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ALASKA STATUTES

Sec. 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(*I*) (interference or failure to cooperate with the Legislative Budget and Audit Committee).

(c) A state employee has the right to examine the employee's own personnel files and may authorize others to examine those files.

(d) An applicant for state employment who appeals an examination score may review written examination questions relating to the examination unless the questions are to be used in future examinations.

(e) In addition to any access to state personnel records authorized under (b) of this section, state personnel records shall promptly be made available to the child support services agency created in AS 25.27.010 or the child support enforcement agency of another state. If the record is prepared or maintained in an electronic data base, it may be supplied by providing the requesting agency with access to the data base or a copy of the information in the data base and a statement certifying its contents. The agency receiving information under this subsection may use the information only for child support purposes authorized under law.

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;

...

CONSTITUTIONAL PROVISIONS

Alaska Const. art. I, § 22. Right of privacy.

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

INTRODUCTION

Kaleb Lee Basey appeals the denial of his public records request for the disciplinary records of two state troopers. The denial was not in error because the State Personnel Act shields from public disclosure the “personnel records” of state employees, subject to limited exceptions.¹

The statutory language, legislative history, and purposes of the State Personnel Act support that disciplinary records are personnel records not subject to disclosure. The plain statutory language provides that disciplinary records are personnel records because one specific type of discipline in personnel records may be disclosed but not others.² The legislative history reveals that the confidentiality statute codified existing practice when it was amended—and that existing practice safeguarded disciplinary records from public access.³ Common sense, the state personnel division, and courts agree that personnel records include disciplinary information because this information captures the essence of an individual’s work history by documenting the employee’s shortcomings and errors.⁴ And disciplinary records are essential to applying the merit principle in personnel administration—the key legislative goal in enacting the State Personnel Act.⁵

In the alternative, if disciplinary records are not confidential by statute, releasing

¹ AS 39.25.080.

² AS 39.25.080(a), (b)(7).

³ See sources cited *infra* notes 64-65, 67-68.

⁴ See sources cited *infra* notes 45, 47, 48-52.

⁵ AS 39.25.010.

them violates the troopers' constitutional privacy right.⁶ They may contain facts about errors and unsubstantiated, stigmatizing allegations so sensitive that disclosure "even to a friend [] could cause embarrassment or anxiety."⁷ Basey's need for the information under a public records request does not outweigh this interest in the absence of specific allegations of serious misconduct and given that he has another avenue—his civil suit—to obtain the records if they are relevant.⁸ [See R. 48-49]

The Court should affirm the denial of his public records request.

ISSUES PRESENTED

In an order dated January 28, 2019, the Court invited media entities, state employee unions, and the Alaska ACLU to participate as amici curiae and permitted the parties, Basey and the Alaska Department of Public Safety, to address these questions:

1. As a matter of statutory interpretation, are state employee disciplinary records confidential personnel records under AS 39.25.080 that are not subject to disclosure under the Alaska Public Records Act (AS 40.25)?
2. If the records are not confidential personnel records, do state employees have a constitutional privacy interest in whether those records might be produced under the Alaska Public Records Act? If so, what should be the balancing considerations?

STATEMENT OF THE CASE

At issue in this appeal is Basey's request under the Alaska Public Records Act for

⁶ Alaska Const. art. I, § 22.

⁷ *Int'l Ass'n of Fire Fighters, Local 1264 v. Municipality of Anchorage*, 973 P.2d 1132, 1134 (Alaska 1999) (citation omitted).

⁸ See *id.* (stating three-factor privacy balancing test, *infra* p. 29).

the “disciplinary records” of two Alaska state troopers, Albert Bell and Kirsten Hansen. [Exc. 12] Both troopers were involved in an investigation that resulted in Basey’s federal conviction on child pornography charges.⁹ Basey sued them and other federal investigators in a related civil rights suit that is stayed.¹⁰ [R. 48] In addition, Basey sought the disciplinary records of federal investigators under the federal Freedom of Information Act (FOIA), and the FBI declined to provide any records.¹¹ A federal district court affirmed the denial, concluding that any disciplinary records were in personnel files the disclosure of which would constitute a “clearly unwarranted” invasion of privacy.¹²

Meanwhile, this is the second appeal to this Court addressing Basey’s state public records requests.¹³ The Bureau of Investigation in the Department of Public Safety denied his requests for various records related to the criminal investigation, including the disciplinary records, in 2016. [Exc. 11-13, 15-16] The denial was based on a requirement that Basey seek the records through discovery in his cases and a prohibition on providing law enforcement records if disclosing them would interfere with enforcement proceedings.¹⁴ [Exc. 15-16] Basey appealed to the commissioner of the Department, who

⁹ *United States v. Basey*, No. 4:14-cr-00028-RRB (D. Alaska June 4, 2018), *appeal docketed*, No. 18-30121 (9th Cir. May 31, 2018).

¹⁰ *Basey v. Hansen*, No. 4:16-cv-00004-RRB (D. Alaska filed Jan. 15, 2016) (stayed July 25, 2016).

¹¹ *Basey v. Dep’t of the Army*, No. 4:16-cv-00038-TMB, slip op. at 28-29 (D. Alaska May 14, 2018).

¹² *Id.* (citing 5 U.S.C. § 552(b)(6)).

¹³ *Basey v. State, Dep’t of Pub. Safety, Div. of Alaska State Troopers, Bureau of Investigations*, 408 P.3d 1173 (Alaska 2017).

¹⁴ AS 40.25.120(a)(6); AS 40.25.122.

affirmed the denial. [R. 43] The Department told Basey that because his request was entirely denied under the discovery requirement, it was not evaluating each subpart of his request to determine if any other protections for the records applied. [R. 43]

Basey filed a complaint in superior court to compel production of the records. [Exc. 1] The court granted the Department's motion to dismiss based on the litigation and law enforcement exceptions to disclosure. [R. 46-47, 76] Basey appealed.¹⁵ This Court reversed and remanded, holding that the Department did not properly invoke the litigation and law enforcement exceptions to prevent disclosure of the records.¹⁶

On remand, Basey filed a motion to compel production of the records. [Exc. 22-23] The Department gave Basey almost all the responsive records that exist without further fact-finding to support the two previously asserted exceptions.¹⁷ [Exc. 24-25; Tr. 4-5] But the Department did not disclose the troopers' disciplinary records, if any even exist, asserting that they are personnel records protected from disclosure under the State Personnel Act and the constitutional right to privacy.¹⁸ [Tr. 17, Exc. 25] Basey argued that (1) the Department waived this exception by not invoking it from the start and (2) personnel records are protected only to the extent that they contain the details of an individual's personal life, and disciplinary actions against an officer affect the public and therefore should be disclosed. [Tr. 13, 15-16, *see* Exc. 38-42]

¹⁵ *Basey*, 408 P.3d at 1174.

¹⁶ *Id.* at 1180-81.

¹⁷ The State filed an affidavit addressing the scope of its records search, and the matter was stayed pending this appeal. [Courtview docket for Case No. 4FA-16-02509 CI and Response to Supreme Court Order (Dec. 19, 2018)].

¹⁸ Alaska Const. art. I, § 22; AS 39.25.080.

The court rejected Basey's waiver argument because it would be unjust to release records without consideration of the merits when individuals' privacy interests are at stake.¹⁹ [Tr. 14] The court concluded that disciplinary records are state personnel records, and the personnel information that could be disclosed was limited to seven enumerated types of information.²⁰ [Tr. 16-17, 18-19; Partial Final Judgment (Dec. 19, 2018)] The court observed that AS 39.25.080 includes "some blanket language" forbidding public disclosure and does not require any balancing of privacy interests against the reasons for disclosure. [Tr. 18-19] Basey confirmed that he did not want any of the information that can be disclosed, so the court denied his request. [Tr. 18-19]

Basey appeals.

STANDARDS OF REVIEW

This appeal presents questions of statutory and constitutional interpretation to which the Court applies its independent judgment.²¹ But "statutory construction adopted by those responsible for administering a statute should not be overruled in the absence of

¹⁹ In addressing timeliness, the media's brief goes outside the Court's briefing order. [See Media Br. 9 n.19] At a minimum, no bar applies to the Department raising the personnel records exemption here because that would unfairly harm the troopers whose disciplinary records, if any, would be disclosed based on a technicality. And the Department warned Basey that it was not evaluating the subparts of his requests in 2016, since they were denied in their entirety based on the discovery requirement. [R. 43] See *State, Dep't of Commerce & Econ. Dev., Div. of Ins. v. Schnell*, 8 P.3d 351, 356 (Alaska 2000) (requiring a showing that applying equitable estoppel against the state would serve "the interest of justice so as to limit public injury" and that the party "acted in reasonable reliance" on a state assertion and suffered prejudice).

²⁰ AS 39.25.080(a), (b).

²¹ *Alaska Wildlife All. v. Rue*, 948 P.2d 976, 979 (Alaska 1997).

weighty reasons.”²² Although *Alaska Wildlife Alliance v. Rue* did not defer to the Department of Fish and Game’s interpretation of the meaning of personnel records in denying a public records request,²³ deference to the expertise of the Department of Administration and Personnel Board—i.e., the agencies that administer the State Personnel Act—is appropriate here.²⁴ The rules and operating procedures addressing personnel records of these agencies are relevant.²⁵

ARGUMENT

I. The State Personnel Act does not permit the release of state employees’ disciplinary records in response to a public records request.

Statutes are interpreted “according to reason, practicality, and common sense, considering the meaning of the statute’s language, its legislative history, and its purpose.”²⁶ Here, the plain meaning of the personnel statute bars disclosure of disciplinary records under a public records request.²⁷ Legislative history supports that this statute was enacted to codify the existing practice that shielded disciplinary records from

²² *Storrs v. State Med. Bd.*, 664 P.2d 547, 552 (Alaska 1983) (citation and internal quotation marks omitted). See *Alaska Judicial Council v. Kruse*, 331 P.3d 375, 381 (Alaska 2014) (“We give weight to an agency’s longstanding and continuous interpretation of a statute.”); *Bartley v. State, Dep’t of Admin.*, 110 P.3d 1254, 1261 (Alaska 2005) (stating that the agency’s longstanding interpretation provided “additional support for the interpretation . . . gleaned from the statute’s history and purpose”).

²³ 948 P.2d at 979.

²⁴ AS 39.25.030; AS 39.25.050; AS 39.25.070; AS 39.25.140.

²⁵ See *State, Dep’t of Admin, Div. of Pers. and Labor Relations, Standard Operating Procedure, Employee Records*, DOPLR-06 (revised Dec. 14, 2015), <http://doa.alaska.gov/dop/ppdb/SOP/Ch06EmployeeRecords/DOP06EmployeeRecordsSOP.pdf>.

²⁶ E.g., *Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1121 (Alaska 2017).

²⁷ AS 39.25.080.

public disclosure.²⁸ And protecting disciplinary records serves the purposes of the State Personnel Act to “establish a system of personnel administration based upon the merit principle.”²⁹ For these reasons, Basey may not obtain any disciplinary records of state troopers pursuant to a public records request.

A. Disciplinary records are personnel records that are confidential and not open to public inspection with one limited exception.

The plain language of AS 39.25.080 and the common-sense meaning of “personnel records” results in a conclusion that disciplinary records are confidential and not open to public inspection. Alaska Statute 39.25.080 shields state personnel records from public access, subject to a limited list of 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(*I*) (interference or failure to cooperate with the Legislative Budget and Audit Committee).

Consistent with this statute, the Alaska Public Records Act does not permit the inspection

²⁸ See sources cited *infra* notes 64-65, 67-68.

²⁹ AS 39.25.010(a).

of public records “required to be kept confidential . . . by state law.”³⁰

The plain language supports that disciplinary records are personnel records. Under AS 39.25.080, the general rule is state personnel records are not released in response to a public records request, except for the information in an exclusive list. The list compels a conclusion that disciplinary records are personnel records to give “purpose, force, and effect” to every provision in the statute.³¹ In AS 39.25.080(b)(7), the legislature permitted disclosure of discipline for not cooperating with a legislative committee. If all disciplinary records were subject to disclosure as non-personnel records, no reason would exist for subsection (b)(7), identifying as disclosable records regarding only one specific disciplinary action. In other words, accepting Basey’s and the ACLU’s interpretation of subsection (a) would make subsection (b)(7) wholly superfluous, depriving it of “purpose, force, and effect.”³² [See ACLU Br. 18, Media Br. at 9, Tr. 15-16] The ACLU disregards the plain language and unconvincingly argues that the lack of a lengthy legislative discussion about this provision defeats the plain meaning here. [ACLU Br. 14-15]

In fact, the legislative history reinforces the meaning of the plain language.³³ [See

³⁰ AS 40.25.120(a)(4).

³¹ *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341, 345 (Alaska 2011) (stating, “We will presume that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.”) (citations and internal punctuation omitted).

³² *Id.*

³³ The media cites to Stephen Branchflower’s testimony for support that AS 39.25.080(b)(7) “may have been unnecessary,” but this misstates his testimony. [Media Br. 19 n.49] He testified that the entire bill, which related to the Legislative

ACLU Br. 14-15] The director of the Division of Legislative Audit, whom the bill sponsor called upon to answer the committee's questions, testified that the provision would allow publicizing of discipline, so that violations would not be concealed "through the confidentiality of the personnel records."³⁴ She stated, "Under the personnel laws, disciplinary actions are confidential."³⁵ This confirms that the legislature understood that (1) disciplinary information is in confidential personnel records, and (2) agencies could release the disciplinary information only if the legislature created an explicit exception.³⁶

And while subsection (b)'s list is exclusive, "personnel records" is subsection (a) is not so limited. Alaska Statute 39.25.080(a) does not explicitly include disciplinary files as an example of personnel records, but the statute's use of the word "including" means that non-disclosable personnel records are not limited to its examples. In a statute, the word "including" "shall be construed as though followed by the phrase 'but not limited

Budget and Audit Committee, was intended to "put some teeth into" employees' existing obligation to cooperate with that legislative committee and that it was intended to be a deterrent, perhaps suggesting that the entire bill was not necessary. [See minutes at p. 8, 14 (H. Jud.) (Apr. 16, 2003); ch. 67, SLA 2003] Significantly, the AS 39.25.080(b)(7) amendment on public disclosure was not under consideration at the time that he testified. It was not inserted in the bill until the next committee of referral, House Finance. Compare HCS for CSSB 45 (H. Jud.) (Apr. 22, 2003) with Sec. 4, HCS for CSSB 45 (H. Fin.) (May 17, 2003).

³⁴ Testimony of Pat Davidson, director, Div. of Legis. Audit, on SB 45 (H. Fin. Comm. May 16, 2003), <http://www.akleg.gov/ftp/archives/2003/HFIN/98-HFIN-030516.mp3> (starting about 43:15).

³⁵ *Id.*

³⁶ The provision was added in the last committee of referral; there were not any other opportunities in committees to discuss its purpose. Compare HCS for CSSB 45 (H. Jud.) (Apr. 22, 2003) with sec. 4, HCS for CSSB 45 (H. Fin.) (May 17, 2003).

to.”³⁷ So, personnel records include but are not limited to “employment applications and examination and other assessment materials.”³⁸ The Department previously asserted—and the unions agree—that disciplinary files may be “examination and other assessment materials.” [State Br. 16-17, Unions Br. 7-8] But even if they are not, disciplinary records are still another type of personnel record shielded from public disclosure. [See Media Br. 11-15, ACLU Br. 13] They are among an employee’s most *personal* personnel records, second only perhaps to medical or disability records. If assessment materials, including psychological evaluations addressing fitness for a job, are protected personnel records because they are personal, surely disciplinary records are, too.

Consistent with the statutory language, attorney general opinions have interpreted AS 39.25.080 as limiting public disclosures of personnel records to the list in subsection (b) and indicated that disciplinary records are protected. Attorney general opinions are “entitled to some deference in matters of statutory construction.”³⁹ One opinion advised that “only those limited types of information identified in AS 39.25.080 may be disclosed to the public.”⁴⁰ This opinion also concluded that the term “personnel records” is broad enough to encompass “records of administrative investigations or inquiries,” making disciplinary investigations or actions confidential.⁴¹ Another opinion advised against

³⁷ AS 01.10.040(b).

³⁸ AS 39.25.080(a).

³⁹ *Basey v. State, Dep’t of Pub. Safety, Div. of Alaska State Troopers, Bureau of Investigations*, 408 P.3d 1173, 1179 n.44 (Alaska 2017) (quoting *Bullock v. State, Dep’t of Cmty. & Reg’l Affairs*, 19 P.3d 1209, 1216 (Alaska 2001)).

⁴⁰ 1994 Op. Att’y Gen. No. 1 at 38 (Nov. 25).

⁴¹ *Id.*

disclosing state employees' resumes in response to public records requests because "you may disclose only the items enumerated in AS 39.25.080(b)."⁴² A third opinion stated, "AS 39.25.080 specifies what personnel records are available for public inspection. Except for the information specified in (b) of the section, all public disclosure is prohibited by law."⁴³

Common sense, agency interpretation, and various courts agree that disciplinary records are personnel records. Adopting this "common and approved usage" of personnel records gives "due regard for the meaning the statutory language conveys to others," which is especially important here since there is no statutory definition.⁴⁴ Commonly understood, personnel records document an individual's work history or relationship with an employer, including employment applications, performance evaluations, and disciplinary actions.⁴⁵ The Division of Personnel and Labor Relations in the Department

⁴² 1983 Inf. Op. Att'y Gen. at 361 (Nov. 9; 366-250-84).

⁴³ 1992 Inf. Op. Att'y Gen. at 37 (Jan. 1 (original date: July 19, 1990); 663-90-0318).

⁴⁴ AS 01.10.040(a) (requiring statutory words and phrases to be interpreted "according to their common and approved usage," unless they are technical or have acquired a "peculiar and appropriate meaning" by legislative definition or otherwise); *Monzulla*, 254 P.3d at 345 (stating that the goal of statutory interpretation is "to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others") (citation and internal quotations omitted)).

⁴⁵ *Mills v. Hankla*, 297 P.3d 158, 162-63 (Alaska 2013) (noting testimony described contents of police chief's "personnel file, including performance and psychological examinations, medical file, and discipline record"), *overruled on other grounds by Lane v. City of Juneau*, 421 P.3d 83 (Alaska 2018); *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 759 (Alaska 2008) (noting supervisor "received a disciplinary letter in his personnel file" due to sexual harassment); *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990) (stating "personnel files 'contain the most intimate details' of an employee's work history"); *Booth v. State*, 251 P.3d 369, 371 (Alaska App. 2011) (remanding for an *in camera* inspection of "personnel files" to determine if they contained "disciplinary

of Administration, whose expertise with administering the State Personnel Act compels deference to its interpretations,⁴⁶ lists “disciplinary actions” among the “general content of a personnel record.”⁴⁷ State collective bargaining agreements also recognize that disciplinary records are in personnel files.⁴⁸

And, as the unions note, other state courts with similar personnel file exemptions to open records laws recognize that disciplinary matters are personnel records not subject

actions based on the use of excessive force”); *Emp. Records and Files*, hr360, <https://www.hr360.com/Human-Resources/Employee-Records-and-Files/Employer-Records-and-Files.aspx> (stating personnel records are a “way of documenting an employee’s relationship with a company” and noting the files include “corrective action or disciplinary letters”) (last visited June 8, 2019); Susan M. Heathfield, *Emp. Pers. File Contents*, The Balance Careers (Jan. 11, 2019), <https://www.thebalancecareers.com/employee-personnel-file-contents-1918218> (stating an employee’s personnel file is the “main employee file that contains the history of the employment relationship from employment application through . . . employment termination documentation,” and recommending that “disciplinary action reports” be included in such files); Laura Handrick, *Pers. File: What to Include & Not Include [+Checklist]*, Fit Small Business.com (Aug. 8, 2018), <https://fitsmallbusiness.com/personnel-file/> (observing that personnel records “cover the entire life cycle” of employment and recommending that “warnings and/or other disciplinary actions” be included in them).

⁴⁶ See, e.g., *Storrs*, 664 P.2d at 552; *Bartley*, 110 P.3d at 1261.

⁴⁷ *State, Dep’t of Admin, Div. of Pers. and Labor Relations, Standard Operating Procedure, Emp. Records*, DOPLR-06, at 3-5 (revised Dec. 14, 2015), <http://doa.alaska.gov/dop/ppdb/SOP/Ch06EmployeeRecords/DOP06EmployeeRecordsSOP.pdf>.

⁴⁸ Collective Bargaining Agreement, between the State and Pub. Safety Emps. Ass’n, at 17, 19-20 & 23 (July 1, 2017-June 30, 2020), <http://doa.alaska.gov/dop/fileadmin/LaborRelations/pdf/contracts/PSEA2017-2020.pdf> (stating that materials and reports involving allegations in a disciplinary investigation cannot go in a member’s personnel file if the member is exonerated or the allegations were unfounded and providing for purging of written warnings or reprimands “from the member’s personnel files” two years after issuance); Bargaining Agreement between the State and the Alaska Pub. Emps. Ass’n representing the Confidential Emps. Ass’n, at 34-35 (July 1, 2016-June 30, 2019), <http://doa.alaska.gov/dop/fileadmin/LaborRelations/pdf/contracts/CEA2016-2019.pdf> (permitting employees to request that “disciplinary documents concerning a warning or reprimand be removed from the employee’s personnel file”).

to disclosure. [Unions Br. 14-16] For example, the Iowa Supreme Court decided that records describing employees' discipline are personnel records because they are "nothing more than in-house job performance records or information."⁴⁹ An Illinois court stated, "Given its plain and ordinary meaning, a 'personnel file' can reasonably be expected to include documents such as . . . disciplinary records."⁵⁰ The Oregon Supreme Court observed, "[P]ersonnel files would usually include information about . . . disciplinary matters or other information useful in making employment decisions regarding an employee."⁵¹ And, referring to disciplinary files as a "core" category of personnel information, Massachusetts' highest court concluded, "It would distort the plain statutory language to conclude that disciplinary reports are anything but personnel file or information."⁵²

The media and the ACLU cite cases from other states that are inapposite because

⁴⁹ *Am. Civil Liberties Union Found. of Iowa, Inc. v. Records Custodian, Atl. Cmty. Sch. Dist.*, 818 N.W.2d 231, 235-36 (Iowa 2012) (withholding employee disciplinary records under statutory exemption for "personal information in confidential personnel records").

⁵⁰ *Copley Press, Inc. v. Bd. of Educ. for Peoria Sch. Dist. No. 150*, 834 N.E.2d 558, 560-62 (Ill. App. 2005) (holding performance evaluations and a letter explaining the board's reasons for placing a superintendent on paid administrative leave that the court viewed as a "record of disciplinary action" were not subject to public disclosure under a statutory exemption for "personnel files").

⁵¹ *Oregonian Publ'g Co. v. Portland Sch. Dist. No. 1J*, 987 P.2d 480, 484-85 (Or. 1999) (holding that, even though disciplinary matters would be protected from disclosure as teachers' personnel records, the report at issue was disclosable because it concerned issues broader than disciplining employees, including policies on securing property to prevent any misuse or theft, and did not make any disciplinary recommendations).

⁵² *Wakefield Teachers Ass'n v. Sch. Comm. of Wakefield*, 731 N.E.2d 63, 64 & 67-68 (Mass. 2000) (holding that a teacher's disciplinary report was exempt from disclosure under statutory exemption for personnel file).

they do not address statutory exemptions from public disclosure for personnel records similar to Alaska's.⁵³ [Media Br. 21-24; ACLU Br. 10-11] The ACLU acknowledges many cases and statutes from other states are not particularly helpful because of varying definitions and wording of exemptions. [ACLU Br. 8] The four states identified that permit disclosure of at least some disciplinary records have statutes unlike the Alaska statute.⁵⁴ [Media Br. 21-22; ACLU Br. 10-11] For example, California's statutes exempt personnel files only if disclosure "would constitute an unwarranted invasion of personal privacy," and allow release of law enforcement officers' disciplinary records if (1) the officer discharged a firearm or used force that seriously injured or killed someone, or (2) a "sustained finding" was made that the officer sexually assaulted someone, or lied about misconduct by another officer or a crime.⁵⁵ Colorado's statute has a restrictive statutory definition of "personnel file," narrowly limiting non-disclosure to "home addresses,

⁵³ See, e.g., *Charleston Gazette v. Smithers*, 752 S.E.2d 603 (W. Va. 2013) (deciding law enforcement and internal memorandum exemptions to public disclosure did not apply to records of employee misconduct investigations and remanding for consideration of a privacy exemption); *City of Louisville v. Courier-Journal & Louisville Times Co.*, 637 S.W.2d 658, 659-61 (Ky. App. 1982) (holding internal investigative files concerning complaints about a police officer exempt from public disclosure as "preliminary," but complaints should be disclosed).

⁵⁴ Two of these states are Vermont and Wisconsin. Vermont exempts "*personal* documents, relating to an individual," including information in personnel files, and the state supreme court ruled that "*personal* documents" include only those that implicate privacy and balanced that interest against the need for disclosure. *Rutland Herald v. City of Rutland*, 48 A.3d 568, 579 (Vt. 2012) (emphasis added). Wisconsin's statute exempting disclosure of information used "for staff management planning" was construed to not encompass employee misconduct records since another provision permitted the disclosure of investigative records relating to employee misconduct once the investigation was completed. *Kroeplin v. Wis. Dep't of Nat. Res.*, 725 N.W.2d 286, 296-97 (Wis. App. 2006) (interpreting Wis. Stat. § 19.36(10)).

⁵⁵ Cal. Gov't Code § 6254(c); Cal. Penal Code § 832.7(b)(1).

telephone numbers, financial information,” and similar information “maintained because of the employer-employee relationship.”⁵⁶ Still other state statutes explicitly allow the release of public employees’ disciplinary or misconduct records, usually once an investigation has been completed or a decision has been made—and so are unhelpful to analyzing Alaska’s statute that does not so provide.⁵⁷ [Media Br. 22-24] But that other states have enacted provisions expressly authorizing the release of disciplinary records in certain circumstances supports the conclusion that the lack of such an express provision in Alaska’s statute forecloses disclosure of disciplinary records.⁵⁸

The media also argues that disciplinary records are not “confidential” personnel records because the Alaska Board of Nursing posts disciplinary actions online. [Media Br. 20] This is not relevant to the confidentiality of state employees’ disciplinary records as personnel records. Like other professional licensing boards, the nursing board enforces standards for licensing of *all* nurses in the state—not limited to those who are state employees.⁵⁹ The board posts limited information about the sanctions that it—not the

⁵⁶ *Daniels v. City of Commerce City, Custodian of Records*, 988 P.2d 648, 651 (Colo. App. 1999).

⁵⁷ Fla. Stat. § 119.071(2)(k). *See* Me. Rev. Stat. tit. 5, § 7070(2)(E) (permitting release only of final written decisions regarding discipline); Me. Rev. Stat. tit. 5, § 7070-A (permitting release of a law enforcement officer’s name and investigative findings involving the officer’s use of deadly or excessive force after investigation and any criminal prosecution is completed).

⁵⁸ The two express disclosure provisions for disciplinary records in Alaska law—not applicable here—are the legislative-related discipline disclosure and lack of coverage for the personnel records of state employees in the exempt service. *Doe v. Alaska Super. Ct., Third Judicial Dist.*, 721 P.2d 617, 622 (Alaska 1986); AS 39.25.080(b)(7).

⁵⁹ *See* AS 08.68.100 (providing that the board shall “examine, license, and renew licenses of qualified [nursing] applicants” and may invoke disciplinary action against a

state acting as an employer—imposes against nurses who violate licensing requirements.⁶⁰ Any disciplinary action that the state as an employer takes against a state-employed nurse, as a result of a licensing action or for another reason, would be confidential under AS 39.25.080.

B. Alaska Statute 39.25.080 codified the existing practice of shielding most personnel files, including disciplinary records, from public access.

The history of AS 39.25.080 as a whole also supports that the legislature intended to shield disciplinary records from public disclosure as personnel records. In 1982, AS 39.25.080 was revised to favor non-disclosure of most personnel records, including disciplinary records, and to specify the only types of personnel records or information that may be released.⁶¹ This was intentional. The legislature wanted to codify the Division of Personnel’s existing practice that withheld almost all personnel records, including disciplinary records, from public inspection.

Before the rewrite, AS 39.25.080 appeared to favor disclosure of personnel records like the Alaska Public Records Act that favors open access to public records:⁶²

The state personnel records, except such records as the rules may

licensee); AS 08.68.270 (providing the grounds for license denial, suspension, or revocation).

⁶⁰ State, Dep’t of Commerce, Cmty. & Econ. Dev., Div. of Corps., Bus. & Prof’l Licensing, Alaska Bd. of Nursing Disciplinary Actions, <https://www.commerce.alaska.gov/web/cbpl/ProfessionalLicensing/BoardofNursing/DisciplineActions.aspx> (last visited June 8, 2019). *See also* AS 40.25.120(a)(3) (providing that “medical and related public health records” are not subject to public disclosure).

⁶¹ Sec. 5, ch. 112, SLA 1982.

⁶² AS 40.25.120 (stating, “Every person has a right to inspect a public record in the state, except . . .”); *Griswold v. Homer City Council*, 428 P.3d 180, 186 (Alaska 2018) (noting that the Alaska Public Records Act is biased in favor of public disclosure).

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.^[63]

But under the personnel rules, almost all information in personnel records was confidential. And contrary to the media's argument, the personnel rules at the time provided a definitive answer to the question here: Disciplinary records were not subject to disclosure. [See Media Br. 17] Personnel Rule 14 did not permit public disclosure of "examination materials, performance evaluations, personal history, or other confidential materials so designated by the [personnel] Director."⁶⁴ [App. A] Materials the director designated confidential included information about disciplinary actions: "Personnel actions," "Disciplinary Letters/Memos for State connected employment," "Grievances," and "Appeals."⁶⁵ [App. B at 5-6] Only employment status information—e.g., name, title, salary, and length of state service—was open to public inspection.⁶⁶ [App. B at 5-6]

The 1982 bill proposed codifying this existing practice, as the commission charged with recommending changes to the State Personnel Act explained in a legislative report:

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

⁶³ Sec. 18, ch. 144, SLA 1960.

⁶⁴ Pers. Rule 14.07.0 (June 1980) (in S. State Affairs Comm. file for SB 193 (1982) [App. A]).

⁶⁵ Memorandum from Patrick L. Hunt, director, Dep't of Admin., Div. of Pers., (Apr. 14, 1970) (attached to 1980 Inf. Op. Att'y Gen. (Feb. 20; A66-281-80) (noting that the attached director's memorandum sets out the public policy under AS 39.25.080 [App. B at 2])).

⁶⁶ *Id.*

materials so designated by the Director of Personnel, employee records are public records. . . . 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).^{67]} [App C]

In sectional analyses provided to the legislative committees, a commission staff member repeated this explanation, stating, “In fact, the amendment would not change the existing practice since those items listed are the only personnel records now open to the public.”⁶⁸ [App. D] The legislature enacted the commission’s proposed changes to AS 39.25.080.⁶⁹

The intentional drafting decision to make non-disclosure the default and disclosure the exception also supports the Department’s reading of the statute—that the only personnel information open to public inspection is the list in subsection (b). The principle of *expressio unius est exclusio alterius* applies here. This statutory canon “establishes the inference that, where certain things are designated in a statute, all omissions should be understood as exclusions.”⁷⁰ Applying the canon here, all omissions from

⁶⁷ Rep. of the Blue Ribbon Comm’n on the State Pers. Act to the Twelfth Alaska State Leg., First Sess., Sen. Bill Ray, chairman, at 9 (Feb. 1981) (emphasis added). [App C] The legislature created this commission to review and propose changes to the State Personnel Act. [App. C at 3] Members included legislators, union representatives, the state personnel director, and others. [App. C at 2]

⁶⁸ Memorandum from Teresa B. Cramer, admin. assistant, Blue Ribbon Comm’n on State Pers. Act, to H. Jud. Comm. (Apr. 30, 1982) (in S. Jud. Comm. file for SB 193 and H. Jud. Comm. file for SB 193); same to H. State Affairs Comm. (Apr. 19, 1982) (in H. State Affairs Comm. file for SB 193). *See also* the similar explanation in the memoranda from Teresa B. Cramer, admin. assistant, Blue Ribbon Comm’n on State Pers. Act, to S. Jud. Comm. (Jan. 27, 1982) (in H. Jud. Comm. file for SB 193) and to S. State Affairs Comm. (Mar. 31, 1981) (in S. State Affairs and H. Jud. Comm. file for SB 193). [App. D]

⁶⁹ Compare sec. 5, ch. 112, SLA 1982 with Rep. of the Blue Ribbon Comm’n on the State Pers. Act to the Twelfth Alaska State Leg., First Sess., at 8-9. [App. C]

⁷⁰ *Ranney v. Whitewater Eng’g*, 122 P.3d 214, 218-19 (Alaska 2005) (applying the

AS 39.25.080(b) are exclusions—nothing may be disclosed from a personnel record in response to a public records request unless it is among the information in subsection (b). Disciplinary records, aside from the express, limited exception regarding information about not cooperating with a legislative committee, are not among the items listed in (b) and are personnel records, so they may not be disclosed.

Contrary to the ACLU’s brief, this is not a “less persuasive” context for applying the canon because its application is to the same statute and most of the exceptions were enacted at the same time.⁷¹ [See ACLU Br. 15 n.46] Although the addition of one exception, (b)(7), was at a later time,⁷² it further supports the canon’s application since the legislature was informed that adding it was necessary to ensure disclosure of a specific type of disciplinary action.⁷³ Applying the canon to this statute is also consistent with the statutory purpose of protecting confidentiality to promote the merit principle in state employment, as discussed further below.⁷⁴

canon and concluding that an unmarried cohabitant was not a deceased worker’s beneficiary for workers’ compensation benefits because the detailed statutory list did not include unmarried partners) (citations and internal quotations omitted).

⁷¹ Sec. 4, ch. 67, SLA 2003; sec. 5, ch. 112, SLA 1982. *See Alaska State Comm’n for Human Rights v. Anderson*, 426 P.3d 956, 964-65 (Alaska 2018) (rejecting application of the canon where the party compared “two completely separate statutory schemes,” rather than urging its application in the context of the same statute or closely related ones.)

⁷² Sec. 4, ch. 67, SLA 2003. *See Alaska State Comm’n for Human Rights*, 426 P.3d at 964-65 (noting canon is “less persuasive when applied to two acts passed far apart in time”) (citation omitted).

⁷³ Testimony of Pat Davidson, director, Div. of Legis. Audit, on SB 45 (H. Fin. Comm. May 16, 2003), <http://www.akleg.gov/ftp/archives/2003/HFIN/98-HFIN-030516.mp3> (starting about 43:15). *See discussion supra* pp. 8-9.

⁷⁴ *Alaskan Crude Corp. v. State, Alaska Oil & Gas Conservation Comm’n*, 309 P.3d 1249, 1255 n.22 (Alaska 2013) (“[T]he principle of *exclusio unius est exclusio alterius*

C. Safeguarding disciplinary records helps the state retain and promote employees based on merit—the goal of the State Personnel Act.

Keeping disciplinary records confidential promotes the “government’s ability to function effectively as an employer,”⁷⁵ serving the purposes of the State Personnel Act. The legislature enacted the State Personnel Act “to establish a system of personnel administration based upon the merit principle,” and this principle includes “retention of employees . . . on the basis of the adequacy of their performance,” while allowing for “reasonable efforts of temporary duration for correction in inadequate performance.”⁷⁶ Disclosing disciplinary information would hinder a meaningful evaluation and correction process. Confidentiality “likely produces candor.”⁷⁷ The goals of improving performance and correcting mistakes are served best if the employee may admit to mistakes or explain actions and others may provide information without the fear of public disclosure.

Moreover, knowing that all of one’s conduct that gets documented in a personnel record—even if minor, not directly related to performance, untrue, embarrassing, or sensitive—could be subject to public disclosure at anyone’s request harms the state’s ability to recruit and retain employees. The recruitment and retention of state employees is served best by a blanket exemption for personnel records, rather than a fact-specific

does not apply if it would contravene the statute’s purposes.”) (citation omitted).

⁷⁵ See *Wakefield Teachers Ass’n v. Sch. Comm. of Wakefield*, 731 N.E.2d 63, 70 (Mass. 2000) (“The exemption from disclosure of personnel files and information has, among other benefits, the protection of the government’s ability to function effectively as an employer.”) (citation omitted).

⁷⁶ AS 39.25.010.

⁷⁷ *Wakefield Teachers Ass’n*, 731 N.E.2d at 70-71 (doubting that disciplined teacher would have cooperated fully if his disciplinary records had been open to public access).

test that weighs privacy interests against the particular need for disclosure.

That disciplinary records are personnel records ends the inquiry. The ACLU and the media advocate for applying a privacy test not found in the statutory language and contrary to legislative intent. [ACLU Br. 18; Media Br. 3] The ACLU also asks that the Court treat law enforcement officers' disciplinary records differently than other state employees. [ACLU Br. 2, 18] The Court cannot rewrite the statute to take either of these suggestions.⁷⁸ Instead, the Court must defer to the legislative choice to enact a statute with a blanket exemption for personnel records.⁷⁹ The legislature did not choose to protect only those records "the disclosure of which would constitute an unwarranted invasion of privacy," or to permit the disclosure of troopers' misconduct records in certain circumstances, as other jurisdictions have done.⁸⁰

Contrary to the media's assertion, 2 AAC 07.910(c) does not contemplate a

⁷⁸ *Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1131 (Alaska 2017) (concluding that the "separation of powers doctrine prohibits this court from enacting legislation or redrafting defective statutes.") (citation and internal quotations omitted).

⁷⁹ *See id.*; AS 39.25.080.

⁸⁰ Cal. Gov't Code § 6254(c) (exempting "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"); Cal. Penal Code § 832.7(b)(1) (permitting release of some law enforcement disciplinary records in certain circumstances); Conn. Gen. Stat. § 1-210(b)(2) (exempting "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy"). *See also* 5 U.S.C. § 552(b)(6) (exempting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); *Basey v. Dep't of the Army*, No. 4:16-cv-00038-TMB, slip op. at 28-29 (D. Alaska May 14, 2018) (ruling that federal law enforcement agents' disciplinary records, if any, were private and not disclosable in response to Basey's public records request).

balancing of interests in support of its statutory interpretation.⁸¹ [See Media Br. 30-31] If it did, it would be invalid because a regulation “cannot justify a statutory interpretation not warranted by the statute’s own language and legislative history.”⁸² Under 2 AAC 07.910(c), information in personnel files not listed in AS 39.25.080(b) is shielded from public disclosure (1) if the employee does not waive confidentiality, or (2) if the release cannot be accomplished “without violation” of the employee’s right to privacy *and* is not in the state’s best interests.⁸³ This is not contrary to the limited statutory disclosures because *any* invasion of privacy would prevent disclosure without balancing that interest against the need for disclosure and the disclosure must be in the best interests of the state. The regulation is probably meant to address circumstances where aggregate data about employees—with no names and thus, no privacy implications for individuals—is disclosed because it is in the best interest of the state in the judgment of the director of the Division of Personnel and Labor Relations.⁸⁴

Overall, deciding that some state employees’ disciplinary records are not protected “personnel records” would distort the plain meaning of the term and overrule the

⁸¹ It also does not support the media’s assertion under the constitutional analysis that the regulation negates state employees’ legitimate expectation of privacy in their personnel files for the same reasons discussed in this paragraph. [Media Br. 30-31]

⁸² *Alaska Airlines, Inc.*, 403 P.3d at 1131 (striking down a workers’ compensation regulation as contrary to the plain statutory language).

⁸³ 2 AAC 07.910(c)(4), (5). *See* AS 39.25.080(c) (stating that employees may examine their own files or authorize others to do so).

⁸⁴ *See* 2 AAC 07.910(c)(5) (requiring the request to be addressed to the director). By “director,” 2 AAC 07.910(c)(5) means the “director of the division of personnel and labor relations in the Department of Administration.” 2 AAC 07.999(11). The regulation is not directly applicable here since Basey made his requests to the Department of Public Safety, not the Department of Administration. [Exc. 11-13, R. 43]

legislature’s intended protections for personnel records in AS 39.25.080. This would be a “glaringly absurd result” that the Court should avoid.⁸⁵

D. The Court has not interpreted “personnel records” in AS 39.25.080 in a way that forecloses the inclusion of disciplinary records.

Although the Court generally construes exceptions to the Public Records Act narrowly,⁸⁶ the Court’s previous interpretations of “personnel records” do not foreclose the inclusion of “disciplinary records” within the scope of that term. Disciplinary records are unlike the only type of record—timesheets—that the Court has excluded from “personnel records” for the purposes of the statutory confidentiality protections.⁸⁷ A statement in another case expressing doubt that unsolicited letters regarding the qualifications of a board applicant were confidential state personnel records should be disregarded as dictum.⁸⁸ Other cases are not on point because they concern municipal personnel records to which AS 39.25.080 does not apply.⁸⁹

In *Alaska Wildlife Alliance v. Rue*, the Court held that timesheets were not subject

⁸⁵ *Premiera Blue Cross v. State, Dep’t of Commerce, Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1120 (Alaska 2007) (rejecting interpretation that rendered a statute a nullity because that would create an absurd result); *Sherbahn v. Kerkove*, 987 P.2d 195, 201 (Alaska 1999) (“In ascertaining the legislature’s intent, we are obliged to avoid construing a statute in a way that leads to a glaringly absurd result.”).

⁸⁶ *E.g., Basey v. State, Dep’t of Pub. Safety, Div. of Alaska State Troopers, Bureau of Investigations*, 408 P.3d 1173, 1176 (Alaska 2017).

⁸⁷ *Alaska Wildlife All. v. Rue*, 948 P.2d 976, 979-80 (Alaska 1997).

⁸⁸ *Doe v. Alaska Super. Ct., Third Judicial Dist.*, 721 P.2d 617, 622 (Alaska 1986).

⁸⁹ *Int’l Ass’n of Fire Fighters, Local 1264 v. Municipality of Anchorage*, 973 P.2d 1132, 1133, 1136 (Alaska 1999); *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 589-91 (Alaska 1990); *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1317-18 (Alaska 1982).

to the confidentiality provisions of AS 39.25.080 because they “indicate merely the hours worked for the public employer.”⁹⁰ The media misstates this case’s holding, claiming that protected personnel records “*must* be of a type . . . which ‘contain details about the employee’s or applicant’s personal life.’”⁹¹ [Media Br. 20 (emphasis added)] The Court did not require that, nor did it hold that “records that ‘tell little about the individual’s personal life’ are not protected personnel records.”⁹² [Media Br. 20 n.53] Instead, the Court found the “examples of documents covered and exempted . . . revealing.”⁹³ Timesheets were unlike the examples of confidential personnel records in subsection (a): Employment applications and examination materials “contain details about the employee’s or applicant’s personal life.”⁹⁴ Timesheets were like the employment status information subject to disclosure under subsection (b): “Such information tells little about the individual’s personal life.”⁹⁵ This says only that timesheets did not contain any “intimate or sensitive information which, if disclosed even to a friend, could cause embarrassment or anxiety.”⁹⁶ But, here, examination and assessment materials are no more personal than disciplinary materials. The former “contain details about the

⁹⁰ 948 P.2d at 980.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 979-80.

⁹⁴ *Id.* at 980.

⁹⁵ *Id.*

⁹⁶ *Int’l Ass’n of Fire Fighters, Local 1264*, 973 P.2d at 1134 (citation and internal punctuation omitted).

employee's or applicant's personal life," so too do the latter.⁹⁷

Disciplinary records, unlike timesheets that log the hours worked, are not merely employment status-related personnel records for all the reasons discussed above. By documenting employees' shortcomings and errors, they capture the essence of an individual's work history or relationship with the employer, unlike timesheets that are not mentioned in sources that describe personnel records, including the Division of Personnel's procedures.⁹⁸ Also, unlike timesheets, they are essential to applying the merit principle in personnel administration and were confidential under the existing practice when AS 39.25.080 was amended.⁹⁹ Unlike timesheets, they cannot be excluded from a common-sense understanding of "personnel records" without reaching an absurd result,¹⁰⁰ especially because one type of disciplinary action—and not others—may be disclosed from personnel records.¹⁰¹ And, lastly, as discussed further below addressing the constitutional privacy right, they are private because they characteristically contain facts or allegations so sensitive that disclosure "even to a friend [] could cause

⁹⁷ See *Alaska Wildlife All.*, 948 P.2d at 980.

⁹⁸ *State, Dep't of Admin, Div. of Pers. and Labor Relations, Standard Operating Procedure, Emp. Records*, DOPLR-06 (revised Dec. 14, 2015), <http://doa.alaska.gov/dop/ppdb/SOP/Ch06EmployeeRecords/DOP06EmployeeRecordsSOP.pdf>; Susan M. Heathfield, *Employee Pers. File Contents*, The Balance Careers (Jan. 11, 2019), <https://www.thebalancecareers.com/employee-personnel-file-contents-1918218>; Laura Handrick, *Pers. File: What to Include & Not Include [+Checklist]*, Fit Small Business.com (Aug. 8, 2018), <https://fitsmallbusiness.com/personnel-file>.

⁹⁹ See sec. 18, ch. 144, SLA 1960; memorandum from Patrick L. Hunt, director, Dep't of Admin., Div. of Pers. (Apr. 14, 1970) (attached to 1980 Inf. Op. Att'y Gen. (Feb. 20; A66-281-80) [App. B]); Pers. Rule 14.07.0 (June 1980) (in S. State Affairs Comm. file for SB 193 (1982) [App. A]).

¹⁰⁰ See *Premiera Blue Cross*, 171 P.3d at 1120; *Sherbahn*, 987 P.2d at 201.

¹⁰¹ AS 39.25.080(b)(7).

embarrassment or anxiety.”¹⁰²

One other case considered—but did not decide—whether a particular document is a personnel record for the purposes of AS 39.25.080. In *Doe v. Alaska Superior Court, Third Judicial District*, the Court expressed doubt that unsolicited letters to the governor opposing or supporting a board applicant are personnel records under AS 39.25.080.¹⁰³ *Doe* held that, even if they were such records, AS 39.25.080 does not apply to them because board and commission members are exempt from the State Personnel Act.¹⁰⁴ For this reason, the nature of the letters was not essential to the Court’s holding and the aside should be disregarded as dictum.¹⁰⁵ The aside is not particularly persuasive, either, as it provided no explanation of the reasoning behind the Court’s doubt.¹⁰⁶

Other cases the ACLU and the media cite do not address the scope of personnel records under AS 39.25.080. [See ACLU Br. 6-7, Media Br. 20-21] The statute is limited to *state* personnel records. Accordingly, it was not at issue in a case that addressed a discovery request for the disciplinary records of municipal police officers.¹⁰⁷ Nor was it applied in cases involving the public disclosure of municipal employees’ names and

¹⁰² *Int’l Ass’n of Fire Fighters, Local 1264*, 973 P.2d at 1134 (citation omitted).

¹⁰³ 721 P.2d at 622.

¹⁰⁴ *Id.*

¹⁰⁵ *E.g., Joseph v. State*, 26 P.3d 459, 468-69 (Alaska 2001) (stating, “Dictum is not a holding,” and is not accorded precedential value).

¹⁰⁶ *See Doe*, 721 P.2d at 622.

¹⁰⁷ *Jones v. Jennings*, 788 P.2d 732, 733 (Alaska 1990). Even if *Jones* had concerned state employees, AS 39.25.080(a) would not foreclose the release of disciplinary records in discovery under a protective order because this would not be “public inspection.”

salaries,¹⁰⁸ a head municipal librarian's performance evaluation,¹⁰⁹ and employment applications for a city manager and police chief.¹¹⁰ To the extent that one of these cases characterizes *Alaska Wildlife Alliance* as defining "'personnel record' narrowly, to include only information which reveals the details of an individual's personal life," that statement is dictum.¹¹¹ [See ACLU Br. 6] Determining the scope of personnel records for the purposes of AS 39.25.080 was not necessary to that case's holding.¹¹² Instead, the Court held that municipal employees' names in conjunction with their salaries could be disclosed because they had no legitimate expectation of privacy in that information under the state constitution or under a municipal ordinance that blocked public disclosure if it would constitute an "unwarranted invasion of personal privacy."¹¹³

Including disciplinary records as personnel records is not contrary to the Court's aim to construe exceptions to public disclosure narrowly to give effect to the Alaska Public Records Act's mandate of broad public access to government records.¹¹⁴ The Court must avoid applying too narrow a construction to the term "personnel records," such that the construction eviscerates the plain language of AS 39.25.080 and thwarts the purposes of the State Personnel Act.

¹⁰⁸ *Int'l Ass'n of Fire Fighters, Local 1264*, 973 P.2d at 1134, 1136.

¹⁰⁹ *Municipality of Anchorage*, 794 P.2d at 590-91.

¹¹⁰ *City of Kenai*, 642 P.2d at 1317-18 & 1323.

¹¹¹ *Int'l Ass'n of Fire Fighters, Local 1264*, 973 P.2d at 1135.

¹¹² *See, e.g., Joseph*, 26 P.3d at 468-69 ("Dictum is not a holding.").

¹¹³ *Int'l Ass'n of Fire Fighters, Local 1264*, 973 P.2d at 1133, 1137.

¹¹⁴ *E.g., Basey v. State, Dep't of Pub. Safety, Div. of Alaska State Troopers, Bureau of Investigations*, 408 P.3d 1173, 1176 (Alaska 2017).

For all of the above reasons, AS 39.25.080 forbids the disclosure of the disciplinary records in response to a public records request. And thus, the Court need not reach the questions about the troopers' constitutional right to privacy.

II. The constitutional right to privacy protects the troopers' disciplinary records from disclosure in response to a public records request.

Under the constitution, evaluating the public disclosure of records requires striking a balance “between the public interest in disclosure on the one hand and the privacy and reputation interests of the affected individuals and the government’s interest in confidentiality, on the other.”¹¹⁵ Contrary to the arguments of the media and ACLU,¹¹⁶ this balancing is specific to the facts of each records request—case by case.¹¹⁷ [See Media Br. 29-35; ACLU Br. 19-25] On these facts, at least, this balancing supports protecting the two troopers' disciplinary records, if any.¹¹⁸

¹¹⁵ *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1323 (Alaska 1982). See Alaska Const. art. I, § 22.

¹¹⁶ The ACLU seems to frame its argument by assuming that the records requested document “discipline for work-related misconduct,” but disciplinary records encompass more information than that—and Basey did not limit his request. [ACLU Br. 19, Exc. 12]

¹¹⁷ See, e.g., *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 (Alaska 1990) (ordering disclosure of a performance evaluation based in part on a finding that it did not deal “in any way” with the employee’s personal life); *Alaska Wildlife All. v. Rue*, 948 P.2d 976, 980-81 (noting state conceded there would ordinarily be no privacy interest in one’s status as a state employee but there was where employees had received threats due to their work in a program).

¹¹⁸ The Department is not asserting a state agency has a constitutional right to privacy; it is asserting its interest in confidentiality as an employer. [See Media Br. 25-26] See *City of Kenai*, 642 P.2d at 1323. The Department is also asserting the constitutional privacy interests of its employees and has standing to do so here. The Department is adverse to Basey. And Hansen’s or Bell’s assertion of their rights “would forfeit the very privacy” that they seek to protect—as they would likely be motivated to intervene only if disciplinary actions against them exist. To safeguard their privacy, the

In evaluating the privacy interest as part of this calculus, the Court engages in a three-part analysis:

- (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?
- (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to privacy?^[119]

Here, the troopers have a legitimate expectation of privacy in their disciplinary records that may contain any number of details that do not amount to misconduct affecting the public interest. Disclosure in this case is not necessary to serve a compelling state interest because government transparency does not outweigh the privacy interests and the Department's interest in confidentiality as an employer. The last factor also weighs against disclosure: There is no least intrusive way to accomplish the disclosure since any redactions would not conceal the identities of the officers—and it is the identification of them in matters that may not even implicate their public duties that may harm their reputational interests.

This Court has considered the constitutional privacy interests of government employees or job applicants in the context of deciding whether their records are disclosed in response to public records requests in four cases and a discovery request in one case.

Department has not indicated whether any such records exist. *See Alaska Wildlife All.*, 948 P.2d at 980.

¹¹⁹ *Int'l Ass'n of Fire Fighters, Local 1264 v. Municipality of Anchorage*, 973 P.2d 1132, 1134 (Alaska 1999) (quoting *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990)) (internal punctuation omitted).

Although these cases inform the Court's consideration of the privacy/disclosure balancing here, none of them definitively resolve how the balancing should come out.

First, in *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, the Court ordered the names and applications of candidates for city manager and police chief released after the candidates had an opportunity to withdraw their applications if they wanted to avoid public disclosure.¹²⁰ An "open selection process for high public officials" who have "substantial discretionary authority" favored disclosure.¹²¹ Also, the contents of the applications were unlikely to be "particularly embarrassing" since applicants voluntarily provided information to sell themselves, and the need for disclosure outweighed any applicant's desire to keep a current employer in the dark.¹²²

Second, in *Municipality of Anchorage v. Anchorage Daily News*, the Court ordered disclosure of a performance evaluation of a head librarian in charge of public library facilities against the librarian's assertion of a constitutional privacy interest.¹²³ Since the evaluation did not "in any way" deal with the librarian's "personal, intimate, or otherwise private" life, the balance favored the public's right to know about his work performance.¹²⁴

Third, in *Jones v. Jennings*, a man sued police officers contending they used

¹²⁰ 642 P.2d at 1323-24.

¹²¹ *Id.*

¹²² *Id.* at 1324.

¹²³ 794 P.2d at 590-91.

¹²⁴ *Id.* at 591.

excessive force in arresting him.¹²⁵ In discovery, he sought personnel records and internal investigations of citizen complaints.¹²⁶ The Court concluded there was “little doubt” that an officer had a legitimate expectation his personnel file would not be disclosed given that these records “contain the most intimate details of an employee’s work history.”¹²⁷ But the Court concluded that at least three compelling state interests necessitated disclosure: (1) permitting broad discovery to ensure the effective functioning of the judiciary and to ascertain the truth in legal proceedings, (2) ensuring the openness of public records so that people could monitor their government and trust in those charged with enforcing the law, and (3) providing a tort remedy to someone who was injured.¹²⁸ Lastly, the disclosure was accomplished in the “least intrusive” way because the records were provided under a protective order after an *in camera* review to exclude “prejudicial and irrelevant material” and redact the names of the officer’s family members and suspects who were never charged, personal financial information, and home addresses.¹²⁹

Fourth, in *Alaska Wildlife Alliance v. Rue*, the Court held the employees in a wolf control program had a legitimate expectation of privacy in their names because credible threats had been made against their lives.¹³⁰ The public interest in keeping an eye on

¹²⁵ 788 P.2d at 733.

¹²⁶ *Id.*

¹²⁷ *Id.* at 738 (internal quotations omitted).

¹²⁸ *Id.* at 738-39.

¹²⁹ *Id.* at 734, 739.

¹³⁰ 948 P.2d at 980.

public funds did not outweigh the safety risk.¹³¹ The Court permitted the release of timesheets only with the employees' names redacted.¹³²

Fifth, in *International Ass'n of Firefighters, Local 1264 v. Municipality of Anchorage*, the Court held the municipality's annual public list of its employees' names and salaries did not violate constitutional privacy rights.¹³³ Employees did not have a legitimate expectation of privacy in the "amount of public money they are paid."¹³⁴ Privacy expectations are reasonable for "personal or sensitive" information in personnel records, but names and salaries are not "intimate or sensitive personal information which, if disclosed even to a friend, could cause embarrassment or anxiety."¹³⁵ The Court also observed that a private matter "loses its wholly private character" when it affects the public and "can be made to yield when an appropriate public need is demonstrated."¹³⁶

Here, as in *Jones*, there is "little doubt" that the troopers have a legitimate expectation of privacy in their disciplinary records, if any, because such records may contain embarrassing details or unsubstantiated, stigmatizing allegations about conduct both on and off duty.¹³⁷ Disciplinary records may contain information that bears only marginally or not at all on employees' public duties but that would be embarrassing to the

¹³¹ *Id.* at 981.

¹³² *Id.*

¹³³ 973 P.2d at 1133.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1134-36 (internal punctuation omitted).

¹³⁶ *Id.* at 1136-37 (citations and internal quotations omitted).

¹³⁷ *See* 788 P.2d at 738.

employee if publically disclosed.¹³⁸ For example, the records may contain evidence of an affair with a co-worker or of viewing inappropriate websites at work, reveal sensitive private medical conditions impacting performance, or point out deficiencies or errors that do not rise to the level of misconduct warranting greater public concern, like a warning about inconsiderate communications. And these troopers are not higher level employees in charge of divisions or departments, like the city manager and police chief or the head municipal librarian, who would expect and receive greater public scrutiny in the performance of their jobs since they manage large amounts of public money, supervise hundreds of employees, and establish policies with widespread effects.¹³⁹

And even though the records may not be “wholly private,” the troopers’ privacy and the government’s desire for confidentiality as an employer should not be made to yield since no “appropriate public need” has been demonstrated.¹⁴⁰ At least two of the compelling state interests for disclosure in *Jones* do not apply, and the third is less weighty.¹⁴¹ The compelling state interests in liberal discovery and in tort remedies do not apply since Basey asked for the records in a public records request, rather than in his civil suit—an avenue he could use to obtain the records if they are relevant.¹⁴²

¹³⁸ The trial court never examined the records *in camera* since it denied the records request under AS 39.25.080. [See Tr. 18-19, Partial Final Judgment] Consequently, the disciplinary records, if any, are not in the appellate record for this Court’s review.

¹³⁹ See *City of Kenai*, 642 P.2d at 1324; *Municipality of Anchorage*, 794 P.2d at 591.

¹⁴⁰ *Int’l Ass’n of Fire Fighters, Local 1264*, 973 P.2d at 1136-37.

¹⁴¹ See 788 P.2d at 738-39.

¹⁴² See *id.*; *Basey v. Hansen*, No. 4:16-cv-00004-RRB (D. Alaska filed Jan. 15, 2016) (stayed July 25, 2016).

The public's interest in monitoring the two troopers' performance is less of a concern here as there are no specific allegations of serious misconduct, such as an officer shooting or a claim of excessive force in making an arrest.¹⁴³ The Court should presume that public officers "discharge their duties correctly, lawfully, and in good faith."¹⁴⁴ Basey alleges only that troopers wrongly arrested him and committed an illegal search and seizure but he was ultimately convicted on child pornography charges.¹⁴⁵ [R. 49] His civil complaint alleges embarrassment during his arrest and a failure to double-lock his handcuffs to prevent tightening—facts that even if true, are nowhere close to excessive force. [R. 53] The public has no more interest in monitoring these troopers by seeing their disciplinary records than it would by viewing their "examination and other assessment materials" that, by statute, cannot be released.¹⁴⁶

Lastly, even criminal defendants do not always obtain full access to officers' personnel records, so these disciplinary records should not be easily obtainable through a public records request where the need for such information is not as dire as preparing a

¹⁴³ See Cal. Penal Code § 832.7(b)(1) (allowing for disclosure if a law enforcement officer shoots, seriously injures, or kills a suspect, and in other certain circumstances).

¹⁴⁴ See, e.g., *Coburn v. McHugh*, 679 F.3d 924, 929 (D.C. Cir. 2012) (noting that the court is "guided by the strong but rebuttable presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith" (quoting *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997)) (internal quotation marks omitted); *White Buffalo Const., Inc. v. United States*, 546 F. App'x 952, 956 (Fed. Cir. 2013) (noting that "there is a presumption that government officials act in good faith, but this presumption can be overcome by evidence of a specific intent to injure").

¹⁴⁵ See *United States v. Basey*, No. 4:14-cr-00028-RRB (D. Alaska June 4, 2018), appeal docketed, No. 18-30121 (9th Cir. May 31, 2018).

¹⁴⁶ AS 39.25.080(a).

defense to criminal charges.¹⁴⁷ To protect the officers' privacy and the government's interest in the confidentiality of personnel records, criminal defendants must show that the file may contain records that are material and relevant to their defense.¹⁴⁸ If they do so, the trial court reviews the file *in camera*, turning over to the defense only the relevant materials.¹⁴⁹

On the final privacy consideration, there is no less intrusive way to protect the troopers' right to privacy. Since the records of only two individuals were requested, no redactions are possible to conceal their identities. This is unlike a requester seeking disciplinary information about a large enough volume of records, or without reference to the records of specific individuals, such that redacting would prevent individuals' identification. And any redactions that are more extensive than the troopers' home addresses or details about their family members would defeat the point of Basey's request—he wants the substantive content of the disciplinary records. [Tr. 19]

For all these reasons, disclosing the troopers' disciplinary records subject to Basey's request would violate the troopers' constitutional right to privacy.

CONCLUSION

The Department asks the Court to affirm the decision denying Basey's public records request for the disciplinary records of two state troopers.

¹⁴⁷ *Booth v. State*, 251 P.3d 369, 374 (Alaska App. 2011); *Dana v. State*, 623 P.2d 348, 354-55 (Alaska App. 1981).

¹⁴⁸ *Booth*, 251 P.3d at 374.

¹⁴⁹ *Id.*

PERSONNEL RULES

Fischer
File SB193



JUNE 1980

STATE OF ALASKA
DEPARTMENT OF ADMINISTRATION
DIVISION OF PERSONNEL

Rule 14
GENERAL PROVISIONS

14 01.0 Citizenship Qualifications

All employees of the State must be citizens of the United States except where otherwise provided for by law.

14 02.0 Oath of Office

All officers and employees of the State, before entering upon their duties, must take and subscribe to the oath or affirmation required by AS 39.05.130.

14 03.0 Roster of Employees

The Director shall establish and maintain a roster of all employees in the classified and partially exempt service.

14 04.0 Personnel Actions: General

All personnel actions affecting positions in the classified and partially exempt services, and the employees appointed to such positions, shall be issued in writing on such forms as may be prescribed by the Director, and a record of all such actions shall be sent to the Director.

14 05.0 Delegation of Personnel Duties

In accordance with the Act and these Personnel Rules, the Director may delegate personnel responsibilities and duties concerned with personnel to the principal departments covered by the Act.

14 06.0 Coverage of the Rules

These Rules apply to the positions in the classified service and to nonpermanent positions as stated. They apply to the positions in the partially exempt service only when such application is specifically stated.

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.

MEMORANDUM

TO : Don Candey
Administrative Officer
Support Services
Central Region
DOT/PF

DATE February 20, 1980

FILE NO. A66-281-80

TELEPHONE NO.

FROM: Avrum M. Gross
Attorney General
BY: Martha T. Mills *MTM*
Assistant Attorney General

SUBJECT: Ombudsman's Access to
Personnel Records

You inquired whether the Ombudsman's Office has unlimited access to personnel records of the Department of Transportation and Public Facilities. The Ombudsman may have access only to the information in personnel files which is generally available to the public. However, if regulations are adopted whereby the Ombudsman must maintain the same confidentiality for personnel records as required by State law, then the Ombudsman may have access to confidential information in personnel files. A similar approach has been taken with respect to the legislative auditor, who has adopted confidentiality procedures. This memorandum supercedes a prior memorandum of advice to B. B. Allen by G. Thomas Koester dated March 5, 1978.

Employee personnel records are protected by the laws of Alaska. Article I, Section 22 of the Alaska Constitution provides:

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

Alaska Statute 39.25.080 provides:

"Public Records". The state personnel records, except those records which the rules require to be held confidential for reasons of public policy, are public records and are open to public inspection, subject to reasonable regulations as to the time and manner of inspection."

The "rules" referred to by the statute are the personnel rules. Personnel Rule 14.07.0 entitled "Public Records", provides:

"Except for examination materials, performance evaluations, personal history, or other confidential materials so designated by the Director, employee records shall be public records. Such

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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."

On April 14, 1970, the attached memorandum on employee records policy and procedure was issued by the Director, Department of Administration, Division of Personnel. The memorandum sets out public policy pursuant to AS 39.25.080, providing that whereas information such as employee name, class title, salary, length of State employment, name of immediate supervisor, office address, office phone number, and (in some instances) home phone number, mailing address, and residence address are available to the public, all other more personal information is confidential.

As evidenced by the April 14, 1970 memorandum, most of the confidential information is available to the state employee and the people employed in the personnel office. Other information, such as background investigations, grievances, appeals, and letters and reports of personnel reference, are unavailable even to the employee. Matters such as applications, personnel actions, educational background, medical reports, performance evaluations, test scores and disciplinary letters or memoranda are confidential. Of course, the employee could waive the right to keep the information available to him or her confidential.

The Ombudsman has broad investigative powers. AS 24.55.160(a) provides:

"In an investigation, the ombudsman may (1) make inquiries and obtain information as he considers necessary; (2) enter without notice to inspect the premises of an agency, but only when agency personnel are present;"

Under AS 24.55.170, the Ombudsman has the power to subpoena any person or documents which he reasonably believes may provide information relating to the matter under investigation. The statutes relating to the Ombudsman do not specifically state that he has access to confidential personnel records, but the authority of the Ombudsman to investigate is very broad.

The only mention of confidentiality in the Ombudsman enabling statutes is in AS 24.55.160(b), which states:

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"The ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before him except insofar as disclosures may be necessary to enable him to carry out his duties and to support his recommendations."

The section does not require the Ombudsman to maintain the confidentiality of personnel records and it is within his discretion to decide what disclosures may be necessary to carry out his duties and support his recommendations.

In Falcon v. Alaska Public Offices Commission, 570 P.2d 469 (Alaska 1977), the Alaska Supreme Court balanced the constitutional provision guaranteeing the right of privacy with the public disclosure of income requirements of the Alaska conflict of interest law for public officials. In physician-patient situations where disclosure of the patient's identity might reveal the nature of the treatment, the court held that:

"In these situations, at least, we find that the extent to which the governmental interest in promoting fair and honest government would be impeded, does not outweigh the individual's privacy interest in protecting sensitive personnel information from public disclosure." Id. at page 480.

The court went on to hold that regulations exempting certain classes of patients, physicians, or others from disclosure would be appropriate.

Given the Falcon decision, if the Ombudsman promulgates regulations which would assure the same confidentiality for personnel records as state law requires, then access to those records would be appropriate.

AMG/MTM/sls

cc: Ombudsman

MEMORANDUM

State of Alaska

TO: ✓

Kenneth L. Karcen, Chief
Examining and Certification
Department of Administration
Division of Personnel

DATE : April 14, 1970

FROM: 

Patrick L. Hunt, Director
Department of Administration
Division of Personnel

SUBJECT:

Employee Records
Policy and Procedure

The purpose of this memo is to establish a written policy concerning the release of certain information we have on employees of the State. The authority for this policy is:

P.R. 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.

A.S. 39.25 .080 Public Records

The state personnel records, except those records which the rules require to be held confidential for reasons of public policy, are public records and are open to public inspection, subject to reasonable regulations as to the time and manner of inspection.

It shall be the policy of this Division to allow access of employee records to all who have justified cause and appropriate authority to view these records. This includes citizens of the State, the employee concerned, individuals and officers of employee associations authorized by the employee concerned to represent him in matters pertaining to his employment, officers and employees of the State who in the conduct of their duties have need to review such records.

It is understood that all employees of the Division of Personnel, and the various department personnel offices shall have access to all records necessary to the conduct of their assigned duties.

Consistent with the stated policy security practices with these records shall insure safeguarding the best interests of the employee and the State at all times.

Individuals who are not Certifying Officers of the State for Personnel Documents and Actions, may be required to sign the following affidavit

April 14, 1970

to be approved by the Director, or the Chief of Examining and Certification, or the Chief of Employee Relations, and maintained on file with the Director of Personnel.

I the undersigned, understand that certain employee records of the state of Alaska, to which I have received access are confidential. That information I have obtained or will obtain is not to be discussed or revealed to anyone except in the conduct of business directly related to the purposes for which this information has been obtained. I willingly accept the responsibility to safeguard the security of any written material I am furnished. It will be seen only by individuals properly authorized by the Director of Personnel to view such material.

_____ Signature	_____ Title	_____ Date
_____ Approved:	_____ Signature	_____ Date

The attached schedule for Employee Records Control is an administrative guide to the confidentiality of these records.

Information listed A-1 and A-2 is public information. Some care must be exercised in releasing home addresses. Inquiry should be made as to who is requesting the information and for what purpose. This Division is not to become a routine supplier of leads to salesmen or sales agencies. If a high volume of such requests are received from any single source, the Supervising Clerk is to be notified.

Though not specifically stated, all material A through B is available to the employee concerned or a duly authorized agent of the employee.

Any State Certifying Officer means an officer or employee of the State who has signed a Certifying Officer's Affidavit which has been approved by his Department Head and properly recorded by the Director of Finance as being authorized to sign "Personnel Documents".

Information listed as C and D is definitely confidential in nature and is not to be released without prior approval of: Director of Personnel; or, Chief of Examining and Certification; or, Chief of Employee Relations.

The Supervisor of the Records Unit is responsible for the security and location of all personnel files at all times. Appropriate "check-out and check-in" procedures will be followed.

Information

Access to:

Who authorizes
information
release:

Who authorize
copies:

A-1
Name, class title, salary, length of
state employment, name of immediate
supervisor, office address, and
office phone number.

Anyone of General
Public

Any Records
Clerk

N/A

A-2
Home phone number, mailing address,
and residence address.

General Public

Any Records
Clerk
NOTE: inquire
as to purpose.

N/A

B
Applications with supplementary
material supplied by the applicant;
except test scores.
Personnel actions; school transcripts,
or Diplomas; Licenses or Registra-
tions; Military Discharge; Letters/
Memos of Commendation for State
connected employment;
Routine Medical Reports ie; Physical.
Performance evaluation; Test Scores;
Disciplinary Letters/Memos for State
connected employment; Arrest/Con-
viction Records; Medical Reports
pertaining to mental/emotional health.

Any State Certi-
fying Officer or
Employee con-
cerned.
OR
Any State Employee
employed in a Per-
sonnel Office or
function.

Any Records
Clerk

Supervisor of
Records Unit;
record date and
to whom given.

C
Background Investigations;
Grievances; Appeals

See: Chief of
Examining and
Certification

D
Letters/Reports of Personnel
Reference; Employee Reference;
Non-State employment.

See: Chief of
Examining and
Certification

REPORT OF THE
BLUE RIBBON COMMISSION ON THE
STATE PERSONNEL ACT
TO THE
TWELFTH ALASKA STATE LEGISLATURE
FIRST SESSION

Senator Bill Ray
Chairman

Prepared by:
Staff of the
Blue Ribbon Commission on
the State Personnel Act
Pouch AG
Juneau, Alaska 99811

February, 1981

**MEMBERSHIP OF THE
BLUE RIBBON COMMISSION ON THE
STATE PERSONNEL ACT**

Senator Bill Ray - Chairman

Donald P. Fisher, Fiscal Analyst, Legislative Finance - Vice Chairman

**Representative Thelma Buchholdt
* Representative Mike Miller**

Myrton R. Charney, Executive Director, Legislative Affairs Agency

**Bruce Cummings, Director, Division of Personnel
* Michael McMullen**

Senator Richard Eliason

**Frank Flavin, Ombudsman
* Paddy Moriarty**

**Representative Jack Fuller
* Representative Sally Smith**

William Huston, Superintendent, S.E. Regional Correctional Institution

Lois Jund

**Lynda McCurry, Personnel Officer, Department of Labor
* Roger Thayer**

**Fred Muller, Deputy Commissioner, Department of Administration
* Sandra Withers**

Greg S. O'Claray, Inlandboatmen's Union SIUNA

**John Pugh, Director, Division of Social Services
* Robert Maurant**

**Cherie Shelley, Executive Director, Alaska Public Employees Assn.
* Darlene Livermore**

*** Alternates**

**Staff: Teresa B. Cramer, Administrative/Research Assistant
Loretta M. Knightlinger, Secretary**

INTRODUCTION

In 1978 the Alaska State Legislature created the Blue Ribbon Commission on the State Personnel Act and charged it with making a comprehensive review of the state personnel system. The commission was directed to consider refinements in light of collective bargaining and the growth of the number of state employees, to examine the question of the decentralization of the hiring of state employees, and to consider the deficiencies which had been revealed in reports from the Division of Legislative Audit and from the Ombudsman. See Appendix A, Legislative Resolve No. 27, 1978.

Since its inception, the commission has worked on the issues it was directed to consider, sponsoring legislation and making its recommendations known in annual reports to the legislature. In 1980, at the request of the commission, the legislature extended its life for another year, noting that because of the complex, inter-related nature of the issues facing the commission, more time was needed to resolve them. See Appendix B, Legislative Resolve No. 38, 1980.

Membership on the commission includes representatives from the groups and persons most concerned about the state personnel system. In addition to legislators, there are representatives from the public employee unions and associations representing state employees, from the Department of Administration and the Division of Personnel, from the Ombudsman, from state agencies, and from the public. This diversity and expertise enables the commission to fully consider the questions before it.

During the past year, the commission has focused on two main areas. It has concluded a comprehensive review of the State Personnel Act and also is recommending changes in the nepotism law of the state. In addition, testimony from retired Alaskans raised issues about the state retirement systems which the commission considered. As a result of this work, the commission is sponsoring three bills amending the retirement systems.

There are issues which the commission was unable to address this year which are discussed briefly in this report. Further study is needed before recommendations can be made on these topics. Because its work is not ended, the commission is requesting that the legislature extend its life for another year.

**SENATE BILL 193: AMENDING THE STATE PERSONNEL ACT
(AS 39.25)**

PURPOSE

The amendments proposed to the State Personnel Act are the result of work done by the commission over the past two years. The bill makes several major changes in the Act as well as making it more comprehensive, more consistent with the Public Employee Relations Act, and more clearly written.

The bill provides that those Personnel Rules which are matters of public policy are subject to the rule-making requirements of the Administrative Procedure Act. This will offer an increased opportunity for public comment before adoption of rules affecting the public.

The commission resolved the question of whether the state should move towards a centralized or a decentralized system of personnel administration by placing the present decentralized system in the Act. However, the bill limits the authority personnel officers presently have to operate independently from the Division of Personnel. Decentralization provides the best working relationship between the departments and the division.

Partially exempt and exempt employees of the state are granted increased protection from discrimination, including the right to appeal to the Personnel Board should they believe that they have been disciplined on the basis of unlawful discrimination.

In addition to these major changes, the bill makes a number of other amendments which are discussed in the analysis below.

SECTION BY SECTION ANALYSIS

Section 1. AS 39.040 is amended to read:

Sec. 39.25.040. DIRECTOR OF PERSONNEL. The head of the division of personnel is the director of personnel appointed by the commissioner of administration and responsible to the commissioner of administration for the execution of the duties and responsibilities imposed by this chapter and the rules adopted under this chapter. The director of personnel shall (MUST) have at least three years of practical working experience in the field of personnel administration.

(SB 193, page 1, line 9)

Comment

This section makes a stylistic amendment to conform to the Manual of Legislative Drafting. The substance is not changed.

Sec. 2. AS 39.25.060(b) is amended to read:

(b) Members of the board may not be (SHALL BE QUALIFIED ELECTORS OF THE STATE WHO ARE NOT) employees (OR OFFICERS) of the state. Not more than two members of the board may be members of the same political party.

(SB 193, page 1, line 17)

Comment

This section deletes the obsolete requirement that members of the Personnel Board be qualified electors of the state. It also eliminates the reference to officers. The definition of state employees in section 18 includes

Sec. 5. AS 39.25.070 is amended by adding a new paragraph to read:

(7) employ staff members, who shall be in the classified service.

(SB 193, page 2, line 3)

Comment

The Personnel Board does not have statutory authority for employing staff members at present. The proposed language places any employees of the board in the classified service. The members of the commission considered that Personnel Board employees should be protected from the possibility of arbitrary action or undue influence to which they might be exposed if they were placed in the partially exempt or exempt service.

Sec. 6. AS 39.25.080 is repealed and reenacted to read:

Sec. 39.25.080. PUBLIC RECORDS. (a) State personnel records, including employment applications and examination 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; and
- (6) the compensation authorized for a state employee.

(c) A state employee has the right to examine his own personnel files and may authorize others to examine his files.

(d) An applicant for state employment who appeals an examination score may review written examination questions relating to the examination unless the questions are to be used in future examinations.

(SB 193, page 2, line 6)

Comment

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).

Subsections (c) and (d) set out new material to confirm a person's right to examine his own files and to establish when an applicant may review written examination materials.

Sec. 7. AS 39.25.090 is amended to read:

Sec. 39.25.090. COVERAGE OF CHAPTER. This chapter and the rules adopted under it apply to all positions in (1) the classified service, and (2) the partially exempt and exempt services (SERVICE) as specifically provided.

(SB 193, page 2, line 26)



JUNEAU, ALASKA

Alaska State Legislature

BLUE RIBBON COMMISSION ON THE
STATE PERSONNEL ACT
Pouch AG/Mail Stop 0123
Juneau, Alaska 99811
(907) 465-4442

Senator Bill Ray
Chairman

MEMORANDUM

March 31, 1981

TO: Members of the Senate State Affairs Committee

FROM: Teresa B. Cramer *TBC*
Administrative Assistant

SUBJECT: SB 193 - Amending the State Personnel Act

Senate Bill 193 makes a comprehensive revision of the State Personnel Act, to change personnel practices, to expand the protections granted employees in the exempt and partially exempt services, and to make the Act consistent with the Public Employment Relations Act. The major changes made in the bill are noted below:

Section 6. Amending AS 39.25.080. PUBLIC RECORDS.

This section amends the current law to provide that only those personnel records listed are available for public inspection. In fact, the materials listed are those which are presently made available under existing law for public inspection. The law now states that except for those materials made confidential by the Personnel Rules, state personnel records are public.

Section 8. Amending AS 39.25.110. EXEMPT SERVICE.

△ The bill deletes the material in the existing paragraph (8) which states that "certificated teachers employed by the state to teach in schools operated by the state" are in the exempt service. After being advised by the Personnel Office of the Department of Education that there were no employees of schools operated by the state, the commission deleted the paragraph. In fact, there are employees considered to fall within this group. They are employed as correspondence study teachers in Juneau and in the Alaska Skills Center in Seward. The commission has not had an opportunity to consider whether it wishes to change its initial action of deleting paragraph (8).



JUNEAU, ALASKA

Alaska State Legislature

BLUE RIBBON COMMISSION ON THE
STATE PERSONNEL ACT

Senator Bill Ray, Chairman

Pouch YG
Mail Stop 3123
Juneau, Alaska 99811
(907) 465-4442

MEMORANDUM

January 27, 1982

TO: Members of the Senate Judiciary Committee

FROM: Teresa B. Cramer *TBC*
Administrative Assistant

SUBJECT: CSSB 193(SA) Amending the State Personnel Act

The Blue Ribbon Commission sponsored SB 193 to make a comprehensive revision of the State Personnel Act, to change personnel practices, to expand protections granted employees in the exempt and partially exempt services; and to make the Act consistent with the Public Employment Relations Act. Last session, Senate State Affairs considered and amended the bill.

The State Personnel Act establishes the state personnel system and implements the constitutional requirement that the merit principle govern employment of persons by the state. Article XII, Section 6. Some of its provisions are superseded by provisions of collective bargaining agreements between the state and employee organizations. It provides the entire personnel system for the 19 or 20 classified service employees who are not members of a bargaining unit and for all partially exempt employees to the extent it applies to them.

The major changes proposed in CSSB 193(SA) are discussed briefly below. I have noted also some of the amendments made by the State Affairs Committee.

Section 6: AS 39.25.080. PUBLIC RECORDS.

Page 2
Line 6

The amendment lists those parts of the personnel records which are to be considered public records and is consistent with the current Personnel Rules. The law presently says that all records except those which the Rules require to be held confidential are open to public inspection.

Section 12: AS 39.25.140. AMENDMENT OF PERSONNEL RULES.

Page 7
Line 25

Subsection (c) of this section changes current law to require that those Personnel Rules which concern



JUNEAU, ALASKA

Alaska State Legislature

BLUE RIBBON COMMISSION ON THE
STATE PERSONNEL ACT

Senator Bill Ray, Chairman

Pouch YG
Mail Stop 3123
Juneau, Alaska 99811
(907) 465-4442

MEMORANDUM

April 19, 1982

TO: House State Affairs Committee

FROM: Teresa B. Cramer *TBC*
Administrative Assistant

SUBJECT: CSSB 193 (Jud) am

The Blue Ribbon Commission sponsored Senate Bill 193 as a comprehensive revision of the State Personnel Act. It makes changes in some personnel practices, expands the protections granted to employees in the exempt and partially exempt services and makes the Act consistent with the Public Employment Relations Act.

Those sections of the bill which present significant changes are analyzed briefly below.

Page 2
Lines 6-25

Section 6. Amending AS 39.25.080. PUBLIC RECORDS.

This section sets out those personnel records which will be open to public inspection. All other personnel records will be kept confidential.

The current law provides that all records are public except those which the Personnel Rules make confidential. In fact, the amendment would not change the existing practice since those items listed are the only personnel records now open to the public.

Page 2
Line 27 ff.

Section 7. Amending AS 39.25.090. COVERAGE OF CHAPTER.

This amendment provides that the State Personnel Act applies to exempt positions as specifically provided. The Committee Substitute gives added rights of appeal to exempt employees of the executive branch in cases of unlawful discrimination. (See Section 16)

Page 3
Line 2 ff.

Section 8. Amending AS 39.25.110. EXEMPT SERVICE.

This section does not change the existing membership of the exempt service. It does add statutory reference to employees of the Citizen's Advisory Commission



JUNEAU, ALASKA

Alaska State Legislature

BLUE RIBBON COMMISSION ON THE STATE PERSONNEL ACT

Senator Bill Ray, Chairman

Pouch YG
Mail Stop 3123
Juneau, Alaska 99811
(907) 465-4442

M E M O R A N D U M

April 30, 1982

TO: House Judiciary Committee

FROM: Teresa B. Cramer *TBC*
Administrative Assistant

SUBJECT: HCS CSSB 193 (SA) Amending State Personnel Laws

The Blue Ribbon Commission sponsored Senate Bill 193 as a comprehensive revision of the State Personnel Act. It makes changes in some personnel practices, expands the protections granted to employees in the exempt and partially exempt services and makes the Act consistent with the Public Employment Relations Act.

Those sections of the bill which present significant changes are analyzed briefly below.

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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,

Appellee.

Supreme Court No. S-17099

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

CERTIFICATE OF SERVICE AND TYPEFACE

I hereby certify that on this date a true and correct copy of the **Supplemental Brief of Appellee State of Alaska, Department of Public Safety** and this **Certificate of Service** was served via U.S. Mail to the following:

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

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


Kaleb Basey #17753006
FMC Lexington
FMC Cardinal Unit
P.O. Box 14500
Lexington, KY 40512

D. John McKay
Attorney at Law
117 East Cook Avenue
Anchorage, AK 99501

Joshua Decker
Stephen N. Koteff
ACLU of Alaska Foundation
1057 West Fireweed Lane, Suite 207
Anchorage, AK 99501

APEA/AFT
c/o Brian Penner
3310 Arctic Blvd., Suite 200
Anchorage, AK 99503

I further certify, pursuant to App. R. 513.5, that the aforementioned documents were prepared in 13 point proportionately spaced Times New Roman typeface.


Virginia K. Bozeman
Law Office Assistant II

Date