IN THE SUPREME COURT OF THE STATE OF ALASKA

KALEB LEE BASEY,

Appellant,

v.

STATE OF ALASKA,
Department of Public Safety,
Division of State Troopers,
Bureau of Investigations,

Appellees.

Supreme Court Case No. S-17099

Superior Court Case No. 4FA-16-02509CI

APPEAL FROM THE SUPERIOR COURT, FOURTH JUDICIAL DISTRICT AT FAIRBANKS, THE HONORABLE DOUGLAS L. BLANKENSHIP PRESIDING

AMICUS CURIAE BRIEF OF GRAY TELEVISION, INC., dba KTUU-TV AND KTVF-TV, ANCHORAGE DAILY NEWS, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

D. JOHN MCKAY
Alaska Bar No. 7811117
Law Office of D. John McKay
117 E. Cook Ave.
Anchorage, AK 99501
Telephone: (907) 274-3154
Facsimile: (907) 272-5646
mckay@alaska.net

Attorney for Amici Curiae Gray Television, Inc., dba KTUU-TV and KTVF-TV, Anchorage Daily News, and the Reporters Committee for Freedom of the Press

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AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Constitution. Article I, Section 22

Right of Privacy. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

AS 39.25.995. Short title

This chapter may be cited as the State Personnel Act.

AS 39.25.080. Personnel records confidential; exceptions

(a) State personnel records, including employment applications and examination and other assessment materials, are confidential and are not open to public inspection except as provided in this section.
(b) The following information is available for public inspection, subject to reasonable regulations on the time and manner of 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;
(6) the compensation authorized for a state employee; and
(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).
…

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. …

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
…

(4) records required to be kept confidential by a federal law or regulation or by state law;

…

(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;

…

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.

AS 44.62.312(a) State Policy Regarding Meetings

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.

…

2 AAC 07.910. Personnel records

(a) This section applies to the records of applicants for state employment and to the employment records of current and former classified and partially exempt employees.

(b) As provided in AS 39.25.080, the following information, if available, is open for public inspection: (1) names and position titles of all state employees; (2) the position held by a state employee or a former employee; (3) the prior positions held by a state employee; (4) whether the employee or former employee is, or was, 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 current state employee.

(c) All other records of applicants for employment and employees in the classified and partially exempt service, including applications and resumes, are confidential and will be released only under the following conditions: … (4) to the public, upon receipt of a written authorization from the employee, former employee, or applicant for employment whose records are requested, or upon receipt of an order of a court of competent jurisdiction; (5) a request for records not covered by paragraphs (1) - (4) of this subsection will be addressed to the director; the director or director's designee shall review the request and may approve the release of information if that release would be in the best interests of the state and can be accomplished without violation of the employee's, former employee's, or applicant's right to privacy.

INTERESTS OF *AMICI CURIAE*

By order dated January 28, 2019, this Court invited Anchorage Daily News, KTUU-TV, and the Reporters Committee for Freedom of the Press to file *amicus* briefs in this case. In response, Gray Television, Inc., as owner and operator of KTUU-TV in Anchorage and KTVF-TV in Fairbanks, Anchorage Daily News, and the Reporters Committee for Freedom of the Press (collectively, "Press *Amici*") respectfully submit this joint *amici* brief.

KTUU-TV, the leading source of local broadcast news in Anchorage and Southcentral Alaska, and KTVF-TV, serving Fairbanks and the Interior, are owned and operated by Gray Media Group, Inc., a subsidiary of Gray Television, Inc. Through subsidiaries, Gray Television, Inc. owns and operates television stations and leading digital properties in over 90 television markets including the first or second highest-rated television station in 85 markets. Gray Television, Inc.'s stations broadcast almost 400 separate programming streams, including nearly 150 affiliates of the CBS/NBC/ABC/FOX networks.

Anchorage Daily News, Alaska's largest newspaper, is published by Anchorage Daily News, LLC. Founded in 1946, the Daily News has received numerous awards for journalistic excellence, including two Pulitzer prizes.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of

government subpoenas attempting to force reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

STANDARD OF REVIEW

Judge Blankenship's ruling was based on his interpretation of AS 39.25.080. This is a matter of law. The court gives de novo review to questions of law, including issues of statutory interpretation.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long protected the public's right to access information about how the government conducts its business. That stalwart protection comes through stringent enforcement of the obligations the Alaska Public Records Act ("PRA" or the "Act") places on government offices. As this Court has stated: "The cornerstone of a democracy is the ability of its people to question, investigate and monitor the government."[2]

Appellant Kaleb Lee Basey ("Basey") appeals the denial of his request, made pursuant to the PRA, for the disciplinary records of two state troopers. The Superior Court's holding that these records are exempt from disclosure as "personnel records"

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[1] *Doe v. State*, 189 P.3d 999, 1002–03 (Alaska 2008); *see also Basey v. State, Dep't of Public Safety*, 408 P.3d 1173, 1176 (Alaska 2017) ("*Basey I*") (the Supreme Court applies its independent judgment to questions of statutory interpretation).

[2] *Jones v. Jennings*, 788 P.2d 732, 735–36 (Alaska 1990).

under the State Personnel Act is contrary to this Court's precedent, which narrowly limits "personnel records" to records that would reveal information about an employee's private life.[3] The PRA and State Personnel Act do not exempt from disclosure records of state employee misconduct in performing public duties.

Moreover, any privacy interest asserted under the Alaska Constitution Article I, Section 22, would not be absolute. If this Court determines that the state Constitution applies at all, it should apply the balancing test established in *International Association of Fire Fighters v. Municipality of Anchorage*, which requires courts to examine: (1) whether the party seeking to withhold constitutionally protected information has a legitimate expectation of privacy, (2) whether the state has a compelling interest in disclosure, and (3) whether disclosure occurs in a manner which is least intrusive with respect to the right to privacy. Here, public employees do not have a legitimate expectation of privacy in records that reveal nothing intimate in their private life, there is a "compelling justification" for Mr. Basey's and others' access to law enforcement disciplinary records, and the disclosure of these public records would not be intrusive. The Alaska Constitution therefore provides no impediment to the release of these officers' disciplinary records.

Finally, this Court's holding in *Basey I* is significant for the fact that this Court once again, as directed by legislative policy and judicial precedent, construed a request for exceptions to our public records law narrowly and in favor of disclosure, and it

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[3] *See Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997).

permitted Mr. Basey to continue this litigation. In this leg of the case, "*Basey II*," the Court's decision will impact not only Mr. Basey, but the press and the public. As a watchdog for the public, the press has a substantial and continuing interest in meaningful access to government information. Monitoring, investigating and reporting upon misconduct of law enforcement officers and other public employees whose behavior significantly affects the public is a core mission of a free press and is in the public interest. Disciplinary records of Alaska state employees, and other records regarding Alaska law enforcement officers, have provided crucial facts for important journalism in this state. Similarly, access to disciplinary records of law enforcement officers in other states have informed the public about officers' misconduct and violations of the public trust.

For the reasons set forth herein, *Amici* urge this court to reverse the ruling of the Superior Court, declare that AS 39.25.080(a) does not make disciplinary records confidential, and order the disclosure of the disciplinary records of the two state troopers that Mr. Basey requested under the PRA.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises from one of two public records requests submitted in September 2016 to the Alaska State Troopers by Kaleb Basey pursuant to the Alaska Public Records Act.[4] Appeals from the initial denial of Mr. Basey's requests eventually led to this Court,

[4] AS 40.25.110 *et seq*.

which issued an opinion on December 29, 2017, in favor of Mr. Basey.[5] In its opinion in *Basey I*, the Court observed that "throughout this case, the State has relied on only two exceptions to justify AST's nondisclosure of the requested records: the AS 40.25.122 litigation exception and the AS 40.25.120(a)(6)(A) law-enforcement-interference exception,"[6] both of which the Court found unavailing.[7] The Court remanded the case to the superior court "for further proceedings consistent with this opinion."[8]

Mr. Basey's public records requests sought specified documents relating to certain state law enforcement activities and personnel. Among these, and the only request at issue in this appeal, is what AAG John Novak characterizes as a request for "the personnel files of two troopers."[9] This request—No. 5 of six items included in Mr. Basey's September 1, 2016, records request—is generally characterized by the superior court and by Mr. Basey in the same May 3, 2018, hearing as a request for "disciplinary records."[10] This Court also characterized the records in question as "disciplinary" records.[11]

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[5] *Basey I*, 408 P.3d at 1176. Much of the relevant history of the disposition of these requests, and related proceedings, is set forth in the Court's opinion in *Basey I* at 408 P.3d at 1174-1175.

[6] *Basey I*, 408 P.3d at 1176.

[7] *Id.* at 1180. The State also recites that Judge Blankenship dismissed the Complaint "pursuant to 40.25.120(a)(6)(A) and/or AS 40.25.122." State Br. at 9.

[8] *Id.* at 1181.

[9] Tr. 5, *l.* 1-2

After the case was remanded, Mr. Basey moved to compel production of the requested documents, and Judge Blankenship conducted a hearing on the motion on May 3, 2018, at which Mr. Novak and Mr. Basey both participated telephonically. In its brief, the State asserts that at this hearing, "Judge Douglas Blankenship orally ruled that Mr. Basey did not make a sufficient showing to justify the court making an in camera review or ordering disclosure of the Alaska State Trooper personnel file materials in this civil public records request case. [Record at 101-103]."[12]

The record, however, does not support this assertion.[13] Instead, it is clear that Judge Blankenship did *not* make a ruling that Mr. Basey had failed to make a sufficient showing to justify in camera review, nor did the superior court balance any competing

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[10] Tr. at 13, *ll.* 5-6, 18, and 25; at 15, *l.* 21; at 16, *l.* 1; at 18, *ll.* 17-19; and at 19, *l.* 12.

[11] *Basey I,* 408 P.3d at 1175 ("He sought records related to his specific investigation, records related to AST's use of military search authorizations, and *disciplinary* and training certification *records* for two AST investigators who are defendants in the civil case.")

[12] Sept. 11, 2018 Department of Public Safety Opposition Brief ("State Br.") at 9.

[13] The record cite supposedly supporting this assertion (101–103) is to the log notes for the May 3 hearing, filed with the State's Brief as Volume 2 of Appellee's Excerpt of Record. This document shows that the superior court based its ruling on a reading that AS 39.25.080 left the court without discretion to order the disciplinary records disclosed. (R. 102, at 03:57:04, 04:02:56, 04:03:28). Since the State filed its Brief, it moved to supplement the record with a transcript of the May 3 hearing. As shown in the accompanying text, this document leaves no doubt that the superior court based its ruling on his interpretation of AS 39.25.080, and did not make a ruling based on any showing by either party.

interests that might have been considered. Instead, Judge Blankenship established that Mr. Basey was pursuing his request based on "the state FOIA," and then based his denial of Mr. Basey's request squarely upon his reading of AS 39.25.080.[14] There was some preliminary discussion about other approaches to addressing Mr. Basey's request. Mr. Basey explained that the federal district court had ruled that his Fourth Amendment rights had been violated, and that Troopers Hansen and Bell were, in part, responsible for these violations. The State did not dispute these assertions.[15] But the court did not pursue this, because it believed that it had no discretion under AS 39.25.080 to entertain this request. Judge Blankenship asked Mr. Basey if he was interested in getting dates of hire, current and former positions held, and other mundane information about Troopers Hanson and Bell disclosable under AS 39.25.080. Mr. Basey responded:

> Well, Your Honor, I don't really care much about obtaining their dates of hire. My request was for their disciplinary records and it appears that I haven't really gotten a clear answer as to why these officers would have a reasonable expectation of privacy in those disciplinary records.
>
> THE COURT: Well, *what it appears to me, sir, is* that -- and the statute is

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[14] May 3 Tr., at 16, *l.* 21-25.

[15] May 3 Tr. at 16, *l.* 1-15. Mr. Basey also stated that Hansen and Bell used invalid military search authorization to search his property outside an area that was military-controlled, in violation of the Fourth Amendment and the Posse Comitatus Act, and that based on the foregoing he wished to see if there were other instances of Fourth Amendment violations in these officers' files. Earlier in the hearing there was a colloquy between the court and AAG Novak about Mr. Basey's request for policies or directives dealing with the federal Posse Comitatus Act and Alaska State Troopers or Department of Public Safety interaction with military law enforcement. The court, while making it clear he was not suggesting that the State's counsel was misrepresenting anything, expressed some incredulity or surprise about the asserted lack of any such policy. *Id.* at 9-11.

> 39.25.080 -- and I believe the FOIA Act incorporates -- has some blanket language unless -- I think it incorporates the Personnel Records Act and *the state is limited to disclosing*, as we said, *the information that you probably don't want or that's not valuable to you*. So *since the scope of your request* under Title 40, what I call the state FOIA Act, since *it's all under that act, then I don't see where I can issue an order* that those be disclosed.
>
> So Mr. Basey, do you want *this information that they can produce* under 39.35.080 or no?
>
> MR. BASEY: Your Honor, I want the information that I've requested in my request in regards to disciplinary files. Other than that, I'm not interested in obtaining intimate information which is located in their personnel file. All I want is the disciplinary records, Your Honor.
>
> THE COURT: Okay. *Well, under 40.25, that information is not available, so the court denies that request.*

(Emphasis added.)[16]

ARGUMENT

I. THE PUBLIC RECORDS ACT REQUIRES DISCLOSURE OF LAW ENFORCEMENT DISCIPLINARY RECORDS.

A. Law Enforcement Disciplinary Records Are Not Confidential "Personnel Records" Under the State Personnel Act.

The Public Records Act guarantees public use and inspection of all public records unless an exemption listed in the Act applies. In the event of any ambiguity in applying the PRA, this Court has "repeatedly held that the [A]ct creates a presumption in favor of disclosure and that the [A]ct's implicit legislative policy of broad public access requires

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[16] *Id.* at 18, *l.* 15 – 19, *l.* 4, and 19, *ll.* 11- 17 (emphasis added).

courts to narrowly construe exceptions to disclosure."[17] The disciplinary records at issue do not fall within the ambit of the State Personnel Act.[18] The Superior Court therefore erroneously read the confidentiality provision of the State Personnel Act into the PRA exemption stated in AS 40.25.120(4).

The State asserted in the trial court that "any materials that may exist of alleged misconduct" by Troopers Hansen and Bell would be exempt under AS 39.25.080(a).[19] The text of the State Personnel Act[20] does not refer to disciplinary records, nor does it compel a reading that would include them among "personnel records" that must be kept

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[17] *Fuller v. City of Homer*, 75 P.3d 1059, 1061–62 (Alaska 2003).

[18] *See* AS 39.25.080(a).

[19] The State made this argument in passing, and for the first time, in response to Mr. Basey's motion to compel. (R. 117). Before then, this Court had remanded with instructions to proceed consistent with its ruling in *Basey I*, which had found that the *only* grounds raised by the State for denying Mr. Basey's request for records were without merit. 408 P.3d at 1176. If the case is to be remanded again, Press *Amici* support Mr. Basey's objection to piecemeal and serial litigation by agencies defending public access suits filed by the press or citizens. Litigation is time consuming and expensive in any event. Because Alaska is the only state in the Union where citizens, and the press, must pay the government if they unsuccessfully seek access through the courts to public records or government meetings, it is increasingly rare that people undertake these risks. Whether the State's failure to raise the Personnel Act until after remand was careless or strategic, it was untimely. At a minimum, the State should not hereafter be allowed to raise any new exceptions or defenses. *Kroeplin v. Wisc. Dep't of Nat. Res.*, 725 N.W.2d 268, 268 ¶ 45 (Wisc. App. 2006) (rejecting State's argument on appeal against release of records that state agency made no reference to in its denial letter and for reasons not specified for denying the newspaper's request).

[20] *See Basey I*, 408 P.3d at 1176 (court applies its independent judgment to questions of statutory interpretation, and considers the statute's "text, legislative history, and purpose").

confidential under subsection .080(a), as this Court essentially held decades ago.[21]

1. The State's Argument That Trooper Disciplinary Records Are Confidential Because They Are "Assessment Materials" Is Without Merit

The State's principal argument for encompassing disciplinary files within the confidentiality provision of AS 39.05.080(a) is that any such files relating to misconduct are "assessment materials" within the meaning of that subsection.[22] However, the cases that the State relies upon for its assertion that Alaska appellate courts "repeatedly have recognized the privacy interests of state employees in personnel file materials, including assessment materials,"[23] do not, in fact, support this proposition. Moreover, neither the legislative history concerning inclusion of "assessment materials" in section .080(a), nor principles of statutory construction, support the State's argument.

a. <u>The cases relied upon by the State do not support its argument</u>

None of the four cases cited by the State involve "assessment materials" at all. *Cockerham* involved a criminal defendant's request for juvenile records of a sexual assault victim, not police records. The request was based entirely on speculation that such records might exist and might include something useful for impeachment, based

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[21] *Alaska Wildlife Association v. Rue*, 948 P.2d at 979–80.

[22] State Br. at 16–17.

[23] *Id.*

solely on the fact that the victim was a runaway.[24] *Braham* also did not even involve police personnel files, but rather addressed a question relating to information about a police informant.[25] *Booth* involved Metlakatla police officers, not state employees, and did not cite or involve AS 39.25.080.[26] And in *Dana,* which did involve a request for a personnel file of a specially commissioned undercover agent for AST, the court turned down the request because it was untimely and also found it was purely a "fishing expedition."[27]

b. Neither the history nor wording of the statute support the State's position that "assessment materials" includes employee disciplinary records

In 2000, the Legislature amended AS 39.25.080 by adding "assessment materials" to the two items already contained in subsection .080(a) as exemplars of the kinds of documents that were intended to be confidential personnel records.[28] It is clear from the other provisions of the bill and comments of proponents that this was simply a package of

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[24] *Cockerham v. State,* 933 P.2d 537, 543-534 (Alaska 1997) (describing the defendant's request as a total "fishing expedition," noting that the defendant's attorney had not even cross-examined the young woman on any subject related to credibility).

[25] *Braham v. State,* 571 P.2d 681 (Alaska 1977).

[26] *Booth v. State,* 251 P.3d 369 (Alaska App. 2011). *Booth* surveys related cases, including *March v. State,* 859 P.2d 714 (Alaska App. 1993). The record in this case suggests that Mr. Basey should also prevail under the standard employed in *March* if that were applied here rather than the more appropriate PRA analysis.

[27] *Dana v. State,* 623 P .2d 348, 355 (Alaska App. 1981). The court in *Dana* held that records of this nature would generally need to be provided. *Id*.

[28] *See* ch. 111, §1, SLA 2000.

measures to modernize the system for hiring state workers.[29] There is nothing in the bill's history to indicate it had anything to do with disciplinary or similar records. Neither the plain meaning of the added term nor a reading of the AS 39.25.080(a) in isolation or in the context of the entire statute lend support to the State's position.

While "assessment materials" is not defined in the State Personnel Act, dictionaries uniformly distinguish "assessment" materials from "disciplinary" materials. Merriam-Webster defines "assessment" as "the action or an instance of making a judgment about something," such as "an assessment of the president's achievements."[30] In contrast, "disciplinary" is defined as "designed to correct or punish breaches" of "discipline," which in turn is defined as "control gained by enforcing obedience or order," or "punishment."[31] In short, assessment records contain judgments about how an employee has performed in their job and how they might improve, while disciplinary records detail breaches of employee conduct standards and enforcement of punishment for said employee misconduct.

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[29] The sponsor's representative for the bill testified that its fundamental change was that "rather than being tied to a costly time and paper manual process, the state hiring process has now become electronic. Comments of State Personnel Manager David Stewart, Minutes at 2079, House State Affairs Comm. Hearing on HB 317, 21st Leg., 2d Sess. (Mar. 9, 2000). *See also*, Gov. Knowles' transmittal letter, 2000 House Journal 1991-1993, Twenty-First Leg., 2d Sess. (Jan. 24, 2000).

[30] *Assessment*, Merriam-Webster Online Dictionary, https://perma.cc/7FFS-DZTD (last visited Apr. 17, 2019).

[31] *Disciplinary*, Merriam-Webster Online Dictionary, https://perma.cc/PX8M-7EBV (last visited Apr. 17, 2019); *Discipline*, Merriam-Webster Online Dictionary, https://perma.cc/8G5U-ZSHW (last visited Apr. 17, 2019).

Moreover, when read in the context of the State Personnel Act as a whole,[32] it is clear that disciplinary records do not fall within the meaning of "assessment materials." Numerous other subsections of the State Personnel Act refer to different types of "assessments" that the state may conduct. For instance, the State Personnel Act specifies that the personnel rules must provide for:

> promotions from within the state service when there are qualified candidates in the state service; vacancies shall be filled by promotion whenever practicable and in the best interest of the state service, and promotion shall be by competitive *assessment* whenever possible; in considering promotions, the applicants' qualifications, performance records, seniority, and conduct shall be evaluated;[33]

This subsection makes clear that "assessment" materials refer to evaluations of a state employee's qualifications or performance—an entirely different examination than investigations of a state employee's misconduct.

The State Personnel Act's numerous other references to "assessments" make clear this type of record is not interchangeable with "disciplinary" matters. For example:

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[32] *See Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341, 345 (Alaska 2011) ("all sections of a statute should be construed together so that all have meaning and no section conflicts with another"); *Phillips v. State*, 183 P.3d 493, 495 (Alaska 2008) (stating that courts are obliged to construe subsections of a statute so that there is no internal inconsistency, if possible).

[33] AS 39.25.150(6) (emphasis added).

- Veterans or former prisoners of war who have the necessary qualifications for a position or job classification applied for under the State Personnel Act may have their "assessment" score improved;[34]
- Alaskan residents who do not meet the minimum educational or experience criteria for state employment may otherwise achieve state employee status and will be placed on lists for vocational classification based on an "assessment" of their vocational abilities and place of residence;[35]
- The personnel board may extend the "partially exempt service to include any position in the classified service" if the responsibilities and duties of employment are not susceptible to the "ordinary recruiting and assessment procedures;"[36]
- Persons in the "partially exempt service" are not required to complete an "assessment"; and[37]
- "[A]ssessment materials" appears in a list of two other types of "[s]tate personnel records" in the State Personnel Act: employment applications and examination materials.[38]

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[34] AS 39.25.159.

[35] AS 39.25.155(c).

[36] AS 39.25.130.

[37] AS 39.25.120.

[38] AS 39.25.080(a).

The State would have this Court read the term "assessment materials" in AS 39.25.080(a) in a manner entirely inconsistent with the use of the same term everywhere else it appears in the State Personnel Act. That interpretation is unsupported by the plain meaning of the statutory text.[39] The types of records listed in the State Personnel Act as examples of "personnel records" signal that the type of material made confidential are records that determine an individual's qualifications for employment or for promotion, not materials related to misconduct.

2. Legislative History Does Not Otherwise Demonstrate That Disciplinary Files or Similar Records Are Encompassed By AS 39.25.080

While the State limits its argument to defining disciplinary records as "assessment materials," a broader review of the statute's legislative history does not compel a different result.

a. The Initial Language of the Personnel Act

The State Personnel Act, which includes AS 39.25.080, was enacted in 1961. Section .080 initially provided that:

> The state personnel records, except such records as the rules may properly require to be held confidential for reasons of public policy, shall be public records and shall be open to public inspection, subject to reasonable regulations as to the time and manner of inspection.[40]

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[39] *See Corkery v. Anchorage*, 426 P.3d 1078, 1088 (Alaska 2018) (quoting *Olson v. Olson*, 856 P.2d 482, 484 n.2 (Alaska 1993)); *see also Alaska Wildlife Alliance v. Rue*, 948 P.2d at 980 (stating that the examples of personnel records included in the statute are "revealing").

[40] *See* ch. 144, §18, SLA 1960.

b. Blue Ribbon Commission Overhaul of State Personnel Act

AS 39.25.080 was repealed and replaced in 1982, as part of an overhaul of the State Personnel Act that was the product of a multi-year effort by a Blue Ribbon Commission on the State Personnel Act ("BRC") chaired by Senator Bill Ray. The BRC and the legislation it proposed[41] dealt comprehensively with matters relating to state public employment and legislative history related to its efforts is voluminous. The current section .080 of AS 39.25 was a minor part of this overhaul.[42] There was almost no discussion of this provision, other than to note that although legislators changed the language to say what was open rather than was closed in personnel files,[43] that change

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[41] The Commission was active between the years 1978 and 1983 and prepared several bills related to the State Personnel Act. SB 193, in which the current provision originated, was introduced by request of the Legislative Council for the Blue Ribbon Commission on the State Personnel Act.

[42] Section 5 [section 6 in early versions] of SB 193 (1982), which repeals and reenacts AS 39.25.080, appeared in the initial version of the bill in the same form as in its final version.

[43] *See,* February 1981 Report of the Blue Ribbon Commission on the State Personnel Act to the Twelfth Alaska State Legislature, 1st Sess., (p. 9) Comment to SB 193, § 6, Files of House Judiciary Comm. on SB 193:

> Current law provides that the state personnel records are public except for those which the rules require to be kept confidential. The Personnel Rules provide that except for examination materials, performance evaluations, personal history or other confidential materials so designated by the Director of Personnel, employee records are public records. (PR 14 07.0) The commission decided that it was more appropriate to indicate what materials actually are open to the public, and to make the remaining records confidential. The public materials are listed in subsection (b).

was to have no significant effect on existing practice.[44] The state Personnel Rules in effect at the time provide no definitive answers, but reflect the presumption of openness.[45]

Press *Amici's* review of a couple thousand pages of legislative history did not reveal any substantive discussion that suggests the Legislature intended to encompass files related to disciplinary matters within the confidentiality provision of section .080(a), thus concealing public employees' misconduct.

The Director of the Division of Personnel, serving as a member of the Blue Ribbon Commission that proposed the draft bill, "explained that the Personnel Rules which implement this section provide for confidentiality of *personal information* about state employees," and that "confidential records include information about an employee's

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[44] *See, e.g.*, April 30, 1982, Memo from BRC Administrative Assistant Teresa Cramer to House Judiciary Committee, re: HCS CSSB 193 (SA) Amending State Personnel Laws, Files of House Judiciary Comm. on SB 193, 12th Leg., 2d Sess. ("In fact, the amendment would not change the existing practice since those items listed would not change the existing practice since those items are the only personnel records now open to the public.").

[45] 14 07.0 Public Records

> Except for examination materials, performance evaluations, personal history, or other confidential materials so designated by the Director, employee records shall be public records. Such records shall be available for inspection in the presence of authorized personnel by the public during regular office hours in accordance with such procedure as the Director may establish.

June 30, 1980, Personnel Rule, State of Alaska, Department of Administration, Division of Personnel

family and performance evaluations."[46] Sen. Ray suggested specifying in the statute what is or is not open, rather than relying on the Personnel Rules to set those standards.[47]

Nothing in this history should persuade the Court to abandon its decades-long position of weighing competing arguments in light of the fundamental policies and purposes of the PRA, that citizens have a presumptive right to know about public employees' misconduct or other significant issues arising from or related to their employment and affecting the public interest, subject to carefully circumscribed exceptions.

c. Subsequent Amendments

Further, AS 39.25.080 has been amended three times since 1982, and no amendments suggest the statute precludes access to trooper disciplinary files. The first amendment, in 1997, added a new subsection to allow sharing of files for purposes of child support enforcement,[48] which has no bearing on this case. The second, a 2000 amendment to subsection .080(a), added "assessment materials," which, as addressed in section I.A.1(b), *supra*, lends no support to the State's position. Finally, in 2003, the Legislature added a new subsection to the list of disclosable records in AS 39.25.080(b)(7), to include "whether a state employee has been dismissed or disciplined

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[46] Comments of BRC Member and Director of Division of Personnel Bruce Cummings, Minutes at p. 4, Special Blue Ribbon Commission on the State Personnel Act, Microfiche File 1354, 12th Leg., 2d Sess. (August 18, 1980) (emphasis added).

[47] *Id.*

[48] Ch. 87, §1 SLA 1997.

for a violation of AS 39.25.160(l) (interference or failure to cooperate with the Legislative Budget and Audit Committee)."[49]

Clearly, none of the amendments, or the legislative history in their enactment, support the State's position in this case.

B. This Court Has Construed "Personnel Records" in AS 39.25.080(a) to Include Only Information That Reveals the Details Of an Individual's Personal Life.

This Court has previously reviewed the PRA and State Personnel Act side-by-side and narrowly interpreted the resulting exemptions. For example, in *Alaska Wildlife Alliance*, this Court held that state employees' time sheets are not personnel records made confidential by the State Personnel Act.[50] The Court emphasized that personnel records protected under the State Personnel Act must be of a type similar to the examples in the statute, which "contain details about the employee's or applicant's personal life."[51] Two

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[49] Ch. 67, §4 SLA 2003. The amendment was part of SB 45, which provided for criminally prosecuting, firing, and barring from future state employment state employees who fail to cooperate with the Legislative Budget and Audit Committee. The .080(b)(7) amendment may have been unnecessary, but this bill was intended to send a message, to "put some teeth into" employees' existing obligations to cooperate. Comments of bill author Stephen Branchflower, Director, Office of Office of Victims Rights, Minutes at p.8, House Judiciary Comm. Hearing on CS for SB 45(JUD), 23rd Leg., 1st Sess. (April 16, 2003). Branchflower predicted there would not be many prosecutions resulting from the bill. "Essentially, it is a deterrent more than anything else." *Id.* at 14. The Chair of the Judiciary Committee, Rep. Lesil McGuire agreed. *Ibid*

[50] 948 P.2d at 980.

[51] *Id.* When *Alaska Wildlife Alliance* was decided, the State Personnel Act contained two examples of personnel records, employment applications and examination materials. *See id.* Addition of "assessment materials" as discussed in section I.A.1(b), *supra,* does not change the Court's rationale of limiting "personnel records" to material

years later, in *International Association of Fire Fighters,* this Court explicitly defined "[p]ersonnel record" in the State Personnel Act narrowly, "to include only information which reveals the details of an individual's personal life."[52]

Disciplinary records that do not reveal the details of an individual's personal life or reveal personal details irrelevant to their job performance simply are not "personnel records" under the State Personnel Act.[53] Indeed, some state agencies conspicuously post disciplinary records on the internet. For instance, the Alaska Board of Nursing publicly posts records for all licensed personnel who face disciplinary action for improper conduct in their official capacity, not including any detailed information about their personal life.[54]

Although the Court has held that "[w]ork history" can be "personal information," it has clarified that work history contains personal information only to the extent that it

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that contains details of an employee's "personal life," or affect its holdings about the appropriate, limited construction of the 1982 amendment.

[52] 973 P.2d at 1135.

[53] *See Alaska Wildlife Alliance*, 948 P.2d at 980 (holding that records that "tell little about the individual's private life" are not personnel records under the State Personnel Records Act); *see also Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 (Alaska 1990) (holding that head librarian's performance evaluations did not "in any way deal with the personal, intimate, or otherwise private life" of the employee, and were thus not exempt from disclosure under PRA).

[54] *See Discipline Actions, Board of Nursing*, Department of Commerce, Community, & Economic Development, http://bit.ly/2V3804G (last visited Mar. 28, 2019).

"includes information like employment applications and examination materials."[55] The Court's examples of personal information that a record might contain—and that therefore may be exempt under the State Personnel Act—include, "sex, religion, politics, acquaintances, personal finances and even one's innermost thoughts."[56] Nothing in the Court's treatment of this issue provides any indication that disciplinary records concerning a public employee's misconduct would or must be considered confidential.

C. Numerous States Require Public Access To Records of Public Employees' Disciplinary History.

In determining whether state employees' disciplinary records are "personnel records" exempt from disclosure under the State Personnel Act, this Court should also consider persuasive authority from other states that is consistent with our fundamental and presumptive right of access to public records. The public records laws of many other states include exemptions for personnel records and nevertheless require disclosure of state employees' disciplinary records.

For instance, the Colorado Court of Appeals has held that records relating to complaints of sexual harassment, gender discrimination, and retaliation are not exempt "personnel files" under the Colorado Open Records Act.[57] Unlike an employee's home address or phone number, which are explicitly protected under Colorado's law,

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55 *Int'l Ass'n of Fire Fighters*, 973 P.2d at 1135.

56 *Id*.

57 *See Daniels v. Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999).

complaints of misconduct are not the same type of "personal, demographic information" that is protected by law.[58]

In addition, the California Public Records Act, which also has a personnel records exemption,[59] requires disclosure of disciplinary records of most state employees if a complaint is of "substantial nature" and "there is reasonable cause to believe the complaint is well founded."[60] Under California law, disciplinary records of a state employee must be disclosed if the complaint is upheld by the agency or there is some discipline imposed, even only privately.[61] California law also explicitly requires the disclosure of records detailing whether a law enforcement officer's actions were "consistent with law and agency policy for purposes of discipline or administrative action" and "copies of disciplinary records relating to the incident."[62]

Even in states that limit access to some disciplinary records, the public interest in final disciplinary action can overcome privacy interests. For instance, the Kentucky Supreme Court has held that complaints submitted to an agency are not subject to disclosure unless there has been some sort of final action that resulted from those

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[58] *Id.*

[59] Cal. Gov't Code § 6254(c).

[60] *Bakersfield City Sch. Dist. v. Superior Court*, 118 Cal. App. 4th 1041, 1045–46 (Cal. App. 2004).

[61] *Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 202 Cal. App. 4th 1250, 1274–75 (Cal. App. 2012).

[62] Cal. Penal Code § 832.7(b)(2).

complaints.[63] Once final action has occurred, "[t]he public upon request has a right to know what complaints have been made and the final action taken by the Chief thereupon."[64]

Similarly, West Virginia courts have held under the state Freedom of Information Act that disclosure of police misconduct complaints is appropriate after an internal investigation has concluded and some determination has been made as to disciplinary action.[65] Under the Florida Public Records Law, the public is allowed access to public employee disciplinary records once an internal investigation has concluded, regardless of whether the agency decided to discipline the employee,[66] the Maine Freedom of Access Act requires disclosure of all records once disciplinary action is taken and a final written decision upholds or imposes discipline,[67] and Wisconsin's public records law does not

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[63] *See Louisville v. Courier-Journal & Louisville Times Co.*, 637 S.W.2d 658, 659–60 (Ky. 1982).

[64] *Id.* at 660; *see also* Ky. Office of Att'y Gen. Op. 91-198 (1991) ("[D]isciplinary action taken against a public employee is a matter related to his job performance and a matter about which the public has a right to know.").

[65] *See Charleston Gazette v. Smithers*, 752 S.E.2d 603, 624 (W.Va. 2013) (holding that information regarding an internal investigation or inquiry stemming from either an external or internal complaint of misconduct by a state police officer in connection with the officer's official capacity as a law enforcement officer is subject to disclosure).

[66] Fla. Stat. § 119.071(2)(k).

[67] 5 M.R.S.A. § 7070(2)(E)

exempt from disclosure records relating to investigation of possible employee misconduct once the investigation has "achieved its disposition."[68]

Finally, public records laws in other states that explicitly exempt disciplinary records demonstrate that if the Alaska Legislature had wanted to shield disciplinary records, it easily could have. For instance, Vermont exempts "personal documents relating to an individual, including information in any files maintained to hire, evaluate, promote, *or discipline* any employee of a public agency" from disclosure.[69] Similarly, Oregon's public records law exempts from disclosure "[a] personnel discipline action, or materials or documents supporting that action."[70] Because the Alaska Legislature has not done so, the Court should reject the State's invitation to create a judicial exemption in the PRA for state employees' disciplinary records.

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[68] *Moustakis v. Wisconsin, DOJ*, 2019 WL 1997288 *5 ¶ 24 (Wisc. App. May 7, 2019).

[69] 1 V.S.A. § 317(c)(7) (emphasis added); *cf., Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) (disciplinary records of officers investigated for misuse of computers ordered disclosed without redactions of officers' personally identifiable information where court concluded public interest in disclosure heavily outweighed any privacy interests of officers).

[70] O.R.S. 192.345(12) (but note, the entire list of enumerated exceptions in section .345 "are exempt from disclosure … unless the public interest requires disclosure in the particular instance").

II. CONSTITUTIONAL PRIVACY INTERESTS ASSERTED BY THE STATE DO NOT PRECLUDE ACCESS TO POLICE DISCIPLINARY FILES

A. Government Agencies, as Such, Have No Legally Cognizable Privacy Interest That Can Be Balanced Against the Public's Right of Access to Disciplinary Records

The Court's previous decisions demonstrate that no cognizable privacy interest prevents disclosure of disciplinary files, or similar records relating to matters of public interest involving public officials and employees, other than narrowly circumscribed exceptions to accommodate genuine privacy interests solely of a personal nature. For decades, this Court has issued rulings supporting the fundamental rights of the press and public to monitor and hold accountable public agencies and their employees, including law enforcement. It also has narrowly interpreted claims of those seeking to avoid public disclosure. And it has embraced the strong statement of legislative intent announced by the Alaska Legislature in 1972 as part of the Open Meetings Act ("OMA") when interpreting and enforcing the Public Records Act, recognizing that "[t]here is a strong public interest in disclosure of the affairs of government generally."[71]

Specifically, the Legislature has declared that it is the policy of the State, that "the people of this state do not yield their sovereignty to the agencies which serve them"; that "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"; and that "the people's right to remain informed shall be protected so that they may retain control

[71] *City of Kenai v. Kenai Peninsula Newspapers, Inc*., 642 P.2d 1316, 1323 (Alaska 1982), *Fuller v. City of Homer*, 75 P.3d at 1061-62.

over the instruments they have created."[72] The State in this action dangerously suggests that the Court bestow government agencies with a right of privacy.[73]

However, appropriate balancing of constitutional interests is limited to the public's interest in the transparency of officials' conduct against the interests of an individual employee in their purely private affairs. The government's institutional interest already has been addressed by this Court's well-established recognition of a presumption in favor of PRA disclosure.

B. Constitutional Privacy Protection Must Be Considered and Balanced Only Insofar As Material in State Employee Disciplinary Records Is Truly Private

The privacy protection of the Alaska Constitution should not apply, at all, to state employee disciplinary records unless the records contain private information. If a given disciplinary record contains no private information about the employee, the Court's analysis should end there, and the record should be released under the PRA.

A court confronted with private information contained in the employee's disciplinary record should balance the privacy interest against the public's interest in access to that private information. In conducting the balancing, the court should apply

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[72] AS 44.62.312(a)(3)-(5).

[73] *See, e.g.*, State Br. at 15–16 (asserting "[t]he privacy interests of the Alaska State Troopers as an organization"), 16 (asserting "the privacy interests of the Alaska State Troopers as an agency"), 11 ("the privacy interests of the Alaska State Troopers"). The State made a similar assertion to the superior court in its Response to Plaintiff's Motion to Compel. (R. 118) (asserting "privacy rights of DPS").

the three-part test established by this Court in *International Association of Fire Fighters* and *Jones v. Jennings*:

> To determine whether the disclosure of public records violates Alaska's constitutional right to privacy, we apply the following test:
>
> (1) does the party seeking to come within the protection of the right to [privacy] have a legitimate expectation that the materials or information will not be disclosed?
>
> (2) is disclosure nonetheless required to serve a compelling state interest, [as distinct from the public employee's purported, narrow privacy interest]?
>
> (3) if so, will the necessary disclosure occur in a manner which is least intrusive with respect to the right to [privacy]?[74]

Here, to the extent that the disciplinary records relate to the state troopers' conduct of the public's business, there is simply no privacy interest at all under the Constitution, let alone a "legitimate expectation of privacy" under the constitutional balancing test. Further, even if these records are subject to some legitimate expectation of privacy[75] a compelling state interest in the public's trust of law enforcement, which transparency fosters and secrecy discourages, requires their disclosure.

C. To Appropriately Uphold the Press and Public's Right of Access, the Court Should Reject The State's Efforts to Impose Rules Applicable in Criminal or Civil Litigation Upon Any Balancing of Interests Necessary in PRA Cases Seeking Police Disciplinary Files

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[74] *Int'l. Ass'n of Fire Fighters,* 973 P.2d at 1134 (quoting *Alaska Wildlife Alliance*, 948 P.2d at 980 (first and third alterations in original)).

[75] The State, in two rounds of proceedings before the Superior Court, and two rounds of briefing to the Supreme Court in *Basey I* and in this appeal, has failed to articulate or identify any actual privacy interest of the troopers involved.

The State focuses on Mr. Basey as a criminal defendant, conflating every citizen's rights under public records law with a defendant's right to criminal discovery. It ignores this Court's ruling in *Basey I* that recognized Mr. Basey made his request under public records law and is entitled to proceed like any other records requestor. The State argues that Mr. Basey's rights should be governed only by the federal criminal court in which he was prosecuted or in federal civil cases to which he is a party.[76] By rejecting application of the litigation exception to AS 40.25.122, this Court's ruling in *Basey I* recognizes that Mr. Basey has the same rights to pursue his PRA request as the press or any other member of the public[77]—undoubtedly the reason the Court invited Press *Amici* and other *amici* to participate in helping this Court reach its next decision.

A.S. 40.25.122 clearly and directly refutes the State's position. It states:

> *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 ….

(Emphasis added, exception omitted).

When the Court decides this case, it should ensure that journalists and other members of the public—including criminal defendants—who request records under the Public Records Act are treated equally. Any credence provided to the State's argument

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[76] State Br. at 11.

[77] *Basey I*, 408 P.3d at 1180.

risks severely undermining longstanding precedent in this Court that the identity and motive of a public records requester is entirely irrelevant.[78]

D. Disciplinary Records Unrelated To a State Employee's Personal Life Are Not Subject to a "Legitimate Expectation That the Materials . . . Will Not Be Disclosed."

Following the balancing analysis outlined in *International Association of Fire Fighters*, an agency only may withhold a State employees' disciplinary records if the State "demonstrate[s] that [the employees] have a 'legitimate expectation that the materials or information will not be disclosed.'"[79] A "legitimate expectation" of nondisclosure is further defined as "one that 'society is prepared to recognize as reasonable,'" and the constitutional right to privacy only "protects 'intimate' or 'sensitive personal information.'"[80] This Court has therefore found that "employees only have a legitimate expectation of privacy in the personal information contained in their personnel records."[81] Any records that do *not* contain "intimate" or "sensitive" personal information are not protected from disclosure under Alaska's constitutional right to privacy.[82] Most

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[78] This Court has held that the purpose of the PRA is to "further[] the public's general right to know and ensure[] government accountability" and "the requesting party's need for the information is *irrelevant*." *Rowan B. v. State Dep't of Health & Social Servs.*, 320 P.3d 1152, 1156–57 (Alaska 2014) (emphasis added)*; see also Int'l Ass'n of Fire Fighters v. Anchorage*, 973 P.2d at 1135 (citing *Alaska Wildlife Alliance*, 948 P.2d at 979–80).

[79] *Id*. (quoting *Alaska Wildlife Alliance*, 948 P.2d at 980).

[80] *Id.*

[81] *Id*. at 1135.

disciplinary records detail misconduct or shortcomings in a public employee's conduct of public business, and contain no "sensitive or personal details."[83]

Further, the state regulation governing access to records of state employees[84] lends support to the position that these state employees do not have a reasonable expectation that even confidential information in their files must be withheld from the public when disclosure is in the public interest. Instead, the regulations contemplate disclosure, and a balancing of interests, even with respect to all documents made "confidential" under .080(a). Specifically, 2 AAC 07.910(b) provides that in addition to the documents expressly identified as open for public inspection, all other records that are presumed confidential can be released under specified conditions. These include disclosure pursuant to court order,[85] and disclosure when the Director determines "that release would be in the best interests of the state and can be accomplished without violation of the employee's, former employee's, or applicant's right to privacy."[86] In other words,

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[82] *Id.* at 1136 (ordering disclosure of records revealing state employees' names in conjunction with their salaries; overruling employees' statutory and constitutional privacy objections).

[83] *See* Steven D. Zansberg and Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, Comm. Lawyer, Fall 2004, at 34 ("Although police officers may have a legitimate privacy interest in certain narrowly circumscribed portions of files concerning their off-duty, private conduct, they do not enjoy a reasonable expectation of privacy with respect to records concerning only how they discharge their official duties.").

[84] *See,* 2 AAC 07.910.

[85] 2 AAC 07.910(c)(4).

any confidential record of an employee can be released pursuant to a balancing of interests, consistent with the case law addressing the contours of a public employee's right to privacy. Law enforcement disciplinary records are not confidential under AS 39.25.080(a), but if they were, they could be disclosed where the circumstances warrant—such as, when the employee has engaged in misconduct affecting the public interest.

Additionally, in determining the boundary of "personal information," this Court has held that "[w]hen a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated."[87] In *International Association of Fire Fighters*, the Court applied this principle to hold that because the public is affected by the salaries of public employees, salary information is not subject to a legitimate expectation of privacy under the Alaska Constitution.[88]

State troopers' disciplinary records unquestionably affect the public. Following the consensus that "[a] public official has no right to privacy as to the manner in which he conducts his office,"[89] other courts have held that law enforcement officers do not have a

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[86] 2 AAC 07.910(c)(5).

[87] *Int'l Ass'n of Fire Fighters*, 973 P.2d at 1136. (quoting *Luedtke v. Nabors Alaska Drilling, Inc.*, 786 P.2d at 1135 (Alaska 1989)).

[88] *Id*.

[89] *Rinsley v. Brandt*, 446 F. Supp. 850, 857–58 (D. Kan. 1977).

privacy interest in records about misconduct.[90] As the United States Court of Appeals for the Tenth Circuit has concluded, "police internal investigation files [are] not protected by the right to privacy when the 'documents relate[] simply to the officers' work as police officers.'"[91]

To the extent that the disciplinary records Mr. Basey seeks relate to the troopers' work as state troopers, they are not wholly private.[92] Matters discussed in disciplinary records that concern troopers' on-duty conduct affect the public. State troopers are public employees paid by public dollars to protect and to serve the public, and it is axiomatic that the public has an interest in overseeing their official actions.[93] The public has a

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[90] *See, e.g.*, *Worden v. Provo City*, 806 F. Supp. 1512, 1515–16 (D. Utah 1992) (finding police officer suspended and reprimanded for on-duty conduct did not have "a legitimate expectation of privacy"); *Burton v. York Cty. Sheriff's Dep't*, 594 S.E.2d 888, 896 (S.C. Ct. App. 2004) (rejecting state officer's attempt to invoke constitutional right of privacy when he was suspended without pay for "conduct unbecoming an officer"); *Cowles Publ'g Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988) ("[I]nstances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer's life.").

[91] *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989) (citation omitted).

[92] *Int'l Ass'n of Fire Fighters*, 973 P.2d at 1136.

[93] *See Jones v. Jennings*, 788 P.2d at 735 ("The cornerstone of a democracy is the ability of its people to question, investigate and monitor the government."); *see also,* See also, *Sheppard v. Maxwell,* 384 U.S. 333, 350, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). "The press ... guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

further interest in overseeing the state's discipline of officers who violate law or policy, to ensure that such discipline is fair and just.[94]

Because state troopers' disciplinary records concern matters that unquestionably affect the public, they are not private—certainly not "wholly private"—and are not subject to a legitimate expectation of privacy. As a result, disclosure of such records does not violate the Alaska constitutional right to privacy under the first prong of the balancing test established in *International Association of Fire Fighters*.

E. Even If State Troopers Have a Legitimate Expectation of Privacy in Their Disciplinary Records, Compelling State Interests in Disclosure Outweigh This Privacy Interest.

As this Court instructed in *International Association of Fire Fighters*, even where a legitimate expectation of privacy in a record exists, disclosure is still warranted if it is necessitated by a compelling state interest.[95] Here, even if this Court holds that state troopers have a legitimate expectation of privacy in their disciplinary records, it should still conclude that disclosure is appropriate because disclosure serves compelling state interests. Among these are ensuring public accountability of, and fostering trust in, law enforcement.

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[94] *See id*. at 739 (affirming the trial court's finding that "the need to 'insure that police behavior conforms to the code of conduct required of a democratic society,'" outweighs an officer's interest in privacy in disciplinary records).

[95] *Int'l Ass'n of Fire Fighters*, 973 P.2d at 1134.

In *Jones v. Jennings*, this Court considered whether disclosure of police disciplinary records in the context of discovery violated the constitutional privacy right.[96] The Court stated: "There is perhaps no more compelling justification for public access to documents regarding citizen complaints against police officers than preserving democratic values and fostering the public's trust in those charged with enforcing the law."[97] Alaska's courts are not alone in recognizing the compelling interests that favor disclosure of law enforcement records.[98]

In a time of widespread public discussion and debate about police misconduct, the public need for access to information about the misconduct and subsequent discipline of law enforcement officers cannot be overstated. As the California Court of Appeal has observed:

> [T]he attitude of the public toward the police discipline system [] will determine the effectiveness of the system as an element of police-community relations. A system can be theoretically sound and objective in

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[96] 788 P.2d at 735.

[97] *Id*. at 738.

[98] *See generally Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997) (holding officers' privacy interests were outweighed by need for disclosure in light of allegations of police torture); *Great Falls Trib. Co. v. Cascade Cty. Sheriff*, 775 P.2d 1267 (Mont. 1989) (explaining that law enforcement conduct is a sensitive matter, so the public should know of any discipline for misconduct in the line of duty); *Welsh v. City & County of San Francisco*, 887 F. Supp. 1293, 1301 (N.D. Cal. 1995) (noting the public's strong public interest in "assessing the truthfulness of allegations of official misconduct" and how agencies respond). For example, the Minnesota Supreme Court has recognized "a compelling need for public accountability, particularly with law enforcement agencies." *Demers v. Minneapolis*, 468 N.W.2d 71, 74 (Minn. 1991).

> practice but if it is not respected by the public, cooperation between the police and the public can suffer.[99]

Therefore, just as in *Jones*, disclosure of law enforcement disciplinary records is required here to serve the "compelling justification[s]" of safeguarding trust in law enforcement and keeping them accountable to the public.

F. There is No Alternative or "Least Intrusive" Means of Disclosure When State Troopers Have No Expectation of Privacy In Disciplinary Records.

Courts need not examine the "least intrusive" means of disclosure where, as here, there is no legitimate expectation of privacy in requested records.[100] In *International Association of Fire Fighters*, the Court affirmed the Superior Court's determination that disclosure did not violate an employee's right to privacy, and consequently made *no* assessment as to whether the disclosures were done in the least intrusive means possible.[101] Similarly, in this case, there is no legitimate expectation of privacy in the disciplinary records of public employees performing their public duties. Accordingly, the

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[99] *S.F. Police Officers' Ass'n v. Superior Court*, 202 Cal. App. 3d 183, 191 (1988). It is also clear that self-policing alone won't satisfy community needs for accountability. A Pew Research study shows that only 27% of police officers themselves feel there is appropriate action taken for police wrongdoing. Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, Behind the Badge: Amid Protests and Calls For Reform, How Police View Their Jobs, Key Issues and Recent Fatal Encounters Between Blacks and Police (Pew Res. Ctr., 2017) (last accessed May 15, 2019), https://perma.cc/W2D7-7CQ4.

[100] *Int'l Ass'n of Fire Fighters*, 973 P.2d at 1134.

[101] *Id.* at 1337.

Court need not reach the issue of whether disclosure of the records will occur in a manner that is least intrusive with respect to the right to privacy.[102]

III. THE NEWS MEDIA FREQUENTLY RELIES ON DISCIPLINARY RECORDS OF LAW ENFORCEMENT AND OTHER STATE EMPLOYEES TO REPORT ON MATTERS OF PUBLIC CONCERN.

In Alaska, journalists routinely rely on public records to report on matters of public concern related to policing. For example, the *Anchorage Daily News* used public records to show that the state has repeatedly hired individuals with criminal backgrounds to protect the more rural and underserved regions of Alaska.[103] Access to police disciplinary records would enable similar reporting and allow the news media to inform the public about the regulation of state employees hired to protect Alaskans.

Alaskan journalists have used statements about disciplinary records to supplement their reporting about law enforcement officers and other state employees, as well. When reporting on how Nome police officers responded to numerous reports of sexual assault, for example, journalists cited a public service announcement the city released that stated

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[102] If the records happen to contain information about the troopers' off-duty conduct or personal information that have no bearing on the troopers' on-duty conduct, then the obvious "least intrusive" means of disclosure would be narrow redactions of that information. *See Alaska Wildlife Alliance*, 948 P.2d at 981 (requester is entitled to records with redactions to information that would put employees and private contractors in danger if information were released).

[103] Kyle Hopkins, *From Criminal to Cop, and Back Again, in Alaska's Most Vulnerable Villages*, Anchorage Daily News (June 8, 2018), https://perma.cc/2RNY-RJK5 (noting that city governments refused to name current village police officers with criminal histories).

"disciplinary action" was taken.[104] In another instance, journalists reported that officials said Anchorage School District employees who were misusing state funds were subject to disciplinary action.[105]

In 2010, a lawyer working for a public agency in Fairbanks snuck onto computers of his legal department co-workers in order to rig a political poll he was conducting. Trying to cover his tracks, he accidentally deleted what his fellow employees had been working on, and when asked about whether he knew anything about the missing work product, he repeatedly lied. He was disciplined, but the matter was not made public at the time. Subsequently, initial attempts to obtain information were rebuffed because it was a "personnel matter." A court ultimately found that the public had a right to know about this disciplinary matter when he ran for U.S. Senate as the nominee of the Republican Party. If the court in that case had taken the position that such disciplinary files were confidential, it is likely the public would not have had access to this information before the election, and that he would have been elected to Congress.[106]

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[104] Kyle Hopkins, *A Second Woman Comes Forward to Say She Was Raped in Nome Without Consequence*, Anchorage Daily News (Oct. 6, 2018), https://perma.cc/ZFD7-7CEF.

[105] Devin Kelly, *Audit Flags Questionable Expenses at Anchorage School District*, Anchorage Daily News (Apr. 29, 2018), https://perma.cc/MSF7-V7EG.

[106] Kyle Hopkins, Judge Orders Miller Documents Released, Anchorage Daily News (Oct. 23, 2010); *In Personnel Records, Joe Miller Admits to Lying*, CBS/AP (Oct. 27, 2010), https://perma.cc/9BFY-2X36.

Clarifying that trooper disciplinary files are not necessarily confidential will enable journalists to report more fully on matters of public interest. For example, a news story last year revealed that a state trooper had been involved in at least two instances of sexually inappropriate behavior arising from his work—one with a former state prosecutor, the other with a 16-year old. The reporter was unable to get information concerning any other transgressions reported to his superiors, or how DPS responded or failed to respond to any such allegations, because the Department considered his personnel files confidential.[107]

Other news stories emphasize the need to have more transparency and accountability, as government agencies continue to try and hide substantial misconduct.[108] In two separate Anchorage trials conducted a year apart, police officers suing the Municipality recovered jury awards of over two million dollars. Observers noted that an array of police witnesses on both sides left them convinced that there was no question that police had lied, only a question of which ones. Facts revealed through these cases and the disciplinary and personnel files that were made public as the cases

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[107] Zaz Hollander, Michelle Theriault Boots, Laurel Adams, *Alaska State Trooper Showed Up in Patrol Car for Hotel Date with Girl, Charges Say*, Anchorage Daily News (Apr. 30, 2018), https://perma.cc/NH8N-Q2CA.

[108] A Austin Baird, *Former Anchorage Police Chief Was Secretly Suspended in 2015, Court Documents Reveal,* KTUU-TV (Aug. 14, 2017), https://perma.cc/N4ET-C6HA.

progressed—despite the government's efforts to keep from disclosing key documents—reinforced the need for greater transparency and oversight.[109]

Outside Alaska, news organizations frequently report on disciplinary records in performing the press's essential watchdog function. Very recently, in California, more than thirty news outlets have joined forces to collaborate on a project to access, review, and publish stories based on newly-available police misconduct records.[110] This effort has resulted in numerous news stories based on police disciplinary records, including stories about incidents of police officers' drunk driving, sexual misconduct and assault, excessive force, embezzlement, and making of false statements under oath.[111]

In South Carolina, the *Greenville News* used public records requests to obtain "personnel files and disciplinary records" from the Anderson Police Department as part of its investigation into a pattern of officer misconduct lawsuits filed against the City of

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[109] Devin Kelly, *Fired Anchorage Police Lieutenant Wins $2.3 Million Judgment Against City Over Claim of Retaliation*, Anchorage Daily News (Nov. 9, 2018), https://perma.cc/J4B5-DADY; Casey Grove, *Judge Orders Anchorage to Pay Ex-cops $2.7M After City Loses Racial Discrimination Case*, Alaska Public Media (July 18, 2017), https://perma.cc/3KLA-FBFB.

[110] Joshua Benton, *With Vast Records of Police Misconduct Now Public, California News Outlets Are Collaborating Instead of Competing*, Neiman Lab (Mar. 20, 2019, 2:02 PM), https://perma.cc/L46F-SHYU.

[111] *See* Ben Poston & Maya Lau, *Here Are the Stories About Police Misconduct Uncovered So Far by a New Media Partnership*, L.A. Times (Mar. 19, 2019, 10:50 AM), https://perma.cc/R799-6LFF (listing stories published by the *Los Angeles Times*, KQED, and *The San Diego Union-Tribune* based on disciplinary records).

Anderson and its police department.[112] According to one of the reporters, the records they obtained "revealed that at least two of the officers had been involved in previous incidents that led to them being disciplined."[113]

In Arkansas, the *Arkansas Democrat Gazette* reported that, according to "[d]isciplinary records," an officer who shot a motorist during a traffic stop in February 2019 had been "reprimanded 10 times since 2015, leading to nearly a month's worth of suspension."[114] The incidents for which the officer was disciplined "included two vehicle crashes, two internal investigations, one citizen complaint and five divisional issues."[115]

In Wisconsin, the *Green Bay Press Gazette* reported that, according to police officer disciplinary records obtained through a public records request, two officers from the Brown County Sheriff's Office "were disciplined for reporting to work while intoxicated, but were not referred for criminal charges despite circumstances that suggested both drove to work drunk and were in the possession of a firearm while under

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[112] Nikie Mayo & Kirk Brown, Anderson Police *Department Settles 3 of 5 Officer Conduct Lawsuits For $130,000*, Greenville News (Feb. 8, 2018), https://perma.cc/7AXV-7D99.

[113] Anna Lee, *High Government Salary, Untrained Police, Lawsuits Made Public Through Records, FOIA Law*, Greenville News (Mar. 16, 2019), https://perma.cc/GX7G-QQ6E.

[114] Youssef Rddad & Clara Turnage, *Video Released From Deadly Little Rock Police Shooting; Officer Relieved of Duty Last Week*, Arkansas Democrat Gazette (Mar. 7, 2019, 6:03 PM), https://perma.cc/C8KX-59LB.

[115] *Id.*

the influence."[116] Access to the disciplinary reports allowed the newspaper to verify "[r]umors that the deputies had dodged significant consequences after driving to work drunk and armed" that "began circulating prior to the November 2018 sheriff's election."[117] The records released also "included a third incident in which a correctional officer at the jail was found sleeping on the floor in a locker room before the start of his shift."[118] Based on the records, the newspaper was able to report the events that resulted in the officers' discipline, the officers' statements about what had occurred, which of the sheriffs' office policies the officers had violated, and the consequences faced by the officers.[119]

Access to police disciplinary records also allows the news media to analyze broader trends, such as the number of complaints that are substantiated or result in disciplinary action. For example, reporters at *Reuters* looked at the public records of numerous cities to determine how many complaints led to disciplinary action.[120] Reuters

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[116] Shelby Le Duc, *Under the Influence, Not Under Arrest: Sheriff's Officers Reported to Work Drunk*, Green Bay Press (Mar. 11, 2019), https://perma.cc/YJ5R-JACF.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] Reade Levinson, *Across the U.S., Police Contracts Shield Officers From Scrutiny and Discipline*, Reuters (Jan. 13, 2017, 1:18 PM), https://perma.cc/TD9Y-TAWB.

determined that, among other examples, in Tacoma, Washington, only around 10 percent of citizen complaints of police misconduct were sustained by an internal review board.[121]

In Chicago, the Citizens Police Data Project provides "a public database containing the disciplinary histories of Chicago police officers," based on public records; it includes "more than 240,000 allegations of misconduct involving more than 22,000 Chicago police officers over a 50-year period."[122] Among other information, the data maintained by the Project reveals that "[o]ut of more than 8,700 excessive force claims from January 2007 to June 2016, investigators sustained only 1.5 percent of complaints."[123] In addition, an analysis of the data showed that, of Chicago police officers who served at least one year between 2000 and 2016, officers with the most complaints made against them are less likely to be disciplined than officers with fewer complaints.[124]

These types of trends and broad analyses are only possible when the public has access to disciplinary records. As University of Nebraska Criminal Justice Professor Samuel Walker has noted, as more disciplinary records are released, the public "will get a

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[121] *Id.*

[122] Jamie Kalven, *Invisible Institute Relaunches the Citizens Police Data Project*, Intercept (Aug. 16, 2018), https://perma.cc/V4TR-BF36.

[123] *Id.*

[124] *Id.*

better picture of the patterns" and be able to identify "some of the recurring problems[.]"[125]

CONCLUSION

For the reasons set forth above, Press *Amici* urge this court to reverse the Superior Court's order and order the disclosure of the disciplinary records of the two state troopers that Mr. Basey requested under the PRA.

Respectfully submitted, this 31st day of May, 2019.

D. John McKay [Ak.Bar No. 7811117]
Law Office of D. John McKay
117 E. Cook Ave.
Anchorage, AK 99501
Telephone: 907-274-3154
Fax: 907-272-5646
mckay@alaska.net

Attorney for Amici Curiae
Gray Television, Inc., dba KTUU-TV
and KTVF-TV, Anchorage Daily News,
and the Reporters Committee for
Freedom of the Press

[125] Sukey Lewis, Nadine Sebai, Alex Emslie, & Thomas Peele, Rio Vista: Two Cops Fired From Tiny Department Over Bad Arrests, Use of Force, Falsifying Reports, Mercury News (Jan. 29, 2019), https://perma.cc/KY7H-ARVC.

IN THE SUPREME COURT OF THE STATE OF ALASKA

KALEB LEE BASEY,

Appellant,

v.

STATE OF ALASKA,
Department of Public Safety,
Division of State Troopers,
Bureau of Investigations,

Appellees.

Supreme Court Case No. S-17099

Superior Court Case No. 4FA-16-02509CI

APPEAL FROM THE SUPERIOR COURT, FOURTH JUDICIAL DISTRICT AT FAIRBANKS, THE HONORABLE DOUGLAS L. BLANKENSHIP PRESIDING

CERTIFICATE OF TYPEFACE AND SERVICE

I certify, pursuant to Appellate Rule 513.5, that the Brief of *Amici Curiae* was prepared in 13-point proportionally spaced Times New Roman typeface.

I certify that on May 31, 2019, a true and correct copy of the Brief of *Amici Curiae* and this Certificate were served via U.S. mail upon the following:

Kimberly D. Rodgers
Office of the Attorney General
1031 West 4th Avenue, Suite 200
Anchorage AK 99501

Kaleb Basey #17753006
FMC Lexington
FMC Cardinal Unit
PO Box 14500
Lexington, KY 40512

Brian Penner
APEA/AFT (AFL-CIO)
3310 Arctic Blvd., Ste. 200
Anchorage, AK 99501

Susan Orlansky
ACLU Cooperating Attorney
Reeves Amodio LLC
500 L Street, Suite 300
Anchorage, AK 99501

Stephen Koteff
Joshua A. Decker
ACLU of Alaska Foundation
1057 W. Fireweed, Suite 207
Anchorage, AK 99503

Khalial Withen
Kevin B. Dougherty
Alaska District Council of Laborers
2501 Commercial Drive
Anchorage, AK 99501

Respectfully submitted, this 31st day of May, 2019.

D. JOHN MCKAY
Alaska Bar No. 7811117
Law Office of D. John McKay
117 E. Cook Ave.
Anchorage, AK 99501
Telephone: (907) 274-3154
Facsimile: (907) 272-5646
mckay@alaska.net

Attorney for Amici Curiae Gray Television, Inc., dba KTUU-TV and KTVF-TV, Anchorage Daily News, and the Reporters Committee for Freedom of the Press