

IN THE SUPREME COURT OF THE STATE OF ALASKA

KALEB LEE BASEY

Appellant,

vs.

STATE OF ALASKA,
DEPARTMENT OF PUBLIC
SAFETY, DIVISION OF STATE
TROOPERS

Appellee.

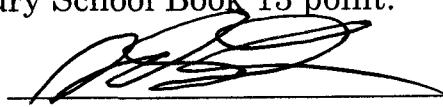
Supreme Court No. S-17099

CERTIFICATE OF SERVICE AND TYPEFACE

I, Bradley C. Scott-Knecht, state that I am employed by the Alaska Department of Law, Office of Special Prosecutions, and that on September 11, 2018, I mailed a copy of the State's DEPARTMENT OF PUBLIC SAFETY OPPOSITION BRIEF, EXCERPT OF RECORD, REQUEST FOR ORAL ARGUMENT and this CERTIFICATE OF SERVICE AND TYPEFACE in the above-titled case to:

Kaleb Basey
FMC
Federal Medical Center
P.O. Box 14500
Lexington, KY 40512

I further certify, pursuant to App. R. 513.5, that the font used in the aforementioned documents is Century School Book 13 point.


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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,

Appellee.

Supreme Court No. S-17099

Trial Court No. 4FA-16-02509CI

APPEAL FROM THE SUPERIOR COURT
JUDGE DOUGLAS BLANKENSHIP ORDER DECLINING TO DISCLOSE
TROOPER PERSONEL FILE MATERIALS

DEPARTMENT OF PUBLIC SAFETY OPPOSITION BRIEF

JAHNA LINDEMUTH
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Filed in the Supreme Court
of the State of Alaska

September _____, 2018.

MARILYN MAY, CLERK
APPELLATE COURTS

VRA CERTIFICATION. I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

Deputy Clerk

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AUTHORITIES RELIED UPON

Alaska Constitution Article I, Section 22 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(a) provides:

Personnel Records Confidential

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.

STATEMENT OF JURISDICTION

On May 3, 2018, Superior Court Judge Douglas Blankenship orally ruled that Mr. Basey had not made a sufficient showing to justify an in camera review or disclosure of personnel file materials of Alaska State Troopers Hanson and Kristen Hansen and Albert Bell in this civil public records request case.

This appeal properly is before this court pursuant to AS 22.05.010(b) and Appellate Rule 202.

STATEMENT OF ISSUE

Did Superior Court Judge Douglas Blankenship err in ruling that Mr. Basey did not make a sufficient showing to justify an in camera review or disclosure of personnel file materials of Alaska State Troopers Kristen Hansen and Albert Bell in this civil public records request case?

STANDARD OF REVIEW

In determining whether Superior Court Judge Douglas Blankenship erred in ruling that Mr. Basey did not make a sufficient showing to justify an in camera review or disclosure of personnel file materials of Alaska State Troopers Kristen Hansen and Albert Bell in this civil public records request case, this court is to apply its independent judgment. *See, Varilek v. City of Houston*, 104 P.3d 849 (Alaska 2004).

STATEMENT OF FACTS / COURSE OF PROCEEDINGS

A joint criminal investigation conducted by the Department of Public Safety, Division of the Alaska State Troopers and Fort Wainwright Army Criminal Investigation Division resulted in the filing of federal criminal charges against Mr. Basey in *United States v. Kaleb Basey*, 4:14-CR-00028-RRB. [Record at 46.] Mr. Basey filed a federal civil rights 42 U.S.C. 1983 lawsuit against the investigating law enforcement officers, including Alaska State Troopers Kristen Hansen and Albert Bell in *Basey v. Kirsten Hansen, Albert Bell, et. al.*, 4:16-CV-00004-RRB. [Record at 48-64.] During the pendency of both the criminal prosecution and civil rights cases, Mr. Basey sent a public record request to AST seeking disclosure of the investigative report and related materials. [Record at 89-91.] AST Captain Anthony April denied the request. [Record at 23-27, 43, and 93-94.] Mr. Basey appealed Captain April's denial decision to the Commissioner of the Department of Public Safety. [Record at 23-27, 43, and 95-98.] The Commissioner of the Department of Public Safety upheld the denial decision. [Record at 43.]

Mr. Basey filed a complaint for injunctive relief in the Superior Court seeking an order directing DPS to disclose the criminal investigative report and related materials, despite the fact that the investigative report and related materials would be subject to disclosure to Mr. Basey in the

federal criminal prosecution and civil rights cases in accord with discovery rules applicable in those cases. *See*, Federal Criminal Rule 16 and Federal Civil Rules 27 – 37. [Record at 79-85.]

Superior Court Judge Douglas Blankenship dismissed the complaint for injunctive relief, pursuant to AS 40.25.120(a)(6)(A) and/or AS 40.25.122, since the sought after records were the subject matter of the pending federal criminal prosecution as well as the pending civil lawsuit. [Record at 76.]

This court in *Basey v. Alaska Department of Public Safety*, 408 P.3d 1173 (Alaska 2017), reversed Superior Court Judge Douglas Blankenship’s dismissal of Mr. Basey’s complaint and remanded the case for further proceedings consistent with the opinion.

On remand, DPS disclosed to Mr. Basey all of the materials he sought, except for the personnel file materials of Alaska State Troopers Kristen Hansen and Albert Bell. [Record at 101-103 and 117.]

On May 3, 2018 Superior Court Judge Douglas Blankenship orally ruled that Mr. Basey did not make a sufficient showing to justify the court making an in camera review or ordering disclosure of the Alaska State Trooper personnel file materials in this civil public records request case. [Record at 101-103.]

This appeal follows.

ARGUMENT

SUPERIOR COURT JUDGE DOUGLAS BLANKENSHIP PROPERLY RULED THAT MR. BASEY DID NOT MAKE A SUFFICIENT SHOWING TO JUSTIFY AN IN CAMERA REVIEW OR DISCLOSURE OF PERSONNEL FILE MATERIALS OF ALASKA STATE TROOPERS KRISTEN HANSEN AND ALBERT BELL IN THIS CIVIL PUBLIC RECORDS REQUEST CASE.

Mr. Basey was provided in connection with the federal prosecution of him all of the materials he again has been provided in this civil public records request case. It is unclear to DPS whether Mr. Basey was provided personnel file materials of Alaska State Troopers Kristen Hansen and/or Albert Bell in connection with the federal prosecution. It also is unclear to DPS whether Mr. Basey has been provided personnel file materials of Alaska State Troopers Kristen Hansen and/or Albert Bell in connection with the federal civil rights case.

The sole remaining materials Mr. Basey seeks and which DPS continues to assert are not subject to disclosure pursuant to a public records request are records reflecting any discipline of Troopers Albert Bell and/or Kirsten Hansen. Those records are personnel file materials and thereby beyond the scope of permissible public record requests. See, Alaska Constitution Article I, Section 22; AS 39.25.080; and *Jones v. Jennings*, 788 P.2d 732 (Alaska 1990).

The proper venues in which to address the question of whether Mr. Basey is entitled to disclosure of the sought after personnel records is the federal criminal prosecution (*United States v. Kaleb Basey*, 4:14-CR-00028-RRB) and/or the federal civil rights lawsuit Mr. Basey has filed against the law enforcement officers involved in the criminal investigation (*Basey v. Kirsten Hansen, Albert Bell, et. al.*, 4:16-CV-0004-RRB). See, e.g., *Braham v. State*, 571 P.2d 631 (Alaska 1977) and *Jones v. Jennings*, 788 P.2d 732 (Alaska 1990). It is only in the context of those cases – as the below discussed law of Alaska demonstrates - that a court is in a position to make an informed decision as to the relevance of the sought after personnel records, determine the sufficiency of Mr. Basey’s showing to justify the court conducting an in camera review of the materials, weigh the privacy interests of the Alaska State Troopers and Troopers Kirsten Hansen and Albert Bell in the materials, and make the ultimate decision on whether disclosure of any of the personnel records is mandated. *Id.*

In *Booth v. State*, 251 P.3d 369 (Alaska App. 2011) the Alaska Court of Appeals addresses the initial threshold that a criminal defendant seeking disclosure of personnel file materials must carry and what is to occur if the threshold is met.

To satisfy the initial threshold, a criminal defendant seeking disclosure must identify information that is the type that would be reflected

in a police enforcement officer's personnel file that is relevant to the defendant's guilt or innocence - in light of the facts of the case, the state's theory of prosecution, and the defendant's theory of defense. The criminal defendant must serve the motion on the law enforcement agency and individual officers so as to allow the agency and officers an opportunity to assert appropriate objections to disclosure consistent with their interests in maintaining the confidentiality of the personnel file materials. *See, Braham v. State*, 571 P.2d 631 (Alaska 1977); *Nelson v. State*, 782 P.2d 290 (Alaska App. 1989); and *Spencer v. State*, 642 P.2d 1373 (Alaska App. 1982). The criminal defendant must support his or her motion for disclosure "with more than conclusory statements or unsupported assertions." *Booth*, 251 P.3d at 376. The motion must include "a detailed statement of material facts which can be proved by the [moving] party." *Id.* at 376; *citing* Alaska Criminal Rule 42(b)(2). The trial court is to deny motions that rely on conclusory statements and unsupported assertions, rather than provide actual factual support for the underlying assertions about why the requested information is relevant. *Id.* at 376-77

If, after consideration of any objections of the law enforcement agency and individual officers, the trial court determines that the criminal defendant carried his or her initial burden, the trial court then is to conduct an in camera review of the materials:

It is important to emphasize that when a defendant satisfies the *Dana* threshold requirement, **this does not mean that the defendant becomes entitled to outright disclosure of the requested personnel file.** Rather, the defendant becomes entitled to have the trial judge examine the file in camera to see if it contains information relevant to the issue(s) that the defendant has identified.

Id. at 376 (emphasis added).

If, during the in camera review, the trial judge determines that the personnel file does indeed contain relevant information, the judge then is to provide notice to the law enforcement agency and individual officers of the materials that the court is considering for disclosure to the criminal defendant and allow the agency and individual officers to review the materials and provide any further objections to disclosure. *See, Braham v. State*, 571 P.2d 631 (Alaska 1977); *Nelson v. State*, 782 P.2d 290 (Alaska App. 1989); and *Spencer v. State*, 642 P.2d 1373 (Alaska App. 1982).

If the agency or individual officers assert privacy interests in the materials proposed to be disclosed, the trial court must provide the prosecutor's office a deadline to determine if the prosecution will go forward with disclosure of the materials, or if the prosecution will dismiss the prosecution in order to protect the interests of the agency or individual officers. *See, Braham v. State*, 571 P.2d at 643.

If the prosecutor's office elects to proceed with the prosecution despite the privacy interests of the agency and individual officers, the materials then are to be provided to both the defendant and the prosecutor's office for use in the criminal proceeding. *Id.* at 643. If the prosecution decides to dismiss the case in order to protect the privacy interests of either the agency or individual officers, the trial court is to return the materials to the agency without disclosure to either the criminal defendant or prosecutor's office. *Id.*

In *Dana v. State*, 623 P.2d 348 (Alaska App. 1981), the Alaska Court of Appeals upheld the trial court's refusal to conduct an in camera review of the personnel file of an undercover officer whose contact with Dana resulted in him being charged with cocaine distribution. Dana argued that the personnel file was relevant to determining any possible bias, prejudice, or other exculpatory material which would reflect on the credibility of the officer or her immediate supervisor, who had recommended the officer be specially commissioned as an officer. *Id.* at 355. The Court of Appeals held that Dana's contention did not carry her burden of "showing of any necessity for discovery of the file." *Id.* In so doing, Court of Appeals found helpful the reasoning of the New York Court of Appeals in *People v. Gissendanner*, 399 N.E. 2d 924 (1980) which reviews other cases finding discovery of similar records

appropriate only when the criminal defendant makes a specific factual preliminary showing of relevance and materiality.

Dana unquestionably stands for the proposition that a trial court may not allow a criminal defendant to go on a fishing expedition for information that may be helpful to him or her. *Id.* at 355. (“Counsel for Dana simply did not make any showing that the materials he wanted from the personnel file would be more than a fishing expedition for unspecified material for impeachment.”)

Crockerham v. State, 933 P.2d 537 (Alaska 1997) is a case in which this court upheld the trial court’s refusal to conduct an in camera review of a personnel file due to the criminal defendant’s effort being a “fishing expedition.”

The present case is a civil public records request case, not a criminal prosecution or civil rights lawsuit. The importance of disclosing personnel file material in this case, therefore, is far less than the importance of disclosing exculpatory information in a criminal prosecution or federal civil rights lawsuit. Mr. Basey was and remains free to seek disclosure of the personnel file materials in the federal criminal prosecution (*United States v. Kaleb Basey*, 4:14-CR-00028-RRB) and federal civil rights case (*Basey v. Kirsten Hansen, Albert Bell, et. al.*, 4:16-CV-00004-RRB) – both of which arise out of the criminal investigation. The privacy interests of the Alaska

State Troopers as an organization and those of Troopers Kristen Hansen and Albert Bell individually far outweigh Mr. Basey's interest in this civil public records request case, which is limited to his being allowed to review the materials for his reading pleasure. *See, Jones v. Jennings*, 788 P.2d 723, 738 (Alaska 1990) (private information to be disclosed by court order only where disclosure required by compelling interest and ordered in least intrusive manner). As Superior Court Judge Blankenship properly found, Mr. Basey did not carry his burden of establishing a specific factual preliminary showing to justify an in camera review, let alone outright disclosure, of the personnel file materials.

In addition to the above, DPS believes it appropriate to address the following two additional issues in this brief, issues Mr. Basey raises in his opening brief.

First, any materials that may exist of alleged misconduct by or impeachment of Troopers Kristen Hansen and/or Albert Bell would be in the personnel files of those individual troopers. AS 39.25.080(a) exempts state employee personnel file materials of that nature from disclosure in response to public record requests. The statute specifically identifies employee "assessment materials" as exempt from disclosure, in recognition of the privacy interests of state employees – including Troopers Kristen Hansen and Albert Bell - in such materials. *Id.* The appellate courts of Alaska

repeatedly have recognized the privacy interests of state employees in personnel file materials, including assessment materials. See, e.g., *Crockerham v. State*, 933 P.2d 537 (Alaska 1997); *Braham v. State*, 571 P.2d 631 (Alaska 1977); *Booth v. State*, 251 P.3d 369 (Alaska App. 2011); and *Dana v. State*, 623 P.2d 348 (Alaska App. 1981). See also, February 28, 1984 Formal Alaska Attorney General Opinion Regarding Ombudsman Access to State Employee Personnel Files.

And second, Mr. Basey properly recognizes in his opening brief that there is no statutory, case law, or other legal basis that would provide for “waiver” of the privacy interests of the Alaska State Troopers as an agency or Troopers Kristen Hansen and Albert Bell individually in the personnel file materials due to Mr. Basey’s request for the materials originally being denied in reliance on AS 40.25.120(a)(6)(A) and AS 40.25.122. The situation in the present case is unlike the situation in the cases upon which Mr. Basey relies - *Beal v. Beal*, 209 P.3d 1012 (Alaska 2009); *Petrolane v. Robles*, 154 P.3d 851 (Alaska 2007); and *State v. Carlson*, 65 P.3d 851 (Alaska 2003). In those cases, this court declined to address an issue sought to be raised in a second appeal under “the law of the case” in light of the fact that the issue was outside scope of the original remand.

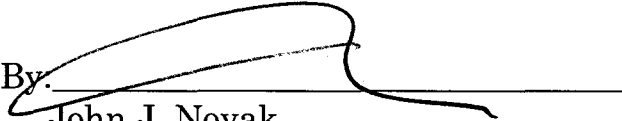
CONCLUSION

For the above discussed reasons, this court must conclude that Superior Court Judge Douglas Blankenship properly ruled that Mr. Basey did not make a sufficient showing to justify an in camera review or disclosure of personnel file materials of Alaska State Troopers Kristen Hansen and Albert Bell in this civil public records request case. The personnel file materials are not subject to disclosure pursuant to a public records request. The proper venues in which to address the question of whether Mr. Basey is entitled to disclosure of the sought after personnel records is the federal criminal prosecution of Mr. Basey and/or the federal civil rights lawsuit Mr. Basey has filed against the law enforcement officers involved in the criminal investigation. It is only in the context of those cases that a court can make an informed decision as to the relevance of the sought after personnel file materials; determine the sufficiency of Mr. Basey's showing to justify the court conducting an in camera review of the materials; weigh the privacy interests of the Alaska State Troopers and Troopers Kirsten Hanson and Albert Bell; and make the ultimate decision on whether disclosure of any personnel file materials is mandated, including the propriety of imposing confidentiality or other conditions on any disclosure. This court must affirm Superior Court Douglas Blankenship's ruling denying Mr. Basey's request for

disclosure of the personnel file materials in this civil public records request case.

DATED this 11th day of September, 2018

JAHNA LINDEMUTH
ATTORNEY GENERAL

By: 
John J. Novak
Assistant Attorney General
Counsel for the Dept. of Public Safety
Alaska Bar No. 8511184

IN THE SUPREME COURT OF THE STATE OF ALASKA

KALEB LEE BASEY,

Appellant,

vs.

STATE OF ALASKA
DEPARTMENT OF PUBLIC SAFETY,

Appellee.

Supreme Court No. S-17099

Trial Court No. 4FA-16-02509CI

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE DOUGLAS BLANKENSHIP

APPELLEE'S EXCERPT OF RECORD
VOLUME 2 OF 2

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MARILYN MAY, CLERK
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA AT FAIRBANKS

Ctrm: 404
Date: May 03, 2018

Kaleb Basey
vs.
ABI

Judge: Blankenship
Clerk: Siebels

Case: 4FA-16-2509CI

PROCEEDINGS: Motion hearing

COUNSEL PRESENT

Plaintiff: Pro Se (Telephonic)

Defendant: Mr. Novak (Telephonic)

03:16:56 To this case
Clerk places phone call to FCC

03:25:46 Recording Paused.
03:30:30 Recording Resumed.

03:30:5 Court recites procedural history of case.

03:32:12 Basey: I have a summary of my records request.

03:32:46 Novak: Para 1 - 3 all those materials have been disclosed . . . para 4 there is no such policy, para 5 is the only matter in contention is the personal files. . . . everything has been produced except para 5, the personnel files.

03:33:50 Court: Posse Comitatus Act

03:35:14 Novak: I reviewed materials . . . back in the 1990 I did drug cases, we had cases . . . we discussed with the investigators, I was involved in motion practice. . . there is no policy in existence dealing with that. OPM that is where policies are set forth. . . .

03:37:40 To comply with the law, there is no policy, there is no directive. . . . I have communicated and spoke with them as well as my own review of the OPM.

03:39:05 Basey: I would like to say, the Alaska Public Records Act from my analysis it is based on the freedom of information act . . . there should be an affidavit. This is not a motion for summary judgment to say he should be relieved of his duties to search for these records. . . .

03:41:40 Court: It does seem to the court there should be something

Novak: At the DPS on any given day we have apprx 1000 public records

Ctrm: 404
Clerk: Siebels
Date: May 03, 2018
Case: 4FA-16-2509CI

request. . . there are requirements on what an appropriate response is supposed to be, there is no requirement a sworn statement be given, an officer of the court. . . I am not wild about Mr. Basey to try to arrange a subpoena, I would like put this to bed. . . .

- 03:45:49 Court: Order in 2 weeks file an affidavit concerning the scope of the inquiry concerning para 4 dated September 1, 2016 records request. Any directive, rules, guidelines, opinions and advice to law enforcement from January 1, 2013 and the response should include any directives . . . that are currently in effect even if communicated before January 1, 2013.
- 03:48:50 Basey: The government in its response would like to place the burden on me. . . . the Supreme Court stated it is the state who is to bear the burden. . . .
- 03:50:49 Court: Booth case. A reasonable reason to require . . . I need to have something to show the reason why you want it. . . . your explanation is twofold, a basis for the courts review and a basis for me to make a determination whether any records should be disclosed.
- 03:53:49 Basey: Booth case, that was a criminal case . . . my criminal case, the federal district court, Hansen and Bell were responsible . . . Hansen and Bell used an invalid search . . . I would be interested if any other instances in these officers personal files.
- 03:57:04 Court: If I understood, there is limitation about what can be disclosed when personnel records are disclosed. . . .
- 03:58:09 Novak: I agree. this action is a public records request, he is just curious, if he wants a review of the procedure . . .
- 03:59:37 Basey: Yes, this lawsuit is based upon the state public records act.
- 03:59:58 Novak: I can certainly disclose, I have not given that information.
- 04:00:43 Basey: My request was for their disciplinary records. . . .
- 04:01:13 Court: AS39.25.080, The act. . . I don't see where I can issue an order those be disclosed. As far as the policies are concerned there needs to a more thorough response.
- 04:02:56 Basey: I want the information I have requested in regards to disciplinary files, I am not interested. . . .
- 04:03:28 Court: That information is not available, the court denies that request.

Ctrm: 404
Clerk: Siebels
Date: May 03, 2018
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Mr. Novak file something to disclose guidelines, policies, directives in effect as of January 1, 2013.

- 04:04:46 Basey: This was my priority, in regards to #6 which pertained to records between Hansen. . . Mr. Novak provided some emails that were not responsive to that date range.
- 04:06:30 Novak: Not only did he get what he asked for. . . .
Every communication with Hansen and FBI, everything you asked for plus more.
- 04:07:20 Court: Include in affidavit also.
If there is other relief or requests, file a request for a hearing.
- 04:09:06 To next case

1 IN THE SUPREME COURT OF THE STATE OF ALASKA

2 KALEB LEE BASEY,

3 Appellant,

4 v.

Supreme Court No. S-17099

5 STATE OF ALASKA
6 DEPARTMENT OF PUBLIC SAFETY,

7 Appellee.

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

9 REQUEST FOR ORAL ARGUMENT


10 I certify this document and its attachments do not contain the (1) name of
11 a victim of a sexual offense listed in AS 12.61.140 or (2) residence or
12 business address or telephone number of a victim of or witness to any
13 offense unless it is an address identifying the place of a crime or an
14 address or telephone number in a transcript of a court proceeding and
15 disclosure of the information was ordered by the court.

16 Comes now, the State of Alaska, Department of Public Safety, by
17 the through Assistant Attorney General John J. Novak and hereby files this
18 request pursuant to Alaska Appellate Rule 505 for oral argument.
19

20 Dated this 11th day of September, 2018 at Anchorage, Alaska.

21 JAHAN LINDEMUTH
22 ATTORNEY GENERAL

23 By:

24 
25 John J. Novak
26 Assistant Attorney General
27 Alaska Bar No. 8511184