).

### 4. Personally identifying information.

In numerous instances catalogued in this outline, various pieces of personally identifying information are exempted from presumptive

disclosure requirements by virtue of specific statutory provisions. In general, where disclosure of personal information is not expressly exempted by a provision of the public records act or other authorities incorporated in it, the records are disclosable unless the information at issue is intimate and sensitive personal information and the individual's interest in privacy outweighs the public's interest in disclosure.

## 5. Expense reports.

No apparent exemption precludes access under the public records law to expense reports. Case law indicates the public's interest in access would generally outweigh privacy interests. Compare *International Ass'n of Firefighters, Local 1264 v. Municipality of Anchorage and Anchorage Daily News*, 973 P.2d 1132 (Alaska 1999), discussed in subsection M.1 above.

## 6. Other.

No additional relevant authorities.

## N. Police records.

Statutes requiring or authorizing the withholding of police records include the Public Records Act, the Criminal Justice Information Systems Privacy and Security Act (AS 12.62), and AS 28.15.151, dealing with drivers' records and traffic reports. *See also*, the provisions of Title 47 dealing with records pertaining to juveniles.

[These laws, and cases addressing these issues, are dealt with in the excellent and comprehensive survey of the law governing access to police records contained in the Nov. 25, 1994, Op. Att'y Gen. No. 663-93-0039 (referred to hereafter as "1994 Police Records AG Opinion."). While most of this remains applicable, some, particularly cites referring to reconfigured statutes dealing with children-in-need-of-aid and juvenile delinquency, have changed and the statutes themselves should always be consulted.]

Police records are specifically addressed in the Public Records Act, as a result of a 1990 amendment that added AS 40.25.120(6). This exception to the general public right to inspect public records provides that an agency may withhold:

Records or information compiled for law enforcement purposes, but only to the extent that the production of the law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings,

(B) would deprive a person of a right to a fair trial or an impartial adjudication,

(C) could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim or witness,

(D) could reasonably be expected to disclose the identity of a confidential source,

(E) would disclose confidential techniques and procedures for law enforcement investigations or prosecutions,

(F) would disclose guidelines for law enforcement investigation or prosecution if the disclosure could reasonably be expected to risk circumvention of the law.

The addition of subsection .120(6) (which mirrors the federal FOIA provisions for law enforcement records, and was substantially copied by subsequent amendment of the Anchorage Municipal Code) simply codified what was generally understood to be the prevailing common law, and was consistent with an earlier superior court case granting access to a police tape recording. *Anchorage Daily News v. Municipality of Anchorage*, 11 Media L. Rptr. 2173 (Alaska Super. Ct., 3rd Jud. Dist., April 26, 1985). There, the court ordered release of tape recorded conversations between a police officer and a municipal assembly member stopped for a traffic violation. The court stated that in order to construe the municipal ordinance exempting police records as be-

ing consistent with state law, police records must be disclosed, at least when a case is closed and in the absence of other circumstances that compel continued withholding, such as endangerment of witnesses and disclosure of confidential informants or investigative techniques.

In *Ramsey v. City of Sand Point*, 936 P.2d 126, 135 (Alaska 1997), a city police chief claimed that he was entitled to obtain, either through discovery or through the Public Records Act, all documents concerning the arrest or other police contact of the council members, the mayor, and the people who signed the petition to oust him as police chief. With respect to the Public Records Act aspect of the claim, the Court said the City was justified in withholding the documents pursuant to AS 09.25.120(a) [since renumbered as AS 40.25.120(a)], which allows anyone to inspect public records except "(6) records or information compiled for law enforcement purposes, but only to the extent that the production of the law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim or witness . . ." The Court said citizens of the community had a reasonable expectation that their contacts with the police department will not be publicly disclosed simply because they signed a petition. *Id.*

Records that are otherwise public remain subject to disclosure when they are used for, included in, or relevant to law enforcement proceedings and other litigation. AS 40.25.122. This clarification was added in 1990 to avoid repetitions of problems such as occurred when the Department of Law took custody of public records of the Department of Administration during an investigation of Sheffield administration procurement practices, and withheld them because they were allegedly part of a law enforcement investigation.

The Alaska Rules of Court were revised in 1989 to exempt search warrants and related affidavits, receipts and inventories from disclosure until after an indictment is returned, except upon a showing of good cause, and to make these documents presumptively public after charges are filed. Ak.R.Cr.P. 37(e).

One very important *caveat* qualifies everything stated in this section about access to police records, and potentially limits access to the individual items discussed below that is the effect of the Criminal Justice Information System Privacy and Security Act. *See* AS 12.62. This statute, and regulations adopted pursuant to it, *see* 13 AAC 68.005 - .905, significantly limit access to criminal justice information maintained on government computers, but not otherwise.

## 1. Accident reports.

Accident reports, like other documents in the custody or control of law enforcement or other public officials, should be disclosable pursuant to the state Public Records Act, but as a practical matter will most likely be withheld or redacted at least initially, under one or more of the provisions of AS 40.25.120(a)(6), especially (a)(6)(A), regarding withholding of records that could reasonably be expected to interfere with enforcement proceedings, or perhaps (6)(C), that permits withholding when disclosure could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness.

## 2. Police blotter.

Police blotters, like other documents in the custody or control of law enforcement or other public officials, should be disclosable pursuant to the state Public Records Act, but as a practical matter will most likely be redacted, under one or more of the provisions of AS 40.25.120(a)(6), especially (a)(6)(C), that permits withholding when disclosure could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness, or perhaps (a)(6)(A), regarding withholding of records that could reasonably be expected to interfere with enforcement proceedings. Also, documents are sometimes withheld (improperly, since only redactions should be warranted) allegedly based on compliance with statutes protecting the rights of victims. For example, the portion of the records of a court or law enforcement agency that contains

the name of the victim of an offense under AS 11.41.300(a)(1)(c) or 11.41.410-11.41.460 must be withheld from public inspection, except with the consent of the court in which the case is or would be prosecuted; and is not a public record under AS 40.25.110 et seq., the Public Records Act. 12.61.140(a).

### 3. 911 tapes.

Although compliance by law enforcement agencies is uneven, 911 tapes should be presumptively disclosable under the Public Records Act. The Legislature has considered a bill that would exempt 911 tapes from coverage of the Public Records Act, but as of publication of the 2011 edition, had failed to pass it.

### 4. Investigatory records.

#### a. Rules for active investigations.

Law enforcement records that could reasonably be expected to interfere with enforcement proceedings may be withheld from disclosure under the Public Records Act. AS 40.25.120(6)(A).

#### b. Rules for closed investigations.

Since law enforcement records are exempt from disclosure “only to the extent” that they could reasonably be expected to interfere with enforcement proceedings, records relating to closed investigations would presumably be open unless they are another exemption applies. AS 40.25.120(6)(A).

### 5. Arrest records.

Records of arrests in general are presumptively available. They are not specifically exempt under the public records act, AS 40.25.120(6) [A], and the statute authorizing or requiring withholding of much information contained in the Criminal Justice Information System (CJIS) expressly excludes from its reach information that an individual is currently under arrest for or is charged with a crime, and prosecution is under review or has been deferred by agreement, a warrant exists for the person’s arrest, or less than a year has elapsed since the date of the arrest or filing of the charges. AS 12.62.900(14). See generally, section II.B.7.

### 6. Compilations of criminal histories.

A detailed discussion of Alaska’s statutes and regulations governing access to information in criminal justice information systems is found in [Open Records] section II.B.7.

### 7. Victims.

The portion of the records of a court or law enforcement agency that contains the name of the victim of an offense under AS 11.41.300(a)(1)(c) or 11.41.410-11.41.460 must be withheld from public inspection, except with the consent of the court in which the case is or would be prosecuted; and is not a public record under AS 40.25.110 et seq., the Public Records Act. 12.61.140(a). In all written court records open to public inspection, the name of the victim of an offense under AS 11.41.300(a)(1)(c) or 11.41.410 -11.41.460 may not appear. Instead, the victim’s initials shall be used. However, a sealed record containing the victim’s name shall be kept by the court in order to ensure that a defendant is not charged twice for the same offense. AS 12.61.140(b).

### 8. Confessions.

Confessions, like other documents in the custody or control of law enforcement or other public officials, may be disclosable pursuant to the state Public Records Act, but as a practical matter will most likely be obtained from court records when they are filed in connection with filed criminal cases because until they are filed, or the case is closed, it is most likely that a confession may be exempt from disclosure under one of the provisions of AS 40.25.120(a)(6), especially (a)(6)(A), that production of these records could reasonably be expected to interfere with enforcement proceedings, or perhaps that disclosure could reasonably be expected to constitute an unwarranted invasion of the

personal privacy of a suspect, defendant, victim, or witness, (6)(C).

### 9. Confidential informants.

Law enforcement records may be withheld from disclosure under the Public Records Act to the extent that they could reasonably be expected to disclose the identity of a confidential source. AS 40.25.120(6)(D).

### 10. Police techniques.

Law enforcement records may be withheld from disclosure under the Public Records Act to the extent that they would disclose confidential techniques and procedures for law enforcement investigations or prosecutions. AS 40.25.120(6)(E), or would disclose guidelines for law enforcement investigation or prosecution if the disclosure could reasonably be expected to risk circumvention of the law. S 40.25.120(6)(F).

### 11. Mug shots.

There is no apparent reason why mug shots should not be disclosable pursuant to the state Public Records Act, except to insofar as a records custodian can successfully argue the applicability of one of the provisions of AS 40.25.120(a)(6), such as that production of these records could reasonably be expected to interfere with enforcement proceedings (6)(A), or could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness, (6)(C). Note that in the context of a challenge to the Alaska Sex Offender Registry Act, with respect to the state’s explicit constitutional right of privacy, the Alaska Court of Appeals noted the constitutional protection of an individual’s privacy depends on the factual context and the competing interests between society and the individual. The court said that at least in the context of convicted sex offenders, the offender’s assumed subjective expectation of privacy in biographical information gathered and released pursuant to the statute must yield to society’s public safety interest. *Patterson v. St.*, 985 P.2d 1007 (Alaska App. 1999). The court found that any subjective expectation of privacy held by the sex offenders in matters already of public record, such as details of conviction or date of birth, or in his physical appearance — as represented by his photograph, or in his employer’s address, was not an expectation society would recognize as reasonable. *Id. Comp. Doe v. State*, 183 P.3d 999, 1002 (Alaska 2008) (referencing posting of convicts’ photos on internet as part of ASORA implementation).

### 12. Sex offender records.

The Alaska Sex Offender Registration Act (ASORA) requires persons convicted of sex offenses or child kidnapping to register and periodically re-register with the Alaska Department of Corrections, the Alaska State Troopers, or local police, and to disclose detailed personal information, including that specified in AS 12.63.010, some of which is not otherwise public. The Department of Public Safety is required to maintain a central registry of sex offenders and child kidnappers. AS 18.65.087. Most of the disclosed information is publicly disseminated and is published by the state on the internet. Specifically, AS 18.65.087(b) provides that information about a sex offender or child kidnapper that is contained in the central registry, including sets of fingerprints, is confidential and not subject to public disclosure except as to the sex offender’s or child kidnapper’s name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements for reporting residency and other information, or cannot be located. The department, at least quarterly, shall compile a list of those persons with a duty to register under who have failed to register, whose addresses cannot be verified, or who otherwise cannot be located. The department shall post this list on the Internet and request the public’s assistance in locating these persons. 18.65.087(g). The name, address, and other identifying infor-



mation of a member of the public who makes an information request under this section is not a public record under the Public Records Act. AS 18.65.087(e).

In general, courts have upheld ASORA against legal challenges. In *Patterson v. St.*, 985 P.2d 1007 (Alaska App. 1999), the appeals court ruled that the state's sex offender registration program does not violate federal or state constitutional rights of privacy. The court in *Patterson* noted that federal constitution's implicit right of privacy does not attach to matters already within the public domain, as information the public can access under the statute "is already in large part." 985 P.2d at 1016. With respect to the state's explicit constitutional right of privacy, the court noted the constitutional protection of an individual's privacy depends on the factual context and the competing interests between society and the individual, and that at least in the context of convicted sex offenders, the offender's assumed subjective expectation of privacy in biographical information gathered and released pursuant to the statute must yield to society's public safety interest. *Id.* The court found that any subjective expectation of privacy held by the sex offenders in matters already of public record, such as details of conviction or date of birth, or in his physical appearance — as represented by his photograph, or in his employer's address, was not an expectation society would recognize as reasonable. *Id.*

However, courts have found the registration requirement unconstitutional with respect to two classes of convicted offenders. First, ASORA violated the due process rights of sex offenders and child kidnappers who were given a suspended imposition of sentence (SIS) by a court, and successfully made a substantial showing of rehabilitation to get through their probationary period without being sentenced, so that their convictions were set aside, before the effective date of ASORA, could not be required to register under the Act. *Doe v. State*, 92 P.3d 398 (Alaska 2004). The court said there is a significant difference between a public record that continues to memorialize a conviction after it is set aside and a state-sponsored Internet site that displays the information ASORA requires. The difference is not merely that the state has improved access to public information it had a legitimate right to gather at the time a defendant was convicted. The difference instead lies in the extent and nature of information to be divulged and the offender's duty to keep it updated. To advance ASORA's purposes effectively, the registry must include enough information to enable the public to reduce the danger registrants are assumed to pose. ASORA therefore requires a sex offender to disclose and update extensive personal information. Much of this information was not otherwise available to the public or the state when the conviction was set aside and much of it would not otherwise be presently available to either the public or the state. Most of the information about Doe that was to have been published in the ASORA registry was not in the public record when Doe was convicted or when the court set aside his conviction and ordered him discharged. (The Legislature subsequently amended ASORA to make it applicable even to offenders whose convictions have been set aside.)

Second, under Alaska's constitution, ASORA's registration and publication requirements cannot be applied to persons who committed their crimes before ASORA became effective. See also, *Doe v. State*, 189 P.3d 999, 1011 (Alaska 2008). The Alaska Supreme Court ruled that ASORA is basically punitive in nature, so that applying its new requirements to those convicted and sentenced before it went into effect violated the ban on retroactive punishment embodied in the "Ex Post Facto clause" of the Constitution. The Ninth Circuit Court of Appeals had reached the same conclusion analyzing the law under the Ex Post Facto clause of the federal constitution, but the U.S. Supreme Court reversed that decision. See *Doe I v. Otte*, 259 F.3d 979 (9th Cir. 2001), *rev'd. sub nom.*, *Smith v. Doe*, 123 S.Ct. 1140 (2003). Noting that it has the authority and, when necessary, duty to construe the provisions of the Alaska Constitution to provide greater protections than those arising out of the identical federal clauses, the Alaska Supreme Court construed analogous provision of the state constitution as providing more protection in this context than the federal constitution does. The U.S. Supreme Court had held the statute was not punitive,

notwithstanding publication of the registry on the Internet. 123 S.Ct. at 1150. ("The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything that could have been designed in colonial times. . . . Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.").

The Alaska Supreme Court, however, found that whatever the intent of the Alaska Legislature in passing ASORA, the effects of the law were clearly punitive. It analyzed the same seven factors the US Supreme Court did, but reached a different conclusion in doing so. With respect to one factor, for example, the Alaska court found "ASORA requires release of information that is in part not otherwise public or readily available. Moreover, the regulations authorize dissemination of most ASORA registration information 'for any purpose, to any person.' Taken in conjunction with the Alaska Public Records Act, ASORA's treatment of this information, confirmed by the regulations, seems to require that the information be publicly available. By federal law, it is disseminated statewide, indeed worldwide, on the state's website. There is a significant distinction between retaining public paper records of a conviction in state file drawers and posting the same information on a state-sponsored website; this posting has not merely improved public access but has broadly disseminated the registrant's information, some of which is not in the written public record of the conviction. As the Alaska Court of Appeals noted, 'ASORA does provide for dissemination of substantial personal and biographical information about a sex offender that is not otherwise readily available from a single governmental source.' We also recognized in *Doe A* that several sex offenders had stated that they had lost their jobs, been forced to move from their residences, and received threats of violence following establishment of the registry, even though the facts of their convictions had always been a matter of public record. We therefore conclude that the harmful effects of ASORA stem not just from the conviction but from the registration, disclosure, and dissemination provisions." 189 P.3d at 1011.

### 13. Emergency medical services records.

While many records relating to emergency management services provided by various government agencies are presumptively available pursuant to the general provisions of the Public Records Act, there are significant restrictions on availability of such records arising from the 1996 Health Insurance Portability and Accountability Act ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 42 U.S.C. and 29 U.S.C.); note also that AS 40.25.120(a)(3) exempts "medical and related public health records."

### O. Prison, parole and probation reports.

1. *Pre-sentence reports.* It is possible that a reporter might argue the pre-sentence reports should be available as public records, in light of the Ninth Circuit's decision recognizing a constitutional right of access to pre-sentence reports prepared for a judge before sentencing. See *United States v. Schlette*, 842 F.2d 1574 (9th Cir. 1988). However, note that Alaska rules of court provide that any information contained in a pre-sentence report is, by rule, confidential. Alaska R. Crim. P. 32.1(b)(3).

2. *Pre-parole reports.* In order to determine whether a prisoner is suitable for discretionary parole, the parole board must consider a pre-parole report. This report includes the pre-sentence report to the sentencing court, recommendations made by the sentencing court, by the prosecuting attorney, by the defense attorney, and statements made by the victim or the prisoner at sentencing, the prisoner's institutional history, recommendations of the correctional facilities staff, and other things. The pre-parole report for the most part is available to pretty much everyone but the public: It may be disclosed to the parole board, the sentencing judge, the prosecuting and defense attor-

neys, the prisoner, the prisoner's attorney, the attorney for the parole board, the staff of the board, and others who have access to parole board information. Otherwise, however, it is confidential. It is possible that a reporter might argue the pre-parole reports should be available notwithstanding the confidentiality provision of AS 33.16.170, in light of the Ninth Circuit's decision recognizing a constitutional right of access to pre-sentence reports prepared for a judge before sentencing. See *United States v. Schlette*, 842 F.2d 1574 (9th Cir. 1988). However, this will not necessarily be the case since pre-sentence reports are prepared by employees of the judicial branch, and solely for use by the sentencing judge, and the right of access analysis has been applied generally to judicial proceedings and documents. But see, D.Ak. Crim.R.32.2. The parole board is an executive branch agency, and the reports and records of such agencies are traditionally analyzed in terms of public records laws where such confidentiality provisions are recognized and honored as exceptions to the extent the legislature provides. If the question arises, it will probably need to be answered by the courts. Subject to any constitutional issues Alaska courts have not addressed yet, release of state pre-sentence reports is governed by Alaska Criminal Rule 32.1(b). See generally, 1994 Police Records AG Opinion, § F.2.

3. *Convict photographs.* A victim is entitled upon request to a photograph of an offender who is released or escapes from incarceration, but must keep it for personal use only and cannot distribute it, according to AS 33.30.013(e). However, the limitation on use or access set forth in this statute may be open to question, since the Alaska Supreme Court has recognized in other contexts that convicts have no reasonable expectation of privacy in photographs of them in connection with their status as convicted offenders. E.g., in the context of a challenge to the Alaska Sex Offender Registry Act, with respect to the state's explicit constitutional right of privacy, the Alaska Court of Appeals noted the constitutional protection of an individual's privacy depends on the factual context and the competing interests between society and the individual. The court said that at least in the context of convicted sex offenders, the offender's assumed subjective expectation of privacy in biographical information gathered and released pursuant to the statute must yield to society's public safety interest. *Patterson v. St.*, 985 P.2d 1007 (Alaska App. 1999). The court found that any subjective expectation of privacy held by the sex offenders in matters already of public record, such as details of conviction or date of birth, or in his physical appearance — as represented by his photograph, or in his employer's address, was not an expectation society would recognize as reasonable. *Id. Comp. Doe v. State*, 183 P.3d 999, 1002 (Alaska 2008) (referencing posting of convicts' photos on internet as part of ASORA implementation).

4. *Prisoner data.* AS 33.30.211 provides that the commissioner of Department of Corrections shall adopt regulations providing for the confidentiality of documents that are transmitted to the correctional facility with a prisoner, including the pre-sentence report, and other information of the probation office or of the court that may affect the person's rehabilitation. Presumably, this confidentiality provision cannot supersede the right of access the public might have to documents that are otherwise public, pursuant to the *Schlette* case, or other provisions of law.

5. *Monitored phone calls.* Prison officials may monitor prisoners' telephone calls to preserve security and order, and to protect the public, if they post a warning informing the prisoner that this may be done. Recordings of prisoners' telephone calls are confidential. AS 33.20.231(c).

## P. Public utility records.

1. *Cooperative records.* The books and records of electric and telephone utility cooperatives, generally open to members, may be withheld when they concern specific matters that were prepared for or during an executive session and not subsequently made public by the cooperative, and the cooperative may also withhold the identity of public information that was referenced during the executive session.

AS 10.25.235.

2. *Alaska Public Utilities Commission Act.* The Alaska Public Utilities Commission Act provides for public access to records in the possession of the commission. The commission may, by regulation, classify records submitted to it by regulated utilities as privileged records, not open to inspection by the public. However, if a record involves an application or tariff filing pending before the commission, the commission shall release the record for the purpose of preparing for or making a presentation to the commission in the proceeding if the record or information derived from the record will be used by the commission in the proceeding. A person objecting to public disclosure of information contained in a record submitted under the Public Utilities Act or of information obtained by the commission under the provisions of the Act must do so in writing and state the grounds for the objection. When an objection is made the commission may not order the information withheld from the public unless the information adversely affects the interest of the person making the written objection and disclosure is not required in the interest of the public. AS 42.05.671. The APUC in 1992 adopted new regulations governing access to records. 3 AAC 48.040-.100. The Alaska Supreme Court has stated that, while the requirement of the statute that information not be withheld if "required in the interest of the public" will normally prevent a conflict with constitutional due process requirements, if a conflict nevertheless occurs, the privilege of access afforded by the statute must be narrowly construed so that the constitutional due process rights of the utilities control.

3. *Pipeline commission.* Records in the possession of the Alaska Pipeline Commission are presumptively open to the public. One who objects to the public disclosure of information contained in a record filed pursuant to the pipeline act or to disclosure of information obtained by the commission under the provisions of the act must do so in writing, stating the grounds for the objection. When an objection is made, the commission shall order the information withheld from public disclosure if the information adversely affects the interest of the person making written objection and disclosure is not required in the interest of the public. The commission may, by regulation, classify records submitted to it by regulated pipeline carriers or pipelines as privileged records that are not open to public inspection, provided that records that would be used in proceedings concerning tariffs must be made available. In such a case, the person who filed the otherwise confidential record must be given notice and an opportunity to object before it is released. AS 42.06.445.

## Q. Real estate appraisals, negotiations.

### 1. Appraisals.

Absent express provisions making certain kinds of appraisals done by or for, or submitted to, public agencies, can be presumed to be public pursuant to the Public Records Act. Some statutes and regulations allow for appraisals, as well as other similar documents, to be withheld. For example, in order to promote the purposes of the Alaska Industrial Development Authority, unless the records or information were a matter of public record before submittal to the authority, a variety of records and information, including appraisals (except the name of the appraiser, the date of the appraisal, and the fair market value determined for the property appraised) must be kept confidential if the person supplying the records or information or the project, bond, loan, or guarantee applicant or borrower requests confidentiality. AS 44.88.215(a). Information compiled by the authority from information described in (a) of this section shall be kept confidential unless disclosure is authorized by the person supplying the information and by the project, bond, loan, or guarantee applicant or borrower. AS 44.88.215(b). And, on a determination that it is in the best interest of the University of Alaska or on the request of the person who has provided the information, the president of the university may keep confidential appraisals, as well as other financial information and records, relating to university land or an interest in university land and considered for, offered for, or currently subject to disposal or a

contract. AS 14.40.367(3). Provisions relating to confidentiality with respect to sales of public lands and resources are note in section [Open Records] §II.B.2(23).

## 2. Negotiations.

There is no apparent generic exemption from Public Records Act provisions for documents relating to real estate negotiations, though various statutes and regulations may permit confidential treatment in particular context, such as applications for bank loans, etc.

## 3. Transactions.

Recorders shall permit memoranda, transcripts, and copies of the public records in their offices to be made by photography or otherwise for the purpose of examining titles to real estate described in the public records, making abstracts of title or guaranteeing or insuring the titles of the real estate, or building and maintaining title and abstract plants, subject to reasonable rules and regulations as are necessary for the protection of the records and to prevent interference with the regular discharge of the duties of the recorders and their employees. AS 44.25.120(c). There is no apparent generic exemption from Public Records Act provisions for documents relating to real estate transactions, though various statutes and regulations may permit confidential treatment in particular context, such as applications for bank loans, etc.

## 4. Deeds, liens, foreclosures, title history.

Recorders shall permit memoranda, transcripts, and copies of the public records in their offices to be made by photography or otherwise for the purpose of examining titles to real estate described in the public records, making abstracts of title or guaranteeing or insuring the titles of the real estate, or building and maintaining title and abstract plants, subject to reasonable rules and regulations as are necessary for the protection of the records and to prevent interference with the regular discharge of the duties of the recorders and their employees. AS 44.25.120(c).

## 5. Zoning records.

The Public Records Act contains no exemption for zoning records, so they are presumptively available to the public on the same terms as other records of public agencies.

## R. School and university records.

### 1. Athletic records.

Exemptions from confidentiality requirements of the federal law protecting privacy rights of students—the “Buckley Amendment,” or Family Educational Privacy Act of 1972, *see* 20 U.S.C. § 1232g—permit disclosure of certain information relating to student athletes, and other provisions allow voluntary disclosure, for use in athletic event programs, press releases, and the like. In *Ericson v. University of Alaska and Anchorage Daily News*, 23 Media Law Rptr. 1724 (Ak. Super. Ct., 3rd Jud. Dist. at Anchorage, 1994), the University of Alaska Anchorage was required to disclose documents relating to termination of employment relationship with former athletic training arising from misconduct allegations, notwithstanding the university employee’s assertions of constitutional privacy interests and claiming the protection of AS 39.25.80, among other things.

### 2. Trustee records.

All records of meetings and proceedings of the University of Alaska Board of Regents must be open to inspection by the public and press, and findings of an executive session must be made part of the record of proceedings. AS 14.40.160(a). The Board of Regents of the University of Alaska shall supervise and adopt procedures for the operation and implementation of the Public Records Act by the University of Alaska. AS 40.25.123(d). Notwithstanding other provisions of this section to the contrary, the Board of Regents of the University of Alaska may establish reasonable fees for the inspection and copying of public re-

cords, including record searches. AS 40.25.100(f).

## 3. Student records.

Educational institutions are legally required to maintain many student records as confidential, in particular those covered by the federal “Buckley Amendment,” or Family Educational Privacy Act of 1972. *See* 20 U.S.C. § 1232g. Alaska’s Public Records Act expressly exempts public records from the requirement that they be made available on request “to the extent the records are required to be kept confidential under 20 U.S.C. 1232g and the regulations adopted under 20 U.S.C.1232g in order to secure or retain federal assistance.” AS 40.25.120(a)(5). A number of documents relating to students do not fall within the restrictions of the Buckley Amendment, and, of course, most documents that relate to operations of school districts and the state university system are not protected student-specific records and are public. Litigation records, including records of settlements, which identify students and are otherwise public should not be withheld, and in any event appropriate redactions could be negotiated to permit the public disclosure of settlement terms and other evidence of operations of the governmental unit involved.

Matters involving consideration of government records that by law are not subject to public disclosure are properly considered in an executive session. So, for example, in an otherwise public hearing concerning discipline of a school teacher, a claim arising out of or relating to that teacher’s alleged improper handling of an IEP plan for an individual student would presumably be conducted in a closed session, and with a separate sealed record. A school district or school district employee with information that a student or employee of the district has acquired immune deficiency syndrome (AIDS) or the human immunodeficiency virus (HIV) must keep the information confidential except from public health officials and certain district personnel on a need-to-know basis. 4 AAC 6.150.

## 4. Other.

No additional relevant statutes or cases to report here.

## S. Vital statistics.

The general public records law specifically excepts vital statistics records, and says these “shall be treated in the manner required by AS 18.50.” It is unlawful for a person to permit inspection of, or disclose information contained in, vital statistics records, or to copy or issue a copy of all or part of such records, except as authorized by the statute or regulations. Notwithstanding AS 40.25.120, when 100 years have elapsed from the date of birth, or 50 years after a death, marriage, divorce, dissolution or annulment, these records become public. AS 18.50.310(a), (f).

### 1. Birth certificates.

When 100 years have elapsed from the date of birth, these records become public. AS 18.50.310(a), (f).

### 2. Marriage & divorce.

When 50 years have elapsed after a marriage, divorce, dissolution or annulment, these records become public. AS 18.50.310(a), (f).

### 3. Death certificates.

When 50 years have elapsed after a death, these records become public. AS 18.50.310(a), (f).

### 4. Infectious disease and health epidemics.

The Department of Health and Social Services may inspect health care records that would identify cancers, birth defects or infectious disease required to be reported, and may conduct research using such health care data. Data obtained or a records inspected under this section that identify a particular individual are confidential, and are not subject to inspection or copying under the public records act. AS 18.05.042.



## V. PROCEDURE FOR OBTAINING RECORDS

In 1990, substantial revisions were made to the Public Records Act, primarily to deal with access to electronic services and products, to address issues concerning fees, and to establish oversight of state agencies with respect to public access to information by the Telecommunications Information Council. Among other things, the amendments to the law at that time required the Telecommunications Information Council to adopt regulations for the operation and implementation of the Public Records Act by public agencies in the executive branch (except the Alaska Railroad Corporation). AS 40.25.123. New regulations governing public access to information maintained by state agencies were finally adopted by the TIC, effective November 6, 1994, as 6 AAC 96.100-.900. These new regulations replaced the state regulations governing access to information that had been adopted in 1982 by the Office of the Governor. The former regulations, found in 6 AAC 95.010-.900, were repealed in 1994 when the new regulations were adopted. As of January 2006, and acting under AS 44.62.125 (b) (6), the regulations attorney relocated former 6 AAC 96 to 2 AAC 96, and made conforming technical changes, to reflect Executive Order 113 (2005), which eliminated the Telecommunications Information Council and transferred its functions to the governor and to the Department of Administration. The history notes for provisions relocated to 2 AAC 96 carry forward the history from former 6 AAC 96.

These regulations in 2 AAC 96 apply to requests made to “a public agency” for the disclosure of public records, as well as to the format used and the fees charged by a public agency in providing or disclosing public records, and the electronic services and products, including software copyrights, that a public agency may provide to access public records. 2 AAC 96.100. The term “public agency” is defined in Chapter 96 of the Administrative Code to have the same meaning as that term is given in the Public Records Act, except that it is limited to public agencies in the executive branch of the state (other than the Alaska Railroad Corporation, the University of Alaska, and the legislative and judicial branches, each of which are authorized by law to adopt their own procedure for the operation and implementation of public access provisions). It should be borne in mind, then, that the following discussion of procedures for obtaining records comprises almost entirely an explanation of Title 2, Chapter 96 of the Administrative Code, and therefore only applies to the specified executive branch agencies of the state government. In addition, the regulations themselves provide that notwithstanding Chapter 96, a public agency may adopt its own procedures for administrative appeals of a public agency’s denial in whole or in part, of a public records request. This outline does not attempt to address any specific or separate procedures adopted by the excluded state agencies, municipalities, school boards or other public agencies covered by the Public Records Act, but not covered by these regulations, or any separate procedures for administrative appeals adopted by any particular agencies that differ from those set forth in Chapter 96.

### A. How to start.

#### 1. Who receives a request?

The Public Records Act is not specific about where requests must be made, other than it directs a public officer “having the custody of public records” to give copies upon request, and also indicates that public records of all public agencies are available for inspection “during regular office hours.” Regulations adopted by the state to govern records requests made of state agencies provide that requests for records of a state agency may be filed at the nearest office of the appropriate agency. 2 AAC 96.305. Addresses of state agencies’ offices are listed in the semiannual Directory of State Officials compiled by the Legislative Affairs Agency. If the request is received by an office of the public agency that does not maintain the requested records, the receiving office shall promptly forward the request to the office responsible for maintaining those records. 2 AAC 96.320.

## 2. Does the law cover oral requests?

### a. Arrangements to inspect & copy.

Oral requests for records are considered valid requests under the state’s public information regulations. Upon receipt of an oral request, a public agency must inform the requester of the provisions of the section of the regulations addressing oral requests, and how they are treated. If the request involves a variety of records, a public agency may require that the request be made in writing. 2 AAC 96.310(b). In any event, the decision to grant or deny an oral request is in the sole discretion of the public agency. An oral request is deemed denied if not granted within five working days after the office of the public agency responsible for maintaining the requested records receives the request (excluding the request day and including the following five working days). 2 AAC 96.310(c). The rules governing oral requests for electronic services and products are the same except that an oral request is deemed denied if not granted within ten (10) working days. 2 AAC 96.410(c). Also, if a requester making an oral request for public records is unable to write a request due to a physical or mental disability, the public agency shall either assist the requester in preparing a written request, or treat the oral request as a written request. 2 AAC 96.310(d). The same procedure is followed with disabled persons making requests for electronic services and products. 2 AAC 96.410(d).

### b. If an oral request is denied:

#### (1). How does the requester memorialize the refusal?

The statutes and regulations do not specify any particular way that a requester must memorialize denial of a request for records, and presumably any means of showing the facts will suffice, from a formal letter of denial if there is one, to an e-mail or other informal correspondence or even an affidavit setting out the relevant facts. Some of these may have advantages over others in terms of evidentiary value or weight. 2 AAC 96.310, applicable to requests for state records, provides that if a request includes a stamped, addressed postcard, the public agency shall promptly use it to acknowledge the date of receipt of the request.

#### (2). Do subsequent steps need to be in writing?

Under regulations applicable to requests for records of state agencies, a requester’s only remedy if the oral request is denied is to make a written request, and then to proceed from scratch in accordance with the provisions governing written requests. 2 AAC 96.310(c).

## 3. Contents of a written request.

### a. Description of the records.

Regulations adopted by the state to govern requests for public records from the state provide that a request must describe the public records sought “in sufficient detail to enable the agency to locate them.” 2 AAC 96.315(a). The agency is required to make reasonable efforts to assist you in identifying and describing the public records sought, and to assist you in formulating your request. If records are described in general terms (for example, “all records concerning the environment”), the agency must attempt to communicate with you in order to identify the records sought, with a view toward both speeding the response to the request, and lessening the administrative burden of processing an overly broad request. 2 AAC 96.315. The regulations say that these attempts may not be used as means to discourage requests. *Id.*

A requester seeking electronic services and products must describe what is sought with enough specificity to allow the public agency to ascertain the electronic services and products that are requested, 2 AAC 96.410(e), and the regulations do not require agencies to assist those seeking electronic services and products in the same fashion as is required with respect to public records.

### b. Need to address fee issues.

Fees may not be assessed as a condition of inspecting public records if the public agency receiving the request does not incur costs to search for the requested public record. 2 AAC 96.240(c). Presumably, the search costs referred to in this regulation that might possibly be used as a condition for inspection of public records could only include those personnel costs required to complete search and copying tasks to the extent that the production of records for that requester in a calendar month has exceeded five person hours. AS 40.25.110(c). A search charge for any amount of time less than six hours incurred for this requester in a calendar month, or based on personnel costs higher than allowed by the statute, is not authorized by law. *Id.* Requesters cannot be charged for time spent by public officials or employees separating out nondisclosable, privileged documents from non-privileged, disclosable documents. *Fuller v. City of Homer*, 113 P.3d 666 (Alaska 2005). Public agencies may establish a fee schedule for duplicating public records, and must establish a fee schedule for providing electronic services and products. Except in the case of news organizations, fees must be paid before the records are disclosed. A public agency may require payment in advance of a search for a public record if the agency reasonably believes that the search will generate a fee under AS 40.25.110 (which allows charges for production of records only to the extent that the personnel costs required to complete the search and copying tasks for any one requester in a calendar month exceeds five person hours). If the request is from a news organization or an employee or agent of a news organization and the state agency reasonably believes that the requested records search will require more than five hours to complete, the agency head may require payment in advance of the search by the news organization only when the request is unreasonable or in bad faith, the news organization has failed to pay for previous requests, or the request requires extraordinary expenditures of state resources. 2 AAC 96.400(c). A public agency may waive the requirement under (c) for payment in advance if the requester and the public agency agree in writing to mutually acceptable time frames for payment. 2 AAC 96.400(d). Any time that elapses between the time a requester is sent notice that processing the request will generate chargeable fees and the time the requester makes suitable arrangement for payment of those fees is excluded from the ten (10) working day period for responses or extensions of that period. 2 AAC 96.325(c).

### c. Plea for quick response.

If your request includes a stamped, addressed postcard, the agency must promptly use it to give a dated acknowledgment of receipt of your request for public records, 2 AAC 96.310(a), or for electronic services and products, 2 AAC 96.410(a).

### d. Can the request be for future records?

Not addressed.

### e. Other.

Not addressed.

## B. How long to wait.

### 1. Statutory, regulatory or court-set time limits for agency response.

The public records statute does not specify any waiting period. Although the regulations do, the statutes would govern, and the public records law specifies that there is no requirement of exhaustion of remedies before a suit for access to public records can be filed. AS 40.25.125.

[In one court case where a pattern of violations of the public records laws was established, the court issued an injunction prohibiting the Municipality of Anchorage from delaying or otherwise manipulating the release of documents for political or other reasons not specified by law. *Anchorage Daily News v. Anchorage*, 11 Media L. Rptr. at 2174. Pursuant to this, the court on at least three occasions, in enforcement

proceedings brought pursuant to this injunction, ordered the release of a document previously withheld by the municipality. In one case, the court ordered that the documents be produced within an hour or two after conclusion of court proceedings to determine that the document was in fact disclosable. However, while affirming the rulings requiring disclosure, the state Supreme Court ruled that the injunction would be improper to the extent it was so broadly worded as to in essence simply direct officials to follow the law. It remanded the issue to the superior court.]

As a general rule, the state regulations provide that the agency maintaining the requested records must furnish all requested records that are disclosable “as soon as practicable,” but no later than the tenth working day after the agency receives a written request that complies with the regulations. 2 AAC 96.325(a).

[Bear in mind that the state regulations contained in the administrative code provisions discussed in this section presumably apply only to state executive branch agencies. 2 AAC 96.900(7). Other public entities may be governed by different rules. *See, e.g.,* AMC 3.90.060, governing response to requests for public records of the Municipality of Anchorage. Municipal officers and employees are required to “make a good faith and diligent effort to provide a rapid and intelligible response to requests for inspection of records made pursuant to this chapter.” *Id.* AMC 3.90.060 further requires that a requester be notified if the records and information cannot be located in time to make a response within two working days, implying that records requests should presumptively be satisfied in two days or less.]

The agency must promptly notify you if your request cannot be further processed until additional information is furnished because the description you gave is not sufficient to allow the agency to identify and locate the records you have requested. Time limits set out in the regulations do not begin to run until a sufficient description of the records is received in the office responsible for maintaining the records. 2 AAC 96.315(b). There is one source of delay which an agency can raise that you may be able to avoid by your initial request — any time which elapses between the time that you are sent the notice that processing your request will generate chargeable fees, and the time that you make suitable arrangements for payment of those charges, will be excluded from the period of 10 working days (or any extension of that). 2 AAC 96.325(c).

Within this 10-day period, the agency is supposed to furnish all requested records that are disclosable, and advise the requester which of the records, if any, are nondisclosable and the specific legal authority supporting this nondisclosure. 2 AAC 96.325(a)(1)(2). Within this same initial 10-working-day period after receipt of a request, a public agency that decides a request for a public record is, in fact, a request for electronic services and products, must advise the requester of its decision and reasons for this decision. 2 AAC 96.325(b).

The agency can extend the basic 10-working-day period for up to another 10 additional working days by sending written notice of this to you within the initial 10-day period. This notice must state the reasons for the extension and the date by which the office expects to be able to furnish the records you have requested or issue a determination that they are not disclosable. The notice must include a statement that “the extension is not invoked for purposes of delay.” Such an extension is permitted only when one or more of the following circumstances exists, and then only as to those specific documents within the request as to which the circumstances apply: (1) there is a need to search for and collect the requested records from field or other offices that are separate from the office responsible for maintaining the records; (2) there is a need to search for, collect and examine a voluminous amount of separate and distinct records which are sought in a single request; (3) there is a need for consultation with an officer or employee who is absent on approved leave or official business; (4) the basic response period comes during a peak workload period; or (5) there is a need to consult with legal counsel to ensure that protected interests of private or government persons or entities are not infringed. 2 AAC 96.325(d).

In extraordinary circumstances the agency may request an extension of the period from the attorney general if the scope of the search or copying task is such that it would, within the initial 10-day period and any authorized extension under (d), substantially impair the functioning of the agency or its office responsible for maintaining the requested records. Such a claim must be made by the agency head to the attorney general, and following such a request for approval, the attorney general must promptly give you and the agency an opportunity to be heard and must render a speedy decision. Approval may be granted only in extraordinary circumstances and only for the minimum period determined by the attorney general to be required to complete the search or copying without substantial impairment of the agency or office function. 2 AAC 96.325(e).

## 2. Informal telephone inquiry as to status.

It may often be helpful to establish contact with those responsible for complying with the records request at some point during the initial 10-day period or any extension thereof, by telephone or in person, to check on the status of the request and to see whether there is anything you can do to prevent unnecessary delays.

## 3. Is delay recognized as a denial for appeal purposes?

The agency must give a written response granting or denying a written request within the prescribed time limit. If no such response has been received by you within a reasonable time after the expiration of the time limit, you may consider the request denied and pursue an appeal. 2 AAC 96.325(f).

The only reasons for which the request may be denied are that the record is not known to exist, or it is not in the agency's possession and after a diligent search the agency does not know where the record is to be found, or the record has been destroyed in accordance with applicable record-retention schedules, or that federal law or regulation, or state law, authorizes nondisclosure of the record; or that the record is believed to exist in the agency's possession but has not yet been located. 2 AAC 96.335. In the case of an unlocated record, the agency must continue to search until the record is located or it appears that the record does not exist and the agency must periodically inform you of the office's progress in this search. 2 AAC 96.335(f).

Denials of record requests may be made by the agency head or by someone to whom that agency head has delegated authority, and must be in writing, stating any specific legal grounds for the denial. The denial must be dated and signed by the person making the determination. It must inform you that you may appeal the denial by complying with the procedures set out in the regulations, but also that the you may obtain immediate judicial review of the denial by seeking an injunction from the superior court under AS 40.25.125 instead of pursuing an administrative appeal. It must further advise you that an election not to pursue injunctive remedies in superior court shall have no adverse effects on your rights before the public agency, and that an administrative appeal from a denial of a request for public records requires no appeal bond. Further, a copy of the appeal procedures must be enclosed with the denial. The denial is considered to be issued at the time that it is either delivered to the U.S. Postal Service for mailing or is hand delivered to you by an agent of the agency (other than a post office employee). 2 AAC 96.335(b) through (e).

## 4. Any other recourse to encourage a response.

Not addressed.

## C. Administrative appeal.

Bear in mind that the discussion of administrative procedures in this subsection generally is based on 2 AAC 96.100 *et seq.*, governing access to records of state administrative agencies, and may not be applicable to other public entities. The municipal ordinance governing access to Anchorage records, for example, provides that "any denial of a request for information or inspection of public records shall be

automatically appealed to the mayor, and a written reply will be given within seven working days either granting or denying the appeal." AMC 3.90.060(B). Any appeal from the clerk's office or ombudsman's office is to the Anchorage Assembly, and any appeal from the school district is to the Anchorage School Board. *Id.*

## 1. Time limit.

The regulations provide that you may appeal the denial, in whole or in part, of your request, or may ask for reconsideration of that denial, by addressing a written appeal to the agency head. It is important to note, however, that this is not a situation where you have some legal obligation to "exhaust your administrative remedies." The law specifically acknowledges your right to obtain immediate judicial review of a denial of public records by seeking injunctive relief from the superior court, pursuant to AS 40.25.125, and the state administrative regulations underscore that an election not to pursue injunctive remedies in the superior court shall have no adverse effects on the requester before a public agency. A request for reconsideration is made by submitting a written appeal to the agency head within 60 working days after the denial is issued. This appeal to the agency head must include the date of the denial and the name and address of the person issuing the denial, and must identify the records to which access was denied and which are the subject of the appeal. If the appeal is based on the failure of the agency to respond within the appropriate time limits set out under state regulations, the appeal must say so, and in addition to identifying the records sought, must identify the public agency to which the request was directed and the date of the request. If no denial was issued, the date for an appeal to the agency head begins to run on the expiration of the time period within which the public agency should have responded. 2 AAC 96.340. The appeal must be mailed or hand-delivered to the agency head within 60 days after the denial is issued. 2 AAC 96.340(b).

## 2. To whom is an appeal directed?

### a. Individual agencies.

The appeal must be directed to the head of the agency from which you are requesting the records. This is apparently the case, regardless of whether the agency head or subordinate was the one who initially denied your request. The agency head may delegate authority and duties to respond to an appeal for reconsideration to a full-time employee of the public agency not involved in the denial and not subordinate to the employee responsible for the denial. The employee delegated this authority may not sub-delegate to another employee. 2 AAC 96.345(c).

### b. A state commission or ombudsman.

The state ombudsman, a legislative employee, may be a source of help for citizens denied access to public records by state agencies. AS 24.55.200. (Similarly, a municipal ombudsman, such as the Municipality of Anchorage's, 2 AMC 60.160 *et seq.*, may be helpful for those dealing with the city of Anchorage and its employees and contractors.)

### c. State attorney general.

The attorney general's office advises its client state agencies on legal matters, and often can be helpful in advising agencies of their duties to provide public access as afforded by state statutes and regulations. Opinions of the attorney general are published, and are available for inspection, online and otherwise.

## 3. Fee issues.

While the regulations do not specifically address appeals or requests for reconsideration to an agency head concerning fees or issues other than denial of requests for public records, there is no apparent reason why any such collateral issues could not be raised in this manner. In addition, the Public Records Act provides that the fees established by a public agency in the executive branch (except the fees of the University of Alaska and the Alaska Railroad Corporation) for providing electronic services and products under AS 40.25.115 may be canceled



by the governor, if the governor determines that the fees are unreasonably high. AS 40.25.115(g). Pursuant to this, the administrative regulations provide that a requester seeking electronic services and products may ask for a review of public agency's fees for those services and products. Upon request from the Office of the Governor, a public agency providing those services and products must provide the assumptions and documentation of the costs and the rate formulas used to calculate its fees for electronic services and products. In reviewing the fees, the Office of the Governor shall determine and find in writing whether the fees comply with the statute and regulations, and provide a decision to the requester and the public agency within 60 working days, explaining the Office's determinations, and including, in the Office's discretion, instructions to the public agency regarding fees. 2 AAC 96.460(g). A fee reduction or an instruction that the Office of the Governor provides to a public agency is effective immediately unless the Office of the Governor acts to impose a later deadline or regulations are required to implement those reductions or instructions. 2 AAC 96.460(h).

In *Copeland v. Ballard*, 210 P.3d 1197 (Alaska 2009), appellants Tom Copeland and Riki Ott sought access to the administrative record in an appeal from a decision of the Alaska Department of Environmental Conservation (DEC) in favor of shipping entities concerning DEC approved oil discharge contingency plans. The Alaska Supreme Court held DEC violated intervenor appellants Copeland and Ott's due process rights under Alaska Const. art. I, §7, by predicated their request for relevant records on completion of those records by the agency, and by dismissing them from the appeal when they did not pay preparation costs for the agency's record. The DEC argued that because a regulation requiring the agency to notify parties that they could have access to the record when it had been certified as complete, it was clear that Copeland and Ott could not access have access to the record before it was certified. Copeland and Ott argue that this regulation, made applicable through AS 40.25.122, unconstitutionally denied them access in violation of their due process rights. The Supreme Court agreed with Copeland and Ott that the DEC violated the due process clause of the state constitution by dismissing them from the administrative appeal, and in denying the residents' request for access to the record. It found they had a strong interest in accessing the record, and that DEC had offered no valid governmental interest in denying access. The agency also erred by not explaining its calculations for preparation costs. The supreme court also concluded that the dismissal of the residents was an abuse of discretion because the agency easily could have reinstated the residents once they submitted payment for the record, and because there was neither prejudice nor evidence of willfulness on the Copeland and Ott's part. The court found that the regulation's effect was to prevent access to the record prior to certification. It found that, as litigants, Copeland and Ott had a strong interest in accessing the record—that it was not only “the platform upon which they must build their case,” but also that access to the record was important to facilitate the parties' attempt to negotiate a limited record for review in order to control costs. The court said none of DEC's asserted justifications constituted valid governmental interests in denying access, and questioned the government's interest in placing “any burden whatsoever on accessing the record.” This case is noteworthy as a rare instance of the Court treating denial of access to records as a constitutional violation.

#### 4. Contents of appeal letter.

##### a. Description of records or portions of records denied.

An appeal must include the date of the denial and the name and address of the person issuing the denial. It must also identify the records to which access was denied that are still sought and are the subject of the appeal. If you are appealing because you received no response within the time limits set out in the regulations, you must say so, and identify the records you are seeking and the agency to which the request was directed and the date of your request. 2 AAC 96.340(b).

##### b. Refuting the reasons for denial.

Although the regulations do not require this, it is implicit that you should explain the reasons why you disagree with the decision made by the agency and contend that you are entitled to access.

##### 5. Waiting for a response.

The agency head or his or her designee must issue a written determination stating which of the records that are subject to the appeal will be disclosed and which will not, “as soon as practicable but not later than the tenth working day after the close of the record on appeal.” 2 AAC 96.345(a). The agency head may extend the 10-working-day period for a period not to exceed 30 working days upon written request from the requester, or by sending a written request to the requester within the basic 10-working-day period. 2 AAC 96.345(b). Any determination denying your appeal must be in writing, must state the specific statute, regulation, or court decision which is the basis for the denial and must state briefly the reason for the denial. 2 AAC 96.350. The denial must further inform you that you have a right to obtain judicial review of the denial by commencing an action in superior court. *Id.*

##### 6. Subsequent remedies.

A requester may obtain judicial review of the denial of a request for reconsideration or appeal to the agency head, by appealing the denial to the superior court. 2 AAC 96.350, AS 40.25.124. The regulations governing state agencies specify that no appeal bond can be imposed in connection with such an appeal to the superior court. 2 AAC 96.335(d)(4). In cases not involving state agencies, although the regulation may not technically be applicable, a person seeking review from any denial of a request for public records should strenuously object to an attempt to impose any appeal bond. The specific recognition of this in the state regulations was included at the urging of counsel for press organizations commenting on these regulations. In normal administrative appeals, an appeal bond in the amount of \$750 is an ordinary requirement of the appellate rules. It seems highly inappropriate, though, to convert any citizen's request for public records into an administrative appeal, with its corresponding burdens such as the appeal bond, simply because administrative regulations are adopted to delineate rights and obligations under the statute and to spell out how administrative agencies are to handle records requests. As a matter of public policy, there should be no requirement of a \$750 appeal bond. If it is raised, I suggest challenging the \$750 bond requirement, as an improper and burdensome tax on the citizen's right to obtain access to public records, imposed by administrative regulation without statutory authority. In any event, it can be waived upon a showing of indigence.

A record that is the subject of a public records request that has been denied shall not be destroyed or transferred from the public agency's custody (except that records may be transferred to state archives and records management services as provided by statute). A public agency may not destroy or transfer custody of a record to which access has been denied or restricted until at least 60 working days after the requester is notified in writing that the request has been denied, or if there is an administrative or judicial appeal or other legal action pending at the end of the 60-working-day period, until the requester has exhausted those actions. 2 AAC 96.335(g).

#### D. Court action.

##### 1. Who may sue?

Anyone who is denied access to records and whose appeal is denied may sue. AS 40.25.124; 2 AAC 96.350. A court must entertain a suit by a person who has not exhausted the “administrative remedies.” In *Carter v. APEA*, the Supreme Court rejected the University's argument that the APEA should have exhausted procedures for obtaining information set by the Labor Relations Agency before suing. “The doctrine is not applicable where the remedy sought is judicial rather

than administrative. . . . Resolution of a question of statutory interpretation is judicial rather than administrative.” 663 P.2d at 922-923, n. 19. The 1990 revisions of the Public Records Act expressly state that injunctive relief seeking access to public records can be sought without exhausting administrative remedies. AS 40.25.125.

## 2. Priority.

There is no statutory provision for priority for records requests, although the courts have been solicitous of public record requests by news organizations when suits have been filed in the past.

## 3. Pro se.

It is certainly possible to proceed on your own behalf rather than through a lawyer to pursue a record request, as it would be the case in any civil litigation. *See, for example, Jones v. Jennings*, 788 P.2d 732 (Alaska 1990) (personnel file of police officer being sued by *pro se* litigant was required to be disclosed, subject to *in camera* inspection for redaction of sensitive personal information not needed by the plaintiff). The advisability of this depends upon the issues involved, particularly the grounds stated in any denial.

## 4. Issues the court will address:

The court may address any issues involved in the appeal or in the record request. Although no decision has addressed whether matters outside the scope of the appeal can be addressed, the fact that the law specifically rejects any requirement that administrative remedies be exhausted would seem to support an argument that any issues pertaining to the public records request could be raised, whether or not they were made part of any administrative appeal below. However, this is more likely to be the case in a suit filed in the trial court after an agency has denied access, as opposed to efforts to present to the state supreme court on appeal issues not raised in the trial court. Courts can and have addressed improper delays, and also have rendered declaratory judgments with respect to access questions and issues concerning future access.

### a. Denial.

An agency's denial of a request for public records is appealable. Propriety of the denial is the main issue in most appeals.

### b. Fees for records.

Among the variety of issues courts address in public records cases is those relating to fees that can appropriately be charged, a matter largely governed by statute. For example, in *Fuller v. City of Homer*, 113 P.3d 659, 666 (Alaska 2005) (*Fuller II*), the Alaska Supreme court interpreted the Public Records Act provisions as not allowing public officials to charge for time spent by a clerk or agency official reviewing records to determine whether they are or are not disclosable due to potential assertions of deliberative process or other privileges. The court said this is not a production task for which a records requester can be charged. Production efforts by an agency for which time spent can be charged to a records requester are those that are those clerical, ministerial functions inherent and necessary in a records search, not executive functions implicating the exercise of professional expertise and judgment *Fuller II*, 113 P.3d at 665-666. (insofar as any portion of the amount the citizen was required to prepay as a condition of obtaining access to requested documents was attributable to a privilege review, this was improper — even if the review were conducted efficiently — and city was required to repay any such amounts). *Id.* At 668. In the event of a dispute, it is for the fact finder to decide whether the amount charged was incurred appropriately, but as a matter of law, the agency cannot charge for time spent on tasks other than searching for and copying the records, and in particular cannot charge for reviewing the documents to determine what might be withheld. *Id.*

### c. Delays.

No cases specifically relating to this issue are addressed here.

## d. Patterns for future access (declaratory judgment).

No cases specifically relating to this issue are addressed here.

## 5. Pleading format.

Pleadings must be in the normal format prescribed by court rules. While the regulations governing public records requests to state agencies use traditional language of administrative agency law, including the fact that a denial “is the final agency decision” and can be appealed to the superior court, so that one might argue the normal 30-day period for bringing an appeal from a final agency action would be applicable, support for argument to the contrary may be found in the fact that it may be sought without exhausting administrative remedies at all pursuant to AS 40.25.125.

## 6. Time limit for filing suit.

There is no time limit spelled out in the statute or regulations for filing suit.

## 7. What court.

Suits would normally be filed in the state superior court in the location where the plaintiff resides. The state district court does not have the power to issue injunctive relief. There is no reason why a claim based on the state public records act could not be asserted in federal court, assuming there is otherwise a basis for federal court jurisdiction. In one case in which asbestos products manufacturer W.R. Grace Co. attempted to preclude the *Anchorage Daily News* from gaining access to a secret settlement of a federal court case through a state court public records suit, the state and federal courts allowed the matter to be resolved in state court. *See Anchorage School District v. Anchorage Daily News*, 779 P.2d 1191 (Alaska 1989); *cf. Anchorage School District v. W.R. Grace*, (U.S. Dist. Ct., D. Ak., 1989); *appeal dismissed sub nom W.R. Grace v. Anchorage Daily News*, (9th Cir. 1989).

## 8. Judicial remedies available.

The court can order that the public record at issue be provided, and can order other injunctive or declaratory relief to which the requester shows he or she is entitled. There is no provision in the statute for an award of damages for wrongfully withholding documents.

## 9. Litigation expenses.

### a. Attorney fees.

Alaska is perhaps the only state with a general “loser pays” rule for attorney fees in most civil litigation. Instead of following the American Rule with respect to attorney fees, Alaska courts, following the “English Rule,” generally award partial attorney's fees to the prevailing party in a civil case pursuant to Alaska Civil Rule of Procedure 82, or in an appeal pursuant to Appellate Rule 508. A complementary rule encourages settlements by treating a party as the prevailing party if it loses at trial but betters a previously made offer of judgment. Ak.Civ.R.Pro. 68. Rule 82 is considered substantive for purposes of *Erie* and is therefore applied in cases tried in Alaska federal courts based on diversity jurisdiction. Civil Rule 82(b) specifies the amount of fees to be awarded to a prevailing party. Most cases involving access to public records or meetings would be governed by Rule 82(b)(2), applicable to cases in which the prevailing party recovers no money judgment. This rule provides that the court presumptively shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk. However, the court may vary the presumptive attorney's fee award if it finds this is warranted upon consideration of factors listed in Civil Rule 82(b)(3). If the court

varies an award, it must explain the reasons for the variation. The prevailing party is the one who succeeds on the main issue. A party need not prevail on every issue to enjoy prevailing party status, nor need he achieve “formal judicial relief.” Under the catalyst theory, a plaintiff who settles enjoys prevailing party status if he proves: (1) that the goal of his litigation was achieved, meaning that he succeeded on a significant issue and achieved a benefit for which the suit was brought, and (2) that his lawsuit was a catalyst in motivating the defendant to settle. Once the plaintiff makes this *prima facie* case, he is entitled to Rule 82(b)(2) attorney’s fees unless the defendant proves that his lawsuit “lacked colorable merit.” *Braun v. Denali Borough*, 193 P.3d 719, 727 (Alaska 2008).

A longstanding judicially created exception to Alaska’s prevailing party attorney fee rule allowed public interest litigants to recover full fees if successful, and pay no fees if not. News media were routinely treated as public interest litigants in records cases. In one case concerning access to records, a superior court judge held that although the newspaper was the prevailing party, it should not recover full fees and costs as a public interest litigant because the judge assumed the paper was motivated in part by public-spiritedness, but also in part by a desire to sell newspapers. On appeal, the Supreme Court rejected this “split-the-baby” analysis, and ordered the superior court to award full fees and costs. Although the court said the determination of “public interest” status depends on the circumstances of each case, both the majority and dissenting opinions made clear that news media seeking access to public records would virtually always be public interest litigants. *Anchorage Daily News v. Anchorage School District*, 803 P.2d 402 (Alaska 1990). Determination of who is considered to be the prevailing party for purposes of Rule 82 is committed to the sound discretion of the trial court, see *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 981 (Alaska 1997); *Gwich’in Steering Committee v. Office of the Governor*, 10 P.3d 572, 584 (Alaska 2000), as was the issue of status as a public interest litigant, *Gwich’in*, 10 P.3d at 585.

In 2003 the legislature amended AS 09.60.010 to abolish the public interest exception to Rule 82 for non-constitutional causes of action. A trial court judge invalidated the new law, but in 2007, the Alaska Supreme Court reversed. *State of Alaska v. Native Village of Nunapitchuk*, 156 P.3d 389 (Alaska 2007). The Supreme Court held that the public interest litigant exception was a common law gloss created by the courts interpreting Rule 82, not part of the rule itself. The Court found the rule was intended to serve the substantive purposes of shielding losing public interest litigants from adverse fee awards and encouraging pursuit of public interest litigation generally, not simply to deal with procedural matters within the core province of the judiciary. Since basing an award of fees on the public policy nature of litigation was an application of substantive law, it was within the province of the legislature, and the Court therefore found the new statute was not invalid on its face. It said courts’ continuing discretion to consider a range of equitable and other factors in making awards under Rule 82 should not be used as an indirect way of using fee awards to encourage litigation of claims that can be characterized as involving the public interest, now that the legislature has disallowed this. However, it also said that trial courts remain free to reduce awards that would otherwise be so onerous to the losing party as to deter similarly situated litigants from accessing courts.

This change has had and is likely to have a significant adverse effect on the press. Between the general “loser pays” rule and elimination of the public interest exception, Alaska has become the only state that would presumptively impose fees and costs on public interest litigants who unsuccessfully pursue non-frivolous claims. The public interest litigant exception survives in the current statute in on limited respect—cases dealing with constitutional issues. Most access litigation, however, including for example the right of the press and public access to meetings and records is statutory, is not constitutional.

#### **b. Court and litigation costs.**

Unless the court otherwise directs, the prevailing party is presump-

tively entitled to recover specified costs allowable under paragraph Rule 79(f) that were necessarily incurred in the action. Award of costs on appeal are governed by Ak.App.Rule 508. As discussed in more detail in the preceding subsection 9(a), a 2003 statute, upheld by the supreme court, precludes awarding full costs to prevailing parties, or sheltering non-prevailing parties from an award of costs, simply based on their status as “public interest litigants.” AS 09.60.010. For discussion of a related cost issue, see [Open Meetings], §IV.C.9 *infra*.

#### **10. Fines.**

A section of the criminal code makes it a Class A misdemeanor for a person acting “under color of law, ordinance or regulation of this state or a municipality or other political subdivision of this state” to “intentionally deprive another of a right, privilege or immunity in fact granted by the constitution or laws of this state.” AS 11.76.110.

#### **11. Other penalties.**

The regulations provide no fines or other penalties for denying or delaying access to public records. However, Alaska law allows recovery of costs and a portion of attorney fees incurred (generally 20-30%) in successful suits to obtain public records, but also exposes access litigants to the risk of paying the other side’s fees and costs if the suit seeking access to records is unsuccessful. See § V.D.9 [Open Records]. In extreme cases, there are criminal penalties for “tampering with public records.” The Alaska criminal code provides that “a person commits the crime of tampering with public records who knowingly suppresses, conceals, removes or otherwise impairs the . . . availability of a public record, knowing that the person lacks the authority to do so.” AS 11.56.820; see also AS 11.56.815. Further, it is a misdemeanor to dismiss, demote, suspend, lay off, or otherwise make subject to any disciplinary action any employee receiving compensation for services provided to the state, for communicating matters of public record or information under the Public Records Act. AS 39.90.010.

Also, in 1989, the Alaska Legislature adopted the Alaska Whistleblower Act, AS 39.90.100 - 39.90.150, which provides protection for public employees who expose wrongdoing or speak out on matters of public concern. One court that has addressed this issue held that a report by a public employee to news media is not protected, as such, by the Whistleblower Act. *Shector v. City of Fairbanks*, and *Cummings v. City of Fairbanks*, Consolidated Case No. 4FA -91-0029 (Super. Ct. 4th Jud. Dist. at Fairbanks). The statute authorizes a person whose rights have been violated to bring a civil suit for damages (including punitive damages) and other relief and also provides for civil fines of up to \$10,000 against violators. The law covers those who work for the state, quasi-public corporations or authorities established under state law, the University of Alaska and municipalities, school districts, regional educational attendance areas, and other political subdivisions of the state. Municipalities that provide substantially similar protections for their employees by ordinance can be exempted. In addition, the Alaska Supreme Court has ruled that an allegation of a violation of the Open Meetings Act is sufficient grounds to support a recall petition directed at removing elected public officials from office. While the issue has not apparently arisen, there is no obvious reason why allegations of violations of the Public Records Act would not have similar effect.

#### **12. Settlement, pros and cons.**

The usual considerations that go into settling rather than litigating disputes will often come into play with respect to issues relating to access to public records. It is difficult to underestimate the benefits of establishing firmly in public officials’ minds the fact that their delays or refusals in providing public records will be dealt with aggressively. In the past, this position has been made credible by Alaska law providing for recovery of attorneys’ fees for public interest litigants, and sheltering unsuccessful requestors from having to pay fees and costs to the other side. This “public interest” exception to Alaska’s unusual “loser pays” rule that allows prevailing litigants in most cases to recover costs and part of their fees from the non-prevailing side was helpful both in



reducing the risk to those seeking access to records, and increasing the exposure of those who resist providing access to public records. The legislature eliminated this exception favoring public interest litigants (which presumptively including news media seeking access to records or meetings) in 2003, and this statute was upheld by the Alaska Supreme Court in 2007 (see [Open Records], section V.D.9 *infra*). This has dramatically changed the analysis of pros and cons that must be made when contemplating litigation, because news organizations and citizens bringing suits seeking access to public meetings and records in Alaska now not only cannot recover their full fees from a government agency found to have been in the wrong, but also must pay attorney fees to the government, or potentially to other parties involved, if they lose.

Also, the burdensome process of administrative appeals and litigation, not only in terms of financial resources but also the emotional energy and drain on personnel and other resources involved in such efforts, may often dictate that the prudent course is to find reasonable compromises that hopefully will enable a party seeking records to obtain the gist of what is being sought, if not everything possible. Such compromises are particularly appealing where there is a significant risk of establishing unfavorable precedent. For example, in a high profile situation involving requests by multiple news media for all e-mails to and from Sarah Palin during her tenure as Alaska governor, when initial estimates were that compliance with the request would result in search and copying fees amounting to many millions of dollars, in part based on the need to search the e-mail accounts of all 16,000 state employees, the parties agreed to limit the search to the accounts of the fifty employees most likely to contain relevant documents. (This netted 22,000 pages of documents from the relevant period, made available for copying charges of \$725 per set.)

## E. Appealing initial court decisions.

### 1. Appeal routes.

Alaska has no intermediate court of appeals for civil cases, and appeals from decisions of the superior court are taken directly to the Alaska Supreme Court. It is possible to petition for review from a trial court decision that does not constitute a final judgment, though the acceptance of review is discretionary with the Supreme Court.

### 2. Time limits for filing appeals.

The ordinary time limit for appealing a final, appealable ruling by the superior court is 30 days. Note that if there is to be an appeal concerning an award of attorney fees in connection with this matter, the time limit for appealing that ruling is separate, and the time for appealing the underlying ruling on the merits may expire before the time for filing an appeal of the attorney fee decision.

### 3. Contact of interested amici.

There are often interested parties who have similar interests, especially when a case moves past the superior court stage and is to be the subject of a Supreme Court decision that would have state-wide precedential effect. In such cases, other news media, or organizations with specific interest in such issues such as civic groups, may have an interest in participating or lending support as “friends of the court.”

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state’s highest court.

## F. Addressing government suits against disclosure.

Nothing applicable.

# Open Meetings

## I. STATUTE — BASIC APPLICATION.

Alaska’s Open Meetings Act (OMA) was enacted in 1959 as part of the Administrative Procedures Act adopted by the first legislature after statehood. A.S. 44.62.310. Its broad language was a comprehensive mandate that meetings of public agencies be open to the public. In 1972, the legislature bolstered the OMA by adding to it a strong statement of purpose, as follows:

AS 44.62.312. *State policy regarding meetings.*

(a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people’s business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people’s right to remain informed shall be protected so that they may retain control over the instruments they have created.

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(b) AS 44.62.310(c)(1) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

AS 44.62.312. The Alaska Supreme Court has liberally construed the OMA, in order to give full effect to the letter and spirit of the law. The legislature amended the OMA in 1994 in several significant respects. Chief among these were a definition of the previously undefined term “meeting.” A few of the amendments weakened the force of the Act, e.g., by making it less likely that violations will be remedied, or reducing the law’s application to advisory groups. Most clarified or codified existing interpretations of the OMA. The legislature also generally reaffirmed the commitment to a strong right of public access to the affairs of government by revising and strengthening the final subsection of the statute to read: “AS 44.62.310(c) [the provision governing executive sessions] and (d) [the subsection defining what gatherings are exempt from coverage of the OMA altogether] shall be construed narrowly in order to effectuate the policy [statement of the Open Meetings Act] and to avoid exemptions from open meetings requirements and unnecessary executive sessions.”

### A. Who may attend?

Alaska’s Open Meetings Act (OMA) (AS 44.62.310-.312) protects the right of any member of the public to attend public meetings. AS 44.62.310(a).

### B. What governments are subject to the law?

The OMA provides that “all meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section (referring to the OMA itself) or another provision of law.” AS 44.62.310. The terms used in this general admonition that government business is to be conducted openly are defined broadly. “Governmental body” means an assembly, council, board, commission, committee or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity, and includes the members of a subcommittee or other

subordinate unit of a governmental body if the subordinate unit consists of two or more members. AS 44.62.310(h)(1). A “public entity” is defined to include any entity of the state or of a political subdivision of the state including an agency, a board or commission, the University of Alaska, a public authority or corporation, a municipality, a school district, and other governmental units of the state or political subdivisions of the state. Due to constitutional separation of powers considerations, the legislature has specified that the term “public entity” does not include the court system or the legislative branch of state government. AS 44.62.310(h)(3).

### 1. State.

As provided in these definitions, meetings of state government entities are subject to the open meetings law.

### 2. County.

*Borough.* Alaska, of course, does not have counties as political subdivisions, but does have boroughs, which are clearly encompassed by the definitions set forth above providing for coverage of the OMA.

### 3. Local or municipal.

Municipal and other local government entities that are political subdivisions of the state or units of political subdivisions of the state are subject to the provisions of the state Open Meetings Act. To the extent that Alaska may have local government entities that are not political subdivisions of the state or units of such political subdivisions — most notably, Indian tribal government organizations — these are presumably not covered by the state OMA.

## C. What bodies are covered by the law?

### 1. Executive branch agencies.

The Open Meetings Act generally governs executive branch agencies, but its application to the day-to-day operations of the executive branch is limited in two significant respects. First, the OMA governs only gatherings that are defined as “meetings.” Second, the OMA specifically excludes from its reach “staff meetings or other gatherings of the employees of a public entity.” AS 44.62.310(d)(6). A meeting is defined to include a gathering of more than three or a majority, whichever is less, of the members of a governmental body when a matter upon which the body is empowered to act is considered by the members collectively. If the body has authority to establish policies or make decisions for a public entity, it does not matter whether the gathering was pre-arranged. AS 44.62.310(h)(2). If it does not, and is purely advisory, the gathering is only defined as a meeting if it is pre-arranged for the purpose of considering a matter upon which the governmental body is empowered to act.

#### a. What officials are covered?

The Open Meetings Act covers “meetings” of various public bodies, and does not purport to regulate communications between and among specific executive branch employees, as such, *e.g.*, between the governor or mayor and his or her aides. So, whether or not a meeting attended by a particular government official, such as a governor or mayor, is covered by the OMA depends on whether that gathering is otherwise a meeting, and not on the attendance of that specific individual. Groups of public employees who work for a particular department will often interact with each other in the process of making decisions or carrying out the functions of their agency. The 1994 amendment to the OMA clarified that such meetings are presumptively not within the scope of the OMA. The individual deliberations of a public official concerning adoption of regulations do not constitute a “meeting” and therefore do not trigger the requirements of the OMA. *Krohn v. State, Dept. of Fish and Game*, 938 P.2d 1019, 1022 (Alaska 1997). The 1994 exclusion for staff meetings and other gatherings of employees probably did nothing other than clarify and codify how the OMA was generally understood to apply before this revision. A 1981 Attorney General’s opinion distinguishes between casual and routine

operational meetings of employees, and gatherings of groups with a more or less fixed membership, meeting on a regular basis. Although it was issued as an interpretation of the law as it existed at that time, it would appear that the opinion still provides useful guidance on this issue.

The casual, day-to-day meetings of government officials and employees who are not so constituted [as a body charged with specific functions and constituted of formally organized, specific members who meet to consider or act with respect to those functions] are simply not amenable to the public notice required by [the OMA]. . . . The law here may not properly be interpreted to include just any coming together of government officials or employees. Notice of their catch-as-catch-can meetings is simply impossible, and therefore, not contemplated by the law.

Ad hoc groups or task forces whose membership consists of non-specific, interchangeable representatives of various state agencies or of state agencies and their counterparts from federal agencies, whose functions are vague and similarly nonspecific and change from meeting to meeting should not, therefore, be included within the coverage of the Open Meetings Act. It would be possible, of course, to establish (by law or by gubernatorial and secretarial directive) a formal, inter-agency or intergovernmental committee with a specific membership and vest it with specific powers and assign it certain functions to be acted upon by a vote of the committee’s membership. If that is done, the law applies. But where the committee, task force or group has no power to act by a vote of its members, has no fixed functions which constitute its business, and has no fixed membership to exercise its power by vote, then the Open Meetings Act, by its own terms, does not apply.

In sum, it is our view that the Open Meetings Act only applies to multi-member bodies, which have a fixed membership, which are supported in whole or in part by public money, and which are empowered pursuant to law to exercise governmental power or to provide advice through a vote of their membership. It does not apply to meetings of individuals, who are public officers or employees, such as the cabinet, but who are not empowered collectively to exercise power or provide advice as a body by a vote of their members.

May 11, 1981, Op. Att’y Gen. No. J-66-655-81, at 4.

(Opinions of the Attorney General are issued from time to time in response to requests from public officials. News media and private citizens cannot formally initiate a request for an Attorney General opinion. They are essentially the legal opinions of one lawyer — the executive branch’s lawyer — and are not binding upon the courts. They are more or less useful as guidance about what a court will do, depending on how well researched they are and how thorough and thoughtful the analysis is.)

A similar distinction discussed in a 1985 Attorney General’s opinion, regarding evaluation of Anchorage office complex proposals, likewise appears to remain an accurate and useful interpretation of how the OMA applies to employee gatherings after the 1994 revisions. The Department of Administration was advised that “staff level” advisory evaluation committees are not subject to the OMA because such evaluation committees are, in practical terms, simply employees undertaking typical staff functions. “There is no indication that the legislature intended to subject such informal, staff-level meetings to the requirements of the OMA.” Jan. 30, 1985, Op. Att’y Gen. No. 366-330-85. Attorney General did advise, however, that where the Request for Proposals in question provided for appointment of a five person committee to evaluate proposals for aesthetic considerations and to assign a score that would form part of the basis for awarding the office complex contract, a court would “more likely than not” rule that this committee — made up of three executive branch appointees, a representative of the Municipality of Anchorage, and a private architect appointed by the state — was a body covered by the OMA. *Id. Compare*, Jan. 1, 1992, Attorney General Op. No. 663-91-0351,

advising that meetings of a mental health lands working group trying to reach a settlement of litigation involving a state mental health lands trust, were not subject to the OMA.

#### **b. Are certain executive functions covered?**

It is only “meetings” of those governed by the OMA that are within the coverage of the OMA. Staff meetings or other gatherings of the employees of a public entity are exempt. AS 44.62.310(d)(6). Conduct of individuals, as such, whether it be individual board or commission members meeting with a constituent or lobbyist, or the governor or mayor exercising a veto or signing legislation, is not subject to the provisions of the Open Meetings Act. However, if an official is serving as a member of a body, then his or her conduct as such would be subject to the act. A hypothetical was raised during a committee hearing on revisions to the OMA in 1994 about the effect of the mayor of a city or borough assembly serving as an *ex officio* member, who can vote only to break a tie. The question posed was whether the presence of the mayor, along with three of the six regular voting members of an assembly, would constitute a meeting under the definition which requires “more than three or a majority, whichever is less.” Legislators considering the bill, including the most vigorous opponents of liberal public access, agreed that this hypothetical gathering would, and should, be considered a meeting, consistent with the general rule that doubtful cases should be resolved in favor of openness.

#### **c. Are only certain agencies subject to the act?**

Certain executive branch meetings are exempt from the act altogether, e.g., meetings of the parole or pardon boards, AS 44.62.310(d)(3), and staff meetings or other gatherings of the employees of a public entity. AS 44.62.310(d)(6). The University of Alaska, which has separate constitutional status, is generally subject to the Open Meetings Act, but its staff meetings or other gatherings, including meetings of an employee group established by policy of the Board of Regents or held while acting in an advisory capacity to the Board of Regents, are excluded from the coverage of the act altogether. *Id.* Meetings of groups established by the University whose membership is not limited to employees (for example, those with student or community members) are not subject to this exclusion, but are covered by the act.

Various other state and local agencies may “wear more than one hat,” and meetings for some purposes may be exempt from the OMA even though the agency’s meetings are generally public. Specifically, meetings of “judicial or quasi-judicial” bodies are exempt from the OMA, but only when they are meeting “solely to make a decision in an adjudicatory proceeding.” For example, when the Guide Board meets to discuss proposed regulations about exclusive guide areas to be allocated for brown bear or caribou hunting, its meetings are covered by the act. When the same group meets to decide whether a guide’s license should be suspended for violations, it is acting in a “quasi-judicial role.” Presumably, this means the part of its meeting at which witnesses testify and other evidence is presented is open; the rest can be closed, and conducted without public notice.

### **2. Legislative bodies.**

Meetings of legislative bodies are covered by the Open Meetings Act, with the exception of the Alaska Legislature, which is expressly excepted from coverage of the OMA. AS 44.62.310(h)(3).

a. *The state legislature.* Meetings of the state legislature are public only to the extent provided for in guidelines for meetings of legislative bodies adopted by the legislature in AS 24.60.037, discussed in more detail below, and even then, only to the extent that legislators choose to follow these guidelines.

Until the 1994 revisions to the Open Meetings Act, the statute covered meetings of the state legislature. The Alaska Supreme Court had ruled, however, that courts could not enforce the OMA against the Alaska State Legislature, despite the statutory language covering the legislature, because of the “separation of powers” between the three branches of state government provided for in the Alaska Constitution.

*Aboud v. League of Women Voters and Anchorage Daily News*, 743 P.2d 333 (Alaska 1987). The Court held that two parts of the constitution require this result: The provision giving the legislature the sole authority over its own rules of procedure, and the provision giving legislators immunity from having to answer to the courts for things they say or do in the course of legislative business. The Court also declined to find that Alaskans have an implied constitutional right of access to meetings of their legislators.

A constitutional amendment would be required to change the effect of the *Aboud* ruling and impose enforceable “open meetings” requirements on state legislators. Since Alaska does not allow citizens to amend the constitution through ballot initiatives, such an amendment would require approval of two-thirds of both houses of the legislature, or a constitutional convention. After the court’s *Aboud* ruling, a coalition of press and public interest groups tried to get a legislative open meetings amendment on the ballot. These efforts were unsuccessful. However, pressure from the public and press finally led to enactment of ethics legislation in 1992 that included a requirement that the Alaska Legislature must generally comply with the OMA. AS 24.60.037. When the OMA was subsequently revised, in 1994, the legislature resolved the awkward discrepancy between the OMA’s language, indicating the legislature was subject to the act, and the reality that this provision was unenforceable, by removing references in the OMA to coverage of the state legislature.

When the state legislature removed any reference to itself from the OMA, it correspondingly changed a provision in the section of the state statutes dealing with standards of conduct for the Alaska legislature. Specifically, it changed the language stating that “legislators shall abide by AS 44.62.310-44.62.312 (Open Meetings Law)” to state that legislators shall abide “by open meetings principles.” The practical effect of this is simply to make the language of the statute conform with the reality of the *Aboud* decision. It eliminated any argument that the statute governing legislative conduct, in Title 24, literally required compliance with the provisions of the OMA, as such, potentially including but not limited to the provision voiding actions taken in violation of the OMA. It also eliminated the argument that legislators were still literally or technically violating the OMA, even though the courts had said that there was no remedy for these violations.

The ethics law provisions dealing with legislative open meetings differ from the OMA in significant respects. First, the ethics law specifically allows closed caucuses, and “private, informal meetings or conversations between legislators in which political strategy is discussed.” Second, the Select Committee on Legislative Ethics is charged with developing guidelines for the application of open meetings requirements to the legislature, and any complaint against a legislator for conduct found to be in compliance with these guidelines must be dismissed. Third, enforcement is strictly up to the Select Committee on Legislative Ethics, which includes both public and legislative members, and can conduct investigations and hearings regarding allegations of improper closed meetings pursuant to procedure spelled out in AS 26.60.170. The Committee makes recommendations to the full legislature if it finds a violation, and the legislature decides on the appropriate sanction by majority vote (except expulsion, which requires two thirds vote). AS 24.60.174

Violations of the open meetings guidelines specified in AS 24.60.037 and the guidelines adopted by the ethics committee pursuant to it are no more enforceable in a court than were the provisions of the OMA itself, for the reasons (the constitutional separation of powers doctrine) explained in *Aboud v. League of Women Voters*. Any requirement of openness by legislators is dependent upon self-policing by the legislature (and public pressure). Interestingly, the legislature has specified that the Ethics Committee is subject to the OMA itself, AS 44.62.310-.312, but presumably this is no more enforceable than other requirements that the legislature comply with the OMA.

For purposes of the legislative open meetings guidelines, a meeting occurs when a majority of the members of a legislative body is present



and action, including voting, is taken or could be taken, or if a primary purpose of the meeting is the discussion of legislation or state policy. AS 24.60.037(b). The Uniform Rules of the Alaska State Legislature control the procedure for conducting open and executive sessions of a legislative body, *ibid.*, and in general prevail in cases where there are conflicts between these guidelines and the Uniform Rules. AS 24.60.037(e). Legislators may meet in a closed caucus or in a private, informal meeting to discuss and deliberate on political strategy. Those meetings are exempt from the legislative open meetings guidelines. AS 24.60.037(c). For purposes of this subsection, “political strategy” includes organization of the houses, assignment of committee membership, scheduling of bills, vehicles for adoptions, house-senate relations, other procedural matters, caucus operations, meetings between majority and minority caucus leaders, meetings between majority and minority caucus leaders of both houses, meetings with the governor, deliberations with regard to political strategy, and discussions of issues in the context of political strategy. A “caucus” is defined as group of legislators who share a political philosophy, or have a common goal, and who organize as a group. AS 24.60.037(g)(1). A “meeting,” as defined under these guidelines, does not include a gathering of members of a legislative body for primarily ministerial or social purposes; or forums where members of a legislative body have been invited to address a group on legislative issues or concerns. AS 24.60.037(g)(3).

A “legislative body,” for purposes of these guidelines, includes the state senate and house of representatives, meeting separately or in joint session; a committee of the legislature, other than the Committee on Committees, but including a standing committee, special committee, joint committee, conference or free conference committee, committee of the whole, and permanent interim committee; a legislative commission, task force or other group established by statute or resolution; or a caucus of members of one or more of these bodies. “Legislative body” does not include, and therefore the legislature presumably intends to exempt from its open meetings guidelines, any committee or group of legislators considering only matters involving the organization of a committee or a house of the legislature, including selection of legislative officers; any committee or group of legislators and the governor or staff of the Office of the Governor; legislative leadership meetings; and officers of a caucus.

b. *Other legislative bodies.* The Supreme Court ruling in the *Abood* case applies to and affects only meetings of the state legislature, because of its fundamental role in the constitutional framework of the government. The OMA otherwise remains completely enforceable, and specifically applies to other legislative bodies such as borough and municipal assemblies and school boards.

### 3. Courts.

Courts are open in Alaska by custom and practice, though there is little or no Alaska case law on the subject. Before the 1994 revisions to the OMA, the statute did not expressly govern the court system, although it did so by negative implication. (AS 44.62.310(d)(1) & (2) state that the OMA “does not apply to judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding” or to juries.) Whether or not the open meetings statute actually governed court proceedings was an open question, and would depend on whether the court applied the same kind of constitutional “separation of powers” reasoning to this issue as it did in the case of the legislature. When the OMA was revised in 1994, it expressly exempted the court system from the definition of public entities covered by the Open Meetings Act. This question and statutory changes are probably academic, however, since the United States Supreme Court has recognized a First Amendment-based right of press and public access to judicial proceedings. *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501 (1984); *Press-Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1 (1986). This right has been applied to all stages of trial proceedings, including jury selection, and to pre-trial motion hearings. News media in Alaska have successfully argued this right to defeat

various attempts to close judicial proceedings. The Alaska Court of Appeals extensively discussed the constitutional right of access in *Renkel v. State*, 807 P.2d 1087 (Alaska App. 1991), holding that an Alaska statute mandating closure of courtrooms to the public in sexual assault cases involving minor victims was unconstitutional, and that, absent particularized findings supporting closure, closure of a court to the general public during testimony of minor victims is reversible error.

### 4. Nongovernmental bodies receiving public funds or benefits.

The OMA itself does not cover non-governmental bodies receiving public funds or benefits. The act covers only meetings of “a governmental body of a public entity of the state.” A “public entity” is defined to mean an entity of the state or a political subdivision of the state, and a “governmental body” is defined to include bodies such as assemblies, councils, boards, commissions and committees “of a public entity.” The key, then, to determining whether a body receiving public funds or benefits is covered by the Open Meetings Act or not is normally whether it is a governmental body of a public entity or not. If a group of individuals who would otherwise simply be “private citizens” are appointed as a commission, board, task force or other similar body by the mayor of a borough or city, or the superintendent of a school district, their gatherings would presumably be governed by the OMA, and would either be required to be open or not depending upon whether they constituted meetings within the definitions of AS 44.62.310(h)(2).

While the 1994 amendments to the OMA did not change the law in this respect, it did eliminate language that may have been confusing on this score, referring to entities “supported in whole or part by public money or authorized to spend public money.” A careful reading of this previous wording showed that it modified “of the state or local government.” So, whether construing the present or former language of the OMA, Alaska Native corporations, local non-profit social service agencies, arts groups and other non-government recipients of public money are not covered by the act. There is probably no reason, however, why a government funding source cannot condition receipt of public funds upon compliance with the provision of state open meetings and open records laws, or on similar requirements for public accountability. For example, the Alaska Public Broadcasting Commission has required this of non-profit educational and community public broadcasting corporations that receive funding from it, and some communities have proposed inserting such provisions in grants to major art groups. Various Native councils and tribal organizations are treated by the state as entities eligible to serve as contractors with the state to deliver services in the “unincorporated communities,” for purposes such as revenue-sharing, community capital project matching grant programs, and village safe-water programs. Regulations governing the state revenue-sharing program, *e.g.*, require these contractors to have held a public meeting to give residents an opportunity to express their ideas and preferences for use of the money, and must have posted notice of the meeting in three public places at least 15 days before the meeting. 19 AAC 30.055.

### 5. Nongovernmental groups whose members include governmental officials.

The OMA does not expressly address the question of non-governmental groups that include public officials, and there is no Alaska case law on the subject. The mere fact that a non-governmental group includes members or participants who are government officials cannot be enough to transform that group into a body covered by the OMA. This is obvious when you consider such groups as Kiwanis, League of Women Voters, athletic booster organizations, and so forth. But the rationale applies equally when the non-governmental groups may be formed or operating to discuss or conduct business very much related to public affairs or public business. The attendance of a government employee or official, even in an official capacity, does not transform this otherwise private meeting. Note, however, that the result may be different where the group is in fact operating as a committee or

subcommittee of a government body, or where the governmental nature of the group is the dominant characteristic and the attendance of private individuals is simply incidental to the meeting of the government body.

## 6. Multi-state or regional bodies.

a. *General.* The OMA does not expressly address multistate or regional bodies, but arguably covers them, at least insofar as Alaska public officials are meeting in their capacity as such. This situation raises questions, however, such as whether the group could be considered a body of the state or a political subdivision of the state, how many Alaska members would suffice to bring the body within the scope of the act, and how many members, Alaskan or not, would trigger the definition of a meeting if the body is covered.

b. *Interstate Compacts.* In some instances, legislation establishing or authorizing participation in multistate or regional bodies specifies terms of public access to meetings and records. For example, the Interstate Compact for Adult Offender Supervision establishes an Interstate Commission that meets at least annually, and more often upon call of the chair or of 27 or more compacting states. Public notice must be given of all Commission meetings, and meetings must be open to the public except as otherwise provided in the statutory compact, or as set out in rules adopted by the Interstate Commission consistent with principles contained in the Government in Sunshine Act, 5 U.S.C. 552(b). AS 33.36.110(e), (f). The Interstate Commission and any of its committees may close a meeting to the public if it determines by two-thirds vote that an open meeting would be likely to (1) relate solely to the Interstate Commission's internal personnel practices and procedures; (2) disclose matters specifically exempted from disclosure by statute; (3) disclose trade secrets or commercial or financial information that is privileged or confidential; (4) involve accusing any person of a crime, or formally censuring any person; (5) disclose information of a personal nature when disclosure would constitute a clearly unwarranted invasion of personal privacy; (6) disclose investigatory records compiled for law enforcement purposes; (7) disclose information contained in or related to examination, operating or condition reports prepared by, or on behalf of or for the use of, the Interstate Commission with respect to a regulated entity for the purpose of regulation or supervision of the entity; (8) disclose information, the premature disclosure of which would significantly endanger the life of a person or the stability of a regulated entity; or (9) specifically relate to the Interstate Commission's issuance of a subpoena or its participation in a civil action or proceeding. AS 33.36.110(f). For every meeting closed under (f) of this provision, the Interstate Commission's chief legal officer shall publicly certify that, in the legal officer's opinion, the meeting may be closed to the public, and shall reference each relevant exemptive provision. The Interstate Commission shall keep minutes that shall fully and clearly describe all matters discussed in any meeting and shall provide a full and accurate summary of any actions taken, and the reasons for the action, including a description of each of the views expressed on any item and the record of any roll call vote as reflected in the vote of each member on the question. All documents considered in connection with any action shall be identified in the minutes. AS 33.36.110(g).

c. *Exxon Valdez Oil Spill Trust.* In August 1991, the U.S. District Court approved a Memorandum Agreement and Consent Decree entered into between the United States and the State of Alaska in settlement of claims to money received for injury, loss and destruction of the natural resources affected by the March 24, 1989, Exxon Valdez oil spill. Federal trustees are appointed by the President, state trustees by the governor. The provisions of the OMA, AS 44.62.310 - .319, apply to a meeting related to the trust in which (1) one or more of the state trustees and one or more of the federal trustees participate, except to the extent that applicable federal law conflicts with AS 44.62.310 or 44.62.312, in which case the applicable federal law governs; or (2) two or more of the state trustees, but none of the federal trustees, participate. AS 37.14.430(a). Notwithstanding section .430(a), the OMA does not apply to a discussion between the trustees outside of a formal

meeting about matters related to the trust if, during the discussion, no decision is made and none of the trustees agrees to vote in a particular way. AS 37.14.430(b). The state trustees may discuss the establishment of an official common state position regarding the trust in executive session under AS 44.62.310(b) and (c)(1). AS 37.14.430(c).

## 7. Advisory boards and commissions, quasi-governmental entities.

a. *Advisory groups.* Advisory groups have been, and remain, expressly subject to the requirements of the OMA. The fact that an organization has no actual decision-making powers does not exempt it from the OMA. *University of Alaska v. Geistauts*, 666 P.2d 424, 428 (Alaska 1983); see also *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d at 589 (Anchorage Library Advisory Board).

[In *Geistauts*, the Alaska Supreme Court ruled that meetings of a university faculty tenure committee were governed by the OMA, and that a faculty member was entitled to reconsideration of a decision denying him tenure as a result of closed tenure committee hearings. While the principle for which the case is cited in the text remains valid, it should be noted that the university was successful in reversing the Supreme Court's ruling when it convinced the legislature to entirely exempt faculty tenure committee hearings and other meetings of university employee groups from the coverage of the OMA as part of the 1994 OMA revisions. See AS 44.62.310(d)(6).]

Before the OMA was revised in 1994, the act referred to "advisory" groups as such. See former AS 44.62.310(a). The current Act explicitly brings advisory groups within its reach by defining a "governmental body" to include not only those bodies of a public entity "with the authority to establish policies or make decisions," but also those "with the authority to advise or make recommendations to the public entity." AS 44.62.310(h)(1). However, the 1994 amendments to the OMA substantially changed the scope of coverage for purely advisory groups, and virtually eliminated penalties for OMA violations by these groups. AS 44.62.310(g). (Note that in certain circumstances, there may be more than one basis for requiring open meetings of an advisory group. See, for example, July 24, 1986, Attorney General Opinion regarding applicability of OMA to the Placer Mining Advisory Group. The opinion noted that if the PMAG received some funding through the U.S. Environmental Protection Agency, it may also be subject to requirements in 40 C.F.R. § 25.7 that all meetings of advisory groups funded in whole or in part by the EPA shall be open to the public.) The Alaska Supreme Court has broadly construed the OMA on each occasion when it has been presented with a question of applicability to advisory committees. See, e.g., *University of Alaska v. Geistauts*, 666 P.2d 424 (Alaska 1983) (advisory university tenure committee subject to OMA); *Hammond v. North Slope Borough*, 645 P.2d 750 (Alaska 1982) (advisory task forces subject to OMA).

b. *Quasi-governmental bodies.* Various Attorney General opinions over the years have suggested that meetings of "independent corporations" or other quasi-governmental bodies set up by state law are subject to the open meetings law as a general rule, see January 2, 1981, opinion regarding Alaska Energy Center; February 17, 1982, opinion concerning Alaska Seafood Marketing Institute; and February 6, 1978, opinion concerning Alaska Industrial Development Authority (and by implication, Alaska State Housing Authority), noting that AS 44.62.310(a) (before the 1994 revisions) specifically made the open meetings statute applicable to an "authority of the state".) The Alaska Permanent Fund Corporation has been determined to be subject to the OMA, both with respect to its regular and special meetings and its work sessions and other meetings that would normally be public in the case of any other entity covered by the OMA. July 6, 1993 Attorney General Opinion No. 663-93-0397. See also February 9, 1984, Attorney General Opinion No. 366-417-84 regarding applicability of the OMA to the Alaska Resources Corporation.

The current law defines a "public entity," subject to the act, to include "a public authority or corporation." AS 44.62.310(h)(3). In some cases, the laws setting up these authorities also provide for open meet-



ings and records. See, e.g., AS 42.40.150, -.170 (governing the Alaska Railroad Corporation), and AS 14.40.871 (meetings of the Alaska Aerospace Corporation). Whether or not a body in fact is a “public authority or corporation” or is otherwise covered by the OMA will depend, from case to case, on how the entity was set up and the degree of government involvement, initially or on an on-going basis.

#### **8. Other bodies to which governmental or public functions are delegated.**

Neither the OMA nor case law addresses the issue of meetings involving public business delegated to “private” groups. In the era of “privatization,” this is an increasing concern. The OMA does govern councils, commissions and other similar bodies of public entities with the authority to advise or make recommendations to the public entity, as well as those that have the authority to establish policies or make decisions. So, depending on the facts, many delegated functions will probably be covered. A superior court held that meetings of phone industry representatives carrying out functions delegated to them by an order of the state’s Public Utilities Commission, concerning preparing, filing and supporting an access tariff, were subject to the OMA. *General Communications Inc. v. APUC and Alaska Exchange Carriers Ass’n*, Case No. 3AN -90-1105 Civ. In addition, local government units can go beyond the requirements of the state law in providing access. And, in the related area of access to records, compare, e.g., Anchorage Municipal Code 3.90.020 (expressly making records in the hands of private contractors that deal with their public contracts “public records”), and AS 40.25.220(6), which now makes records “developed or received by a . . . public contractor for a public agency” available as “public records.”

#### **9. Appointed as well as elected bodies.**

The OMA governs appointed as well as elected public bodies.

### **D. What constitutes a meeting subject to the law.**

#### **1. Number that must be present.**

By amending the law in 1994 to specify the number of members required to be present to constitute a meeting, the legislature intended to, and did, eliminate virtually all ambiguity about whether any particular gathering constitutes a meeting. In order for a gathering of members of a governmental body to constitute a “meeting,” more than three members or a majority of the members, whichever is less, must be present. Since well over 95 percent of the governmental bodies in the state comprise seven or fewer members, the practical effect of this definition is to require the presence of a quorum for all but a relative handful of the groups covered. Comments made during hearings on the 1994 revisions to the OMA underscored that any remaining ambiguity should be resolved in favor of openness, consistent with the general philosophy underlying the act and the longstanding approach the Supreme Court has taken in interpreting it. For example, one of the key legislators in the process of amending the OMA answered a question about whether three or four members would constitute a meeting of a city council, with six members that met regularly, when the mayor was a seventh, *ex officio*, member who only voted to break ties. The legislature indicated that three members should constitute a meeting given the duty to resolve ambiguities in favor of openness.

[Note: Before the 1994 amendments to the OMA defined a “meeting,” the Alaska Supreme Court had indicated that the absence (or presence) of a quorum was not necessarily determinative of whether the law was violated. *Brookwood Area Homeowners Association v. Municipality of Anchorage*, 702 P.2d at 1323 n. 6. Because a quorum was probably present in that case, the Supreme Court did not need to decide on a definition of a “meeting.” A 1981 Attorney General’s opinion had said that when “two or more” members of a public body meet and discuss the business of that body, the OMA applies. See May 11, 1981, Attorney General Opinion No. J-66-655-81. Many, within and outside the press, felt this went too far, as a general rule. However, the Alaska Press Club in its friend-of-the-court brief in the *Brookwood* case

asked the Court not to limit the applicability of the OMA to quorums, even though a quorum was present in that case. There are good arguments that meetings of fewer than a quorum should be governed by the OMA when, for example, the purpose or effect of such a meeting is to circumvent the OMA, or where the group is effectively a “negative quorum” (e.g., when less than a quorum can sustain a veto or prevent action that must be passed by a two-thirds majority). The Supreme Court apparently accepted the press’ position, and declined in *Brookwood* to define a “meeting” narrowly.

No case involving less than a quorum was squarely addressed by the Court before the legislature stepped in to define “meeting.” Two superior courts in 1992 had ruled that the OMA could be violated by a meeting of two members of a body. See *Taylor v. Van Brocklin*, 3CO-90-46 (Super.Ct. 3d Jud. Dist. at Cordova), a political dispute between a city council member and her colleagues) and *Shector v. City of Fairbanks*, and *Cummings v. City of Fairbanks*, Consolidated Case No. 4FA-91-0029 (Super.Ct. 4th Jud. Dist. at Fairbanks). The Cordova case was not appealed, the Fairbanks case was. Meanwhile, both cases were providing impetus for legislative changes. Local government organizations hoped to use the appeal of the Fairbanks case as a vehicle to get a more restrictive interpretation of the OMA. The Supreme Court, aware that the legislature was actively considering changes to the OMA that would probably include definition of a “meeting,” declined to entertain the appeal. The court, in effect, was being asked to render an advisory opinion to define what a “meeting” was — an issue upon which the state legislature has the final word in any event. It avoided the substantive issues by disposing of the case based on a finding that the appeal was moot due to a settlement that occurred between the parties before the appeal was taken.]

#### **a. Must a minimum number be present to constitute a “meeting”?**

The law defines a meeting as a gathering of more than three, or a majority, of the members of a public body. In most cases, the minimum number of people that must be present to constitute a meeting would be three (for a group with five or more members). However, it would be two, when the committee, subcommittee, or other subordinate unit of a governmental body consists of either two or three members. It is also possible that a series of gatherings of fewer than the number of members necessary to constitute a meeting could still be held a violation of the OMA, where the intent or effect of such gatherings was to circumvent the OMA. For example, in a Florida case cited in briefing of various open meetings cases, the court held that a series of sequential meetings between a school superintendent and individual members of the school board (so that no more than one member of the body was ever present at the same time) still constituted a violation of that state’s open meetings act, where it was done with the purpose of avoiding the requirements of the public meetings law.

In *Hickel v. Southeast Conference*, 868 P.2d 919 (Alaska 1994), the superior court held that the Reapportionment Board violated the OMA by “meeting outside of noticed meetings to do the business of reapportionment.” In particular, the superior court found that the Board members had one-on-one conversations with each other, in which they discussed reapportionment affairs and districting preferences, and solicited each other’s advice, and also found that the “dearth of [substantive] discussion on the record, combined with the manner of some Board members at trial, as well as other evidence presented at trial, convinces this court that important decision-making and substantive discussion took place outside the public eye.” The Supreme Court reiterated its earlier holding in *Brookwood Area Homeowners’ Ass’n v. Anchorage*, 702 P.2d 1317, 1323 (Alaska 1985) that “a ‘meeting’ includes every step of the deliberative and decision-making process when a governmental unit meets to transact public business.” The *Hickel* court reiterated that the Supreme Court had noted in *Brookwood* that “the question is not whether a quorum of a governmental unit was present at a private meeting. Rather, the question is whether activities of public officials have the effect of circumventing the OMA.”



*Hickel*, 868 P.2d at 929, quoting *Brookwood*, 702 P.2d at 1323, n.6. The Supreme Court stated that its review of the record indicated support for the factual finding that the Reapportionment Board had conducted some of its reapportionment business outside scheduled public meetings, and based on this, the Supreme Court agreed that the Board had violated the OMA. It is arguable that this decision, which was issued by the court before the 1994 amendments to OMA were adopted, may be affected by the fact that the legislature defined a meeting in that case as a gathering of more than three or a majority of the members, whichever is less. However, the legislature did not intend by this clarification or definition of meeting to change the rule articulated in *Brookwood*, that situations that would not otherwise constitute meetings would still violate the OMA where the purpose or effect of the communications was to circumvent the OMA. This point was made on a number of occasions throughout the legislative committee hearings and other proceedings leading up to the 1994 revisions of the OMA, and was a point upon which proponents of both sides of the OMA debates, as well as the key legislators involved, did not differ.

#### **b. What effect does absence of a quorum have?**

If a quorum is not present, there may still be a meeting if the group is large enough that four members (more than three) does not constitute a majority.

### **2. Nature of business subject to the law.**

Numbers alone do not completely determine whether a gathering of public officials is a “meeting.” Every member of the same public body might attend the same hockey tournament or sled dog race or picnic, without there being a meeting. It is the discussion of the public business of the body that makes a gathering of its members a meeting. The statute defines a “meeting” as a gathering of the requisite number of members of a governmental body when “a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decisions for a public entity.” AS 44.62.310(h)(2)(a).

*Authority of Group Conducting Meeting.* In defining when a gathering constitutes a meeting, the Alaska Open Meetings Act distinguishes between meetings of governmental bodies generally, and those that are purely advisory. When the governmental body has the authority to establish policies or make decisions for a public entity, it is a “meeting” whenever the requisite number of that body are present and consider a matter upon which the body is empowered to act. It does not matter whether the meeting was regularly scheduled, informally arranged by all of the members shortly in advance of the meeting, or spontaneous and serendipitous. The question is whether public business of the body is considered by the members collectively. (The reference to considering the matter “collectively” was added at the urging of certain legislators who were concerned that an individual or group could subvert governmental action by, e.g., approaching members of the body individually, and unbeknownst to one another, while all were gathered at a social function and not otherwise considering any business.) On the other hand, when members of a purely advisory group meet — a governmental body that has only the authority to advise or make recommendations for a public entity, but has no authority to establish policies or make decisions for the public entity — that gathering constitutes a meeting only when it is “prearranged for the purpose of considering a matter upon which the governmental body is empowered to act.” So, when more than three or a majority of members of an advisory group plan to get together, and then do so, it is a meeting subject to the other provisions of the OMA. However, when they simply run into one another by chance, or for some reason unrelated to the business of the body they serve on, but end up discussing that business, their failure to have given reasonable public notice in advance of this gathering, or otherwise to comply with the requirements of the OMA, will not be the basis of a challenge to any action subsequently resulting from the process of which their meeting is a part, since it is not a “meeting” under the act.

#### **a. “Information gathering” and “fact-finding” sessions.**

The Alaska Supreme Court has consistently construed the OMA to strongly support the policy of openness expressed in the act’s statement of purpose, AS 44.62.312. The court has ruled that the act applies to mere discussions and informational meetings as well as to decisional meetings. *Brookwood Area Homeowners Association v. Anchorage*, 702 P.2d 1317 (Alaska 1985). It has relied in its rulings on strong open meetings law precedent from other jurisdictions such as Florida and California. In *Brookwood*, e.g., it quoted with approval the following language from *Sacramento Newspaper Guild v. Sacramento Cty. Bd. of Supervisors*, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (Cal. App. 1968):

An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. . . . Construed in the light of the Brown Act’s objectives, the term “meeting” extends to informal sessions or conferences of the board members designed for the discussion of public business.

*Id.* at 487 (emphasis added, footnote omitted), cited in *Brookwood*, 702 P.2d at 1322.

#### **b. Deliberations toward decisions.**

The Alaska Supreme Court has said that coverage of the Open Meetings Act extends to “every step of the deliberative and decision-making process when a governmental unit meets to transact public business.” *Brookwood Area Homeowners Ass’n*, 702 P.2d at 1323. “Modern public meetings statutes reject the argument that only the moment of ultimate decision must be subject to public scrutiny, and require that preliminary deliberations be open as well.” *University of Alaska v. Geistauts*, 666 P.2d at 428 n. 6.

### **3. Electronic meetings.**

#### **a. Conference calls and video/Internet conferencing.**

Members of a governmental body may meet by teleconference. Implicit in this is the requirement that any such conference call meeting be conducted in a fashion that all participating members of the body can simultaneously listen to the debate or discussion of all others, and be heard by all others. Compare with a situation where one member of a body makes a sequential series of phone calls to other individuals in the body to obtain their concurrence in an action to be taken. A superior court judge in one such case voided the resulting action on the grounds that the failure to have all members able to simultaneously participate was improper, and rendered the resulting decision defective.

If the meeting is to be by teleconference, the location of any teleconferencing facilities that will be used must be included in the public notice given for the meeting. AS 44.62.310(e). Agency materials that are to be considered at the meeting shall be made available at teleconference locations “if practicable,” and votes at a meeting held by teleconference must be taken by roll call. AS 44.62.310(a). In *Hickel v. Southeast Conference*, 868 P.2d 919, 928-929 (Alaska 1994), the Supreme Court reversed a superior court finding that the Reapportionment Board had committed a violation of the OMA by failing to give notice of teleconference sites, failing to make materials available for teleconferences, and failing to take roll call votes during teleconferences, when it allowed public participation by phone without giving public notice of every location from which citizens might call in.

The Supreme Court noted that the OMA allows, but does not require, the use of teleconferencing “for the convenience of the parties,

the public, and the governmental units conducting the meetings,” AS 44.62.312(a)(6), and that “attendance and participation at meetings . . . may be by teleconferencing.” AS 44.62.310(a). The court observed that while teleconferencing is not mandatory, the act requires certain procedures if it is used, including making materials available at teleconference locations, taking votes by roll call, and providing reasonable public notice as to the time, date and location of the teleconference location to be used. The Supreme Court concluded that

In this case, the Board usually had only one meeting site. However, the Board allowed any citizen to call in and provide testimony by telephone, without necessarily traveling to an official teleconference site. In the Board’s view, this approach expanded public access to the reapportionment process, and was consistent with the provisions of the Open Meetings Act. We agree. The participation of the public would have been more meaningful had the individual callers been provided with reapportionment materials. Nevertheless, the Board was only required to hold open meetings — it was not required to allow citizens to call in or to set up teleconferencing centers. AS 44.62.310. We therefore hold that the Board’s procedure, however imperfect, did not violate the Open Meetings Act.

Implicit in the holding is that all phones used to participate in a meeting are not “teleconferencing facilities” within the meaning of the act. The Attorney General had since advised public agencies that the *Hickel* ruling does not authorize members of a body who are participating in meetings by telephone to do so anywhere except at publicly noticed teleconferencing facilities, unless attendance at a teleconferencing facility would cause undue hardship. August 21, 1995, Attorney General Opinion No. 663-95-0524.

#### **b. E-mail.**

The Open Meetings Act does not address expressly conducting “meetings” by e-mail. The use of e-mail by members of a governmental body to communicate among themselves would seem to raise two issues. The first would be whether the public has a right of access to these communications under the public records law, and the answer would seem clearly to be yes. Whether such communications would constitute a “meeting” under the OMA, which by definition would then require “reasonable public notice,” is more problematic. However, where a governmental body employs e-mail to conduct its business in a way that is functionally equivalent to an actual meeting, and particularly where computer technology is used in essentially the same fashion as a video or audio teleconference, then it may be reasonable to subject such a “meeting,” where the members are “virtually present,” to the requirements of the OMA.

Courts have shown a willingness to find violations of the OMA in circumstances which, on their face, may not constitute a violation, where the purpose or effect of the activity is to circumvent the open meetings act. Giving reasonable public notice of such meetings will ensure that interested parties and other members of the public will have the opportunity to participate, either at the time, or by checking the electronic record of these communications afterwards. Implicit in this is the assumption that the notice stating the “place of the meeting” would provide an Internet address or other means of accessing the electronic communications being exchanged. It is also reasonably arguable that if a public body is to conduct business in this manner, it must provide a public terminal or other similar means of access to members of the public who may not otherwise have a reasonable access to gatherings in cyberspace.

Whether e-mail communications should and will be treated as “meetings,” rather than simply as records, and if so how notice, public attendance, and similar matters will be addressed in this context, are issues that will presumably be worked out by experience over time, perhaps aided by judicial interpretations. It seems clear, however, that if members of governmental bodies use e-mail to conduct business at all, the use of this forum must be approached cautiously given the

obvious difficulties in affording the public access to a process that can so readily be conducted with no meaningful public notice, participation, or awareness. In at least one case, the superior court found that members of a state board had violated the open meetings act through their use of e-mail, but the Supreme Court did not squarely address the issue on appeal. “Assuming that the trial court was correct in finding that some of the (Redistricting) Board members’ e-mail exchanges violated the OMA, we agree with the trial court that no remedy is appropriate. We hold that the superior court properly concluded that, based on the factors set out in AS 44.62.310(f), “the public interest[] in requiring compliance with the Open Meetings Act does not outweigh the harm that would be caused to the public interest by voiding the entire Redistricting Plan on this basis. Because we hold that the superior court permissibly refused to grant any remedy for the particular e-mail exchanges it found to violate the Open Meetings Act, we need not address whether those e-mail exchanges actually violated the Act.” In re: 2001 Redistricting Plan, 44 P.3d 141, 147 (Alaska 2002).

#### *Out-of-jurisdiction meetings.*

By requiring that meetings be open to the public, the law impliedly requires that they be held within the area in which the body has jurisdiction. See May 11, 1981, Attorney General Opinion, *supra*, at 5. Nevertheless, when necessary to its business, a board or commission (or subcommittee) and its staff can make duly noticed field trips outside the board’s geographic jurisdiction. In doing so, however, the body must limit its activities to those for which the field trip was required, and it cannot act on other matters which could have been acted upon at its usual place of business at a public meeting. *Id.*

#### *Voting by mail.*

A member of a body may vote by mail (or by teleconferencing, so long as the vote is recorded to identify each person, and show how the person voted). AS 44.62.600. Voting by mail does not constitute a meeting, *per se*, but the Attorney General has recommended to agencies that all mail voting materials contain a notice stating in part: “Board action on this matter is being taken via mail vote in accordance with AS 44.62.600. Due to open meeting requirements in this state, members are reminded not to discuss this matter with one another.” July 5, 1994 Attorney General Opinion No. 663-94-0569.

#### **c. Text messages.**

There do not appear to be any cases or authorities addressing text messages as meetings at this time, and in general, the same considerations set forth in [Open Meetings] §I.D.3.b above concerning e-mails should be applicable.

#### **d. Instant messaging.**

There do not appear to be any cases or authorities addressing instant messaging as meetings at this time, and in general, the same considerations set forth in [Open Meetings] §I.D.3.b above concerning e-mails should be applicable.

#### **e. Social media and online discussion boards.**

There do not appear to be any cases or authorities addressing social media and online discussion boards as meetings at this time, and in general, the same considerations set forth in [Open Meetings] §I.D.3.b above concerning e-mails should be applicable.

### **E. Categories of meetings subject to the law.**

#### **1. Regular meetings.**

##### **a. Definition.**

The OMA does not define “meeting” as a gathering of the requisite number of members of the governmental body when a matter upon which the governmental body is empowered to act is considered by the members collectively, and the Alaska Supreme Court has held that “‘meeting’ includes every step of the deliberative and decision-making process when a governmental unit meets to transact public

business.” *Brookwood Area Homeowners Ass’n*, 702 P.2d at 1323. Where the governmental body is purely advisory, gatherings of any number of members of the body do not constitute meetings unless they are pre-arranged for the purpose of considering a matter upon which the governmental body is empowered to act. If the governmental body has authority to establish policies or make decisions for the public entity, rather than being purely advisory, the fact that the meeting was not pre-arranged, or not pre-arranged for the purpose of considering the business of the body, is immaterial. The OMA does not draw distinctions between categories of meetings subject to the law, such as “regular” or “special” meetings. Attorney General opinions do address such distinctions, and provisions dealing with meetings in municipal government charters and codes often do so as well.

## **b. Notice.**

The Supreme Court addressed the issue of what constitutes “reasonable public notice” in *Hickel v. Southeast Conference*, and upheld superior court factual findings and legal conclusions that the Reapportionment Board had violated the OMA by providing inadequate notice for a number of its meetings. The superior court found that the Board violated its own guidelines as to reasonable notice. Although the executive director had adopted a policy of five days notice for meetings, the Board provided less notice for a number of them, including three days notice for some and four days notice for others. The superior court also found that the Reapportionment Board had failed to advertise in rural newspapers on several occasions, providing either no notice or insufficient notice in these papers. Finally, the superior court found that in several instances the Board had provided information about meetings that was “varied and confusing,” as to time and also as to whether a meeting or hearing would take place. 868 P.2d at 919, n.13-15. The superior court also found that the manner of notification discouraged citizen participation. Based on these findings, the Supreme Court held that the Reapportionment Board violated the OMA by failing to provide reasonable notice regarding the Board’s meetings throughout the state.

### **(1). Time limit for giving notice.**

The OMA simply requires “reasonable notice” for all meetings. AS 44.62.310(e). What is reasonable will vary depending on the type of meeting and circumstances. A 1981 Attorney General’s opinion provides some further guidance on this. (See May 11, 1981, Attorney General Opinion, *supra*, at 6-7.

What is reasonable depends upon the situation in which the public body must meet to hear, consider, deliberate and take — or not take — action, and the effect of its doing so on the public and on any individual. The greater the exigency of the former, the less notice will probably be necessary. The greater the latter, the more notice will probably be required.

Regularly scheduled meetings need no further notice, if the time and place are known to the public, but special meetings always require special notice, unless an emergency makes notice impractical or impossible.

Public bodies must plan ahead and their failure to do so will not justify their holding a meeting without adequate, effective public notice. Absent exigent circumstances, three days notice appears to be the minimum allowable to be reasonable public notice and the three days cannot include Saturday, Sunday or holidays.

*Id.* Similarly, another Attorney General opinion stated that the notice requirement of the OMA required that the Museum Collections Advisory Committee publish a schedule of its fixed monthly meetings twice yearly, stating the date, time and place of the meetings. For unscheduled meetings, the public could be notified by public service announcements on the radio, as long as there is confidence that the announcements will in fact be made; but regardless of the media used, at least three days notice should be given. See December 30, 1992, Attorney General Opinion.

In addition to this general interpretation of the statutory notice requirements under the OMA, there may be other statutes, regulations, or local ordinances that require more specific public notice for particular agencies. See, for example, the statute referencing applicability of the Open Meetings Act to the University of Alaska Board of Regents says the Board of Regents may determine the time and place of its meetings, but that 30 days notice is required for all regular meetings and 10 days notice is required for special meetings of the Board of Regents, its committees or subcommittees called under the bylaws or rules or procedure of the Board of Regents. Emergency meetings may be called without notice. AS 14.40.160(b). And, members of the Alaska Bar and the public must be given 30 days’ notice of meetings of the Alaska Bar Association Board of Governors, except for emergency meetings, and meetings of the board must take place in the state. AS 08.08.075. See also, AMC 2.30.030(L) requiring publication of the agenda for the regular Anchorage Assembly meeting in a newspaper of general circulation not less than 36 hours before the meeting. Note that Alaska law affords the public not only a right to attend meetings of municipal bodies, but also a reasonable right to be heard at all regular and special meetings. AS 29.20.020(a). This right is afforded in the Municipal Code, and is not part of the OMA, so that no such right exists generally with respect to all governmental bodies or public entities in the state other than those covered by the Municipal Code. However, the municipal code otherwise tracks the open meetings act by incorporating its exceptions and exemptions, so this right to be heard at municipal meetings does not extend a right to participate, or even be present, to the subject of an adjudication in the portion of an adjudicatory meeting closed pursuant to AS 44.62.319(d)(6) or its analogues. *Griswold v. City of Homer*, 55 P.3d 64, 73 (Alaska 2002).

### **(2). To whom notice is given.**

Notice of all meetings must be given to the public, and in terms of timing, it is the receipt of notice that counts. Mailing notices to the media three days before a meeting will not suffice, May 11, 1981 Attorney General Opinion, *supra*, at 6, and where a public service announcement on the radio is used, there must be confidence that the announcement will in fact be made. In addition to the general public notice, the law requires specific notice to any individual a governmental body proposes to discuss in executive session for the reason that a public discussion could harm that person’s reputation or character. In such cases, giving only general public notice, or even giving the individual only notice of the time and place of the upcoming meeting, are inadequate. The governmental body has an obligation under the OMA to inform the affected individual of the meeting at which the discussion about him or her will take place, and to inform the person of the right to request that the meeting be open to the public. *University of Alaska v. Geistauts*, 666 P.2d at 429. See also, *Revelle v. Marston*, 898 P.2d 917 (Alaska 1995). Actual notice cures any defect in formal notice under the OMA. *Ramsey v. City of Sand Point*, 936 P.2d 126, 135 (Alaska 1997).

### **(3). Where posted.**

Notice of meetings must be posted “at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. The governmental body shall provide notice in a consistent fashion for all its meetings.” AS 44.62.310(e).

### **(4). Public agenda items required.**

The Open Meetings Act does not contain any requirement for publication of an agenda or other subject matter notice of items to be discussed at meetings. For years, the wording of the OMA did not make clear whether it requires either general or specific notice of the subjects to be discussed at meetings. The Supreme Court has been presented with the question once, but avoided answering it. *Malone v. Meekins*, 650 P.2d 351, 358-359 (Alaska 1982) (court found it unnecessary to decide this question, given that circumstances of case before it involving reorganization of the state legislature, which the court found



did not require notice at all because of an OMA exception for meetings held to organize a body).

In 1985, the notice provision of the OMA was amended to add: “The notice must include the date, time and place of the meeting, and if the meeting is by teleconference the location of any teleconferencing facilities that will be used.” AS 44.62.310(e). This additional language would lend support to an argument that subject matter notice is not required by the language specifying “reasonable public notice.” Note that there may be other applicable legal requirements, in the Municipal Code and local ordinances, which do specifically require some form of subject matter notice to certain governmental bodies. See, e.g., AMC 2.30.030(L) (requiring advance publication of agenda for Anchorage Assembly meetings). Section 17.05 of the Anchorage Municipal Charter, a provision identical to § 1.25.010 of the Anchorage Municipal Code, requires municipal agencies to give reasonable advance notice of the subject of each meeting. *Tumley v. Municipality of Anchorage*, 631 P.2d 67, 81 n.5 (Alaska 1981); *Anchorage Independent Longshore Union Local 1 v. Municipality of Anchorage*, 672 P.2d 894, 895 (Alaska 1983). In *Longshore Union*, the Municipality argued that sufficient proper notice had been given, because the matter was “simple,” “pro forma,” and “ministerial,” and the public had notice that matters other than those on the agenda might be discussed since the agenda included a reference to “items not on the agenda.” Further, it argued that any alleged deficiencies had been cured because a representative of the plaintiff had received actual notice. The Court held that whether such notice should be deemed to satisfy the requirements of *Tumley*, or whether any deficiency was cured, involved issues of fact for the trial court to resolve on remand. *Id.*

#### (5). Other information required in notice.

The Open Meetings Act does not specify the contents of the “reasonable public notice” that must be given for all meetings except to require that the notice “must include the date, time and place of the meeting and, if the meeting is by teleconference, the location of any teleconferencing facilities that will be used.”

#### (6). Penalties and remedies for failure to give adequate notice.

Actual notice cures any defect in formal notice under the OMA. *Ramsey v. City of Sand Point*, 936 P.2d 126, 135 (Alaska 1997). Action taken at or as the result of meetings held or conducted in violation of the OMA is voidable. AS 44.62.310(f). In 1994 amendments, the legislature codified and expanded upon judicial decisions discussing the circumstances that would lead to voiding of action taken as the result of OMA violations. At the same time, the legislature limited the right to bring suit to void an action taken in violation of the OMA to a 180-day period after the date of the action the party seeks to void. AS 44.62.310(f). Previously, the statute had contained no statute of limitations, and the Supreme Court had ruled that the doctrine of laches did not apply to bar OMA suits based on the passage of time between the violation alleged or the action taken, and when the suit was filed to set the action aside. In addition, the legislature eliminated the right to bring suit to void an action taken in violation of the OMA based upon OMA violations by purely advisory groups. AS 44.62.310(g). Previously, the Supreme Court had specifically recognized the right to challenge an action taken when a violation had occurred at any stage of the process leading up to it, including violations by advisory groups in early stages of the fact-gathering process.

Alaska Supreme Court decisions before the OMA was revised in 1994 indicated that a public body could cure violations by having another meeting at which there is a substantial, independent, *de novo* reconsideration of the issues, but not just a rubber stamp confirmation of the earlier action. See *Alaska Community College's Federation of Teachers Local No. 2404 v. University of Alaska* (hereinafter, “ACCFT”) 677 P.2d 886 (Alaska 1984). The OMA now provides that a governmental body that violates or is alleged to have violated the OMA may cure the violation or alleged violation by holding another meeting in compliance with notice and other requirements of the OMA, and conducting a

substantial and public reconsideration of the matters considered at the original meeting. The law now explicitly states what was understood before the 1994 amendments — even if a court finds that an action is void, the governmental body may discuss and act on the matter at another meeting held in compliance with the OMA.

A court may hold that an action taken at a meeting held in violation of the OMA is void only if the court finds that, considering all the circumstances, the public interest in compliance with the OMA outweighs the harm that would be caused to the public interest and the public entity by voiding the action. AS 44.62.310(f). In making the determination of whether or not to void a challenged action due to violations of the OMA, the legislature has directed the court to consider at least nine factors now specified in the act (largely codifying principles articulated in Supreme Court decisions to that time) as well as any others the court finds relevant. These factors are: (1) the expense that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided; (2) the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided; (3) the degree to which the public entity, other governmental bodies, and individuals may be exposed to additional litigation if the action is voided; (4) the extent to which the governing body, in meetings held in compliance with (the OMA), has previously considered the subject; (5) the amount of time that has passed since the action was taken; (6) the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action; (7) whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of (the OMA); (8) the degree to which violations of (the OMA) were willful, flagrant or obvious; and (9) the degree to which the governing body failed to adhere to the policy stated in AS 44.62.312(a). See, e.g., *In re: 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) (no remedy for assumed OMA violation resulting from e-mail exchanges of Board members, given stronger public interest in upholding than voiding redistricting plan).

#### c. Minutes.

##### (1). Information required.

The OMA does not specifically require that minutes be taken, although it does require that votes must be conducted so the public “may know the vote of each person entitled to vote,” except when voice votes are authorized. AS 44.62.310(a). Votes must be taken by roll call at teleconferenced meetings. There is probably an implied statutory obligation, or common law obligation, to keep minutes of public meetings.

##### (2). Are minutes public record?

Any minutes that are taken are, of course, public records. AS 40.25.110-.120. Cf. February 16, 1983, Attorney General Opinion No. 366-426-83, at 2. If the body is properly meeting in executive session, there is probably no requirement that it keep minutes of this closed session, or that it release any such minutes if it does keep them. *Id.* At least one Attorney General opinion advises that where a tape recording (or minutes) of a portion of an executive session which was not properly an executive session exists, it must be released upon request. August 26, 1982, Attorney General Opinion No. 166-622-82, at p. 5. The Alaska Supreme Court has not addressed this. However, there may be local ordinances that do require that minutes be kept. See e.g., AMC 2.30.030.A (requiring that all regular and special meetings and all work sessions of the Anchorage Municipal Assembly be electronically recorded). Likewise, there may be specific legal requirements that tapes or minutes of executive sessions be kept, and made available after a certain time period, or after the matter discussed in executive session has been finally resolved. See, e.g., AMC 2.30.030. K.2, which provides:

No official action may be taken in executive sessions. Although the public may be excluded, the session shall be electronically re-

corded. The tapes shall be available for public access according to the following schedule:

- a. If the session concerns pending litigation, the release date shall be when all causes of action have been resolved by final judgment or when further claims arising from the matter are otherwise barred.
- b. If the session concerns labor negotiations, the release date shall be six months following expiration of the labor contract.
- c. If the session concerns matters that if immediately disclosed would tend to affect adversely the finances of the municipality (except labor negotiations) the release date shall be a date certain set by the Assembly at the conclusion of the executive session.
- d. If the session concerns matters which tend to defame or injure the reputation of persons the Assembly may set a release date or may provide that no release shall occur.

## 2. Special or emergency meetings.

### a. Definition.

The OMA does not define special or emergency meetings, or distinguish between them and regular meetings. It simply requires “reasonable notice” for all meetings. AS 44.62.310(e). Attorney General’s opinions provide further guidance. Special meetings are ones that are unscheduled, as opposed to ones that occur at a regular, fixed time and place. Emergency meetings consist solely of situations that call for immediate action to protect the public peace, health or safety. *See* May 11, 1981, Attorney General Opinion, at 6.

### b. Notice requirements.

#### (1). Time limit for giving notice.

Special meetings always require special notice, unless an emergency makes notice impractical or impossible. The latter consists solely of situations that call for immediate action to protect the public peace, health or safety. In other words, in the absence of a situation demanding immediate action to protect the public peace, health or safety, it does not suffice that a meeting is held on such short notice that there is no effective notice. Public bodies must plan ahead, and their failure to do so will not justify their holding a meeting without adequate, effective public notice.

... Even emergency meetings must be noticed, if possible, by calling radio and television stations and the press and by posting.

May 11, 1981, Attorney General Opinion, at 6. Specific statutes may impose more specific notice requirements. *See e.g.*, AS 14.42.130(b), requiring at least 24 hours notice before a meeting of the Alaska Student Loan Corporation at which the issuance of corporation bonds is authorized.

#### (2). To whom notice is given.

Notice of all meetings must be given to the public, and in terms of timing, it is the receipt of notice that counts. Mailing notices to the media three days before a meeting will not suffice, May 11, 1981 Attorney General Opinion, *supra*, at 6, and where a public service announcement on the radio is used, there must be confidence that the announcement will in fact be made. In addition to the general public notice, the law requires specific notice to any individual that a governmental body proposes to discuss in executive session for the reason that a public discussion could harm that person’s reputation or character. In such cases, giving only general public notice, or even giving the individual only notice of the time and place of the upcoming meeting, are inadequate, and the governmental body has an obligation under the OMA to inform the affected individual of the meeting at which the discussion about him or her will take place and to inform the person of

the right to request that the meeting be open to the public. *University of Alaska v. Geistauts*, 666 P.2d at 429. *See also, Revelle v. Marston*, 898 P.2d 917. Actual notice cures any defect in formal notice under the OMA. *Ramsey v. City of Sand Point*, 936 P.2d 126, 135 (Alaska 1997).

### (3). Where posted.

The OMA provides that subject to posting notice of a meeting on the Alaska Online Public Notice System as required by AS 44.62.175(a), the notice may be given using print or broadcast media. The notice shall be posted at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. The governmental body shall provide notice in a consistent fashion for all its meetings. AS 44.62.310(e).

### (4). Public agenda items required.

The Open Meetings Act does not contain any requirement for publication of an agenda or other subject matter notice of items to be discussed at meetings. For years, the wording of the OMA did not make clear whether it requires only notice of the time and place of a meeting, or whether in addition it requires specific notice of subjects to be discussed at meetings. The Supreme Court has been presented with the question once, but avoided answering it. *Malone v. Meekins*, 650 P.2d 351, 358-359 (Alaska 1982).

In 1985, the notice provision of the OMA was amended to add: “The notice must include the date, time and place of the meeting, and if the meeting is by teleconference the location of any teleconferencing facilities that will be used.” AS 44.62.310(e). This additional language would lend support to an argument that subject matter notice is not required by the language specifying “reasonable public notice.” Note that there may be other applicable legal requirements, in the Municipal Code and local ordinances, that do specifically require some form of subject matter notice to certain governmental bodies. *See, e.g.*, AMC 2.30.030(L) (requiring advance publication of agenda for Anchorage Assembly meetings). Section 17.05 of the Anchorage Municipal Charter, a provision identical to § 1.25.010 of the Anchorage Municipal Code, requires municipal agencies to give reasonable advance notice of the subject of each meeting. *Tumley v. Municipality of Anchorage*, 631 P.2d 67, 81 n.5 (Alaska 1981); *Anchorage Independent Longshore Union Local 1 v. Municipality of Anchorage*, 672 P.2d 894, 895 (Alaska 1983). In *Longshore Union*, the Municipality argued that sufficient proper notice had been given, because the matter was “simple,” “pro forma,” and “ministerial,” and the public had notice that matters other than those on the agenda might be discussed since the agenda included a reference to “items not on the agenda.” Further, it argued that any alleged deficiencies had been cured because a representative of the plaintiff had received actual notice. The Court held that whether such notice should be deemed to satisfy the requirements of *Tumley*, or whether any deficiency was cured, involved issues of fact for the trial court to resolve on remand. *Id.*

In any event, it seems implicit that notice of an emergency meeting must include subject matter notice advising of the nature of the emergency requiring the meeting.

### (5). Other information required in notice.

The Open Meetings Act does not specify the contents of the “reasonable public notice” that must be given for all meetings except to require that the notice “must include the date, time and place of the meeting and, if the meeting is by teleconference, the location of any teleconferencing facilities that will be used.”

### (6). Penalties and remedies for failure to give adequate notice.

A lawsuit to void an action taken in violation of the Open Meetings Act in connection with a special or emergency meeting, as with any other OMA violation, must be filed in superior court within 180 days after the date of the action being challenged. The governmental

body that violates or is alleged to have violated the OMA can cure the violation, before or after court action, by holding another meeting in compliance with notice and other requirements of the OMA and conducting a substantial and public reconsideration of the matter as considered at the original meeting. A court may void action taken as the result of a meeting held in violation of the OMA only if it finds that, considering all circumstances, the public interest in compliance with the OMA outweighs the harm that would be caused to the public interest and to the public entity by voiding the action. In making this determination, the court must consider at least the nine factors specified by the legislature in AS 44.62.310(f), as well as any others the court may find relevant.

### c. Minutes.

#### (1). Information required.

The OMA does not specifically require that minutes be taken, although it does require that votes must be conducted so the public “may know the vote of each person entitled to vote.”

#### (2). Are minutes a public record?

Any minutes taken are effectively public records, disclosable pursuant to AS 40.25.110-.120.

### 3. Closed meetings or executive sessions.

#### a. Definition.

The OMA does not define “executive session.” It obviously refers to a meeting closed to the public. What is not clear is whether and to what extent non-members can be allowed to attend executive sessions. *E.g.*, can staff attend? Can a mayor or school superintendent? Apparently an attorney or labor negotiator may be present in an executive session, since the law prohibits taking action at an executive session, “except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations.” AS 44.62.310(b). Certain public entities are authorized by law to establish their own rules for compliance with open meetings principles, and have established grounds for convening in executive session that differ somewhat from the OMA requirements. *See, e.g.*, AS 42.40.170(b) (Alaska Railroad Corporation).

#### b. Notice requirements.

Actual notice cures any defect in formal notice under the OMA. *Ramsey v. City of Sand Point*, 936 P.2d 126, 135 (Alaska 1997).

#### (1). Time limit for giving notice.

Since there is no subject matter notice required for meetings generally, there is no special public notice required in advance of executive sessions. As to the general requirements concerning notice of meetings, a requirement in the Municipal Code that governmental bodies of municipalities covered by Title 29 give subject matter notice of items to be discussed at their meetings may require specific notice of executive sessions. While notice to the general public of executive sessions may not be required, AS 44.62.310(c)(2) requires advance notice to an individual who is to be discussed in executive session, so that this person may meaningfully exercise his or her right to request an open hearing. *University of Alaska v. Geistausts*, 666 P.2d at 429; *see also Revelle v. Marston*, 898 P.2d 917. *See*, March 15, 1979, Attorney General Opinion No. J-66-485-79, concerning whether an individual whose hiring, firing or transfer is to be discussed is entitled to advance notice of an executive session for that purpose. The Attorney General notes that if the individual requests a public discussion, there can be no executive session to discuss hiring, firing or transferring him.

He may exercise this right, however, only if he has advance notice that his hiring, firing or transfer is to be discussed; that matters tending to injure his reputation and character will (or may) be discussed; and that the body intends to meet in executive session at a given time and place; and that he may request that the matter be discussed in public rather than at an executive session. Only

in this manner will the affected person have a reasonable opportunity to exercise his right to a public meeting. *Cf.*, *McCarrey v. Comm’r. of Natural Resources*, 526 P.2d 1353 (Alaska 1974).

If, without adequate notice to the person affected, a governing body announces in the course of its meeting that it is going into executive session, the person affected will have no reasonable way of exercising his right to a public meeting. Even if the person happened to be present at the meeting, the failure to afford him adequate advance notice compels him to consider his options in unreasonable haste, without any time to prepare, and without any opportunity to seek counsel on the matter. The individual’s statutory rights are made a sham. We very much doubt that the courts would look with favor on that kind of practice.

As a practical matter, a week to ten days is a minimum period — absent an emergency — for adequate notice. For more complicated matters, at least 30 days is the minimum reasonable period of notice. We conclude, therefore, that in order to use the exception for executive sessions under AS 44.62.310(c), the governing body must give the person affected at least one week’s notice that it intends to do so, together with notice of the subject to be discussed and of his right to a public discussion on the subject.

#### (2). To whom notice is given.

While notice to the general public of executive sessions may not be required, AS 44.62.310(c)(2) requires advance notice to an individual who is to be discussed in executive session, so that this person may meaningfully exercise his or her right to request an open hearing. *See*, March 15, 1979, Attorney General Opinion No. J-66-485-79, discussed in detail in the preceding subsection. The Attorney General notes that if the individual requests a public discussion, there can be no executive session to discuss hiring, firing or transferring him. *See also, University of Alaska v. Geistausts*, 666 P.2d at 429, in which the Alaska Supreme Court held that failure to give the affected faculty member adequate notice of tenure committee meetings deprived him of his right to request an open discussion pursuant to AS 44.62.310(c)(2). “In our view, requiring the governmental body to inform the individual only of the time and place of the upcoming meeting is inadequate notice.” The Court held the University had an implied statutory obligation to inform the faculty member of all meetings in which his tenure application would be considered and to inform him that he had the right to request that the meetings be open to the public. *See also, Revelle v. Marston*, 898 P.2d 917.

#### (3). Where posted.

There is no special posting requirement for executive or closed sessions, and there is no apparent requirement that the special, personal notice that must be given to an individual who the governmental body proposes to discuss in executive session must also be posted or otherwise published.

#### (4). Public agenda items required.

Unless required by the state municipal code for governmental bodies covered by it, or by local ordinance or other statute or regulation, specific public notice of an executive session to be conducted as part of a meeting does not require separate public notice.

#### (5). Other information required in notice.

Only the time, date and place of a meeting need be published as a general rule, and not any information specific to the executive session.

#### (6). Penalties and remedies for failure to give adequate notice.

The Alaska Supreme Court recognized that individuals who are the subject of executive sessions based upon AS 44.62.310(c)(2), as the discussion would tend to prejudice their reputation or character, have additional rights personal to them as opposed to the public generally. The statute gives such individuals the right to require that the ses-



sion the governmental body had proposed to conduct in secret instead be conducted in public. The Supreme Court has made it clear that individuals discussed in an executive session will have a remedy for failure to give adequate notice. This notice must be timely and complete enough to allow the person to exercise a meaningful choice about whether to attend, to decide whether or not to have the discussion conducted publicly, and to decide whether or not the presence of legal counsel is advisable. It would appear that the 180-day time limit applies to an individual bringing suit to challenge an action taken in violation of his or her right to notice of an executive session to conduct a prejudicial discussion about that person. However, it is likely that a court would balance factors in this circumstance somewhat differently. In the first place, the personal nature of the right afforded by AS 44.62.310(c)(2) would seem to dictate that more than the “public interest in compliance with the OMA” must be taken into account, and that the individual’s interest must also be balanced against any harm that would be caused to the public interest and to the public entity by voiding an action affecting that individual. See *Revelle v. Marston*.

### c. Minutes.

#### (1). Information required.

The state Open Meetings Act contains no requirement that minutes be kept of executive sessions, or any other portions, or public meetings generally, but some other provisions of laws or local ordinances do require recording of executive sessions. Note that the Alaska Supreme Court has held that documents not otherwise confidential are not exempt from disclosure simply because they were discussed or generated in executive session. *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 590 (Alaska 1990).

#### (2). Are minutes a public record?

While minutes of public meetings would generally be considered public record, the converse might presumptively be true of minutes of executive sessions. The issue is not dealt with in the state Open Meetings Act, but see the treatment of this issue, directing that electronic recordings be kept of executive sessions of the Anchorage Municipal Assembly and disclosed under certain specified circumstances.

### d. Requirement to meet in public before closing meeting.

A body cannot meet in executive session unless it has first properly convened in a duly noticed public meeting. AS 44.62.310(b) and (e). The statute provides that “if permitted subjects are to be discussed at a meeting in executive session, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that are listed in (c) of this section shall be determined by a majority vote of the governmental body.” AS 44.62.310(b). An illegal closed meeting cannot be justified or made legal by calling it an “executive session.”

The mere fact that a public body has convened a regular and proper session, however, does not mean that it may carry on that meeting in a formal or informal setting, or “regular” or “executive” session, without complying with the normal public meeting requirements. So, for example, a superior court ruled that the Board of Fisheries violated the Open Meetings Act where the board discussed proposed regulations at a dinner meeting that followed the adjournment of a regular board meeting. *Johnson v. State of Alaska Board of Fisheries*, Case No. 3KN-83-386 Civ. (Alaska Super. Ct. 3rd Jud. Dist., Feb. 11, 1985).

### e. Requirement to state statutory authority for closing meetings before closure.

The OMA requires that the body indicate what specific legal basis it has for holding an executive session. Subjects may not be considered at an executive session except those mentioned in the motion calling for the executive session unless the discussion is “auxiliary to the main question.” AS 44.62.310(b). The law requires that “the motion to convene in executive session must clearly and with specificity describe the

subject of the proposed executive session without defeating the purpose of addressing the subject in private.” *Id.* This provision was added as part of the 1994 revisions to the Open Meetings Act, to strengthen and clarify the requirement of adequate subject matter notice of executive sessions, and to promote consistency in the way notice is given.

The subjects that may be considered in an executive session are limited to the following: (1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity; (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion; (3) matters which by law, municipal charter, or ordinance are required to be confidential; and (4) matters involving consideration of government records that by law are not subject to public disclosure. AS 44.62.310(c). The law requires that these provisions must be “construed narrowly in order to effectuate the policy stated in Section .312(a) [of the OMA] and to avoid . . . unnecessary executive sessions.” AS 44.62.312(b). In addition to limiting the permissible subject areas for executive sessions, the requirement of clear and specific notice of the precise subject of the closed session allows the public and/or a reviewing court to meaningfully determine whether the body is adhering to the act, and allows members to know whether they are straying from discussion permitted by law. For example, it is much more informative to say the school board is going into executive session to discuss the status of labor negotiations with the teacher’s union, than to simply say the session is to discuss “matters the immediate knowledge of which could have an adverse effect on the finances of the school district.” Both are accurate, and an executive session would be proper for this reason, but only the former gives the legally required meaningful, specific notice of why the board is retiring to executive session. Specific notice need not be provided where giving such notice would defeat the purpose of the statutory exception (e.g., a motion to discuss “child molesting allegations against sixth grade teacher, Jan Doe, at Big Moose Elementary”).

### f. Tape recording requirements.

While the legal requirements of particular municipalities, or other laws, regulations or ordinances may require tape recordings of executive sessions, e.g. Anchorage Municipal Ordinance 2.30.030.8.2, the state Open Meetings Act does not. Executive session tape recording requirements are not addressed by the statute or case law.

## F. Recording/broadcast of meetings.

### 1. Sound recordings allowed.

Although audio and video recording and photographing of public meetings is customarily done, the state OMA does not address this issue. If this issue arises, the press should argue there is a legal right to photograph or record such meetings, either implicit in the OMA, or arising from the common law or constitution. Be aware, however, that in the context of access to judicial proceedings, the courts have held there is a right to attend and observe court proceedings, but no right to record. Recording in the courts is considered a privilege governed by court rules. See Alaska Rules of Court, Administrative Rule 50. There are cases from other jurisdictions dealing with the right to record or photograph at public meetings.

### 2. Photographic recordings allowed.

Although audio and video recording and photographing of public meetings is customarily done, the state OMA does not address this issue. If this issue arises, the press should argue there is a legal right to photograph or record such meetings, either implicit in the OMA, or arising from the common law or constitution. Be aware, however, that in the context of access to judicial proceedings, the courts have held there is a right to attend and observe court proceedings, but no right to photograph. Photography in the courts is considered a privilege governed by court rules. See Alaska Rules of Court, Administrative Rule 50. There are cases from other jurisdictions dealing with the right to record or photograph at public meetings.

## G. Are there sanctions for noncompliance?

A court may void action taken as the result of a meeting held in violation of the OMA only if it finds that, considering all circumstances, the public interest in compliance with the OMA outweighs the harm that would be caused to the public interest and to the public entity by voiding the action. In making this determination, the court must consider at least the nine factors specified by the legislature in AS 44.62.310(f), as well as any others the court may find relevant. A lawsuit to void an action taken in violation of the Open Meetings Act in connection with a special or emergency meeting, as with any other OMA violation, must be filed in superior court within 180 days after the date of the action being challenged. The governmental body that violates or is alleged to have violated the OMA can cure the violation, before or after court action, by holding another meeting in compliance with notice and other requirements of the OMA and conducting a substantial and public reconsideration of the matter as considered at the original meeting. Violations of the OMA can constitute legally sufficient grounds for recalling a public official.

## II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

### A. Exemptions in the open meetings statute.

#### 1. Character of exemptions.

##### a. General or specific.

The provisions of AS 44.62.310(d) specifying the gatherings to which the OMA does not apply are quite specific. The law provides that Section .310(d) must be “construed narrowly in order to effectuate the policy stated in [.312(a) of the OMA] and to avoid exemptions from open meeting requirements. . .” Section .310(c) specifies the subjects that a governmental body is permitted to discuss in executive session. Unlike those gatherings specified in .310(d), the executive sessions are subject to the Open Meetings Act, and must be conducted as part of duly noticed meetings. Like .310(d), Section .310(c) must also be construed narrowly to effectuate the policies of the OMA and avoid unnecessary executive sessions. The exemptions contained in AS 44.62.310(c) are more general, and have the potential for abuse to varying degrees in different situations. In addition, the legislature has underscored its intent that Subsection (c)(1) be construed narrowly by use of words such as “immediate” and “clearly.” AS 44.62.310(c)(2) lends itself even more to abuse because of its expansive language, although the proviso that the affected individual must be allowed to require a public discussion helps provide a check. The “catchall” provision, AS 44.62.310(c)(3) tends to be broad, since it potentially incorporates not only such common law notions as the attorney-client privilege, but also a variety of local ordinances. The Alaska Supreme Court has generally construed the OMA liberally in favor of public access, and the legislature has underscored its obligation to do so.

##### b. Mandatory or discretionary closure.

The statutory provision governing executive sessions in § 310(c) of the OMA is discretionary: It says that these excepted subjects “may be” discussed in executive session. Thus, the body presumably can meet publicly if it chooses, even if it would be permitted to discuss the matter privately. Note however that this may not be the case with respect to all matters that are covered by Section .310(c)(3) insofar as it deals with matters that are “required to be confidential.” No cases address the apparent discrepancy between the prefatory language apparently allowing a body to choose to discuss in public matters that are by definition “required to be confidential.” Some meeting categories are not covered by the act. See Section .310(d). The act does not *require* those meetings to be closed, it simply provides that they are not within the scope of this law.

#### 2. Description of each exemption.

Some meetings or portions of meetings are considered to be outside the scope of the act altogether. See AS 44.62.310(d). Other portions of meetings are covered by the act but properly closed as executive ses-

sions. The specific categories of meetings that can be held as executive sessions are spelled out in AS 44.62.310(c). If the meeting at issue is simply not covered by the act, then presumably the closed meeting can occur without satisfying the requirements of AS 44.62.310(b) requiring the group to first convene in a regularly noticed public session, have a roll call vote on going into closed session, and limiting discussion to specific items noted in the motion for executive session. Municipal code provisions for a reasonable right to be heard at public meetings do not extend a right to participate, or even be present, to the subject of an adjudication in the portion of an adjudicatory meeting closed pursuant to AS 44.62.310(d)(6) or its analogues. *Griswold v. City of Homer*, 55 P.3d 64, 73 (Alaska 2002).

Executive sessions are permitted only for reasons provided by law, and according to procedure set out in the OMA. There are three exceptions to the general requirement of open meetings and they are found in AS 44.62.310(c), which provides that:

The following excepted subjects may be discussed in executive session:

- (1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;
- (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;
- (3) matters which by law, municipal charter or ordinance are required to be confidential.

When a municipal government agency conducts closed meetings authorized by state law, these are permissible even if the public body is governed by a local charter or ordinance which only allows executive sessions in more limited circumstances. The Supreme Court discussed the preemption issue in *Walleri v. City of Fairbanks*, 964 P.2d 463, 468 (Alaska 1998). There, the plaintiff argued that the city had violated the law because it conducted an executive session regarding financial matters when the only exemption the Fairbanks Charter mentions is for discussion of questions that would tend to defame or prejudice the reputation and character of any person. The Court found that the plaintiff's claim was preempted by AS 29.10.200, a section of the state law governing municipal governments, which lists provisions that “apply to home rule municipalities as prohibitions on acting otherwise than as provided.” So, the Court said, these provisions “supersede existing and prohibit future home rule enactments that provide otherwise.” *Id.* One of the provisions mentioned in AS 29.10.200 is AS 29.20.020, which provides in part that the “meetings of all municipal bodies shall be public as provided in AS 44.62.310.” Section .310(a), in turn, provides in part that “all meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law,” and AS 44.62.310(c) lists the subjects that may be considered in executive session. Since this list is broader than the sole exception specified in the Fairbanks City Charter, the Fairbanks City Charter provides “otherwise,” and is thus preempted. *Id.*

It is possible for a body that is properly meeting in executive session to waive the protection of that executive session. For example, in an August 26, 1982, opinion to Natural Resources Commissioner John W. Katz, the Attorney General advised that by inviting representatives of a loan applicant into a meeting with the Agricultural Revolving Loan Fund to make a presentation during the course of an executive session, the ARLF waived any protections normally associated with executive sessions and, effectively, converted the executive session into a public hearing. When the executive session portion of the meeting reverted into a public session, the meeting became a public meeting under AS 44.62.310. Therefore, the board was required to provide to the applicant requesting it a copy of that portion of the tape recording of the board's executive session in which the applicant's representatives were invited to participate.

The types of meetings not covered by the OMA are found in AS 44.62.310(d)(1) through (7). They include the following:

- (1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;
- (2) juries;
- (3) parole or pardon boards;
- (4) meetings of a hospital medical staff; or
- (5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline; or
- (6) staff meetings or other gatherings of the employees of a public entity, including meetings of an employee group established by policy of the Board of Regents of the University of Alaska or held while acting in an advisory capacity to the Board of Regents; or
- (7) meetings held for the purpose of participating in or attending a gathering of a national, state or regional organization of which the public entity, governmental body or member of the governmental body is a member, but only if no action is taken and no business of the governmental body is conducted at the meetings.

It is possible that there may be common law or constitutional rights of access to some meetings even though the OMA itself does not require that they be open (as in the case of access to courts). *See, e.g.*, February 3, 1981, Attorney General Opinion No. J-66-339-81, concerning closed deliberations by the Public Employees' Retirement System [PERS] Board. After noting that the PERS Board deliberations to consider appeals are exempt from coverage by the act as quasi-judicial adjudicatory proceedings pursuant to AS 44.62.310(d)(1), the Attorney General notes:

The holding of private deliberations following a public adjudicatory hearing is consistent with the traditional practice of private deliberations by a jury or court in civil and criminal proceedings and is, we believe, consistent with the spirit as well as the letter of the Alaska public meetings law. We caution that, despite the omission of a requirement in the PERS act that your appeals hearings be public, we believe that the Alaska public meetings law interpreted in the context of the Anglo-American tradition of open trials (see K. Davis, *Administrative Law Treatise* § 14.13 (2d ed. 1980)), requires that all but the deliberative portions of your appeals hearings be held in public.

The addition of section .310(d)(6) in 1994 reflects what was generally understood to be the law before this. *See, e.g., Kila Inc. v. State, Dept. of Administration*, 876 P.2d 1102, 1109-1110 (Alaska 1994) (the Supreme Court found that the OMA contemplates meetings of a governmental body, and that no "meetings" to discuss contract modifications by any official or even informal "bodies" took place where the alleged "meetings" in question consisted of two separate teleconferences held between state employees who had no power to take collective action by vote and representatives of private company seeking an award from the Department of Corrections for operation of an adult community residential center. The court agreed with the hearing officer's finding that the meetings were "informal" and that it would be "impossible to apply [the OMA] to the everyday dealings of the public employees when they meet with each other and those outside of state government in the day-to-day conduct of the state's business").

## **B. Any other statutory requirements for closed or open meetings.**

Various statutory provisions require closed proceedings in certain contexts. For example, multidisciplinary child protection teams are created by the Department of Health and Social Services to assist in the evaluation and investigation of reports of harm to children made under AS 47.17 and to provide consultation and coordination for agencies involved in child protection cases under AS 47.10, the child-in-need-of-aid statute. AS 47.14.300. Meetings of a team are closed to the public and are not subject to the provisions of AS 44.62.310 and 44.62.312, the OMA. AS 47.14.300(e). Similarly, meetings of the state

child fatality review team are closed to the public and are not subject to the provisions of AS 44.62.310 and 44.62.312. AS 12.65.140(c), as are meetings of domestic violence fatality review teams. AS 18.66.400(d).

Whenever circumstances subject a child to the jurisdiction of the court under the child-in-need-of-aid (CINA) statute, AS 47.10.005 - 47.10.142, a preliminary inquiry and report may result in informal or formal hearings and proceedings. CINA hearings are now presumptively open to the public, except as provided in the CINA statute and unless prohibited by federal or state law, court order or court rule. AS 47.10.070(a). The CINA statute provides that child-in-need-of-aid cases are closed to the public during (1) the initial court hearing after the filing of a petition to commence the child-in-need-of-aid case; (2) a hearing following the initial hearing in which a parent, child or other party to the case is present but has not had an opportunity to obtain legal representation; or (3) a hearing, or a part of a hearing, for which the court issues a written order finding that allowing the hearing, or part of the hearing, to be open to the public would reasonably be expected to (A) stigmatize or be emotionally damaging to a child; (B) inhibit a child's testimony in that hearing; (C) disclose matters otherwise required to be kept confidential by state or federal statute or regulation, court order, or court rule; or (D) interfere with a criminal investigation or proceeding or a criminal defendant's right to a fair trial in a criminal proceeding. AS 47.10.070(c). If a hearing, or part of a hearing, in a child-in-need-of-aid case is not closed under this subsection .070(c), the court shall hear in camera any information offered regarding the location, or readily leading to the location, of a parent, child or other party to the case who is a victim of domestic violence or whose safety or welfare may be endangered by public release of the information. Access to testimony heard in camera under this subsection is limited to the court and authorized court personnel. AS 47.10.070(d). Notwithstanding any other provision of the CINA statute, a person attending a hearing open to the public may not disclose a name, picture or other information that would readily lead to the identification of a child who is the subject of the child-in-need-of-aid case. At the beginning of the hearing, the court must issue an order specifying the restrictions necessary to comply with this subsection. If a person violates the order, the court may impose any appropriate sanction, including contempt and closure of any further hearings to the person. AS 47.10.070(f). Also, the CINA statute provides for adjudication hearings to determine whether the child is or is not a child in need of aid, and, if so, to determine an appropriate disposition for the matter, which might include releasing the child to parents or others, making the child a ward of the state, committing the child to the custody of the Department of Health and Social Services, to a foster home, and hearings concerning a "permanency plan" for the child or termination of parental rights. A hearing conducted under this section is open to the public unless an exception provided in AS 47.10.070 (c) applies to make the hearing closed to the public or unless prohibited by federal or state statute or regulation. AS 47.10.080(u).

Notwithstanding section .110(a), a court hearing on a petition seeking the adjudication of a minor as a delinquent shall be open to the public, except as prohibited or limited by order of the court, if (1) the department files with the court a motion asking the court to open the hearing to the public, and the petition seeking adjudication of the minor as a delinquent is based on (A) the minor's alleged commission of an offense, and the minor has knowingly failed to comply with all the terms and conditions required of the minor by the department or imposed on the minor in a court order; (B) the minor's alleged commission of (i) a crime against a person that is punishable as a felony; (ii) a crime in which the minor employed a deadly weapon (b), in committing the crime; (iii) arson; (iv) burglary; (v) distribution of child pornography; (vi) promoting prostitution in the first degree; or (vii) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver; or (C) the minor's alleged commission of a felony and the minor was 16 years of age or older at the time of commission of the offense when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's com-



mission of an offense that is a felony; or (2) the minor agrees to a public hearing on the petition seeking adjudication of the minor as a delinquent, AS 47.12.110(d), or when the district attorney has elected to seek imposition of a dual sentence and a petition has been filed under AS 47.12.065, or when a minor agrees as part of a plea agreement to be subject to dual sentencing. AS 47.12.110(e).

There are isolated other statutory provisions in laws governing various agencies that allow for closed proceedings. *See, e.g.*, AS 14.20.180(b) (a tenured teacher notified of dismissal or nonretention can demand a hearing and require that the hearing be either public or private). Also, a number of statutes give the person or entity whose rights are the subject of or affected by the proceedings to choose to have the proceedings open. For example, upon receipt of a proper petition for a civil commitment for mental health reasons, the court holds a hearing, at which the respondent, the person to be committed, has certain rights, including the right to have the hearing open or closed to the public as the respondent elects. AS 47.30.735(b)(3).

A meeting of the board to act on applications for loans is exempt from the public meeting requirements of the Open Meetings Act. AS 03.10.050(c).

Meetings of public electric and telephone cooperatives are required to be open, but under the provisions of the corporate code governing utility cooperatives, not the OMA. *See* AS 10.25.175. The most significant effect of this distinction is that only “members” of the cooperative are entitled to attend board meetings. *Zoerb v. Chugach Electric Ass’n Inc.*, 798 P.2d 1258 (Alaska 1990) (employee of electric cooperative properly excluded from meeting because he was not a member). Other differences between the open meetings provisions of Title 10 and Title 44 (OMA) are that the section governing utility cooperatives applies only to meetings at which a quorum of the board is present, discussions between the Board and its attorney can be closed if disclosure would have an immediate adverse effect, only “formal action” is prohibited in executive sessions, and action taken contrary to the statute is not void if other equitable relief is available. Co-op board members may be subject to recall for violations of open meetings rules governing utility cooperatives found in Title 10 or in utility by-laws, as public officials may be for alleged violations of the OMA. *Cf.*, section IV.C.11, *infra*.

### C. Court mandated opening, closing.

In criminal proceedings involving the prosecution of an offense committed against a child under the age of 16, or witnessed by a child under the age of 16, the court on its own motion or on the motion of the party presenting the witness or the guardian ad litem of the child, may order that the testimony of the child be taken by closed circuit television or through one-way mirrors if the court determines that the testimony by the child victim or witness under normal court procedures would result in the child’s inability to effectively communicate. In making this determination, the court is to consider such factors as the child’s age, level of development, general physical health; any physical, emotional or psychological injury experienced by the child; and the mental or emotional strain that will be caused by requiring the child to testify under normal courtroom procedures. AS 12.45.046(a).

## III. MEETING CATEGORIES — OPEN OR CLOSED.

### A. Adjudications by administrative bodies.

The deliberations of an administrative body acting in an “adjudicating” role — such as the Game Board or the state Bar Association or the Architect’s and Engineer’s Board deciding on whether to suspend or revoke a license — are not covered by the open meetings act, although the fact-gathering, evidentiary hearing stage of such proceedings is covered. Specifically, the language of the statute is that the open meetings law “does not apply to a governmental body performing a judicial or *quasi*-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding.” AS 44.62.310(d)(1). Because those meetings or portions of a meeting that are not conducted solely to make a decision do not fit within this exemption, they

are governed by the Open Meetings Act, and conversely to the extent that meetings or portions of meetings fall within the exemption, those gatherings need not comply with any of the provisions of the act, including those requiring reasonable public notice and those requiring that certain procedures be followed for going into executive session, including public votes and the notification of individuals to be discussed in a way that could prejudice their reputation or character. The municipal code provisions affording a right of participation in public meetings that does not exist in the open meetings act otherwise tracks the open meetings act by incorporating its exceptions and exemptions, so this right to be heard at municipal meetings does not extend a right to participate, or even be present, to the subject of an adjudication in the portion of an adjudicatory meeting closed pursuant to AS 44.62.319(d)(6) or its analogues. *Griswold v. City of Homer*, 55 P.3d 64, 73 (Alaska 2002).

In common usage, “adjudication” includes any dispute and resolution procedure. It is a proceeding for determining facts or rights of parties, and is generally synonymous with or analogous to the term “litigation.” Whenever parties litigate, the decision-maker adjudicates. For example, in the context of advising the Alaska Public Utilities Commission, the Attorney General advised the Commission that “adjudicatory proceedings” include all proceedings of a commission for determining disputes between parties or determining the rights of a party, including all formal dockets of the commission with the exception of rulemaking proceedings. *See generally*, March 27, 1986, Attorney General Opinion No. 661-86-0494. Under the Administrative Procedure Act, the scheme of laws applying to state agencies, there are two classes of formal agency action, rulemaking and administrative adjudication, and the definition of adjudication as everything other than rulemaking has been reflected in recent Alaska Supreme Court opinions. *Id.* The Attorney General has advised the APUC, for example, that certification in rate making proceedings are adjudicatory, since each of these types of proceedings meet the requirements of involving the expansion or contraction of state granted rights, authorities, licenses or privileges. The question of what is not adjudication and therefore not subject to the exception of AS 44.62.310(d)(1), is addressed in the 1986 Attorney General Opinion to the APUC. *Id.* at 3. In addition to rulemaking procedures, which are generally subject to OMA requirements, and are not adjudication, the Attorney General has observed that there are a number of other things that agencies do that are not adjudication:

- General policies. An agency may discuss its policies and directions, often outside the context of a specific rulemaking or adjudicatory proceeding.
- Investigation/negotiation. Commission investigations of the practices of those they regulate are not necessarily adjudication even though they may lead to adjudicatory proceedings.
- Business or management activities. The commission is required to operate a substantial agency with a number of employees, and the internal management of the agency is neither rulemaking nor adjudication.

March 27, 1986 Attorney General opinion, *supra*, at 3-4. These sorts of actions do not fall within the OMA exceptions set out in AS 44.62.310(d)(1). The Attorney General advised the APUC that informal adjudication, including for example, permission action on tariff advice letters, should be handled in compliance with the OMA even though this is not literally required by the act. *Id.* at 4. (Tariff advice (“TA”) letters are filings made by a utility to seek Commission approval of a rate change, contract or other change in its existing tariff.) Note that the APUC adopted new regulations in 1992 governing access to its meetings. 3 AAC 48.140-.188.

### 1. Deliberations closed, but not fact-finding.

Various provisions of the OMA or related statutes provide for executive sessions, or exempt a gathering from as a meeting for purposes

of the act, insofar as it is judicial or “quasi-judicial” in nature, analogous to court proceedings where the fact-finding process of a trial is all open, but the deliberations of a jury or judge on those facts are not. See, eg., AS 44.62.310(d)(1), which states that the Open Meetings Act does not apply to a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding.

## **2. Only certain adjudications closed, i.e. under certain statutes.**

Various statutes noted throughout this outline provide for closed adjudications in specified circumstances. Also, provisions of the OMA or related statutes provide for executive sessions, or exempt a gathering from as a meeting for purposes of the act, insofar as it is judicial or “quasi-judicial” in nature, analogous to court proceedings where the fact-finding process of a trial is all open, but the deliberations of a jury or judge on those facts are not. For example, the Open Meetings Act does not apply to a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding, AS 44.62.310(d)(1), or to parole or pardon boards, AS 44.62.310(d)(3), meetings of a hospital medical staff, AS 44.62.310(d)(4), or meetings of the governmental body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline. AS 44.62.310(d)(4).

### **B. Budget sessions.**

“Budget” is an ambiguous and overworked term used, and often abused, to justify executive sessions. There is no legal provision for closed meetings to discuss budgets, *per se*. In fact, the process of developing the state budget is supposed to be public. See AS 37.07.010(6). But, AS 44.62.310(c)(1) allows a body to discuss in executive session “matters, the immediate knowledge of which would clearly have an adverse effect on the finances of the government unit.” AS 44.62.312(b) says this provision must be construed narrowly in order to effectuate the policies underlying the Open Meetings Act and avoid unnecessary executive sessions. So, the budget process should rarely if ever be a proper subject for executive session. Note that the law now requires that a motion to convene an executive session must clearly and with specificity describe the subject of the proposed executive session.

### **C. Business and industry relations.**

There is no statutory or case law addressing this issue.

### **D. Federal programs.**

There is no statutory or case law addressing this issue.

### **E. Financial data of public bodies.**

The Open Meetings Act allows, but does not require, discussion in a closed, executive session of “matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity.” AS 44.62.310(c)(1). This is subject to the requirement that this provision must be construed narrowly in order to effectuate the public policies underlying the OMA and to avoid unnecessary executive sessions. The law also requires that the motion to convene an executive session must clearly and with specificity describe the subject of the proposed executive action without defeating the purpose of addressing the subject in private. So, for example, it would not be sufficient for a public body to go into executive session by simply stating that it was going to consider “financial matters,” or even “matters the immediate knowledge of which would clearly have an effect on the finances” of the entity, without giving more specific information about what, by saying, e.g., “I move that we go into executive session to discuss the contract with the Firefighters’ Union,” or “I move that we go into executive session to discuss a purchase of land on Bragaw Street for use by the University for dormitories.” No action may be taken in executive session, except to “give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or

pending labor negotiations.”

### **F. Financial data, trade secrets or proprietary data of private corporations and individuals.**

A number of statutes make certain information that is submitted to or generated by various public agencies confidential. The open meetings law authorizes, but does not require, an executive session to discuss “matters involving consideration of government records that by law are not subject to public disclosure.” AS 44.62.310(c)(4). There is no case law addressing this issue under the OMA. However, in an opinion relating to one of a number of statutes providing or requiring protection for trade secrets and other proprietary information, the Attorney General states that except for information required to be kept confidential under AS 37.17.090(f), information contained in Alaska Science and Technology Foundation grant status reports is public and the reports must therefore be presented in open session, not executive session. February 25, 1991, Attorney General Opinion No. 663-91-0199. The Attorney General ruled that in instances in which it was proper to consider confidential information in executive session as part of a grant status report, the report should be presented in executive session to protect the particular confidential information, and then presented again in open session with the confidential information omitted.

### **G. Gifts, trusts and honorary degrees.**

There is no statutory or case law addressing this issue.

### **H. Grand jury testimony by public employees.**

Grand jury proceedings are secret while they are going on, except that no requirement of secrecy can be imposed on a witness with respect to that witness’s testimony. See Alaska Rule of Criminal Procedure 6(f); and see *In re: Hanson*, 532 P.2d 303 (Alaska 1975). The Supreme Court has also upheld court rules restricting or delaying disclosure of certain portions of investigative grand jury reports when no indictment is issued to protect due process and privacy interests of individuals named in the report. See *O’Leary v. Superior Court*, 816 P.2d 163 (Alaska 1991); AK.R.Cr.P. 6.1.

### **I. Licensing examinations.**

See generally, AS 08.01.010 *et seq.* and regulations adopted pursuant to this title with respect to occupational licensing. AS 08.01.090 provides that the Administrative Procedures Act, including the OMA, applies to proceedings held under the chapter governing licensing, except certain investigations and examinations of a business’ books and records.

### **J. Litigation; pending litigation or other attorney-client privileges.**

There is no express provision in the OMA allowing closed meetings to discuss litigation or to confer with the body’s attorney or discuss advice from the attorney. Executive sessions for these purposes are common practice, however. They are generally justified on one of two grounds: They may legitimately come within (c)(1), as where the public discussion of settlement proposals to resolve a lawsuit would allow the other side to immediately know the public agency’s position and thereby clearly have an adverse effect on the agency’s finances. Or, they are often justified under (c)(3) as “matters which by law, municipal charter or ordinance are required to be confidential.” Many local government units have adopted specific provisions allowing closed meetings with their attorneys; others may rely on a common law privilege for attorney-client communications. (If it is the latter, note that the attorney-client privilege applies only to communications intended to be confidential, and can be waived by the client at any time). States generally recognize the right of public agencies to confer with counsel. However, a number of courts in other states have cautioned that this privilege can be easily abused, and must be narrowly construed to prevent unnecessary executive sessions. In the 1980s, superior courts in Wrangell and Ketchikan made rulings that were not receptive to

expansive interpretations of the privilege, *see, Etolin Enterprises Inc. v. Wrangell City School District*, Case No. 1WR-85-43 Civ. (Alaska Super. Ct., 1st Jud. Dist., filed February 28, 1985) (voiding the award of a bus contract; no judicial opinion issued squarely addressing the privilege issue); and *see Pioneer Printing Company Inc. v. Georgia Skannes*, Case No. 1KN-86-494 Civ. (Alaska Super. Ct., 1st Jud. Dist., 1986) (finding OMA violations in a series of assembly actions).

In *Cool Homes v. Fairbanks Northstar Borough*, 860 P.2d 1248 (Alaska 1993), the Alaska Supreme Court addressed the concurrent operation of the lawyer-client privilege and the Open Meetings Act. During a meeting of the Fairbanks North Star Borough's Board of Equalization, convened to review the Borough's assessment of Cool Homes' property, the Board called an executive session to discuss "the ins and outs and status of both Cool Homes and the Alaska Housing cases" and "litigation." The executive session was held over Cool Homes' objection. Relying on AS 44.62.310(c)(3), which provides that executive sessions may be conducted to discuss "matters which by law, municipal charter or ordinance are required to be confidential," the superior court held that the attorney-client privilege operates concurrently with AS 44.62.310 although it is not an expressed exception, so that the Board's executive session called to discuss the status of this case with its attorney did not violate the OMA.

The Alaska Supreme Court, citing the policies underlying the principle of open meetings in AS 44.62.312, including "the people's right to remain informed shall be protected so that they may retain control over the instruments they have created," held that the "applicability of the lawyer-client privilege must be narrow to afford this objective maximum realization." The Alaska Supreme Court cited with approval a case that it has previously relied upon in other public access decisions, *The Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 263 Cal. App.2d 41, 58, 69 Cal. Rptr. 480 (1968) (since superseded by statute). It cited with approval the California court's discussion of the importance of limiting the lawyer-client privilege:

The two enactments are capable of concurrent operation if the lawyer-client privilege is not over-blown beyond its true dimensions. . . . Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest.

The Supreme Court also noted that other jurisdictions have limited a lawyer-public body exception to their open meeting acts to consideration of underlying pending litigation, stating that such a limitation "reflects a concern that when the public body is a party to a lawsuit, it should not be disadvantaged by allowing its opponents access to its meetings with counsel." 860 P.2d at 1261. The Alaska Supreme Court stated that the exception is not appropriate for the "mere request for general legal advice or opinion by a public body in its capacity as a public agency," 860 P.2d at 1261-1262, and that the privilege should not be applied blindly.

It is not enough that the public body be involved in litigation. Rather, the rationale for the confidentiality of the specific communication at issue must be one that the confidentiality doctrine seeks to protect: candid discussion of the facts and litigation strategies. . . . The principles of confidentiality in the lawyer-public body relationship should not prevail over the principles of open meetings unless there is some recognized purpose in keeping the meeting confidential. . . . The privilege thus should be applied only when the revelation of the communication will injure the public interest or there is some other recognized purpose in keeping the communication confidential.

860 P.2d at 1262. The court in *Cool Homes* emphasized that this restrictive application of the attorney-client privilege in the context of public bodies is especially appropriate where the public bodies' coun-

sel is also appearing before the body as an advocate. "Public revelation of public counsel's interpretation of 'what has happened in the year between the last session and today as to court findings' would not be injurious to the public interest. It might be informative and desirable." 860 P.2d at 1262. Despite these general observations, the court found that the executive session in the *Cool Homes* case was not a violation, given the peculiar circumstances present there. It said that the Board was entitled to legal advice as to how its members could avoid legal liability with specific reference to ongoing litigation. In fact, the trial judge had admonished the Borough's counsel to give legal advice to the Board and its members about this. The Supreme Court said the Board was entitled to legal advice as to how it and its members could avoid legal liability under these circumstances, "although not general legal advice." *Ibid*.

## K. Negotiations and collective bargaining of public employees.

Whether collective bargaining negotiations are a suitable topic for public discussion of the body charged with approving the labor contracts, and even whether negotiations between the employees and representatives of the public employer should be public, are matters of public policy which may change from time to time as various state or local government entities experiment with the best way to handle such questions. There is no state law that generally requires either collective bargaining negotiating sessions or meetings of public bodies relating to collective bargaining to be conducted openly.

### 1. Any sessions regarding collective bargaining.

There is no law that requires any sessions regarding collective bargaining to be conducted openly. To the contrary, the Open Meetings Act specifically authorizes the consideration in a closed executive session of "matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity." AS 44.62.310(c)(1). The development of positions and the discussion of how much a public entity is able or willing to put on the table in collective bargaining is a quintessential example of the subjects ordinarily considered to fall within this exception allowing executive sessions.

### 2. Only those between the public employees and the public body.

No state law at this time specifically requires negotiating sessions between public employees and a public body, as such, to be conducted publicly. There would seem to be a strong argument that to the extent that the negotiations included the requisite number of members of a governing body of a public entity to otherwise constitute a "meeting" under the Open Meetings Act, there is no reason to exclude a collective bargaining session from the coverage of the act. Since by definition both sides in the negotiation are present, the only ones being excluded are members of the public. The "other side" is already privy to the information.

The situation does not arise often, however, since public entities ordinarily conduct negotiations through management representatives. In any event, with the clarification of the number required to constitute a meeting under the 1994 revisions to the Open Meetings Act, unless there are more than three, or a majority, of the members of the governing body of the public entity engaged in the collective bargaining session, it would not constitute a meeting in any event.

There have been attempts at times to open the negotiating process to the public, and depending on their political and philosophical positions, and their perceived advantage of the moment, one side or the other will from time to time publicly call for open negotiating sessions. For example, a 1996 law governing public school teacher negotiations requires that before beginning bargaining, the school board shall provide opportunities for public comment on the issues to be addressed in the collective bargaining process, and further requires that initial proposals, last best-offer proposals, tentative agreements before ratification, and final agreements reached by the parties are



public documents subject to inspection and copying by the public. AS 23.40.235. In the 1997 negotiations with the Anchorage School District, the NEA-Alaska, a representative of the teachers, went further and sought public negotiating sessions. Some preliminary sessions were in fact conducted publicly, but upon the intervention of a mediator this came to a halt. *See also*, for example, the controversy over whether to require open discussion of public employee negotiations by the Anchorage Municipal Assembly, and the Anchorage administration's proposal to require that all negotiations between labor unions and the city be open to public observation. *See generally*, news articles in *Anchorage Daily News*, October 8, 1988, at C-1, and Dec. 12, 1988, at C-1, and editorial in *Anchorage Daily News*, Oct. 12, 1988, at B-6; *see also* news articles in *Anchorage Times*, Oct. 7, 1988, at A-1, Oct. 8, 1988, at B-1, Oct. 12, 1988, at B-1, Dec. 3, 1988, at A-1, Dec. 7, 1988, at A-1, Dec. 13, 1988, at A-1, and Dec. 14, 1988, at A-1; editorials in the *Anchorage Times*, Dec. 6, 1988, Dec. 10, 1988, and Dec. 14, 1988; and an op-ed column by Anchorage Mayor Fink in the *Anchorage Times*, Dec. 10, 1988.

#### **L. Parole board meetings, or meetings involving parole board decisions.**

Parole board meetings are specifically exempted by the OMA, *see* AS 44.62.310(d)(3), as are meetings of "pardon boards." Alaska does not have a group formally denominated a "pardon board." However, the governor's executive clemency advisory committee clearly does the work of a pardon board. It reviews applications for clemency and investigative records produced by the parole board, and makes recommendations to the governor regarding pardons, commutations of sentences, and remissions of fines or forfeitures. The Attorney General has advised the committee, therefore, that it may meet privately, without public notice or participation. *See* April 20, 1987, Attorney General Opinion No. 663-87-0436. (Note that the Attorney General has advised further that while certain portions of applications for executive clemency may be withheld from public inspection, the application generally should be treated as a public document available for inspection, including the fact that a criminal has applied for some form of clemency and the crime or crimes of which the applicant was convicted, the sentence received, and so forth.)

#### **M. Patients; discussions on individual patients.**

While there is nothing in the Open Meetings Act that specifically protects the privacy of patients, as such, this is effectively the result of provisions exempting from the coverage of the act altogether meetings of a hospital medical staff, AS 44.62.310(d)(4), and meetings of the governmental body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline. AS 44.62.310(d)(5). Some statutes allow those who are the subject of hearings relating to examination or treatment to exercise rights concerning public access. For example, upon receipt of a proper petition for a civil commitment for mental health reasons, the court holds a hearing, at which the respondent, the person to be committed, has certain rights, including the right to have the hearing open or closed to the public as the respondent elects. AS 47.30.735(b)(3).

#### **N. Personnel matters.**

Not all "personnel matters" may properly be discussed in closed session. Like the catchphrase "budget," the word "personnel" is often too readily invoked to justify an arguably improper executive session. AS 44.62.310(c)(2), allows, but does not require, executive sessions to discuss "subjects that tend to prejudice the reputation and character of any person." If the subject to be discussed relates to personnel, but does not tend to prejudice a specific person's reputation or character, it must be discussed publicly (e.g., criteria for selection of new superintendent or city manager). Even if the discussion would likely be prejudicial, the act further provides that an executive session may be held only if the person to be discussed does not request a public discussion. The individual has a statutory right to require that the discussion be open, which means that in order to meaningfully exercise this right he

or she should be given advance notice of the planned discussion. *See* March 15, 1979 Attorney General Opinion, *supra*. There is one apparent exception to this rule. The Supreme Court has ruled that where comparative qualifications and attributes of job applicants are being discussed, this may be done in executive session without allowing any one or more of the applicants the opportunity to require that the discussion be open. *See City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1326 (Alaska 1982). As a reporter, you may want to remind a person you know will be the subject of a discussion about his or her right to have the meeting remain open, and ask whether the person is willing to allow a closed session or to require open proceedings.

### **1. Interviews for public employment.**

There is no special provision in the Open Meetings Act requiring public access to interviews for public employment, and such interviews would rarely come within the coverage of the act. If a public body were conducting a meeting, and at this gathering that would otherwise constitute a meeting under the Open Meetings Act, decided to interview a prospective hiree, that meeting would presumably be open like any other meeting. So, for example, if a city council or assembly held a series of work sessions to individually interview applicants for a city manager's position, these meetings would presumably be public. This general rule would be subject to the apparent exceptions that, would allow the discussion of comparative qualifications and attributes of job applicants in executive session without allowing any one or more of the applicants the opportunity to require that the discussion be open, and any other discussion conducted in a duly convened executive session to discuss "subjects that tend to prejudice the reputation and character of any person," to the extent that the person has been given the requisite notice and opportunity to require that the prejudicial discussion be conducted publicly. It should be noted that in the ordinary case interviews for public employment are conducted by management employees, or by representatives of a public body, rather than by the public body itself or even a sufficient number to trigger the notice requirements associated with a "meeting" of the body.

### **2. Disciplinary matters, performance or ethics of public employees.**

Matters concerning discipline, performance problems, or alleged violations of ethics by public employees often fall into the category of "subjects that tend to prejudice the reputation and character of any person." A public body may, if it chooses, discuss such matters in executive session, provided that the statutory requirement is satisfied of providing that person with notice so he or she can decide whether to request a public discussion. Note, however, that other statutory provisions may limit this general rule, as in the case of disciplinary hearings for tenured teachers or school administrators, which the school board by law may close altogether at the request of the teacher. *See* AS 14.20.180(b). Of course, if the meeting at which disciplinary or related issues are being discussed is an adjudicatory proceeding, where the public body is serving a *quasi*-judicial function, the portion of that meeting which is conducted solely to make a decision is not covered by the Open Meetings Act, and can be closed with or without the consent of the individual in question. *Cf., Griswold v. City of Homer*, 55 P.3d 64, 73 (Alaska 2002).

The Supreme Court again recognized the right of public officials to discuss sensitive personnel matters in closed-door executive sessions, in the context of a meeting of the Haines Borough School Board regarding whether to retain an elementary school principal, who requested that the Board discussion regarding her retention take place in executive session. *von Stauffenberg v. Committee for Honest and Ethical Sch. Bd.*, 903 P.2d 1055, 1060, n.13 (Alaska 1995). Other statutes govern the stage at which proceedings are presumptively open. In the case of a complaint under the Alaska Executive Branch Ethics Act concerning the governor, lieutenant governor or attorney general, all meetings of the personnel board concerning the complaint and investigation before the determination of probable cause are closed to the public. Sec. 39.52.340(a).

### 3. Dismissal; considering dismissal of public employees.

The main considerations that arise with respect to the dismissal or potential dismissal of a public employee are discussed in the preceding subsection concerning disciplinary matters or performance problems. These will commonly be an appropriate subject for executive session, subject to the obligation to provide the person notice and an opportunity to require that the session be conducted publicly unless the proceeding is an adjudication, where the body is meeting in its *quasi*-judicial capacity solely for the purpose of making a decision.

#### O. Real estate negotiations.

Real estate negotiations will generally fall within AS 44.62.310(c)(2) while they are ongoing, assuming that immediate public knowledge of such negotiations “would clearly have an adverse effect on the finances of the government unit.”

#### P. Security, national and/or state, of buildings, personnel or other.

There is no statute or case law addressing this issue.

#### Q. Students; discussions on individual students.

While the Open Meetings Act itself does not address discussions concerning individual students, to the extent that these discussions would tend to prejudice the reputation or character of the student, they would be a permissible topic for an executive session, subject to the rights of the part of the person being discussed to notification and opportunity to require a public session. There are many student records that are legally required to be maintained confidential, in particular those covered by the federal “Buckley Amendment,” or Family Educational Privacy Act of 1972. *See* 20 U.S.C. § 1232g. Matters involving consideration of government records that by law are not subject to public disclosure are properly considered in an executive session. So, for example, in an otherwise public hearing concerning discipline of a school teacher, a claim arising out of or relating to that teacher’s alleged improper handling of an IEP plan for an individual student would presumably be conducted in a closed session, and with a separate sealed record. A school district or school district employee with information that a student or employee of the district has acquired immune deficiency syndrome (AIDS) or the human immunodeficiency virus (HIV) must keep the information confidential except from public health officials and certain district personnel on a need-to-know basis. 4 AAC 6.150.

## IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

### A. When to challenge.

#### 1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

There is no provision in the law for expedited procedures for reviewing requests to attend upcoming meetings. Nor are there administrative regulations governing access to meetings generally, as is the case with public records of the state. However, there are court procedures for obtaining expedited consideration of any motion, upon a proper showing, *see* Alaska Rule of Civil Procedure 77(g), and for temporary restraining orders or preliminary injunctions, Ak. R. Civ. Pro. 65. News media have successfully used these procedures to obtain prompt and timely review of questions involving access to meetings or records.

#### 2. When barred from attending.

Injunctive relief from a court is certainly a legal remedy available to enforce rights under the Open Meetings Act to obtain access where someone has been barred from attending what should be a public session. However, the ability to meaningfully pursue this given time constraints when a meeting is either occurring or imminent, not to mention cost considerations, make it difficult to effectively use the courts to secure access to any given meeting at which a problem arises. It is

easier to obtain review afterwards to determine whether the meeting should have been closed, and rely on prospective effect to prevent recurrences of the problem. This should underscore the need for reporters and others who regularly seek access to public meetings to work with public officials in advance. Try to ensure that they are educated with respect to their obligations under the Public Records Act, and the public policies favoring liberal access to meetings of public bodies. Reporters may also try to cultivate sympathetic members of public bodies who will represent the public’s interest in openness from “inside the tent.”

### 3. To set aside decision.

The open meetings act provides that “[a]ction taken contrary to (its provisions) is voidable.” AS 44.62.310(f). Based on this, an action may be brought to set aside a decision or other action that is the product of a process that involved violations of the open meetings law. Alaska Supreme Court decisions indicated that public bodies would have an opportunity to cure such violations, through substantial, independent, *de novo* review of the tainted decisions. That notion was codified and expanded upon when the Open Meetings Act was revised in 1994, so that a public body can cure the violation or alleged violation of the Open Meetings Act before the matter is litigated in court, or after the court finds an action is void.

As a result of the 1994 amendments to the Open Meetings Act, litigation to set aside a decision, or void an action taken in violation of the Open Meetings Act, is subject to some significant restrictions. First, a lawsuit to void an action taken in violation of the Open Meetings Act must be filed in superior court within 180 days after the date of the action being challenged. AS 44.62.310(f). In addition, action taken by a public body is not subject to being voided as the result of Open Meetings Act violations by purely advisory groups — those governmental bodies that have only authority to advise or make recommendations to a public entity and have no authority to establish policies or make decisions for the public entity. AS 44.62.310(g).

When a suit is brought seeking to void action taken in violation of the Open Meetings Act, the court may hold that action taken at a meeting held in violation of the OMA is void only if the court finds that, considering all of the circumstances, the public interest in compliance with the OMA outweighs the harm that would be caused to the public interest and to the public entity by voiding the action. AS 44.62.310(f). In making this determination, the court must consider a number of factors, including considerations of disruption or expense that would be caused by voiding the action, the degree to which the action has been relied upon, or the passage of time since it was taken, the extent to which the governmental body has already engaged in public reconsideration of the matters, the degree to which the violations were willful, flagrant, or obvious, and the lack of adherence to the policies stated under the Open Meetings Act in Section .312.

### 4. For ruling on future meetings.

It is possible to get a ruling regarding the applicability of the law to future meetings, in the form of a declaratory judgment. This is not provided for in the open meetings law itself, but is a procedure generally available to litigants using the court system. This would require that there be a sufficiently real and concrete dispute to allow the court to properly litigate the question, and not simply a speculative concern about a possible violation in the future. The Alaska Supreme Court has held that the mootness doctrine is generally inapplicable in cases involving the Open Meetings Act. *See, e.g., ACCFT, Local No. 2404 v. University of Alaska*, 677 P.2d 886, 889 (Alaska 1984). There, the court noted that it generally has the discretion to resolve particular questions of significant public interest despite the fact that the parties have settled their dispute, and that many public bodies are in need of guidance as to the proper construction of the open meetings law. The court said that “the mootness bar is especially inappropriate in OMA cases. The public disclosure of the nature and circumstances of an OMA violation is an important component of the remedy available under the statute.” *Ibid*. When the legislature amended the law

to impose the 180-day statute of limitations for filing an action void decisions reached as a result of a process including Open Meetings Act violations, there was specific discussion about the fact that the limitation on this particular remedy would not affect other remedies available to litigants, such as the right to seek a declaratory judgment that the open meetings law had been violated. In *Mullins v. Local Boundary Commission*, 226 P.3d 1012 (Alaska 2010), the Alaska Supreme Court explained and narrowed the OMA exception to the mootness doctrine articulated in *ACCFT*. The plaintiff in *Mullins* alleged that the LBC violated the Open Meetings Act by using information gathered during a private tour of a proposed borough in making its decision. Unlike in *ACCFT*, the Court said, the LBC's approval decision in *Mullins* was not reaffirmed at a curative meeting, and it is not still in effect. "Mullins, unlike the plaintiff in *ACCFT*, cannot obtain the substantive relief she seeks because the LBC's decision allegedly made in violation of the OMA has been voided by subsequent events (defeat of the proposed action in a voter initiative). Where a decision is still in effect when an OMA claim is brought, the holding in *ACCFT* requires that a court review the alleged OMA violation even if a curative meeting was held. Where a decision is no longer in effect, as is the case here, a court should conduct a standard mootness analysis to determine whether to address the OMA claim. In this case, for the reasons described above, Mullins's public participation challenge to LBC's private car tour as a violation of the OMA is moot and we will not consider it." 226 P.3d at 1020.

### 5. Other.

No other issues as of this revision.

## B. How to start.

### 1. Where to ask for ruling.

#### a. Administrative forum.

##### (1). Agency procedure for challenge.

There is no specific provision in the open meetings law for challenges or appeals from denials of access to agency meetings in any administrative forum, whether that be the agency itself or any separate commission or independent agency.

##### (2). Commission or independent agency.

There is no specific provision in the open meetings law for challenges or appeals from denials of access to agency meetings in any administrative forum, whether that be the agency itself or any separate commission or independent agency.

#### b. State attorney general.

There is no provision in the law for citizens to appeal to or ask for a ruling from the state Attorney General concerning actual or threatened violations of the open meetings law, and the Attorney General will not entertain such requests for opinions from private citizens. However, public agencies involved, who are entitled to seek and obtain the advice of the Attorney General, may be able to get such questions answered either for themselves or on behalf of interested citizens who are working with them or through them.

#### c. Court.

A court suit concerning open meetings law violations is begun the same as any court suit, by filing a complaint and paying the \$100 filing fee. There is no provision in court rules for simply running in to a judge to get a ruling on opening a particular meeting without filing a complaint and naming the appropriate people as defendants and serving summons on them. (Note, however, that expedited preliminary proceedings usually occur before the complaint and summons(es) are served on the defendant(s) and before an answer is filed.)

### 2. Applicable time limits.

Notwithstanding the need to start a lawsuit for meetings violations

like any other lawsuit, and to prepare and have a complaint and summonses served on the appropriate defendants, a temporary restraining order or other expedited relief can be obtained even before the summonses are served on the defendants and they have filed answers. Notice must be given pursuant to Civil Rule 65 if you are seeking an injunction, except in extraordinary instances where this is not possible.

### 3. Contents of request for ruling.

Not applicable, except that a complaint filed in court must contain at least a short and simple statement of your claims.

### 4. How long should you wait for a response?

There is no specific time limit in the OMA for an agency to respond to a complaint that is not part of a lawsuit. Once a lawsuit is filed, if neither party requests expedited treatment, or if the court does not grant it, a complaint about open meetings violations would be treated like any other. The defendant will have 20 days to respond (unless it is a state agency, in which case it has 40 days), then there is discovery and pretrial motion work, and a trial would be set whenever the court's calendar permits. There is no time limit for a court to issue a ruling (except that if a judge has not issued a ruling within six months after the motion or other matter is submitted for a ruling, his or her paycheck will be withheld).

### 5. Are subsequent or concurrent measures (formal or informal) available?

Always keep in mind that the object of a suit over violations of open meetings or records is primarily intended to allow you access to the meeting or record, and to obtain information for use in gathering and reporting news, rather than simply to win a victory in a lawsuit or otherwise. As a result, you should keep in mind your goal of getting the information, and constantly be aware of other sources of obtaining that, formal or informal, while you or your lawyers pursue lawsuits or other similar remedies.

## C. Court review of administrative decision.

### 1. Who may sue?

As a general rule, any person or legal entity aggrieved by a decision of an agency or personally affected adversely by it may sue. The courts have generally recognized the rights of news media to sue over open meetings violations, recognizing that they represent the public interest and stand in the place of the public in obtaining access to public meetings.

### 2. Will the court give priority to the pleading?

There are court procedures for obtaining temporary injunctive relief or other expedited consideration of pleadings concerning open meetings violations.

### 3. Pro se possibility, advisability.

There is no legal reason why an individual cannot sue on his or her own behalf, without a lawyer. Individuals around the state have done so on such issues, with varying degrees of success. Whether it is advisable on any particular case obviously depends on the individual involved, the likelihood and nature of the opposition and the complexity of the legal issues involved.

### 4. What issues will the court address?

#### a. Open the meeting.

If the meeting has not already occurred, but access has been prospectively denied to it, the court can certainly order that the meeting be conducted in accordance with the open meetings law.

#### b. Invalidate the decision.

If the meeting has already occurred and action has been taken as a result of proceedings that included open meetings violations, the court has the authority to invalidate the decision or other action taken



at such meetings. The Open Meetings Act provides that any action taken in violation of the law is “voidable,” AS 44.62.310(f), and both the legislature and the Alaska Supreme Court have said public bodies should be given the opportunity to reconsider and cure their decisions reached as a result of improperly held sessions. The legislature has provided in AS 44.62.310(f) that

a governmental body that violates or is alleged to have violated this section may cure the violation or alleged violation by holding another meeting in compliance with notice and other requirements of this section and conducting a substantial and public reconsideration of the matters considered at the original meeting. If the court finds that an action is void, the governmental body may discuss and act on the matter at another meeting held in compliance with this section. A court may hold that an action taken at a meeting held in violation of this section is void only if the court finds that, considering all of the circumstances, the public interest in compliance with this section outweighs the harm that would be caused to the public interest and to the public entity by voiding the action.

The Supreme Court examined this issue of curing violations in *Geistauts*, *ACCFT*, and *Brookwood*. In *Geistauts*, the Court held that a decision that was void under Section .310(f) must be sent back to the decision-maker for new consideration. The court has suggested that the ultimate remedy in an OMA case is a remand to the transgressing governmental body, which may either ratify or reject its original decision, subject to the statutorily required public scrutiny. *ACCFT*, 677 P.2d at 890. But how do we prevent the validation meeting from being a mere “rubber stamp” of the original decision? The Court gave the following guidance:

Approximation of the status quo at the time of the original decision is desirable. A court fashioning a remedy under section 310(f) should attempt to recreate the circumstances surrounding the defective meeting to the extent practicable. Exact duplication of the context of the first meeting is not possible. Even if the decision-making entity can return to its pre-decisional state of mind, it must nevertheless respond to information and developments arising since the time of the first meeting. It is unavoidable and proper that the ratification body act upon all knowledge available to it.

*Id.* (footnotes omitted). However, the Court noted,

There is a limit upon the extent to which the desire to recreate the circumstances of the first meeting answers all of the remedial questions posed by AS 44.62.310(f). Clearly other factors must also guide the courts in fashioning a remedy.

Concededly section 310(f) does not set forth a detailed scheme for the enforcement of the open meeting laws. [T]he statute is silent as to how ‘void’ action is to be remedied or cured. Consequences of voidness must therefore be determined with reference to the purposes underlying the OMA.

AS 44.62.312, entitled “state policy regarding meetings,” provides an enunciation of the broad concerns embodied in AS 44.62.310. Section 312 makes clear that the OMA exists primarily to advance the interests of “the people of this state.” When the sunshine law is breached it is “the people’s right to remain informed” which sustains injury. There is no inherent damage stemming from the substantive action which is taken; it is the manner of action that offends. Of course AS 44.62.310, by ensuring that issues are decided publicly, does attempt to insure that better substantive decisions are made through public scrutiny and adequate information.

The commentators who have reported upon the sunshine laws in other jurisdictions present a picture of the intent behind these statutes consistent with our reading of AS 44.62.312. Open decision-making is regarded as an essential aspect of the democratic process. It is believed that public exposure deters official misconduct, makes government more responsive to its constituency, allows for greater public

provision of information to the decision-maker, creates greater public acceptance of government action, and promotes accurate reporting of governmental processes. . . . Note that none of the above rationales focus upon the substance of the decision made.

[O]pen meeting statutes were not primarily intended as vehicles for individuals displeased with governmental action to obtain reversals of substantive decisions. What the statutes envision instead is that non-conforming procedures be righted as near to the point of derailment as possible, and that the governmental process be allowed to resume from there.

Because the OMA protects a public right, the courts must carefully consider public interest concerns in applying section 310(f). Mechanistic vacation of decisions made in nonconformity with the sunshine law may do more disservice to the public good than the violation itself. In a complex case such as the one at hand, many equitable variables must be considered in passing upon the effectiveness of a voluntary ratification.

666 P.2d at 890-891. The Court in *Brookwood* summarized the obligations upon agencies that have violated the OMA, stemming from § 310(f):

In *ACCFT*, 677 P.2d 886, we discussed the procedure that a trial court should follow to decide whether a subsequent public meeting validated a governmental decision made at a meeting held in violation of the OMA. . . . If a public body acts in violation of the OMA, its actions are void. AS 44.62.310(f). To determine whether a subsequent remedial effort may validate an otherwise void action, we established the following approach. First, the plaintiff must show by a preponderance of the evidence that a violation occurred. *Id.* at 892. Second, if a violation is shown, the burden shifts to the defendant to show that a “substantial reconsideration” of the issue was made at a subsequent public meeting, i.e., “whether the validation meeting functioned as a true de novo consideration of the defective action.” *Id.* at 891, 893. Third, if the defendant fails to meet this requirement, the court must decide whether invalidation of the governmental action is a proper remedy. To choose invalidation, the court must determine (a) that invalidation is a necessary prerequisite to actual reconsideration of the issue by the government, and (b) that invalidation will serve the public interest. In deciding the public interest issue, the court should weigh the “remedial benefits to be gained in light of the goals of the OMA against the prejudice likely to accrue to the public.” *Id.* at 893.

*Brookwood*, 702 P.2d at 1324-1325. Since these cases were decided, the legislature codified and expanded upon regulations relating to curing violations of OMA, as well as factors that should be considered in whether or not to void action. These factors are set forth in AS 44.62.310(f)(1)-(9).

### c. Order future meetings open.

Where prospective violations of the open meetings laws are proven, the court has the authority to enjoin future violations, at least in the specific context of proven threats of specific violations.

### 5. Pleading format.

Pleadings must be in the format generally prescribed for civil litigation in the Alaska Court System.

### 6. Time limit for filing suit.

There is a 180-day specific statute of limitations set out in Alaska law for bringing actions relating to open meetings violations. AS 44.62.310(f). As a general rule, there is a doctrine called “laches” which prevents someone from bringing a claim after a period of undue delay, and another doctrine called “mootness” that will often preclude a party from asserting a claim after the issue has as a practical matter been resolved. The Alaska Supreme Court had ruled that laches and mootness would not serve to bar the bringing of complaints about

open meetings violations, given the important public interest involved in such questions. *ACCFT*, 677 P.2d at 892. *Compare Hayes v. Charney*, 693 P.2d 831, 835 n. 10 (Alaska 1985) (carving out exception to general inapplicability of mootness doctrine in OMA cases for case involving state legislature); cf. *Hayes*, 693 P.2d at 835-836 (Rabinowitz, J. dissenting).

The legislature's imposition of the 180-day time limit when it revised the OMA in 1994 effectively reverses the court's ruling concerning laches, but did not affect the rulings generally declining to apply the "mootness" doctrine to avoid addressing OMA violations. To that extent, the language of the court's rulings remains instructive.

In certain circumstances a decision taken in violation of the OMA, and never adequately cured, will be allowed to stand. A significant part of the OMA remedy requires that the nature and circumstances of violations come to light. Because we have previously held that voluntary ratification of defective actions under the OMA does not necessarily render the violations moot, declaratory relief will frequently be available to OMA plaintiffs.

*ACCFT* 677 P.2d at 892. *ACCFT* 677 P.2d at 892. However, in *Mullins v. Local Boundary Commission*, 226 P.3d 1012 (Alaska 2010), the Alaska Supreme Court explained and narrowed the OMA exception to the mootness doctrine articulated in *ACCFT*. The plaintiff in *Mullins* alleged that the LBC violated the Open Meetings Act by using information gathered during a private tour of a proposed borough in making its decision. Unlike in *ACCFT*, the Court said, the LBC's approval decision in *Mullins* was not reaffirmed at a curative meeting, and it is not still in effect. "Mullins, unlike the plaintiff in *ACCFT*, cannot obtain the substantive relief she seeks because the LBC's decision allegedly made in violation of the OMA has been voided by subsequent events (defeat of the proposed action in a voter initiative). Where a decision is still in effect when an OMA claim is brought, the holding in *ACCFT* requires that a court review the alleged OMA violation even if a curative meeting was held. Where a decision is no longer in effect, as is the case here, a court should conduct a standard mootness analysis to determine whether to address the OMA claim. In this case, for the reasons described above, Mullins's public participation challenge to LBC's private car tour as a violation of the OMA is moot and we will not consider it." 226 P.3d at 1020.

Note that the 180-day time limit would not apply to the extent the suit seeks relief other than voiding a decision made or action taken. For example, a suit seeking a declaratory judgment that public officials violated the OMA could still be brought.

## 7. What court.

Suits to remedy open meetings violations, or to enjoin such violations, should be brought in the superior court for the appropriate locale where the meeting has occurred or is to occur. State district courts do not have authority to issue injunctions, and AS 44.62.310(f) says suits to set aside action taken in violation of the OMA are to be filed in superior court.

## 8. Judicial remedies available.

The only judicial remedy specifically made available in the open meetings law is that action taken contrary to the law is voidable if a suit is filed within 180 days to challenge the action and the court finds, after weighing and balancing all appropriate factors, that the public interest is served by voiding the action. AS 44.62.310(f). In addition to this remedy spelled out in the open meetings act itself, a court could enter a declaratory judgment determining whether an OMA violation had occurred.

The Alaska Supreme Court has rejected the notion that the Open Meetings Act gives an at-will employee a property interest in his or her job, by giving the employee a right to be present at any meeting where his or her reputation is at issue, and a right to request that the meeting be public. *See* AS 44.62.310(c)(2). The court found this contention without merit because nothing in the Open Meetings Act

indicates a legislative intent to create either an implied contract of employment or an expectation of continued employment for at-will positions. *Revelle v. Marston*, 898 P.2d 917, 925, n. 14 (Alaska 1995).

However, the Alaska Supreme Court has recognized the possibility of a damages remedy for violations of the Open Meetings Act, at least in the form of back pay and benefits that might be payable to an employee discharged as the result of Open Meetings Act violations. *Revelle v. Marston*, 898 P.2d 917 (Alaska 1995). This is potentially a very significant ruling, in that it highlights the range of interests served by the Open Meetings Act, and underscores the need to consider a broad range of remedies to fully effectuate the purposes of the OMA. In the *Revelle* case, the Municipal Librarian was terminated from his position by incoming Mayor Tom Fink based solely upon a performance evaluation developed by the Municipal Library Advisory Board in one or more meetings that violated the Open Meetings Act. Because the evaluation was the product of these illegal meetings, the superior court found that it was void. In order to enable a full and fair reconsideration of this void decision by the mayor — who had the authority to have fired Revelle for virtually any reason or no reason, but not to do so solely on the void evaluation — the court found that what was needed was a remedy that would purge the void evaluation of the LAB from the decision-making process concerning whether to fire or retain Revelle.

The Supreme Court, reviewing the standards set forth in *Alaska Community of Colleges' Federation of Teachers' Local No. 2404 v. University of Alaska*, 677 P.2d 886, 890 (Alaska 1984) [*"ACCFT"*] observed that if reconsideration of the original flawed decision is not possible without invalidating it, then the court must conduct a balancing test to determine whether invalidation is in the public interest. In deciding the public interest issue, the court must weigh the remedial benefits to be gained in light of the goals of the Open Meetings Act against the prejudice likely to accrue to the public. 898 P.2d at 922, citing *Brookwood Area Homeowners' Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1325 (Alaska 1985) and *ACCFT*, 677 P.2d at 893. Note that although the *Revelle* case was decided interpreting the OMA before it was amended in 1994, this analysis is essentially what the legislature requires in the amendments made to Section .310(f) of OMA in 1994.

The superior court in *Revelle* concluded that invalidation of Mayor Fink's termination decision was necessary to foster a full and fair reconsideration of it. She ordered the reinstatement of Revelle for a "cooling off period" of 120 days, in order to permit adequate time for this full and fair re-evaluation of Revelle's job qualifications and past performance. The mayor was explicitly prohibited from relying on the LAB's void evaluation, or materials derived from it during reconsideration. Revelle had claimed he was entitled to an award of back pay and benefits as a result of the municipality's violation of the Open Meetings Act. But the superior court denied this on the grounds that such an award would not serve the public interest.

On appeal, the Supreme Court characterized the issue before it as whether the superior court had properly balanced the remedial aspects of the Open Meetings Act against the prejudice that the public would likely suffer in determining whether to award Revelle back-pay and benefits. Significantly, the court did not say that as a matter of law damages, in the form of back pay and benefits or otherwise, are not available as a remedy for an Open Meetings Act violation. Rather, the Supreme Court concluded that whether Revelle was entitled to back-pay and benefits depended upon the application of the balancing test originally articulated in *ACCFT* (and later effectively codified in AS 44.62.310(f)).

In the past, the court had observed that open meeting statutes were not primarily intended as vehicles for individuals displeased with governmental action to obtain reversals of substantive decisions, *ACCFT*, 677 P.2d at 891, and it underscored that its analysis in *Revelle* in no way changes "this prior statement." 898 P.2d at 924, n.10.

However, the court elaborated upon the multiple interests served by the Public Meetings Act, and remedies for its violation. It noted that

the superior court, in rejecting Revelle's claim for back pay and benefits, had interpreted the OMA as having been enacted for the public good rather than providing an avenue for obtaining private relief. The trial court judge noted the potential harms to the Municipality that would occur if money that might otherwise be spent for library purposes, or that might need to be raised from taxpayers, were used to reimburse the librarian for his back-pay and benefits. The Supreme Court reaffirmed that the OMA protects and advances the public's right to remain informed, and noted that the superior court was correct in considering the act's broad purpose of encouraging "public participation and input in the operation of government." 898 P.2d at 923. However, the Supreme Court noted, a legitimate but more specific purpose not considered by the superior court was that of maximizing informed and principled decision-making in individual cases.

The Court said that those who will be affected by a public body's decision have the right to appear and be heard in a public forum, and noted that it had previously considered the remedial purposes of OMA from the individual's perspective. It had ruled in *University of Alaska v. Geistauts*, 666 P.2d 424, 430-31, n. 10 (Alaska 1983) that ideally the plaintiff is entitled to be placed in the position he would have been in had the violation never occurred. That position is not one where the adverse decision is never made. Instead it is one where the decision, adverse or not, is taken in conformity with the sunshine laws. The court noted that the Open Meetings Act also facilitates informed decision-making, so that by ensuring that issues are decided publicly, the act attempts to ensure that better substantive decisions are made through public scrutiny and adequate information. The Supreme Court concluded that the superior court should have considered the purpose of maximizing informed and principled decision-making in individual cases in fashioning its remedial decision in response to the LAB's violation of the act.

The Supreme Court also found that the superior court had apparently not considered the act's remedial goal of deterrence. It observed that placing governmental bodies on notice that courts will strongly enforce the Open Meetings Act serves the act's remedial goal of deterrence, citing *Brookwood*, an Alaska case where a decision of the Municipality was voided, and citing a Massachusetts case upholding an award of back-pay in favor of a school principal discharged in violation of that state's Open Meetings Act. 898 P.2d at 923-924. Thus, the court concluded, in assessing the remedial benefits to be gained in light of the act's goals, the superior court should have considered the goals of maximizing informed and principled decision-making in individual cases and deterring future violations, as well as the goal of encouraging "public participation and input in the operation of government." The superior court should have weighed all these benefits against the prejudice likely to accrue to the public if Revelle were to have been awarded back pay and benefits.

The court stated that ideally the goal of the Open Meetings Act would be to place Revelle in the position he would have been in had the violation never occurred, so that it was relevant to inquire whether there was a nexus between the LAB's Open Meetings Act violation and Revelle's termination. If there were, the superior court could then further determine that an award of back pay and benefits was appropriate. If, on the other hand, Revelle would have been dismissed even if the Open Meetings Act had been observed, the superior court could conclude that there was an absence of a nexus between the OMA violation and the termination, and that back-pay and benefits were therefore not warranted. Significantly, the Supreme Court stated that if the trial court were to reach the latter conclusion, it could still determine that consideration of the remedial goal of deterrence warranted awarding Revelle at least his costs and the full reasonable attorneys' fees he incurred as a result of his attempts to remedy the LAB's violation of the act. 898 P.2d at 924-925.

## 9. Availability of court costs and attorneys' fees.

Alaska court rules provide that the prevailing party in a civil suit is entitled to recover its costs and a portion of its reasonable attor-

neys fees from the other side. See Alaska Civil Rule of Procedure 82 (fees) and Civil Rule 79 (costs). Cost awards on appeal are governed by Ak.App.Rule 508. The reasonableness of the fee request should be judged in light of "all relevant factors, including the nature and value of the services rendered, the duration and complexity of the litigation, and novelty of the issues presented, the amount in controversy, and the party's timekeeping procedures." *Hickel v. Southeast Conference*, 868 P.2d at 932, n. 20 (Alaska 1994), citing *Atlantic Richfield Company v. State*, 723 P.2d 1249, 1252 (Alaska 1986).

A longstanding judicially created exception to Alaska's prevailing party attorney fee rule allowed public interest litigants to recover full fees if successful, and pay no fees if not. News media were routinely treated as public interest litigants in records cases. In 2003 the legislature amended AS 09.60.010 to abolish the public interest exception to Rule 82 for non-constitutional causes of action, and this was upheld by the supreme court in 2007. For a more extended discussion of issues relating to availability of fees and costs, and the operation and abrogation of the public interest exception to Alaska's Rule 82 prevailing party attorney fee rules, see [Open Records] §V.D.9, *supra*.

The court in *Hickel* rejected an argument that the presumptive award of full reasonable fees to a prevailing public interest litigant should be modified to apportion fees by issue, and reduce the fee award with respect to issues on which the public interest plaintiff did not prevail. The Supreme Court reaffirmed its unwillingness to require apportionment of fees on the basis of individual issues. It did, however, note that while it has declined to *require* apportionment by issue, it has *allowed* trial courts the discretion to consider the prevailing party's varying degree of success on issues when the court sets the award amount. "The important point is that the determination of the fee award is left to the broad discretion of the trial court. The trial court *may* apportion fees by issue in setting a reasonable fee award. However, the trial court is not required, as a matter of law, to do so." *Hickel*, 868 P.2d at 925-926. Accordingly, the court held that the superior court had not erred in refusing to apportion fees by severable issue or degree of relief awarded.

The cases the court cited to reach this result that would allow an apportionment of fees within the discretion of the trial court were not cases involving public interest litigants. The court in *Hickel* also addressed the prevailing party status of the Alaska Democratic Party, which had challenged the governor's reapportionment plan on the basis that the Reapportionment Board violated the Open Meetings Act, the Public Records Act, and the state Procurement Code. The superior court held that the Open Meetings Act and the Public Records Act applied to the Board and that the Board violated these acts. However, the court also held that "because of the other decisions in this case, the public interest is better served by not voiding the plan on the basis of Open Meetings Act violations." On appeal, the Supreme Court affirmed the superior court's holding that the Open Meetings Act and the Public Records Act generally apply to the activities of the Reapportionment Board, but because the superior court did not grant relief on that basis, the Supreme Court did not reach the questions of whether there had in fact been violations, or whether any such violations warranted avoidance of the plan. The state challenged the award of attorneys' fees to the ADP on the basis that it was not a prevailing party because it did not prevail on the main issue in the case — whether the original plan should be declared void on the basis of procedural violations committed by the Board. The plaintiffs responded that the ADP was the prevailing party because it was successful on the main issue. They said that the ADP had obtained a declaratory judgment that the Open Meetings Act applied to the Board and that the Board violated the act, and an order requiring the Board to comply with the Open Meetings Act in the future.

The Alaska Supreme Court stated that in examining this issue, "it is important to keep in mind the principle underlying the Open Meetings Act and the Public Records Act: open decision-making is one of the essential aspects of the democratic process." 868 P.2d at 928. Citing its earlier decision in *ACCFT*, the court noted that "open meet-



ings statutes were not primarily intended as vehicles for individuals displeased with governmental action to obtain reversals of substantive decisions. What the statutes envision instead is that nonconforming procedures be righted as near to the point of derailment as possible, and that the governmental process be allowed to resume from there.” 868 P.2d at 928, citing *ACCFT*, 677 P.2d at 891.

Accordingly, the Supreme Court concluded, a litigant does not have to have a substantive decision invalidated on the basis of governmental violations of the Open Meetings Act or Public Records Act to be considered a prevailing party. The Supreme Court agreed with the superior court that with respect to the Alaska Democratic Party, the main issue in this case was whether the Open Meetings Act and the Public Records Act applied to the Reapportionment Board, and whether the Board had violated these Acts in preparing the proposed reapportionment plan. Although the superior court’s declaratory judgment regarding violations by the Board of the Open Meetings Act and the Public Records Act was moot, the court noted that it would review an otherwise moot issue on its merits to determine who was the prevailing party for purposes of attorneys’ fees. It therefore went on to address the substantive merits before concluding that the superior court did not err in holding that the Board violated these Acts, and therefore did not abuse its discretion in granting the ADP prevailing party status or in awarding the ADP attorneys’ fees.

With respect to costs, the Supreme Court held that costs may not be assessed *against* a losing public interest litigant. *McCormick v. Smith*, 799 P.2d 287, 288 (Alaska 1990). However, the 2003 statute noted above rejects this result, and prohibits courts from sheltering non-prevailing public interest litigants in non-constitutional cases from having to pay costs to the other side. AS 09.60.010.

In *Hickel*, the public interest plaintiffs urged the court to adopt a public interest exception to Alaska Administrative Rule 7(c), which places certain limitations upon the recovery of costs. These limitations can cause a substantial financial impact, as is demonstrated by the facts in the reapportionment case. Rule 7(c) states that recovery of expert witness costs is “limited to the time when the expert is employed and testifying and shall not exceed \$50.00 per hour, except as otherwise provided in these Rules,” which has been interpreted to mean that a party may not recover costs for an expert’s preparation time, nor any costs associated with the experts if they do not testify. Based on Rule 7(c), the superior court refused to compensate plaintiffs for \$129,832.13 in expert costs incurred in preparation for trial and in developing an interim reapportionment plan.

The state argued against creation of a rule whereby prevailing public interest litigants would receive full expert witness preparation fees, noting that Alaska Civil Rule 94, which allows courts to relax the rules to prevent injustice, already provides ample protection for public interest litigants without the rigidity of an “automatic” rule. The Supreme Court declined to create a public interest exception to Administrative Rule 7(c), relying instead on the trial court’s exercise of discretion under Civil Rule 94. In any event, subsequent passage of AS 09.60.010, discussed above, would appear to limit the court’s discretion to adopt such a rule.

## 10. Fines.

There are no fines specified in the public meetings laws for violations.

## 11. Other penalties.

There are no other penalties stated in the open meetings laws for violations. The law specifies that suits to enforce the OMA cannot be brought against members of a governmental body in their individual capacity. Although there are criminal penalties that might arguably apply for knowing and willful violations of the law, this is a very unlikely scenario.

However, the Alaska Supreme Court has ruled that an allegation of violation of the Open Meetings Act states adequate grounds for a

recall, *Meiners v. Bering Strait School District*, 687 P.2d 287, 301 (Alaska 1984), and public officials have been recalled in a number of communities on this ground. State law requires that the grounds for recall be stated with particularity to give the office-holder a fair opportunity to defend his conduct in a rebuttal limited to 200 words. AS 29.26.260(a)(3). A court reviewing a challenge to a recall petition will not determine the truth or falsity of allegations in the recall petition, because that is the role of the voters, not the courts. *Meiners*, 687 P.2d at 300, n. 18; *von Stauffenberg v. Committee for an Honest and Ethical Sch. Bd.*, 903 P.2d 1055, 1061 (Alaska 1995).

While a court cannot determine whether the facts alleged against an official who is the subject of a recall are true or not, the right to recall municipal officials in Alaska is limited to recall for cause, and a court is empowered to review the legal sufficiency of allegations in recall petitions. To do so, it assumes for the sake of the review that the allegations in the petition are true, and then determines whether, if so, the allegations state one of the specified grounds for recall listed in the statutes (“misconduct in office, incompetence, or failure to perform prescribed duties”). Noncompliance with the Open Meetings Act was found by the Supreme Court in *Meiners* to constitute a failure to perform prescribed duties. In *Meiners*, the Supreme Court stated that a petition which alleges violation of totally nonexistent laws is legally insufficient, while a petition which merely characterizes the law in a way different than the targeted official would prefer is legally sufficient. *Meiners*, 687 P.2d at 301. As to the latter case, the Supreme Court stated that the “rebuttal statement is the proper forum in which the official may defend against the charges.” In *von Stauffenberg*, the Supreme Court assumed for purposes of review that School Board members had entered into a closed-door session for consideration of whether to retain a school principal, where that discussion was likely to address sensitive personal information, and limited its review to determining whether doing so was a violation of Alaska law. The court stated that “given the relevant exception to the Open Meetings Act (referring to AS 44.62.310(c)(2)), the grounds for recall allege a violation of a totally nonexistent law. That is, there is no law which precludes public officials from discussing sensitive personnel matters in closed-door executive sessions.” 903 P.2d 1060, n.13.

While not subject to the OMA itself, regulated utility cooperatives are subject to statutory open meetings requirements pursuant to AS 10.25.175 and their own bylaws. Utility board members may be recalled for violations of open meetings requirements, much as public officials can be. *Matanuska Electric Association v. Rewire the Board*, 36 P.3d 685, 693 (Alaska 2001). Legally sufficient but unfounded charges must be defended against in the recall process, not dismissed, and where some alleged open meetings violations are legally sufficient and others are not, severance is the proper remedy, not throwing out the recall petition. *Id.*

## D. Appealing initial court decisions.

### 1. Appeal routes.

The appeal from a superior court decision concerning open meetings violations will be to the Alaska Supreme Court.

### 2. Time limits for filing appeals.

The time for filing an appeal expires 30 days after the entry of judgment by the superior court. Note that, while an attorney fee award may be the basis for a separate related appeal, it is entered subsequent to the final order or judgment. The date of the judgment controls, and the time for appealing the ruling on the merits may run before the time for filing an appeal concerning fees has run.

### 3. Contact of interested amici.

It may be useful to contact news media or press or civic organizations to assist you by filing an *amicus curiae* (“friend of the court”) brief in a particular case that would have general significance. Most organizations will have little or no interest or ability to come in as an *amicus* at the trial level, both for reasons of finances and because the

issues have not generally sorted themselves out to a point where it is clear the outcome of the case will have general significance as is the case with an appellate decision. However at the appellate level, any decision issued by the Supreme Court is almost by definition likely to have general impact, and therefore the Alaska Press Club, the Alaska Broadcasters Association, Reporters Committee for Freedom of the Press, American or Alaska Civil Liberties Union, League of Women Voters or others may have some interest or be willing to file something in support of your position. It never hurts to ask.

## V. ASSERTING A RIGHT TO COMMENT.

### A. Is there a right to participate in public meetings?

Alaska law affords the public not only a right to attend meetings of municipal bodies, but also a reasonable right to be heard at all regular and special meetings. AS 29.20.020(a). This right is afforded in the Municipal Code, and is not part of the Open Meetings Act, so that no such right exists generally with respect to all governmental bodies or public entities in the state other than those covered by the Municipal Code. However, the municipal code otherwise tracks the open meetings act by incorporating its exceptions and exemptions, so this right to be heard at municipal meetings does not extend a right to participate, or even be present, to the subject of an adjudication in the portion of an adjudicatory meeting closed pursuant to AS 44.62.319(d) (6) or its analogues. *Griswold v. City of Homer*, 55 P.3d 64, 73 (Alaska 2002).

### B. Must a commenter give notice of intentions to comment?

The Open Meetings Act does not address a right to comment. Rights afforded by local government bodies are governed by the rules of those bodies.

### C. Can a public body limit comment?

Those bodies covered by the municipal code provisions guaranteeing a right of participation are afforded only a “reasonable” right to be heard, implicitly subject to reasonable rules of the body or rulings of the chair.

### D. How can a participant assert rights to comment?

The Open Meetings Act does not address a right to comment. Rights afforded by local government bodies are governed by the rules of those bodies.

### E. Are there sanctions for unapproved comment?

The Open Meetings Act does not address a right to comment. Rights afforded by local government bodies are governed by the rules of those bodies.

## Statute

### Open Records

#### *Alaska Public Records Act*

#### *Alaska Stats. 40.25.110 et seq.*

#### *Sec. 40.25.100. Disposition of tax information.*

(a) Information in the possession of the Department of Revenue that discloses the particulars of the business or affairs of a taxpayer or other person is not a matter of public record, except as provided in AS 43.05.230(i) or for purposes of investigation and law enforcement. The information shall be kept confidential except when its production is required in an official investigation, administrative adjudication under AS 43.05.405 - 43.05.499, or court proceeding. These restrictions do not prohibit the publication of statistics presented in a manner that prevents the identification of particular reports and items, prohibit the publication of tax lists showing the names of taxpayers who are delinquent and relevant information that may assist in the collection of delinquent taxes, or prohibit the publication of records, proceedings, and decisions under AS 43.05.405 - 43.05.499.

(b) If a copy of a record of tax information is requested under (a) of this section for the purposes of child support administration, the copy may be released only to the child support services agency created in AS 25.27.010 or a child support enforcement agency of another state. The Department of Revenue shall provide the requesting agency with a copy of the record. The requesting agency receiving information under this subsection may use it only for child support purposes authorized under law.

#### *Sec. 40.25.105. Disclosure of information for compliance with the tobacco product Master Settlement Agreement.*

(a) Notwithstanding the provisions of AS 40.25.100 (a), the Department of Revenue may disclose information submitted to the Department of Revenue relating to cigarette and tobacco products, cigarette and tobacco product manufacturers, and cigarette and tobacco product retailers to the attorney general and to other parties as the Department of Revenue determines necessary to monitor and enforce compliance by cigarette and tobacco product manufacturers with the tobacco product Master Settlement Agreement described in AS 45.53.010- 45.53.100.

(b) A person receiving information under this section shall maintain the confidentiality that the Department of Revenue is required to extend under AS 43.05.230 to the returns, reports, documents, determinations, and workpapers furnished to that person under this section.

#### *Sec. 40.25.110. Public records open to inspection and copying; fees.*

(a) Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of the fee established under this section or AS 40.25.115 a certified copy of the public record.

(b) Except as otherwise provided in this section, the fee for copying public records may not exceed the standard unit cost of duplication established by the public agency.

(c) If the production of records for one requester in a calendar month exceeds five person-hours, the public agency shall require the requester to pay the personnel costs required during the month to complete the search and copying tasks. The personnel costs may not exceed the actual salary and benefit costs for the personnel time required to perform the search and copying tasks. The requester shall pay the fee before the records are disclosed, and the public agency may require payment in advance of the search.

(d) A public agency may reduce or waive a fee when the public agency determines that the reduction or waiver is in the public interest. Fee reductions and waivers shall be uniformly applied among persons who are similarly situated. A public agency may waive a fee of \$5 or less if the fee is less than the cost to the public agency to arrange for payment.

(e) Notwithstanding other provisions of this section to the contrary, the Bureau of Vital Statistics and the library archives in the Department of Education and Early Development may continue to charge the same fees that they were charging on September 25, 1990, for performing record searches, and may increase the fees as necessary to recover agency expenses on the same basis that was used by the agency immediately before September 25, 1990. Notwith-

standing other provisions of this section to the contrary, the Department of Commerce, Community, and Economic Development may continue to charge the same fees that the former Department of Commerce and Economic Development was charging on July 1, 1999, for performing record searches for matters related to banking, securities, and corporations, and may increase the fees as necessary to recover agency expenses on the same basis that was used by the former Department of Commerce and Economic Development immediately before July 1, 1999.

(f) Notwithstanding other provisions of this section to the contrary, the Board of Regents of the University of Alaska may establish reasonable fees for the inspection and copying of public records, including record searches.

(g) Notwithstanding other provisions of this section to the contrary, the board of directors of the Alaska Railroad Corporation may establish reasonable fees for the inspection and copying of public records, including record searches.

(h) Notwithstanding other provisions of this section to the contrary, the judicial branch may establish by court rule reasonable fees for the inspection and copying of public records, including record searches.

(i) Electronic information that is provided in printed form shall be made available without codes or symbols, unless accompanied by an explanation of the codes or symbols.

*Sec. 40.25.115. Electronic services and products.*

(a) Notwithstanding AS 40.25.110 (b) - (d) to the contrary, upon request and payment of a fee established under (b) of this section, a public agency may provide electronic services and products involving public records to members of the public. A public agency is encouraged to make information available in usable electronic formats to the greatest extent feasible. The activities authorized under this section may not take priority over the primary responsibilities of a public agency.

(b) The fee for electronic services and products must be based on recovery of the actual incremental costs of providing the electronic services and products, and a reasonable portion of the costs associated with building and maintaining the information system of the public agency. The fee may be reduced or waived by the public agency if the electronic services and products are to be used for a public purpose, including public agency program support, nonprofit activities, journalism, and academic research. Fee reductions and waivers shall be uniformly applied among persons who are similarly situated.

(c) Notwithstanding (b) of this section, the fee for duplicating a public record in the electronic form kept by a public agency may not exceed the actual incremental costs of the public agency.

(d) Public agencies shall include in a contract for electronic services and products provisions that

(1) protect the security and integrity of the information system of the public agency and of information systems that are shared by public agencies; and

(2) limit the liability of the public agency providing the services and products.

(e) Each public agency shall notify the state library distribution and data access center established under AS 14.56.090 of the electronic services and products offered by the public agency to the public under this section. The notification must include a summary of the available format options and the fees charged.

(f) When offering on-line access to an electronic file or database, a public agency also shall provide without charge on-line access to the electronic file or database through one or more public terminals.

(g) Each public agency shall establish the fees for the electronic services and products provided under this section. The governor may cancel the fees established by a public agency in the executive branch, except the fees of the University of Alaska and the Alaska Railroad Corporation, if the governor determines that the fees are unreasonably high.

(h) A public agency may not make electronic services and products available to one member of the public and withhold them from other members of the public.

(i) A public agency other than a municipality or the Alaska Railroad Corporation shall separately account for the fees received by the agency under this section and deposited in the general fund. The annual estimated balance in the

account may be used by the legislature to make appropriations to the agency to carry out the activities of the agency.

*Sec. 40.25.120. Public records; exceptions; certified copies.*

(a) Every person has a right to inspect a public record in the state, including public records in recorders' offices, except

(1) records of vital statistics and adoption proceedings, which shall be treated in the manner required by AS 18.50;

(2) records pertaining to juveniles unless disclosure is authorized by law;

(3) medical and related public health records;

(4) records required to be kept confidential by a federal law or regulation or by state law;

(5) to the extent the records are required to be kept confidential under 20 U.S.C. 1232g and the regulations adopted under 20 U.S.C. 1232g in order to secure or retain federal assistance;

(6) records or information compiled for law enforcement purposes, but only to the extent that the production of the law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings;

(B) would deprive a person of a right to a fair trial or an impartial adjudication;

(C) could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness;

(D) could reasonably be expected to disclose the identity of a confidential source;

(E) would disclose confidential techniques and procedures for law enforcement investigations or prosecutions;

(F) would disclose guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law; or

(G) could reasonably be expected to endanger the life or physical safety of an individual;

(7) names, addresses, and other information identifying a person as a participant in the Alaska Higher Education Savings Trust under AS 14.40.802 or the advance college tuition savings program under AS 14.40.803 - 14.40.817;

(8) public records containing information that would disclose or might lead to the disclosure of a component in the process used to execute or adopt an electronic signature if the disclosure would or might cause the electronic signature to cease being under the sole control of the person using it;

(9) [See delayed repeal note]. reports submitted under AS 05.25.030 concerning certain collisions, accidents, or other casualties involving boats;

(10) records or information pertaining to a plan, program, or procedures for establishing, maintaining, or restoring security in the state, or to a detailed description or evaluation of systems, facilities, or infrastructure in the state, but only to the extent that the production of the records or information

(A) could reasonably be expected to interfere with the implementation or enforcement of the security plan, program, or procedures;

(B) would disclose confidential guidelines for investigations or enforcement and the disclosure could reasonably be expected to risk circumvention of the law; or

(C) could reasonably be expected to endanger the life or physical safety of an individual or to present a real and substantial risk to the public health and welfare;

(11) the written notification regarding a proposed regulation provided under AS 24.20.105 to the Department of Law and the affected state agency and communications between the Legislative Affairs Agency, the Department of Law, and the affected state agency under AS 24.20.105.

(12) records that are

(A) proprietary, privileged, or a trade secret in accordance with AS 43.90.150 or 43.90.220(e);



(B) applications that are received under AS 43.90 until notice is published under AS 43.90.160.

(b) Every public officer having the custody of records not included in the exceptions shall permit the inspection, and give on demand and on payment of the fees under AS 40.25.110 - 40.25.115 a certified copy of the record, and the copy shall in all cases be evidence of the original.

(c) Recorders shall permit memoranda, transcripts, and copies of the public records in their offices to be made by photography or otherwise for the purpose of examining titles to real estate described in the public records, making abstracts of title or guaranteeing or insuring the titles of the real estate, or building and maintaining title and abstract plants, subject to reasonable rules and regulations as are necessary for the protection of the records and to prevent interference with the regular discharge of the duties of the recorders and their employees.

*Sec. 40.25.121. Copies of public records for veterans.*

When a copy of a public record is required by the Department of Military and Veterans' Affairs, the Department of Commerce, Community, and Economic Development, or by the United States Department of Veterans Affairs to be used in determining the eligibility of a person to participate in benefits, the official custodian of the public record shall, without charge, provide the applicant for the benefits, a person acting on behalf of the applicant, or an authorized representative of the department or the United States Department of Veterans Affairs with a certified copy of the record.

*Sec. 40.25.122. Litigation disclosure.*

A public record that is subject to disclosure and copying under AS 40.25.110 - 40.25.120 remains a public record subject to disclosure and copying even if the record is used for, included in, or relevant to litigation, including law enforcement proceedings, involving a public agency, except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with the rules of procedure applicable in a court or an administrative adjudication. In this section, "involved in litigation" means a party to litigation or representing a party to litigation, including obtaining public records for the party.

*Sec. 40.25.123. Supervision and regulation.*

(a) The Department of Administration shall supervise and adopt regulations for the operation and implementation of AS 40.25.110 - 40.25.140 by public agencies in the executive branch, except the Alaska Railroad Corporation.

(b) The legislative council shall supervise and adopt procedures for the operation and implementation of AS 40.25.110 - 40.25.140 by public agencies in the legislative branch.

(c) The administrative director of courts shall supervise and adopt procedures for the operation and implementation of AS 40.25.110 - 40.25.140 by public agencies in the judicial branch.

(d) The Board of Regents of the University of Alaska shall supervise and adopt procedures for the operation and implementation of AS 40.25.110 - 40.25.140 by the University of Alaska.

(e) The regulations and procedures adopted under this section must include the establishment of procedures for making an administrative appeal of public agency action that is taken under AS 40.25.110 - 40.25.140.

(f) In this section,

(1) "action" includes the calculation of a fee, the denial of a fee reduction or waiver, and the denial of a request to inspect or copy a public record;

(2) "public agency" does not include a municipality.

*Sec. 40.25.124. Appeals.*

A person may appeal to the superior court the final administrative order made by a public agency under AS 40.25.110 - 40.25.140.

*Sec. 40.25.125. Enforcement: Injunctive relief.*

A person having custody or control of a public record who denies, obstructs, or attempts to obstruct, or a person not having custody or control who aids or abets another person in denying, obstructing, or attempting to obstruct, the inspection of a public record subject to inspection under AS 40.25.110 or 40.25.120 may be enjoined by the superior court from denying, obstructing, or attempting to obstruct, the inspection of public records subject to inspection

under AS 40.25.110 or 40.25.120. A person may seek injunctive relief under this section without exhausting the person's remedies under AS 40.25.123 - 40.25.124.

*Sec. 40.25.140. Confidentiality of library records.*

(a) Except as provided in (b) of this section, the names, addresses, or other personal identifying information of people who have used materials made available to the public by a library shall be kept confidential, except upon court order, and are not subject to inspection under AS 40.25.110 or 40.25.120. This section applies to libraries operated by the state, a municipality, or a public school, including the University of Alaska.

(b) Records of a public elementary or secondary school library identifying a minor child shall be made available on request to a parent or guardian of that child.

*Sec. 40.25.151. Confidentiality of retirement records.*

(a) Except as provided in (b) - (d) of this section, public records, including electronic services and products involving public records, containing information about a person and maintained under AS 14.25, AS 22.25, AS 26.05.222 - 26.05.229, AS 39.35, or former AS 39.37 shall be kept confidential and are not subject to inspection or copying under AS 40.25.110 - 40.25.120.

(b) Records described in (a) of this section concerning a person who is a member or former member of a state retirement system who is still living may only be released to

- (1) the person or the person's guardian;
- (2) the person's employer or former employer;
- (3) a state agency authorized to obtain confidential information;
- (4) another person if the person has

(A) written authorization for release from the affected member or former member or the member's or former member's guardian; or

(B) a court order or subpoena to obtain the information.

(c) Records described in (a) of this section concerning a member or former member of a state retirement system who is deceased or a deceased member's named beneficiary may only be released to

- (1) the member's named beneficiary or the beneficiary's guardian;
- (2) the member's or former member's former employer;
- (3) a state agency authorized to obtain confidential information;
- (4) the personal representative of the member's or former member's estate;
- (5) another person if the person has

(A) written authorization for release from the member or former member, the member's named beneficiary, or the personal representative of the member's or former member's estate; or

(B) a court order or subpoena to secure the information.

(d) The name and address of a living person who is a member or former member of a state retirement system may be released to a retirement organization representing persons receiving benefits under a state retirement system if the retirement organization is affiliated with an organization representing employees of the employer under AS 23.40.070 - 23.40.260 (Public Employment Relations Act).

(e) In this section, "state retirement system" means the teachers' retirement system under AS 14.25, the judicial retirement system under AS 22.25, the retirement system for members of the national guard under AS 26.05.222 - 26.05.229, the public employees' retirement system under AS 39.35, or the elected public officers retirement system under former AS 39.37.

*Sec. 40.25.220. Definitions for AS 40.25.100 - 40.25.295.*

In AS 40.25.100 - 40.25.295, unless the context otherwise requires,

(1) "electronic services and products" means computer-related services and products provided by a public agency, including

(A) electronic manipulation of the data contained in public records in order to tailor the data to the person's request or to develop a product that meets the person's request;

(B) duplicating public records in alternative formats not used by a public agency, providing periodic updates of an electronic file or data base, or duplicating an electronic file or data base from a geographic information system;

(C) providing on-line access to an electronic file or database;

(D) providing information that cannot be retrieved or generated by the existing computer programs of the public agency;

(E) providing functional electronic access to the information system of the public agency; in this subparagraph, “functional access” includes the capability for alphanumeric query and printing, graphic query and plotting, non-graphic data input and analysis, and graphic data input and analysis;

(F) providing software developed by a public agency or developed by a private contractor for a public agency;

(G) generating maps or other standard or customized products from an electronic geographic information system;

(2) “public agency” means a political subdivision, department, institution, board, commission, division, authority, public corporation, council, committee, or other instrumentality of the state or a municipality; “public agency” includes the University of Alaska and the Alaska Railroad Corporation;

(3) “public records” means books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency; “public records” does not include proprietary software programs;

(4) [Telecommunications Information Council, Repealed, E.O. No. 113 Sec. 18 (2005)].

*Sec. 40.25.295. Short title* AS 40.25.100 — 40.25.295 may be cited as the Alaska Public Records Act.

*Regulations concerning disclosure of records by Alaska state agencies*

*2 AAC 96.100 - 2 AAC 96.900*

*Article 1*

*Applicability and Purpose*

*2 AAC 96.100. Applicability*

(a) This chapter applies to

(1) requests made to a public agency for the disclosure of public records;

(2) the format used and the fees charged by a public agency in providing or disclosing public records; and

(3) the electronic services and products, including software copyrights, that a public agency may provide to access public records.

(b) Records that are readily available for public inspection are not subject to the procedures of this chapter. In this subsection, “readily available” means available during state business hours in an agency’s office or in a public library. Records that are readily available for public inspection include records in unrestricted state archives, state recorder offices; records pertaining to a public agency’s regularly conducted and regularly recorded activities, including its adjudicatory proceedings; library books; books still in print; statutes; case law reporters; magazines; journals; published regulations; state land plats; natural resource case files; motor vehicle records; and treatises. If records that are defined as readily available under this subsection are withheld or access is denied, then the records are no longer considered to be readily available for public inspection.

(c) Notwithstanding this chapter, a public agency may adopt its own procedures for administrative appeals of a public agency’s denial, in whole or part, of a public records request.

(d) This chapter does not prescribe substantive standards for determining if information and records are disclosable or nondisclosable.

(e) Except for the provisions of 2 AAC 96.240, 2 AAC 96.440, 2 AAC 96.450, and 2 AAC 96.460, this chapter does not apply to records of the Alaska Industrial Development and Export Authority. The procedures applicable to the Alaska Industrial Development and Export Authority are contained in the booklet entitled “Procedures for Inspection of Records” dated July 1, 1999,

prepared by the Alaska Industrial Development and Export Authority and adopted by reference in this subsection.

The Alaska Industrial Development and Export Authority’s Procedures for Inspection of Records, adopted by reference in 2 AAC 96.100(e) is available on the authority’s website, at the following Internet address: <http://www.aidea.org/statutes.html>

The “Guide to Data Center & Telecommunications Services” and Federal Information Processing Standard 96 referred to in 2 AAC 96.460 may be reviewed by contacting Enterprise Technology Services, Department of Administration, P.O. Box 110206, Juneau, AK 99811-0206.

*2 AAC 96.110. Purpose*

The purpose of this chapter is to ensure that requests for disclosure of public records and for electronic services and products are handled in a timely, reasonable, and responsive manner, without infringing on the established legal rights of a person.

*Article 2*

*Disclosure Requirements*

*2 AAC 96.200. Public information principles*

(a) It is the policy of the executive branch of government to disclose public records and to provide copies of those records in an expeditious manner. Disclosing public records and making copies of them upon payment of the required fees, if any, is a public agency obligation.

(b) It is the policy of the executive branch of government to limit the collection of personal information only to that data necessary for the efficient administration of a public agency.

(c) To ensure that public information is widely available to the public, public agencies are to comply with AS 40.25.115 (e) regarding submission of information to the Alaska State Library about

(1) public information that a public agency collects, compiles, or publishes, including information regarding databases used by the agency to maintain public records; and

(2) information about the electronic services and products routinely provided to the public, the public agency shall provide information to the Alaska State Library when electronic services and products are made available to the public and when electronic services or products of that public agency are substantially modified.

*2 AAC 96.210. Access to records; rights; requirements; format*

(a) Subject to the provisions of AS 40.25.110 - 40.25.220, a public record maintained by a public agency is available for inspection and copying in the format in which that agency maintains or disseminates the record. A public agency shall duplicate and provide copies of a public record upon request and upon payment of the applicable fee as described by this chapter.

(b) A public agency is not required to compile or summarize its public records in response to a request for public records.

(c) A public agency is not required to manipulate its data to create new records in response to a request for public records. A public agency may manipulate its data to create electronic services and products if

(1) the public agency can do so without impairing its functioning;

(2) the data is protected from intentional or accidental modification or destruction; and

(3) the requester pays for the cost of developing the requested electronic service or product, based on fees established by the public agency under 2 AAC 96.460.

(d) When providing public records or electronic services or products, a public agency shall ensure that access to confidential information and proprietary software is protected. Except as provided by law, if the request is for a public record that contains confidential information, the public agency shall delete or mask the nondisclosable confidential information and provide the requested public records upon payment of the applicable fee as described in 2 AAC 96.360.

*2 AAC 96.220. Requester’s justification or need for records*

All disclosable public records must be made available upon request and upon

compliance with the requirements of AS 40.25.110 - AS 40.25.125 and this chapter. A public agency may not request a justification or explanation of need or intended use, but a public agency may inquire whether the person making the request is a party, or represents a party, involved in litigation with the state or a public agency to which the requested record is relevant. If so, the requester shall be informed to make the request in accordance with applicable court rules.

#### *2 AAC 96.230. Nondiscrimination*

When providing public records or electronic services and products, a public agency may not discriminate among requesters or classes of requesters, such as academic researchers, state and federal agencies, members of the public, news organizations, genealogists, or nonprofit

#### *2 AAC 96.240. Reasonable fees required*

(a) A public agency may establish a fee schedule for duplicating public records, and shall establish a fee schedule for providing electronic services and products. Fees shall be consistent with AS 40.25.110, AS 40.25.115, and this chapter.

(b) The fees developed by a public agency to provide electronic services and products may not be set at a level necessary to recover all development and operational costs of the public agency's information system, unless the system exists solely for responding to requests for public records.

(c) Fees may not be assessed as a condition of inspecting public records if the public agency receiving the request does not incur costs to search for the requested public record.

### *Article 3*

#### *Requests for Public Records*

#### *2 AAC 96.300. Records prepared for routine distribution*

A request for production of materials prepared by a public agency for routine public distribution, including pamphlets, published maps, copies of speeches, press releases, educational materials, blank forms and applications, must be honored and the information supplied in reasonable quantities as determined by the public agency. The public agency may set a reasonable limit on the number of copies of materials that the public agency provides in response to a request under this section. The public agency may take into account its existing stock of the materials in determining that limit. No determination under 2 AAC 96.325 - 2 AAC 96.335 is necessary in these cases, since preparation of the records for routine public distribution itself constitutes a determination that the records are disclosable. Copies must be furnished with reasonable promptness in response to the request.

#### *2 AAC 96.305. Place to file*

A request for a public agency record may be filed at the nearest office of that public agency.

#### *2 AAC 96.310. Form of request*

(a) Except as otherwise provided by this chapter, a request to a public agency for a public record must be in writing. Request forms may be provided by a public agency, but a request may not be denied solely because it is not on that form. If a request includes a stamped, addressed postcard, the public agency shall promptly use it to acknowledge the date of receipt of the request.

(b) An oral request for records is considered a valid request under this chapter. Upon receipt of an oral request, a public agency shall inform the requester of the provisions of this section. If the request involves a variety of records, a public agency may require that the request be submitted in writing.

(c) An oral request is deemed denied if not granted within five working days after the office of the public agency responsible for maintaining the requested records receives the request, excluding the request day and including the following five working days. The decision to grant or deny an oral request is within the sole discretion of the public agency. A requester's only remedy if the oral request is denied is to make a written request in accordance with (a) of this section.

(d) If a requester making an oral request for public records is unable to write a request due to a physical or mental disability, the public agency shall either assist the requester in preparing a written request or treat the oral request as a written request.

#### *2 AAC 96.315. Description of records sought*

(a) A requester must describe the public records sought in sufficient detail to enable the public agency to which the request is made to locate the records. The public agency shall make reasonable efforts to assist in the identification and description of records sought, and to assist the requester in formulating the request. If the records are described in general terms, the agency shall attempt to communicate with the requester in order to identify the public records requested, speed the response, and lessen the administrative burden of processing an overly broad request. These attempts may not be used as a means to discourage requests.

(b) If a public agency determines that the description of the records sought by the request is not sufficient to allow the public agency to identify the requested records, that agency shall, no later than 10 working days after receipt of the request, notify the requester that the request cannot be processed until additional information is furnished. Time limits set out in this chapter do not begin to run until a sufficient description of the records is received in the office of the public agency responsible for maintaining the records.

#### *2 AAC 96.320. Initial action upon receipt of a request*

(a) Except for requests governed by 2 AAC 96.300, a public agency shall maintain a log of each written request for public records that it receives. The log must include the date the request was received by the public agency, the name of the requester, a notation on whether notice of receipt was sent to the requester under 2 AAC 96.310, and the date that additional information, if required, was requested under 2 AAC 96.315. If the request is received by the office of the public agency that does not maintain the requested records, the receiving office shall promptly forward the request to the office responsible for maintaining those records.

(b) The log of requests for public records is a public record. It must be preserved, included as a separate item on the public agency's record retention schedules, and provided upon request in accordance with this chapter.

#### *2 AAC 96.325. Response to request; time limits*

(a) Except as otherwise provided in this section, as soon as practicable, but not later than the 10th working day after the date the agency receives a request for public records that complies with this chapter, the public agency shall

(1) furnish all requested records that are disclosable; and

(2) advise the requester which of the requested records are nondisclosable, if any, and the specific legal authority and specific facts supporting nondisclosure.

(b) If the public agency decides that a public record is, in fact, a request for electronic services and products, the public agency shall advise the requester of its decision within 10 working days after receipt of a request and the reasons for this decision.

(c) Any time that elapses between the time a requester is sent notice that processing the request will generate chargeable fees and the time the requester makes suitable arrangement for payment of those fees under 2 AAC 96.355 and 2 AAC 96.360 is excluded from the 10-working-day period of (a) of this section, or any extension of that period.

(d) A public agency may extend the basic 10-working-day period established under (a) of this section for a period not to exceed 10 additional working days by providing notice to the requester within the basic 10-working-day period. The notice must state the reasons for the extension and the date by which the office expects to be able to furnish the requested records or to issue a determination that the records are not disclosable. The notice must include a statement that the extension is not invoked for purposes of delay. The basic 10-day period may be extended only when one or more of the following circumstances exist, and then only as to those specific documents within the request as to which the circumstances apply:

(1) there is a need to search for and collect the requested records from field or other offices that are separate from the office responsible for maintaining the records;

(2) there is a need to search for, collect, and examine a voluminous amount of separate and distinct records sought in a single request;

(3) there is a need for consultation with an officer or employee who is absent on approved leave or official business;

(4) the basic response period comes during a peak workload period; or

(5) there is a need to consult with legal counsel to ensure that protected interests of private or government persons or entities are not infringed.



(e) If a search or copying task will, within the 10-day period and any authorized extension under (d) of this section, substantially impair the other functions of the public agency or an office responsible for maintaining the requested records, the agency head may request an additional extension from the attorney general. Upon receipt of a request for an additional extension, the attorney general shall promptly give the requester and the agency an opportunity to be heard. The attorney general shall tender a speedy decision. The attorney general may grant an extension only to the public agency in extraordinary circumstances and only for the minimum period determined by the attorney general to be required to complete the search or copying of the public records without substantial impairment of the other public agency functions.

(f) A public agency shall give a written response granting or denying a written request for public records within the prescribed time limit. If a response is not received by a requester by the expiration of the time limit, the requester may consider the request denied.

(g) The time limits set out in this section do not apply if the requester agrees in writing that the requested records need not be supplied until a specified date. If the requester does not agree in writing to an extension of time beyond that date, an extension beyond the specified date is governed by (d) and (e) of this section.

#### *2 AAC 96.330. Deletion of nondisclosable information*

(a) If a record contains both disclosable and nondisclosable information, the nondisclosable information must be segregated and withheld and the disclosable information must be disclosed. If the disclosable portions of a record cannot reasonably be segregated from the nondisclosable portions in a manner that allows information meaningful to the requester to be disclosed, the public agency may not disclose the record.

(b) If an electronic file or database contains both nondisclosable and disclosable records, a public agency must

(1) delete or mask the nondisclosable information before releasing the requested record; or

(2) write a program to extract the requested disclosable public records from the electronic file or database.

(c) Masking or deleting nondisclosable information does not constitute providing an electronic service or product. Except as provided by 2 AAC 96.355 or other law, a fee charged shall be consistent with 2 AAC 96.360.

#### *2 AAC 96.335. Denial of request*

(a) A request for a public record that complies with this chapter may be denied only if

(1) the record is not known to exist after the public agency makes a diligent search for it;

(2) the record is not in the public agency's possession, and after a diligent search the public agency does not know where the record is to be found;

(3) the record has been destroyed in accordance with an applicable record-retention schedule;

(4) nondisclosure of the record is authorized by a federal law or regulation, or by state law; or

(5) the record is believed to be in the agency's possession but has not yet been located, in which case the public agency shall proceed under (f) of this section.

(b) A request may be denied by the public agency head or by an agency employee to whom denial authority has been delegated by the public agency head.

(c) An initial denial of a written request must be in writing; must state the reasons for the denial, including any specific legal grounds for the denial; and must be dated and signed by the person issuing the denial. If a request is denied by a public agency employee to whom denial authority has been delegated, the notice of denial must reflect this delegation. A copy of 2 AAC 96.335 - 2 AAC 96.350 must be enclosed with the denial.

(d) A denial of a written request, in whole or in part, must state that

(1) the requester may administratively appeal the denial by complying with the procedures in 2 AAC 96.340;

(2) the requester may obtain immediate judicial review of the denial by seeking an injunction from the superior court under AS 40.25.125;

(3) an election not to pursue injunctive remedies in superior court shall have no adverse effects on the rights of the requester before the public agency; and

(4) an administrative appeal from a denial of a request for public records requires no appeal bond.

(e) A denial of a written request is considered to be issued at the time the denial is either delivered to the United States Postal Service for mailing, or hand-delivered to the requester by an employee or agent of the public agency.

(f) If a written request is denied because a record has not yet been located and the record is believed to exist in the agency's possession, the office in the public agency responsible for maintaining the record is believed to exist in the agency's possession, the office in the public agency responsible for maintaining the record shall continue to search until the record is located or until it appears that the record does not exist or is not in the public agency's possession. The public agency shall periodically inform the requester of its progress in searching for the requested record.

(g) A record that is the subject of a public records request that has been denied shall not be destroyed or transferred from the public agency's custody, except that records may be transferred to state archives and records management services as provided by AS 40.21 and regulations adopted under AS 40.21. A public agency may not destroy or transfer custody of a record to which access has been denied or restricted until at least 60 working days after the requester is notified in writing that the request has been denied, or if there is an administrative or judicial appeal or other legal action pending at the end of the 60-working-day period, until the requester has exhausted those actions.

#### *2 AAC 96.340. Appeal from denial; manner of making*

(a) A requester whose written request for a public record has been denied, in whole or in part, may ask for reconsideration of the denial by submitting a written appeal to the agency head.

(b) An appeal under (a) of this section must be mailed or hand-delivered to the agency head within 60 working days after the denial is issued and must include the date of the denial and the name and address of the person issuing the denial. The appeal must also identify the records to which access was denied and which are the subject of the appeal. If an appeal is from the failure of the agency to respond to the records request within the appropriate time limit under 2 AAC 96.325, the appeal must so state, must identify the records sought, and must identify the public agency to which the request was directed and the date of the request.

(c) The 60 working days within which an appeal must be filed begins to run upon the issuance of the denial or, if no denial is issued, upon the expiration of the time period within which the public agency should have responded.

#### *2 AAC 96.345. Appeal determinations; time allowed; by whom made*

(a) As soon as practicable, but not later than the 10th working day after the close of the record on appeal, the agency head shall issue a written determination stating which of the records that are the subject of the appeal will be disclosed and which records will not be disclosed. The written determination must comply with 2 AAC 96.350.

(b) The agency head may extend the 10-working-day period for a period not to exceed 30 working days upon written request from the requester, or by sending a written notice to the requester within the basic 10-working-day period.

(c) The agency head may delegate authority and duties under (a) and (b) of this section to a full-time employee of the public agency not involved in the denial and not subordinate to the employee responsible for the denial. The employee delegated this authority may not subdelegate to another employee.

#### *2 AAC 96.350. Contents of determination denying appeal*

A determination under 2 AAC 96.345 responding to an appeal must be in writing, must specify the specific statute, regulation, or court decision that is the basis for the denial, and must state briefly the reason for the denial. A denial under this section is the final agency decision. A denial must further state that, as provided by AS 40.25.124, the requester may obtain judicial review of the denial by appealing the denial to the superior court.

#### *2 AAC 96.355. Records in electronic form*

(a) Except as otherwise provided by law, public records maintained in electronic form are subject to disclosure and copying. Upon receipt of a request complying with this chapter, a public agency shall provide a copy of a public record in the form in which it is maintained or disseminated by the public

agency. A public agency may not release proprietary software except as provided in 2 AAC 96.440.

(b) A copy of an electronic public record is generated by copying the electronic file that was used to produce the printed form of the public record. Except as provided in (c) and (d) of this section, a public agency shall establish the fee to duplicate an electronic public record in accordance with 2 AAC 96.360.

(c) A copy of an electronic public record in a geographic information system is generated by copying the plot file, the associated geographic and tabular files, or other files required to generate the printed form of the public record. A public agency shall establish the fee to duplicate an electronic public record in a geographic information system in accordance with 2 AAC 96.460.

(d) The Department of Public Safety will establish the fee for a copy of an electronic public record in a vehicle registration list in accordance with 2 AAC 96.460.

(e) A public agency entering into a contract with a private, public, or non-profit entity to provide electronic copies of public records is not relieved from complying with AS 40.25.110 and this chapter.

#### *2 AAC 96.360. Copies and fees*

(a) A public agency shall prescribe in writing the standard unit charge for copies of public records.

(b) The fee to search for and duplicate a public record may reflect

(1) actual costs for copying the record in the requested format, including costs for paper, tapes, microfiche, disks or other media;

(2) costs incurred by the agency to duplicate the record, including computer processing time; and

(3) salary and benefits costs for the employees performing the work, including computer programming work required to extract or copy the records, as set out in AS 40.25.110.

(c) Except in the case of news organizations, fees must be paid before the records are disclosed. A public agency may require payment in advance of a search for a public record if the agency reasonably believes that the search will generate a fee under AS 40.25.110. If the request is from a news organization or an employee or agent of a news organization and the agency head reasonably believes that the requested record search will require more than five hours to complete, the public agency head may require payment in advance of the search by the news organization only when

(1) the request is unreasonable or in bad faith;

(2) the news organization has failed to pay for previous requests; or

(3) the request requires extraordinary expenditure of state resources;

(d) A public agency may waive the requirement under (c) of this section for payment in advance if the requester and the public agency agree in writing to mutually acceptable time frames for payment.

#### *Article 4*

#### *Requests for Electronic Services and Products*

#### *2 AAC 96.400. Agency responsibilities*

(a) A public agency providing electronic services and products shall adopt procedures for handling requests, including fee schedules and procedures for negotiating any written agreements that may be required.

(b) A public agency may contract with a private, public, or nonprofit entity to provide electronic services and products. A contract under this subsection must provide that the state retains ownership of public records, and that the public agency must ensure compliance with AS 40.25.110 - AS 40.25.220, this chapter, and the state's records management program.

(c) A public agency shall identify databases that undergo periodic or continuous updates.

(d) A public agency shall notify the requester of electronic services and products that any agreement for those services or products must contain a release of liability that the public agency is not liable for any harm or injury that a requester may suffer as a consequence of any inaccurate information the requester may obtain through the electronic service or product.

#### *2 AAC 96.410. Form of request*

(a) Except as provided in (b) and (d) of this section, a request to a public agency for electronic services and products must be in writing. A request form may be provided by a public agency, but a request may not be denied solely because it is not on that form. If a request includes a stamped, addressed postcard, the public agency shall promptly use it to acknowledge the date the request was received.

(b) An oral request for electronic services and products is considered a valid request under this chapter. If the request involves a variety of electronic services and products, a public agency may require that the request be submitted in writing.

(c) An oral request is deemed denied if not granted within 10 working days after the office of the public agency responsible for providing the requested electronic services and products receives the request, excluding the request day and including the following 10 working days. The decision to grant or deny a request under (b) of this section is within the sole discretion of the public agency. Upon receipt of an oral request, a public agency shall inform the requester of the provisions of this section.

(d) If a requester making an oral request for electronic services and products is unable to write a request due to a physical or mental disability, the public agency shall assist the requester in preparing a written request, or treat the oral request as a written request.

(e) A requester must describe the electronic services and products sought with enough specificity to allow the public agency to ascertain the electronic services and products that are requested.

#### *2 AAC 96.420. Response to request; agreement for electronic services and products*

(a) A public agency may require a written agreement, signed by the requester and an authorized officer of the public agency, before beginning work required to provide electronic services and products. The agreement shall include

(1) estimated fees and payment arrangements;

(2) provisions to protect the security and integrity of the information system; and

(3) a release of liability for the public agency providing the electronic services and products.

(b) Except for the release of liability under (a)(3) of this section, an agreement under this section may not contain restrictions on third-party use of the information, including restrictions on sale, distribution, or reformatting of the information.

#### *2 AAC 96.430. Denial of a request*

When a request for electronic services or products is denied because the public agency cannot reasonably provide the requested work, the public agency shall provide a response to the requester explaining that the requested service or product cannot be provided. To the extent possible, the response must further inform the requester of how to obtain the public records that would have been used to satisfy the request for electronic services and products.

#### *2 AAC 96.440. Software copyrights*

(a) A public agency may adopt procedures governing the duplication and distribution of copyrighted software owned by the state, in order to protect that agency's rights under AS 44.99.400. These procedures may not conflict with AS 40.25.110 - AS 40.25.220 and this chapter.

(b) Nothing in this section shall be interpreted to limit or impair the rights or protection granted to a public agency under federal copyright law as a result of its ownership of the copyright to the state.

(c) A public agency may charge a reasonable fee for software copyrighted under this section. Fees shall be established in accordance with 2 AAC 96.460.

#### *2 AAC 96.450. Public terminals; on-line access*

Before providing on-line access to an electronic file or database, a public agency shall ensure that

(1) access instructions or assistance are provided to persons using public terminals;

(2) access to nondisclosable information is prohibited; and

(3) protection is provided against intentional or accidental disclosure, modification, or destruction of records.

*2 AAC 96.460. Fees for electronic services and products; fee review*

(a) A public agency shall prescribe, in writing, in advance of processing a request for electronic services and products, all fees for providing those services and products, and shall provide an estimate of fees to the requester.

(b) A public agency shall adopt a fee schedule for electronic services and products in accordance with AS 40.25.115 and this chapter.

(c) A public agency that has not adopted a fee schedule for electronic services and products may charge no more than the rates established by the Department of Administration and published in the "Guide to Data Center & Telecommunications Services", October, 1994. A public agency may use those rates until that public agency adopts a fee schedule.

(d) A public agency shall set out, in writing, the assumptions used to calculate rates and document the agency's costs and the rate formulas. A public agency shall monitor the use and costs of the data processing services used to support the building and operation of the agency's information system, and then shall bill requesters no more than their proportional use of the information system. A public agency may use federal guidelines, such as Federal Information Processing Standard 96 or a similar standard, to develop, adopt, and implement a charging system. Suggested guidelines for establishing a public agency fee schedule for electronic services and products include

(1) forecasting the estimated volume of usage for each electronic service and product produced by the public agency; these usage forecasts should generally be in terms of the number of service units, including processing unit seconds, records printed, data stored, and programmer analyst hours of each data processing service to be used for a given rate period;

(2) forecasting the costs of all the various resources, including hardware, software, personnel, and development and maintenance costs of the information system used to provide the electronic service or product;

(3) distributing the resource costs to each of the services according to the resources required to support the service or product; and

(4) determining rates by dividing the total cost of each service or product by the total estimated volume of usage.

(e) A public agency's fees may include the following charges associated with providing the electronic service or product:

(1) processing costs, including any chargeback fees paid to another state, federal, or municipal agency or service bureau;

(2) salary and benefits costs for each employee responding to and providing the electronic services and products;

(3) currently published postal and freight charges;

(4) costs for tapes, mailing label paper, computer paper, microfiche, disks, and other media used to provide the records; and

(5) costs for providing a public terminal for on-line access to electronic information as described by 2 AAC 96.450.

(f) A public agency may waive the requirement for advance payment for electronic services or products upon receipt of a written agreement from the requester that establishes time frames for payment that are mutually acceptable.

(g) A requester for electronic services and products may request a review, consistent with AS 40.25.115 (g), of a public agency's fees for those services and products. Upon request from the Office of the Governor, a public agency providing those services and products must provide the assumptions and documentation of the costs and the rate formulas used to calculate its fees for electronic services and products. In a review under this subsection,

(1) a written determination and finding will be made whether the fees comply with AS 40.25.115 and this chapter; and

(2) a decision will be provided to the requester and the public agency within 60 working days, explaining the determination under this subsection; that decision may include instructions to the public agency regarding fees.

(h) A fee reduction or an instruction provided under (g) of this section to a public agency is effective immediately, unless a later deadline is imposed or regulations are required to implement those reductions or instructions.

*Article 5*

*General Provisions*

*2 AAC 96.900. Definitions*

Unless the context indicates otherwise, in this chapter

(1) "agency head" means the principal executive officer of a public agency;

(2) deleted;

(3) "database" means information that is created or compiled by a public agency or its agent to support the public agency's primary business or responsibility and that contains a set of interrelated data or data files in a computerized form organized so the data can be expanded, updated, and retrieved rapidly;

(4) "electronic format" means information that is not stored in paper format, including electronic information stored or provided in computer-based, optical, magnetic, or microfiche forms;

(5) "geographic information system" or "GIS" means an integrated system linking spatial and tabular data that is a system of computer hardware, software, and procedures supporting the capture, management, manipulation, analysis, and display of spatially referenced data;

(6) "hard copy" means a copy of a record in printed format;

(7) "public agency" has the same meaning as in AS 40.25.220, but is limited to public agencies in the executive branch of the state not excluded by AS 40.25.123 ;

(8) "public terminal" means an input or output device, established and operated by a public agency for the use and benefit of the public and provides access to electronic public records;

(9) "standard unit charge" means the predetermined cost incurred by a public agency to produce a unit of product or to perform a particular operation under normal operating conditions;

(10) "working day" means every day except Saturday, Sunday, or a legal state holiday.

**Open Meetings**

*Alaska Open Meetings Act*

*Alaska Stats. 44.62.310 - .319*

*Sec. 44.62.310. Government meetings public.*

(a) All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law. Attendance and participation at meetings by members of the public or by members of a governmental body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call. This section does not apply to any votes required to be taken to organize a governmental body described in this subsection.

(b) If permitted subjects are to be discussed at a meeting in executive session, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that are listed in (c) of this section shall be determined by a majority vote of the governmental body. The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private. Subjects may not be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. Action may not be taken at an executive session, except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations.

(c) The following subjects may be considered in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential;



(4) matters involving consideration of government records that by law are not subject to public disclosure.

(d) This section does not apply to

(1) a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff;

(5) meetings of the governmental body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline;

(6) staff meetings or other gatherings of the employees of a public entity, including meetings of an employee group established by policy of the Board of Regents of the University of Alaska or held while acting in an advisory capacity to the Board of Regents; or

(7) meetings held for the purpose of participating in or attending a gathering of a national, state, or regional organization of which the public entity, governmental body, or member of the governmental body is a member, but only if no action is taken and no business of the governmental body is conducted at the meetings.

(8) meetings of municipal service area boards established under AS 29.35.450—29.35.490 when meeting solely to act on matters that are administrative or managerial in nature.

(e) Reasonable public notice shall be given for all meetings required to be open under this section. The notice must include the date, time, and place of the meeting and if, the meeting is by teleconference, the location of any teleconferencing facilities that will be used. Subject to posting notice of a meeting on the Alaska Online Public Notice System as required by AS 44.62.175 (a), the notice may be given using print or broadcast media. The notice shall be posted at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. The governmental body shall provide notice in a consistent fashion for all its meetings.

(f) Action taken contrary to this section is voidable. A lawsuit to void an action taken in violation of this section must be filed in superior court within 180 days after the date of the action. A member of a governmental body may not be named in an action to enforce this section in the member's personal capacity. A governmental body that violates or is alleged to have violated this section may cure the violation or alleged violation by holding another meeting in compliance with notice and other requirements of this section and conducting a substantial and public reconsideration of the matters considered at the original meeting. If the court finds that an action is void, the governmental body may discuss and act on the matter at another meeting held in compliance with this section. A court may hold that an action taken at a meeting held in violation of this section is void only if the court finds that, considering all of the circumstances, the public interest in compliance with this section outweighs the harm that would be caused to the public interest and to the public entity by voiding the action. In making this determination, the court shall consider at least the following:

(1) the expense that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided;

(2) the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided;

(3) the degree to which the public entity, other governmental bodies, and individuals may be exposed to additional litigation if the action is voided;

(4) the extent to which the governing body, in meetings held in compliance with this section, has previously considered the subject;

(5) the amount of time that has passed since the action was taken;

(6) the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action;

(7) whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of this section;

(8) the degree to which violations of this section were willful, flagrant, or obvious;

(9) the degree to which the governing body failed to adhere to the policy under AS 44.62.312 (a).

(g) Subsection (f) of this section does not apply to a governmental body that has only authority to advise or make recommendations to a public entity and has no authority to establish policies or make decisions for the public entity.

(h) In this section,

(1) "governmental body" means an assembly, council, board, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity; "governmental body" includes the members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members;

(2) "meeting" means a gathering of members of a governmental body when

(A) more than three members or a majority of the members, whichever is less, are present, a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decisions for a public entity; or

(B) more than three members or a majority of the members, whichever is less, are present, the gathering is prearranged for the purpose of considering a matter upon which the governmental body is empowered to act, and the governmental body has only authority to advise or make recommendations for a public entity but has no authority to establish policies or make decisions for the public entity;

(3) "public entity" means an entity of the state or of a political subdivision of the state including an agency, a board or commission, the University of Alaska, a public authority or corporation, a municipality, a school district, and other governmental units of the state or a political subdivision of the state; it does not include the court system or the legislative branch of state government.

#### *Sec. . State policy regarding meetings.*

(a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310 (a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies that serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

(b) AS 44.62.310 (c) and (d) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and to avoid exemptions from open meeting requirements and unnecessary executive sessions.

#### *Sec. 44.62.319. Short title*

AS 44.62.310—44.62.319 may be cited as the Open Meetings Act.

#### *A.Criminal Justice Information*

*Alaska. Stats. AS 12.62.005 - AS 12.62.200*

#### *Sec. 12.62.005. Intent.*

It is the intent of the legislature that the department administer the provisions of this chapter in a manner that protects victims of crime, allows the proper administration of justice, and avoids vigilantism.

#### *Sec. 12.62.100. Criminal justice information advisory board; functions and duties.*

(a) The Criminal Justice Information Advisory Board is established in the department. The board consists of the following members:

(1) a member of the general public appointed by and serving at the pleasure of the governor;

(2) a municipal police chief appointed by and serving at the pleasure of the governor; in making this appointment, the governor shall consult with the Alaska Association of Chiefs of Police;

(3) the attorney general or the attorney general's designee;

(4) the chief justice of the supreme court or the chief justice's designee;

(5) the commissioner of administration or the commissioner's designee;

(6) the commissioner of corrections or the commissioner's designee;

(7) the commissioner of health and social services or the commissioner's designee;

(8) the commissioner of public safety or the commissioner's designee, who will serve as chair of the board; and

(9) the executive director of the Alaska Judicial Council or the executive director's designee.

(b) Members of the board receive no compensation for services on the board, but are entitled to per diem and travel expenses authorized for boards under AS 39.20.180

(c) The board shall meet at least once every six months.

(d) The board shall advise the department and other criminal justice agencies on matters pertaining to the development and operation of the central repository described in AS 12.62.110 (1) and other criminal justice information systems, including providing advice about regulations and procedures, and estimating the resources and costs of those resources, needed to carry out the provisions of this chapter.

*Sec. 12.62.110. Duties of the commissioner regarding information systems.*

The commissioner shall

(1) develop and operate a criminal justice information system to serve as the state's central repository of criminal history record information, and to collect, store, and release criminal justice information as provided in this chapter;

(2) consult with the board established by AS 12.62.100 regarding matters concerning the operation of the department's criminal justice information systems;

(3) provide a uniform crime reporting system for the periodic collection, analysis, and reporting of crimes, and compile and publish statistics and other information on the nature and extent of crime in the state;

(4) cooperate with other agencies of the state, the criminal record repositories of other states, the Interstate Identification Index, the National Law Enforcement Telecommunications System, the National Crime Information Center, and other appropriate agencies or systems, in the development and operation of an effective interstate, national, and international system of criminal identification, records, and statistics; and

(5) in accordance with AS 44.62 (Administrative Procedure Act), adopt regulations necessary to implement the provisions of this chapter; in adopting the regulations, the commissioner may consult with affected law enforcement agencies regarding the fiscal implications of the regulations; regulations may not be adopted under this section that affect procedures of the court system.

*Sec. 12.62.120. Reporting of criminal justice information.*

(a) The commissioner, by regulation and after consultation with the board and affected agencies, may designate which criminal justice agencies are responsible for reporting the events described in (b) of this section. An agency designated under this subsection shall report the events described in (b) of this section to the department, at the time, in the manner, and in the form specified by the department.

(b) An agency designated under (a) of this section shall report the following events to the department if they occur in connection with an arrestable offense:

(1) the issuance, receipt, withdrawal, quashing, or execution of a judicial arrest warrant, a governor's warrant of arrest for extradition, or a parole arrest warrant;

(2) an arrest, with or without a warrant, or an escape after arrest;

(3) the release of a person after arrest without charges being filed;

(4) the admittance to, release or escape from, or unlawful evasion of, official detention in a correctional facility, either pretrial or post-trial;

(5) a decision by a prosecutor or a grand jury not to commence criminal proceedings, to defer or indefinitely postpone prosecution, or to decline to prosecute charges;

(6) the filing of a charging document, including an indictment, criminal complaint, criminal information, or a petition or other document showing a violation of bail, probation, or parole, or the amendment of a charging document;

(7) an acquittal, dismissal, conviction, or other disposition of charges set out in a charging document described in (6) of this subsection;

(8) the imposition of a sentence or the granting of a suspended imposition of sentence under AS 12.55.085;

(9) the commencement or expiration of parole or probation supervision and the conditions of that parole or probation supervision;

(10) the commitment to or release from a facility, designated by the Department of Health and Social Services, of a person who was previously accused of a crime but who has been found to be incompetent to stand trial or found not criminally responsible;

(11) the filing of an action in an appellate court or a federal court relating to a conviction or sentence;

(12) a judgment of a court that reverses, remands, vacates, or reinstates a criminal charge, conviction, or sentence;

(13) a pardon, reprieve, executive clemency, commutation of sentence, or other change in the length or terms of a sentence by executive or judicial action; and

(14) the release of a person on bail and the conditions of that release; and

(15) any other event required to be reported under regulations adopted under this chapter.

*Sec. 12.62.130. Reporting of uniform crime information.*

A criminal justice agency shall submit to the department, at the time, in the manner, and in the form specified by the department, data regarding crimes committed within that agency's jurisdiction. The department shall compile, and provide to the governor and the attorney general, an annual report concerning the number and nature of criminal offenses committed, the disposition of the offenses, and any other data the commissioner finds appropriate relating to the method, frequency, cause, and prevention of crime.

*Sec. 12.62.140. Reporting of information regarding wanted persons and stolen property.*

(a) A criminal justice agency shall report to the department, at the time, in the manner, and in the form specified by the department, data regarding

(1) a person the agency is trying to locate, whether that person is wanted in connection with the commission of a crime, and the discovery, if any, of that person;

(2) the theft, and recovery if any, of an identifiable motor vehicle; and

(3) the theft, and recovery if any, of identifiable property.

(b) A criminal justice agency, annually and at other times if requested by the department, shall confirm whether information already reported under (a) of this section continues to be valid, and shall cooperate with the department in periodic audits to validate the information reported.

*Sec. 12.62.150. Completeness, accuracy, and security of criminal justice information.*

(a) A criminal justice agency shall

(1) adopt reasonable procedures to ensure that criminal justice information that the agency maintains is accurate and complete;

(2) notify a criminal justice agency known to have received information of a material nature that is inaccurate or incomplete;

(3) provide adequate procedures and facilities to protect criminal justice information from unauthorized access and from accidental or deliberate damage by theft, sabotage, fire, flood, wind, or power failure;

(4) provide procedures for screening, supervising, and disciplining agency personnel in order to minimize the risk of security violations;

(5) provide training for employees working with or having access to criminal justice information;

(6) if maintaining criminal justice information within an automated information system operated by a noncriminal justice agency, develop or approve system operating procedures to comply with this chapter or regulations adopted under this chapter, and monitor the implementation of those procedures to ensure that they are effective; and

(7) maintain, for at least three years, and make available for audit purposes,

(A) records showing the accuracy and completeness of information maintained by the agency in a criminal justice information system; and

(B) records required to be maintained under AS 12.62.160 (c)(4).

(b) The department shall adopt reasonable procedures designed to ensure that information about arrests and criminal charges that is stored in a criminal justice information system can be linked with information about the disposition of those arrests and charges.

(c) Every two years the department shall undertake an audit, and every four years shall obtain an independent audit, of the department's criminal justice information system that serves as the central repository and of a sample of other state and local criminal justice information systems, to verify adherence to the requirements of this chapter and other applicable laws. The department shall provide to the board the final report of each audit.

*Sec. 12.62.160. Release and use of criminal justice information; fees.*

(a) Criminal justice information and the identity of recipients of criminal justice information are confidential and exempt from disclosure under AS 40.25. The existence or nonexistence of criminal justice information may not be released to or confirmed to any person except as provided in this section and AS 12.62.180(d).

(b) Subject to the requirements of this section, and except as otherwise limited or prohibited by other provision of law or court rule, criminal justice information

(1) may be provided to a person when, and only to the extent, necessary to avoid imminent danger to life or extensive damage to property;

(2) may be provided to a person to the extent required by applicable court rules or under an order of a court of this state, another state, or the United States;

(3) may be provided to a person if the information is commonly or traditionally provided by criminal justice agencies in order to identify, locate, or apprehend fugitives or wanted persons or to recover stolen property, or for public reporting of recent arrests, charges, and other criminal justice activity;

(4) may be provided to a criminal justice agency for a criminal justice activity;

(5) may be provided to a government agency when necessary for enforcement of or for a purpose specifically authorized by state or federal law;

(6) may be provided to a person specifically authorized by a state or federal law to receive that information;

(7) in aggregate form may be released to a qualified person, as determined by the agency, for criminal justice research, subject to written conditions that assure the security of the information and the privacy of individuals to whom the information relates;

(8) may be provided to a person for any purpose, except that information may not be released if the information is nonconviction information or correctional treatment information;

(9) including information relating to a serious offense, may be provided to an interested person if the information is requested for the purpose of determining whether to grant a person supervisory or disciplinary power over a minor or dependent adult; and

(10) may be provided to the person who is the subject of the information.

(c) Unless otherwise provided for in regulations adopted by the commissioner, if access to criminal justice information is permitted under (b) of this section

(1) the information may be released only by the agency maintaining that

information;

(2) the information may not be released under this section without first determining that the information is the most current information available within that criminal justice information system, unless the system is incapable of providing the most current information available within the necessary time period;

(3) the information may not be released under this section until the person requesting the information establishes the identity of the subject of the information by fingerprint comparison or another reliable means of identification approved by the department;

(4) the information may not be released under this section unless the criminal justice agency releasing the information records, and maintains for at least three years, the name of the person or agency that is to receive the information, the date the information was released, the nature of the information, and the statutory authority that permits the release; and

(5) information released under this section may be used only for the purpose or activity for which the information was released.

(d) Notwithstanding AS 40.25, a criminal justice agency may charge fees, established by regulation or ordinance, for processing requests for records under this chapter, unless the request is from a criminal justice agency or is required for purposes of discovery in a criminal case. In addition to fees charged under AS 44.41.025 for processing fingerprints through the Alaska automated fingerprint system, the department may charge fees for other services in connection with the processing of information requests, including fees for contacting other jurisdictions to determine the disposition of an out-of-state arrest or to clarify the nature of an out-of-state conviction. The department may also collect and account for fees charged by the Federal Bureau of Investigation for processing fingerprints forwarded to the bureau by the department. The annual estimated balance in the account maintained by the commissioner of administration under AS 37.05.142 may be used by the legislature to make appropriations to the department to carry out the purposes of this chapter.

(e) When an interested person requests information under (b)(9) of this section, the department may also obtain a national criminal history record check under AS 12.62.400 if the person submits the fingerprints and fees required for that check under (d) of this section.

*Sec. 12.62.170. Correction of criminal justice information.*

(a) A criminal justice agency shall correct, modify, or add an explanatory notation to criminal history records that the agency is responsible for maintaining if the revision is necessary to achieve accuracy or completeness.

(b) A person may submit a written request to the head of the agency responsible for maintaining criminal justice information asking the agency to correct, modify, or add any information or explanatory notation to criminal justice information about the person that the person believes is inaccurate or incomplete. The decision of the head of the agency is the final administrative decision on the request.

(c) The person requesting revision of criminal justice information may appeal an adverse decision of the agency to the court under applicable rules of procedure for appealing the decision of an administrative agency. The appellant bears the burden on appeal of showing that the agency decision was in error. An appeal filed under this subsection may not collaterally attack a court judgment or a decision by prison, probation, or parole authorities, or any other action that is or could have been subject to appeal, post-conviction relief, or other administrative remedy.

*Sec. 12.62.180. Sealing of criminal justice information.*

(a) Under this section, a criminal justice agency may seal only the information that the agency is responsible for maintaining.

(b) A person may submit a written request to the head of the agency responsible for maintaining past conviction or current offender information, asking the agency to seal such information about the person that, beyond a reasonable doubt, resulted from mistaken identity or false accusation. The decision of the head of the agency is the final administrative decision on the request.

(c) The person requesting that the information be sealed may appeal an adverse decision of the agency to the court under applicable rules of procedure for appealing the decision of an administrative agency. The appellant bears the burden on appeal of showing that the agency decision was clearly mistaken. An appeal filed under this subsection may not collaterally attack a court judgment or a decision by prison, probation, or parole authorities, or any other action that is or could have been subject to appeal, post-conviction relief, or other administrative remedy.



(d) A person about whom information is sealed under this section may deny the existence of the information and of an arrest, charge, conviction, or sentence shown in the information. Information that is sealed under this section may be provided to another person or agency only

- (1) for record management purposes, including auditing;
- (2) for criminal justice employment purposes;
- (3) for review by the subject of the record;
- (4) for research and statistical purposes;
- (5) when necessary to prevent imminent harm to a person; or
- (6) for a use authorized by statute or court order.

*Sec. 12.62.190. Purging of criminal justice information.*

(a) A criminal justice agency may purge only the criminal justice information that the agency is responsible for maintaining. An agency may determine when and what information will be purged, under (b) of this section.

(b) Criminal justice information may be purged if the agency determines that the information is devoid of usefulness to a criminal justice agency due to the

- (1) death of the subject of the information;
- (2) age of the information;
- (3) nature of the offense or of the information;
- (4) volume of the agency's records or other record management considerations.

*Sec. 12.62.200. Civil action and defense.*

(a) Failure to comply with a requirement of this chapter or a regulation adopted under this chapter is not a basis for civil liability, but may be the basis for employee discipline or administrative action to restrict a person's or agency's access to information. However, a person whose criminal justice information has been released or used in knowing violation of this chapter or a regulation adopted under this chapter may bring an action for damages in the superior court.

(b) It is a defense to a civil or criminal action based on a violation of this chapter, or regulations adopted under this chapter, if a person relied in good faith upon the provisions of this chapter or of other laws or regulations governing maintenance, release, or use of criminal justice information, or upon policies or procedures established by a criminal justice agency.

*Sec. 12.62.900. Definitions.*

In this chapter,

- (1) "agency" means a criminal justice agency;
- (2) "automatic data processing" has the meaning given in AS 44.21.170;
- (3) "board" means the Criminal Justice Information Advisory Board;
- (4) "commissioner" means the commissioner of public safety;
- (5) "complete" means that a criminal history record contains information about the disposition of criminal charges occurring in the state and entered within 90 days after the disposition occurred;
- (6) "correctional treatment information" means information about an identifiable person, excluding past conviction information or current offender information, collected to monitor that person in a correctional facility or while under correctional supervision, including the person's current or past institutional behavior, medical or psychological condition, or rehabilitative progress;
- (7) "crime involving domestic violence" has the meaning given in AS 18.66.990.
- (8) "criminal history record information" means information that contains
  - (A) past conviction information;
  - (B) current offender information;
  - (C) criminal identification information;
- (9) "criminal identification information" means fingerprints, photographs, and other information or descriptions that identify a person as having been the

subject of a criminal arrest or prosecution;

(10) "criminal justice activity" means

(A) investigation, identification, apprehension, detention, pretrial or post-trial release, prosecution, adjudication, or correctional supervision or rehabilitation of a person accused or convicted of a crime;

(B) collection, storage, transmission, and release of criminal justice information; or

(C) the employment of personnel engaged in activities described in (A) or (B) of this paragraph;

(11) "criminal justice agency" means

(A) a court with criminal jurisdiction or an employee of that court;

(B) a government entity or subdivision of a government entity that allocates a substantial portion of its budget to a criminal justice activity under a law, regulation, or ordinance; or

(C) an individual or organization obligated to undertake a criminal justice activity under a written agreement with an agency described in (A) or (B) of this paragraph; as used in this subparagraph, "organization" includes an interagency or interjurisdictional task force formed to further common criminal justice goals;

(12) "criminal justice information" means any of the following, other than a court record, a record of traffic offenses maintained for the purpose of regulating drivers' licenses, or a record of a juvenile subject to the jurisdiction of a court under AS 47.12:

(A) criminal history record information;

(B) nonconviction information;

(C) correctional treatment information;

(D) information relating to a person to be located, whether or not that person is wanted in connection with the commission of a crime;

(13) "criminal justice information system" means an automatic data processing system used to collect, store, display, or transmit criminal justice information, and that permits information within the system, without action by the agency maintaining the information, to be directly accessed by another principal department of the state, another branch of state government, an agency of another state or the federal government, or by a political subdivision of a state or the federal government;

(14) "current offender information" means information showing that an identifiable person

(A) is currently under arrest for or is charged with a crime and

(i) prosecution is under review or has been deferred by written or oral agreement;

(ii) a warrant exists for the person's arrest; or

(iii) less than a year has elapsed since the date of the arrest or filing of the charges, whichever is latest;

(B) is currently released on bail or on other conditions imposed by a court in a criminal case, either pretrial or post-trial, including the conditions of the release;

(C) is currently serving a criminal sentence or is under the custody of the commissioner of corrections for supervision purposes; "current offender information" under this subparagraph includes

(i) the terms and conditions of any sentence, probation, suspended imposition of sentence, discretionary or mandatory parole, furlough, executive clemency, or other release; and

(ii) the location of any place of incarceration, halfway house, restitution center, or other correctional placement to which the person is assigned; or

(D) has had a criminal conviction or sentence reversed, vacated, set aside, or has been the subject of executive clemency;

(15) "department" means the Department of Public Safety;

(16) "dependent adult" means an adult with a physical or mental disability who requires assistance or supervision with the activities of daily living;

(17) “information” means, unless the context clearly indicates otherwise, data compiled within a criminal justice information system;

(18) “interested person” means a person as defined in AS 01.10.060 that employs, appoints, or permits a person to serve with or without compensation in a position in which the employed, appointed, or permitted person has or would have supervisory or disciplinary power over a minor or dependent adult;

(19) “nonconviction information” means information that an identifiable person was arrested or that criminal charges were filed or considered against the person and

(A) a prosecutor or grand jury has elected not to begin criminal proceedings against the person and at least a year has elapsed since that decision;

(B) criminal charges against the person have been dismissed or the person has been acquitted and at least a year has elapsed since that action; or

(C) there is no indication of the disposition of the criminal charges or the arrest and at least a year has elapsed since the arrest, filing of the charges, or referral of the matter for review by a prosecutor, whichever is latest;

(20) “past conviction information” means information showing that an identifiable person who has been unconditionally discharged has previously been convicted of a crime; “past conviction information” includes

(A) the terms of any sentence, probation, suspended imposition of sentence, or discretionary or mandatory parole; and

(B) information that a criminal conviction or sentence has been reversed, vacated, set aside, or been the subject of executive clemency;

(21) “purge” means to delete or destroy information in a criminal justice information system so that there can be no access to the information;

(22) “seal” means to retain information in a criminal justice information system subject to special restrictions on access or dissemination;

(23) “serious offense” means a conviction for a violation or for an attempt, solicitation, or conspiracy to commit a violation of any of the following laws, or of the laws of another jurisdiction with substantially similar elements:

(A) a felony offense;

(B) a crime involving domestic violence;

(C) AS 11.41.410 - 11.41.470;

(D) AS 11.51.130 or 11.51.200 - 11.56.210;

(E) AS 11.61.110 (a)(7) or 11.61.125;

(F) AS 11.66.100 - 11.66.130;

(G) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160; or

(H) former AS 11.40.080, 11.40.110, 11.40.130, or 11.40.200 - 11.40.420, if committed before January 1, 1980;

(24) [Repealed, Sec. 4 ch 53 SLA 2001].