

SUPREME COURT LIVE

October 10, 2019
Fairbanks

ORAL ARGUMENT CASE SUMMARY

Kaleb Lee Basey,

Appellant,

v.

State of Alaska, Department of Public Safety,

Appellee.

Supreme Court Case No. S-17099

Disclaimer: *This summary of the case highlights the major issues raised but is not intended to be comprehensive. It has been prepared for educational purposes only by the Supreme Court LIVE program staff and does not reflect the input or views of any member of the court.*

OVERVIEW OF THE CASE

How much access should the public have to the discipline records of law enforcement officers? A man was charged with a **criminal offense** in **federal court** after an investigation involving the **Alaska State Troopers** and the Fort Wainwright Criminal Investigation Division. He brought a **civil lawsuit** in federal court against certain people involved in the investigation, including two Alaska State Troopers. The man made a **public records request** to the **Alaska Department of Public Safety (DPS)**, the agency of which the Troopers are a part, seeking information about the two Troopers' training and discipline records. DPS refused to give him the records, so the man sued in **state court** asking the court to order DPS to give him the records. The **trial judge** refused to do so, and the man appealed to the Alaska Supreme Court, asking it to decide that he can access disciplinary records of the two Troopers as a member of the public.

ATTORNEYS

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QUESTIONS PRESENTED FOR REVIEW

1. Are state employee discipline records confidential under the State Personnel Act and not subject to disclosure under the Alaska Public Records Act?
2. If the records are not confidential under the State Personnel Act, do state employees have a state constitutional privacy interest in their discipline records that should be protected?

MAJOR AUTHORITIES TO CONSIDER

- **Alaska Constitution, Article 1, § 22**, Right of Privacy
- **Alaska Statutes AS 39.25.010-.995**, State Personnel Act
- **Alaska Statutes 40.25.100-.295**, Alaska Public Records Act.

Alaska Supreme Court Case Law

- ***Basey v. State, Department of Public Safety***, 408 P.3d 1173 (Alaska 2017) (first appeal related to Mr. Basey's request).
- ***Jones v. Jennings***, 788 P.2d 732 (Alaska 1990) (police officer's right to privacy when discipline records sought in civil discovery).
- ***Alaska Wildlife Alliance v. Rue***, 948 P.2d 976 (Alaska 1997)

- (considering whether time sheets are subject to Public Records Act and whether state employees have expectation of privacy in them).
- ***International Association of Fire Fighters, Local 1264 v. Municipality of Anchorage***, 973 P.2d 1132 (Alaska 1999) (firefighters have no legitimate expectation of privacy in their names and salaries).
 - ***City of Kenai v. Kenai Peninsula Newspapers, Inc.***, 642 P.2d 1316 (Alaska 1982) (setting out historical context of public records disclosure in Alaska).

SUMMARY OF THE CASE

Kaleb Basey was the subject of a criminal investigation while he was stationed at Fort Wainwright. The Alaska State Troopers played a role in the investigation. After Basey was arrested and charged with federal crimes, he brought a civil lawsuit in federal court against a number of people involved in the investigation, including two Alaska State Troopers, alleging they had violated federal law.

Basey's federal civil lawsuit was **stayed** (put on hold) during his criminal case, so Basey could not conduct **discovery** in the civil lawsuit.¹ Basey asked the State of Alaska to give him certain documents as a member of the public, using the **Alaska Public Records Act**, which allows members of the public to access many government documents. Basey asked for records related to the investigation that resulted in his arrest, records about the Troopers' "use of military search authorization," and discipline and training records of the two Troopers named in his lawsuit.² The Department of Public Safety, Division of Alaska State Troopers (**DPS**), at first denied the requests because it said the records were related to "a matter that is currently the subject of civil and/or criminal litigation" to which Basey was a **party**.

Basey then sued DPS in **state superior court**, as allowed by the Alaska Public Records Act, and DPS raised two objections based on the Public Records Act. Basey appeared **in propria persona** (has represented himself) in the state court proceedings. The superior court **dismissed** his case, and Basey filed his first appeal with the **Alaska Supreme Court**. The Alaska Supreme Court agreed with Basey that the superior court should not have dismissed the lawsuit, and it **remanded** (sent back) the case to the superior court.

¹ The **discovery** process allows both sides of a lawsuit to get information from the other side and from witnesses before trial. In a federal civil suit discovery is governed by the Federal Rules of Civil Procedure.

² *Basey v. State, Department of Public Safety*, 408 P.3d 1173, 1175 (Alaska 2017).

Basey waited two weeks after the first Alaska Supreme Court decision; he then filed a **motion to compel** with the superior court asking it to order DPS to give him the documents. DPS said it would give him some documents, but it gave a new reason for not disclosing any discipline records the Troopers might have: DPS now said the disciplinary records were protected by the **State Personnel Act**, which makes many state employee records confidential. Because the **Alaska Public Records Act** does not allow disclosure of records that state law requires “to be kept confidential,” DPS reasoned that the State Personnel Act did not allow disclosure of discipline records.

DECISION BELOW

The superior court again agreed with DPS, and in an **oral order**, denied Basey’s motion. Basey filed an **appeal** with the Alaska Supreme Court. Because an appeal can only be filed after a **final judgment** — a complete resolution of all issues in the case — the Supreme Court issued an order asking the superior court to answer several questions, including whether the oral order was intended to be a final judgment or whether the superior court should issue a **partial final judgment**.³ The superior court responded that it should issue a partial final judgment, and the superior court issued an order clarifying its decision. The Partial Final Judgment was based on the superior court’s interpretation of the **State Personnel Act**.

LEGAL ISSUES GENERALLY

The primary issue in this case is the meaning and interaction of two **statutes**, the **Alaska Public Records Act** and the **State Personnel Act**. The Alaska Public Records Act, like the federal **Freedom of Information Act (FOIA)**, allows the public to access some government documents, usually to get information about the government. The State Personnel Act governs the state’s administration of its employees. The Personnel Act creates a merit system and sets out classifications of state employees; it also provides protections to state employees, including making many personnel records confidential. The policy issues in this case involve the balancing of the Troopers’ interest in not having any work-related discipline in their personnel files available to the public and the press and public’s interest in knowing when law enforcement or other public employees have engaged in misconduct leading to discipline.

The legislature, another branch of the state government, writes **statutes**. Because the issues are related to the meaning of statutes, the court, when interpreting the law, tries

³ A lawsuit can have more than one legal **claim**. In some cases, for example, a person can make a negligence claim and a products liability claim. A **final judgment** must resolve all claims between all of the parties to the lawsuit. A **partial final judgment** can be issued when a trial court resolves one claim in a lawsuit but does not resolve all of them. Alaska R. Civ. P. 54(b).

to determine what the legislature intended when it wrote the statutes. The statutes at issue in this case were written at different times, so their meaning and the way the legislature wanted them to interact is not obvious.

Both of these statutes were originally adopted in the 1960s, early in statehood, but they have been **amended** (changed) over time. The participants' briefs include information about how the statutes have changed and arguments about what the legislature meant when it changed the statute. The participants also look at common definitions of certain words to support their arguments.

This is not a typical public records case because Basey is suing the two Troopers in federal court, so he is a **party** in a case against the two Troopers. In the first appeal, the Alaska Supreme Court decided that one exception to the Public Records Act, related to being in a lawsuit against a state agency, did not apply to Basey's case because his lawsuit was against the individual Troopers. If Basey loses his appeal, **he** may still be able to get the Troopers' records through **discovery** in federal court. And DPS argued in its September 2018 brief responding to Basey that cases about discovery in criminal cases were relevant to the issue before the Court.

But even if Basey may be able to get the documents through **discovery**, this case is about his rights as a member of the **public** and could have a very broad effect on the way all people in Alaska can access the records of state employees, particularly law enforcement.

After the superior court issued the Amended Partial Final Judgment, the Alaska Supreme Court issued an order inviting several organizations to participate in the case as **amici curiae** (Latin for "friends of the court"). Those organizations interested in participating were asked to submit briefs about two topics: the interplay between the Alaska Public Records Act and the State Personnel Act and the related question of the interaction of the Alaska Public Records Act and state employees' privacy rights under the Alaska Constitution.

Cases generally do not have amici participating; usually only the parties to the lawsuit appear and argue the case before the court. An **amicus curiae** (friend of the court) can be helpful when a case presents a novel issue that may have broad impact on many people or on a specific profession or industry. Amici can also be helpful when the case presents a significant issue and one party is self-represented. Amici are frequently organizations that have an interest in the legal issue, and they can ask the court for permission to participate in a case to present an argument that supports their interpretation of the law. As an example, in a recent case about whether medical professionals can be sued under a statute usually related to businesses, the Alaska

State Medical Association and the Alaska Dental Society filed briefs as amici curiae.⁴

Two unions that represent public employees, Public Employees Local 71 and APEA/AFT, elected to participate in Basey's appeal. The unions filed an **amicus brief** that generally supports DPS's arguments because they would like the court to interpret the law to protect their members' privacy.

The American Civil Liberties Union of Alaska filed a brief generally supporting Basey's arguments, but focusing mostly on the question of police discipline rather than the records of all public employees. The Anchorage Daily News, two television stations, and an organization called Reporters Committee for Freedom of the Press, which will be called "the press amici," filed a joint amicus brief. The press amicus brief supports Basey's position as well. The press brief strongly favors open access so that the press can investigate issues related to the government.

After DPS requested **oral argument**, Basey asked the court to allow the amici who supported his position to use what would have been his time for oral argument because he is currently in federal prison while the appeal in his criminal case is pending. Attorneys for the press amici and the ACLU said they would argue the case if the court permitted them to do so, and the court did.

The State Personnel Act and the Alaska Public Records Act

The Alaska Public Records Act allows public access to many government documents, but it shields others from public disclosure. Alaska Statute 40.25.120 has a list of 18 types of records that are not subject to inspection. The focus in this case is on AS 40.25.120(4), which excepts from public inspection records that must be kept confidential under state or federal law. The Alaska Supreme Court usually interprets exceptions to the Public Records Act **narrowly**, so that more documents rather than fewer are open to the public.

The State Personnel Act says that personnel records are confidential, with some exceptions that do not apply here. Much of the argument in the briefs is about whether the State Personnel Act should be interpreted to include discipline records of state employees, particularly law enforcement, in the definition of "personnel records." Alaska Statute 39.25.080(a) says, "State personnel records, including employment applications and examinations and other assessment materials, are confidential and are not open to public inspection" Because of the list in the statute, the parties argue about whether discipline records are similar to the items on the list.

⁴ *Adkins v. Collens*, ___ P.3d ____, Op. No. 7386 (Alaska July 12, 2019).

Basey's Position: Trooper discipline records do not fall within the state employee personnel records exception to the Alaska Public Records Act because the Alaska Supreme Court has already decided that the types of documents protected by this statute are ones that reveal information about the state worker's personal life. Trooper discipline records deal with public matters because police actions affect the public and because police are in a position of public trust.

Amicus ACLU's Position: Whether discipline records of public employees should be open to public inspection will vary depending on the facts of each case. Because of the power that police have over citizens, records of police discipline should be available to the public. Records of police discipline are no different from public employees' time sheets, which the Alaska Supreme Court has decided can be disclosed. Cases from other states show that courts treat police disciplinary records differently from other employee records. Nothing shows that the legislature meant to create a large category of documents that would be inaccessible to the public when it made public employee personnel records confidential. And there is a difference between evaluations that employees undergo every year and disciplinary action taken when an employee, especially a Trooper, does something that may affect the public.

Press Amici's Position: The language of the statute does not require a decision that disciplinary actions are confidential. Records related to police misconduct are not assessment materials, one of the specific types of documents in the statute, because "assessment" is used in an entirely different way in other parts of the Personnel Act. Nothing in the legislative history requires interpreting the statute to prevent the public from accessing information about police misconduct. Other states require disclosure of discipline, especially if it is in response to a public complaint.

DPS's Position: The Troopers' discipline records are personnel records and are confidential. The state agency that administers the Personnel Act considers disciplinary actions part of personnel records that are confidential. The legislature meant to adopt the practices the state was using when the statute was amended in the 1980s, and discipline was considered confidential then. Allowing the public to access employee discipline records will make it hard for agencies to evaluate employees honestly and will make people less likely to want to work for the state. And discipline is a personal matter, not just a personnel issue; disciplinary materials are not like time sheets. In any event, Basey can access the records through the discovery process in federal court, and his request should be handled in those cases. As a member of the public Basey has

no right to look at the Troopers' discipline records; criminal defendants cannot always get them, so a member of the public should not be able to.

Union Amici's Position: Disciplinary materials are a type of "examination and other assessment material," so they are confidential under the State Personnel Act. Dictionary definitions and other sources support considering discipline records a type of "assessment material." Other courts have decided that the discipline records of state government employees are confidential, and allowing the State to keep employee records confidential will help workers be truthful during disciplinary investigations.

The Constitutional Question

The court asked amici to address an alternative question related to the state constitutional rights of state employees. **Constitutions** are the foundational documents in our governmental system. The United States Constitution sets out the form of the federal government and the powers that each branch of the federal government has. Alaska has its own state constitution that sets out the structure of the state government. Both the U.S. Constitution and the Alaska Constitution enumerate certain individual rights: the first ten amendments to the U.S. Constitution is the Bill of Rights, and Article I, the first part of the Alaska Constitution, is the **Declaration of Rights**.

One right that is explicitly recognized in the Alaska Constitution but not specifically listed in the Bill of Rights is the right to privacy. **Article 1, section 22** of the Alaska Constitution says, "The right of the people to privacy is recognized and shall not be infringed." If the statute does not make discipline records confidential, how would public disclosure affect the Troopers' right to privacy? And if the Troopers have some privacy interest, what should a court consider when balancing that right with the public's statutory right to access government records?

Basey's Position: The Troopers can have no legitimate expectation that their discipline records are confidential. The right to privacy is related to intimate, personal information. Police misconduct and any resulting discipline should be public knowledge to protect democratic values. If the discipline records contain truly personal information, the State can redact that information.

Amicus ACLU's Position: State employees only have an expectation of privacy in purely personal matters, not in discipline for misconduct. Even if the Troopers have some legitimate expectation of privacy, public knowledge of police misconduct in particular is an important check on excessive or inappropriate exercises of government power. The privacy interests of state employees can be protected by redacting documents. If

a member of the public thinks too much has been redacted or withheld, he can ask a judge to look at the original documents ***in camera*** (in the judge's private office or chambers) and the judge can decide if the information is protected by the right to privacy.

Press Amici's Position: Only truly private information in discipline records can have any constitutional protection. Even when discipline records have private information, the court should apply the test it has used in the past and balance whether the employee has a legitimate expectation of privacy and how compelling the state interest is in disclosure, and determine the best way to allow disclosure. The court should consider in this case the interest of the press in investigating government conduct. As applied in this case, the balancing test requires disclosure.

DPS's Position: The Troopers have a legitimate expectation of privacy in their discipline records because those records have truly private information. In this case there is no need for the public to have access to them; Basey wants them because he is in litigation with the Troopers, and he can use discovery to get the records. There are no specific allegations of serious misconduct that might justify public access. And there is no less intrusive way to safeguard the Troopers' privacy. Because specific troopers have been named, redactions cannot mask their identities.

Union Amici's Position: Because discipline records always contain intimate details of a state employee's life, employees have a legitimate expectation of privacy in those records. The interests in favor of disclosure here are not strong, and the public can be protected through other means. Basey is a party to a case involving the Troopers, and discovery allows access to documents the public might not have a right to see.

Basey's Other Argument

Basey's opening brief raised two issues in addition to the questions the court asked amici to address. He argued that a state agency is required to raise every possible reason for not disclosing a government record at once. He supported this argument with some federal cases about the Freedom of Information Act and also included a doctrine called the **law of the case** that prevents parties from raising in a second appeal issues they could have raised in the first.

The press amici included a footnote supporting Basey's argument because in its view allowing a state agency to make objections one at a time instead of all at once will discourage people from seeking public records at all. DPS contends it would be unfair

not to allow the new objection because of the Troopers' otherwise confidential records could be disclosed because of "a technicality."

QUESTIONS FOR STUDENTS TO CONSIDER

1. List some reasons that government documents should be available to the public and identify the reasons you think are the most important. Do any of those reasons play a role in this case?
2. Now list reasons why some government documents should not be available to the public. Do any of these reasons play a role in this case? What do you think is the best way to balance public access and a need to keep some things confidential?
3. This case involves action by the Troopers, part of law enforcement in Alaska. The ACLU's brief focuses on police conduct and argues that police and law enforcement personnel may be different from other public employees. Evaluate this argument. Do you think a police officer should be treated differently than, for example, a person who processes Permanent Fund Dividend applications or a teacher in terms of their expectation of privacy in their job? Why or why not?
4. The unions' brief acknowledges "that there could be policy arguments in favor of disclosure of certain disciplinary records." [Union Br. p. 16] Do you agree with this statement? If so, what types of disciplinary records do you think should be disclosed? If not, how would the press be able to investigate some of the issues identified in the press's brief at pages 36-42?
5. Do you think state employees should have the same privacy rights related to work that employees of private companies have? Why or why not? Think about DPS's argument on page 20 of its supplemental brief that public access to disciplinary information would have a negative impact on the State as an employer.
6. How can the public access information about possible police corruption if all discipline records are confidential? Some U.S. cities have had major police corruption scandals. For example, in Baltimore last year several members of an elite task force were convicted of racketeering. And in the 1980s more than 100 police officers in Miami were subject to discipline or arrest after they engaged in selling drugs they had seized. And in a more recent case, some Miami police officers were convicted of federal crimes even though no discipline was imposed on them. Think about other recent examples of press investigations of government and evaluate the participants' argument about public access to police discipline.

Here are a few links to articles about police corruption.

<https://www.bbc.com/news/world-us-canada-44402948>

<https://www.cbsnews.com/news/corruption-rap-for-4-miami-cops/>

<https://www.themarshallproject.org/records/2528-police-corruption>

7. The participants in this case distinguish between private information and public information. What makes information private? There have been many recent examples of videos posted on the internet that show problematic behavior. How does the use of cell phones and the internet affect the idea of privacy?
8. When courts interpret statutes, they consider word meanings and sometimes look at dictionaries. In this case the court needs to consider what the legislature meant by “personnel records.” Try looking this phrase up in a dictionary. Is the information you found helpful? Does looking up the individual words “personnel” and “records” provide better information? What sources do the participants think the court should use?
9. The focus of this case is on law enforcement, but consider other issues of public concern that might arise. If employees in a state agency were regularly using their work computers and time to engage in on-line gambling, should their discipline be a matter of public concern? Would those employees have a legitimate expectation in the privacy of their discipline records? How do you think the balancing test would apply?
10. What do you think is the strongest argument of DPS and the Unions? What do you think is their weakest argument? Explain.
11. What do you think is strongest argument of Basey and the amici aligned with him? What do you think is the weakest argument? Explain.
12. If you were a justice on the Alaska Supreme Court, how would you decide this case? Explain.