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 # **4FA-16-02509CI**

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

JOINT BRIEF OF AMICI CURIAE PUBLIC EMPLOYEES LOCAL 71 AND APEA/AFT

Khalial Withen
Alaska Bar No. 1311092
Kevin Dougherty
Alaska Bar No. 8111086
Alaska District Council of Laborers
Counsel for Public Employees Local 71
& APEA/AFT
2501 Commercial Drive
Anchorage, AK 99501
(907) 276-1640
kwithen@alaskalaborers.com

Filed in the Supreme Court
of the State of Alaska
May ____, 2019

MARILYN MAY, CLERK
APPELLATE COURTS

_____
Deputy Clerk

APP. R. 513.5 CERTIFICATION

I certify pursuant to App. R. 513 that the font used in this document is Times New Roman 13 point with Times New Roman 12 point font in the footnotes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Public Release of Police Records, 1 Op. Alaska Att'y Gen. (1994)

BLACK'S LAW DICTIONARY 500 (5th ed. 1979)

ELKOURI & ELKOURI, HOW ARBITRATION WORKS (Kenneth May ed., 8th ed. 2016)

RULES

App. R. 212(c)(9)

CONSTITUTIONAL PROVISIONS

ALASKA CONSTITUTION Article I, section 22

AUTORITIES RELIED UPON

STATUTES

Alaska Statute 39.25.080 provides:

(a) State personnel records, including employment applications and examination and other assessment materials, are confidential and are not open to public inspection except as provided in this section.

(b) The following information is available for public inspection, subject to reasonable regulations on the time and manner of inspection:

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

(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.

Alaska Statute 40.25.120 provides:
(a) Every person has a right to inspect a public record in the state, including public records in recorders' offices, except

. . .

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

. . .

(6) records or information compiled for law enforcement purposes, but only to the extent that the production of the law enforcement records or information
(A) could reasonably be expected to interfere with enforcement proceedings;
(B) would deprive a person of a right to a fair trial or an impartial adjudication;
(C) could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness;
(D) could reasonably be expected to disclose the identity of a confidential source;
(E) would disclose confidential techniques and procedures for law enforcement investigations or prosecutions;
(F) would disclose guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law; or
(G) could reasonably be expected to endanger the life or physical safety of an individual;

. . .

CONSTITUTIONAL PROVISIONS

ALASKA CONSTITUTION Article I, section 22, provides:

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

STATEMENT OF JURISDICTION

Public Employees Local 71 and APEA/AFT adopt by reference the statement of jurisdiction put forth by the State of Alaska, Department of Public Safety. This appeal involves the May 3, 2018, oral ruling by the Superior Court and the January 14, 2019, Amended Partial Final Judgment. This appeal is properly before this court pursuant to AS 22.05.010(b) and Appellate Rule 202.

STATEMENT OF ISSUES

As a matter of statutory interpretation, are state employee disciplinary records confidential "personnel records" under AS 39.25.080(a) of the State Personnel Act, not subject to disclosure under the Alaska Public Records Act?

If the records are not confidential "personnel records" under AS 39.25.080(a) of the State Personnel Act, do state employees have a state constitutional privacy interest playing a role 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

In *Basey v. State*, the Court held that the State had failed to show that the litigation exception or the law enforcement-interference exception applied to Kaleb Basey's public records requests, remanding the case for further proceedings.[1] On remand, Basey filed a motion to compel production of the information he sought, including disciplinary records

[1] 408 P.3d 1173 (Alaska 2017).

of two state troopers.[2] The State filed a response, asserting that the disciplinary records were not subject to disclosure based on the Alaska Personnel Act at AS 39.25.080.[3] Following Basey's reply, the Superior Court held a hearing.[4] The Superior Court denied Basey's motion to compel as to the two state trooper disciplinary records, explaining on the record that the disciplinary records were not subject to disclosure under the Alaska Public Records Act and the Alaska Personnel Act.[5]

Basey filed a notice of appeal on May 14, 2018, contesting the Superior Court's denial of the release of state trooper disciplinary records. In response to the Supreme Court's Order dated December 12, 2018, the Superior Court issued an Amended Partial Final Judgment on January 14, 2019.[6]

On January 28, 2019, the Court invited amici curiae participation, and Public Employees Local 71 and Alaska Public Employees Association/AFT (APEA/AFT), two public-sector labor organizations, both submitted notices of their intent to participate.[7]

STANDARD OF REVIEW

This Court exercises "independent judgment when interpreting statues which do not implicate an agency's special expertise or determination of fundamental policies," and the

---

2 Exc. 22-23.

3 Record at 116-125.

4 Exc. 101-02; *see also* Transcript 13-19.

5 Transcript 18-19.

6 Amended Partial Final Judgment (Jan. 14, 2019).

7 Supreme Court Order (Jan. 28, 2019); *see also* App. R. 212(c)(9).

Public Records Act and State Personnel Act are such statutes.[8] Likewise, this Court applies independent judgment to constitutional questions, applying " 'a reasonable and practical interpretation in accordance with common sense' based upon 'the plain meaning and purpose of the provision and the intent of the framers.' "[9]

ARGUMENT

Disciplinary records constitute the essence of a state employee's personnel file, which is shielded from disclosure by the express confidentiality protection in the Alaska Personnel Act. Under the Alaska Personnel Act, "personnel records, including . . . examination and other assessment materials" are confidential.[10] Because disciplinary records constitute "personnel records" and a form of examination and assessment of state employees, the plain language of the statute establishes that disciplinary records are confidential personnel records under the Alaska Personnel Act, not subject to disclosure under the Alaska Public Records Act.

It is therefore not necessary for this Court to reach the constitutional right-to-privacy issue. But if the Court ultimately considers the constitutional question, then it is clear that state employees have a legitimate and reasonable privacy interest in their disciplinary records. Disciplinary records contain some of the most personal details surrounding a state employee's work history, and such records could reference medical, disability, and other intimately personal information. There is a substantial burden to show a compelling state

---

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

9 *Id.* (quoting *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992)).

10 AS 39.25.080(a).

interest to justify disclosure. The balancing considerations for potential disclosure under the Alaska Public Records Act should include (1) whether the employee holds or is seeking a high public office;[11] (2) whether the records would reveal potentially embarrassing, personal, or intimate information;[12] (3) whether the records would threaten the employee's reputation and good standing in the community;[13] and (4) whether the details in the records would add substantially to a general understanding of a legitimate public inquiry.[14]

I. State Employee Disciplinary Records Are Confidential Personnel Records Under AS 39.25.080(a) and Therefore not Subject to Disclosure Under the Alaska Public Records Act.

First, the plain language of the Alaska Personnel Act makes clear that disciplinary records, as a form of "examination and other assessment materials," are confidential personnel records not subject to disclosure under the Alaska Public Records Act. To conclude that disciplinary records do not fall within the scope of "personnel records" under the Act would eviscerate the force and effect of the plain language of the statute. Second, the statutory exception to this general rule of confidentiality for an extremely narrow form

---

11 *See Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1324 (Alaska 1982); *see also Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 n.11 (Alaska 1990).

12 *See Anchorage*, 794 P.2d at 591 (considering whether the record dealt with the "personal, intimate, or otherwise private life" of the head librarian).

13 *Ray v. United States Dep't of Justice, INS*, 778 F. Supp. 1212, 1214 (S.D. Fla. 1991) (citing *Miller v. Webster*, 661 F.2d 623 (7th Cir. 1981)); *see Anchorage*, 794 P.2d at 590 (balancing the "privacy and reputation interests of the affected individuals" under the Alaska Public Records Act).

14 *Bast*, 665 F.2d at 1255; *see also Miller v. Webster*, 661 F.2d 623, 629 (7th Cir. 1981) (considering whether there was a "countervailing showing of substantial public interest in disclosure" under FOIA exemption 7(C) covering investigatory records compiled for law enforcement purposes to the extent that production of such records would constitute an unwarranted invasion of personal privacy).

of discipline in AS 39.25.080(b)(7) shows that the broad rule does in fact include all disciplinary records not subject to that exception in part (b)(7). Finally, court decisions from other states buttress support for the conclusion that state employee disciplinary records are confidential personnel records exempt from disclosure under the Alaska Public Records Act.

A. Under the plain language of AS 39.25.080(a), state employee disciplinary records, as a form of examination and "assessment materials," are confidential personnel records.

Under the plain language of AS 39.25.080(a), state employee disciplinary records, as a type of examination and assessment materials, are clearly confidential "personnel records" not subject to disclosure under the Alaska Public Records Act. The starting point in this statutory interpretation inquiry is the language of the Alaska Personnel Act itself "construed in light of the purposes for which it was enacted."[15] This inquiry demonstrates that, in light of the statutory language and purpose, state employee disciplinary records are indeed confidential personnel records.

The relevant provisions of the Alaska Personnel Act in AS 39.25.080 provide:

> (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;

---

15 *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 904 (Alaska 1987).

> (4) whether a state employee is in the classified, partially exempt, or exempt service;
> (5) the dates of appointment and separation of a state employee;
> (6) the compensation authorized for a state employee; and
> (7) whether a state employee has been dismissed or disciplined for a violation of AS 39.25.160(*l*) (interference or failure to cooperate with the Legislative Budget and Audit Committee).

The Alaska Public Records Act states, "Every person has a right to inspect a public record in the state, including public records in recorders' offices, except . . . records required to be kept confidential by a federal law or regulation or by state law."[16]

This Court has stated that "[t]he goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."[17] As a result, "unless words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage."[18]

Although the Alaska Personnel Act does not define confidential "personnel records," in a variety of settings, the Court has referenced the common sense fact that disciplinary records constitute personnel records. For instance, the Court has referenced a police chief's "personnel file, including performance and psychological evaluations, medical file, and discipline record"[19] and "a disciplinary letter in [an employee's] personnel

---

16 AS 40.25.120(a)(4).

17 *Tesoro Alaska Petroleum Co.*, 746 P.2d at 905 (citing *State v. Alex,* 646 P.2d 203, 208 & n.4 (Alaska 1982)).

18 *Id.*

19 *Mills v. Hankla*, 297 P.3d 158, 162-63 (Alaska 2013) (overruled in part by *Lane v. City & Borough of Juneau*, 421 P.3d 83, 92 (Alaska 2018)).

file."[20] This is consistent with the plain language of the statute, which provides that personnel records, with narrow exceptions, are confidential.[21]

Similarly, the Alaska Personnel Act does not define "examination" or "assessment materials." BLACK'S LAW DICTIONARY defines "examination" as "[a]n investigation; search; inspection; interrogation."[22] An employer investigation is a core component of disciplinary decision-making and records.[23] An arbitral treatise summarizes the role of the employer's examination in disciplinary decisions: "Procedural fairness requires an employer to conduct a full and fair investigation . . . and to provide an opportunity for [the employee] to offer denials, explanations, or justifications."[24] The MERRIAM-WEBSTER DICTIONARY defines "assessment" as "the action or an instance of making a judgment about something: the act of assessing something: APPRAISAL."[25] According to the OXFORD DICTIONARY, an assessment is "The action of assessing someone or

---

20 *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 759 (Alaska 2008).

21 AS 39.25.080.

22 BLACK'S LAW DICTIONARY 500 (5th ed. 1979).

23 *See, e.g.*, ELKOURI & ELKOURI, HOW ARBITRATION WORKS, at 15-49 (Kenneth May ed., 8th ed. 2016) ("Industrial due process also requires management to conduct a reasonable inquiry or investigation before assessing punishment."); *see also City of North Pole v. Zabek*, 934 P.2d 1292, 1297 (Alaska 1997) ("Like the federal constitution, the Alaska constitution affords pretermination due process protection to public employees who may only be terminated for just cause." (internal citations and quotation marks omitted)).

24 *See, e.g.*, ELKOURI & ELKOURI, HOW ARBITRATION WORKS, at 15-50 (Kenneth May ed., 8th ed. 2016) (internal citations and quotation marks omitted).

25 MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/assessment (May 31, 2019).

something."[26] Under these definitions and common usage, a disciplinary record makes a judgment about conduct or work performance.[27] Because a disciplinary record assesses an employee's conduct or performance, it is an assessment material under AS 39.25.080(a). To suggest otherwise—that discipline is not a form of employee "assessment"—would undermine the legislative intent and effectively rewrite the statute.

Consistent with the plain-language meaning of "examination and other assessment materials," disciplinary records fall squarely into this Court's delineation of the term "personnel records" in cases interpreting the scope of the Alaska Personnel Act. This Court has stated that "personnel files contain intimate details about 'work history,' " continuing "[w]ork history *is* personal information, but it only includes information like employment applications and examination materials—not information such as base salary and benefits."[28]

This Court's prior decisions offer additional support for the conclusion that a disciplinary record is a form of an assessment. In *Alaska Wildlife Alliance v. Rue*, this Court addressed whether state employee time sheets are personnel records within the meaning of AS 39.25.080.[29] This Court compared the documents that are confidential personnel records under the Alaska Personnel Act with those exempted from such

---

26 OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/assessment (May 31, 2019).

27 *See generally id.*

28 *Int'l Ass'n of Fire Fighters, Local 1264 v. Mun. of Anchorage*, 973 P.2d 1132, 1135 (Alaska 1999) (citing *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 979-80 (Alaska 1997)).

29 948 P.2d 976 (Alaska 1997).

confidentiality in AS 39.25.080(b). Examples of personnel records include "employment applications" and "examination materials." These documents contain details concerning the employee's or applicant's personal life. By contrast, exemptions listed in AS 39.25.080(b) include "position titles," the employee's status as "classified, partially exempt, or exempt service," dates of appointment and separation, and compensation authorized. These exemptions reveal "little about the individual's personal life, but instead simply describe[] employment status."[30] Because disciplinary records contain some of the most personal information about one's conduct and mistakes, the conclusion that disciplinary records are confidential personnel records is consistent with the Legislature's intent to shield revealing personal information from disclosure.

Disciplinary records potentially contain some of the most intimate details about an employee's work history. For example, state employee disciplinary records could contain the following intimate and sensitive information:

- Facts related to equal employment opportunity, arising under AS 39.28.020, and related disciplinary disputes;
- Disciplinary disputes related to implementation of the Alaska Family Medical Leave Act, AS 39.20.500;
- Americans with Disabilities Act accommodation matters and disciplinary disputes, arising under AS 39.25.158; and

30 *Id.* at 980.

- Protection of whistleblower matters and disciplinary disputes, arising under A.S. 39.90.100.

These referenced statutory rights are sometimes intertwined with disciplinary disputes, attendance, and compliance with personal leave standards. Opening the intimate details of a state employee's work history, including disciplinary records, would contradict this Court's explanation of the scope of personnel records under the Alaska Personnel Act.

Finally, an Alaska Attorney General Opinion concerning the release of police records offers a persuasive interpretation of the confidentiality protection established in the Alaska Personnel Act, noting that administrative investigations and inquiries are within the scope of "personnel records" under the act.[31] The Opinion provides:

> It should be noted that the statute does not merely protect a person's personnel file, but is broader and makes all personnel records confidential and not subject to disclosure. This would include a number of records that may not appear in the official department personnel file, such as records relating to financial, family, or medical matters, as well as records of administrative investigations or inquiries. Whether such records may be discoverable because they are relevant to specific litigation should be determined on a case-by-case basis in the context of that litigation.[32]

The Alaska Attorney General Opinion therefore supports the conclusion that state employee disciplinary records are confidential "personnel records" under the Alaska Personnel Act, not subject to disclosure under the Alaska Public Records Act.

The legislative history of AS 39.25.080 also reinforces the conclusion that the Legislature clearly intended all personnel records including disciplinary records, with

---

31 Public Release of Police Records, 1 Op. Alaska Att'y Gen. 38-39 (1994).

32 *Id.* at 39.

limited exceptions, to be confidential and not subject to public inspection. The Legislature passed the earliest version of this statute in 1960—and that version provided the opposite of the current law: "Public Records. The state personnel records, except such records as the rules may properly require to be held confidential for reasons of public policy, shall be public records and shall be open to public inspection, subject to reasonable regulations as to the time and manner of inspection."[33] Then in 1982, the Legislature gave the statute a makeover following a report from a blue ribbon commission, passing very close to the current version of the statute: "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."[34] In making this shift from the 1960 default-open-to-public-inspection personnel records to default-confidential personnel records, the legislative records indicate that the change was made with the understanding that "personnel records" had a broad meaning in practice and included "examination materials, performance evaluations" among other materials that in practice were already kept confidential by the State as an employer.[35] The legislative history is therefore consistent with the common sense interpretation that "personnel records" include disciplinary records.

---

33 *See* § 18 ch. 144 SLA, HB 188 (1960).

34 *See* § 5 ch. 112 SLA, SB 193 (1982).

35 SB 193: Amending the State Personnel Act (AS 39.25), H. Jud. Comm. File, cmt. at 33 (1982) (noting that under the personnel rules, examination materials and performance evaluations were treated as confidential even under the 1960 law).

Because disciplinary records can implicate alleged on-duty and off-duty misconduct with a nexus to one's employment as well as intimate details about one's behavior—disciplinary records are much more personal than one's mere employment status or time sheets. Disciplinary records fall squarely into the category established in AS 39.25.080(a) for "personnel records" including examination and other assessment materials," and disciplinary records are thus shielded by the confidentiality protection in the statute.

B. The exemption in AS 39.25.080(b)(7), which provides that dismissal or discipline for a violation of AS 39.25.160 related to the Legislative Budget and Audit Committee is subject to public inspection, confirms that the all other disciplinary records are confidential personnel records under part (a) of the statute.

While the plain language and purpose of the statute govern, the principle of statutory construction *expressio unius est exclusion alterius* is also applicable to this case. This Court has explained that this maxim "establishes the inference that, where certain things are designated in a statute, all omissions should be understood as exclusions."[36] This "maxim is one of longstanding application, and it is essentially an application of common sense and logic."[37]

Part (a) of AS 39.25.080 establishes a general rule: "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." Part (b) then lists seven limited exceptions to this rule, including one exception related to

---

36 *Alaska State Comm'n for Human Rights v. Anderson*, 426 P.3d 956, 964 n.34 (Alaska 2018) (internal citations and quotation marks omitted).

37 *Id.* (internal citations and quotation marks omitted).

discipline. The Alaska Personnel Act therefore clearly shields disciplinary records from disclosure with a single narrow exception: "The following information is available for public inspection . . . whether a state employee has been dismissed or disciplined for a violation of AS 39.25.160(*l*) (interference or failure to cooperate with the Legislative Budget and Audit Committee)."[38] The term "examination and other assessment materials" plainly encompasses evaluations and disciplinary records, and the Legislature made the limited exception for information related to discipline only for a violation of AS 39.25.160(l), the statute related to cooperation with the Legislative Budget and Audit Committee. Applying the principle of statutory construction *expressio unius est exclusion alterius*, this narrow statutory exception to the general confidentiality protection for disciplinary records confirms that the broad scope of part (a) of the Alaska Personnel Act encompasses disciplinary records.

This Court has summarized another maxim of statutory interpretation: "[T]here is a presumption that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used."[39] Here, if general disciplinary records were not subject to the confidentiality protection in AS 39.25.080(a), then the exception in part (b)(7), "whether a state employee has been dismissed or disciplined for a violation of AS 39.25.160(*l*) (interference or failure to cooperate with the Legislative Budget and

---

38 AS 39.25.080(b)(7).

39 *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 906 (Alaska 1987) (internal citations and quotation marks omitted).

Audit Committee)," would be superfluous. As a result, the interpretation put forth by Basey would eviscerate the force and effect of the statutory language in AS 39.25.080(b)(7).[40]

C. Other appellate state courts have concluded that public employee disciplinary records constitute part of an individual's personnel file.

The conclusion that disciplinary records are confidential personnel records under the Alaska Personnel Act is buttressed by other courts' decisions concluding that disciplinary records constitute personnel records.[41]

For instance, the Iowa Supreme Court addressed whether disciplinary records fit into the category of "[p]ersonal information in confidential personnel records" in a case involving controversial strip searches of students. In *American Civil Liberties Union Foundation of Iowa, Inc. v. Custodian*, the Court reasoned that "[d]isciplinary records and information regarding discipline are nothing more than in-house job performance records and information," concluding that the disciplinary information was exempt from disclosure as part of an employee's confidential personnel record.[42] The court noted that its

---

[40] Appellant's Opening Brief 21-24.

[41] *See, e.g.*, *Wakefield Teachers Ass'n v. Sch. Comm. of Wakefield*, 431 Mass. 792, 797-78 (Mass. 2000); *Oregonian Publ. Co. v. Portland Sch. Dist. No. 1J*, 987 P.2d 480, 484 (1999) ("Such 'personnel files' would usually include information about a teacher's education and qualifications for employment, job performance, evaluations, disciplinary matters or other information useful in making employment decisions regarding an employee."); *Pivero v. Largy*, 143 N.H. 187, 189-190 (1998) (" 'Personnel file' means any and all personnel records created and maintained by an employer and pertaining to an employee including and not limited to . . . internal evaluations, disciplinary documentation, . . . and performance assessments, whether maintained in one or more locations . . ."); *Swinton v. Safir*, 93 N.Y.2d 758, 762 (1999) (disciplinary records considered part of employee personnel file).

[42] *See Am. Civ. Liberties Union Found. of Iowa, Inc. v. Custodian*, 818 N.W.2d 231, 235-36 (Iowa 2012).

conclusion was "consistent with those of other courts that have considered whether disciplinary action is exempt from disclosure under their jurisdictions' open records acts . . . easily conclud[ing] that the plain language of the statute supports the exemption [from the open records act] in this case."[43]

Similarly, in *Wakefield Teachers Association v. School Committee of Wakefield*, the Supreme Judicial Court of Massachusetts considered whether a disciplinary decision and report involving the performance of a public school teacher was part of the category "personnel and medical files or information," which was exempt from public disclosure under the Massachusetts public records law.[44] The Court concluded that the term "personnel [file] or information" in the statute "includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee."[45] Those documents "constitute the core categories of personnel information that are useful in making employment decisions regarding an employee."[46] Because disciplinary documents are a core category of personnel records, "[i]t would distort the plain statutory language to conclude that disciplinary reports are anything but personnel [file] or information."[47]

---

43 *Id.*

44 431 Mass. 792, 797-78 (Mass. 2000).

45 *Id.* at 798.

46 *Id.* (citing *Oregonian Publ. Co.*, 329 Or. 393, 401 n.14 (1999)).

47 *Id.* (citing *Globe Newspaper Co. v. Chief Med Examiner*, 388 Mass. 427, 431 (Mass. 1983)).

In addition, the Supreme Judicial Court of Massachusetts relied on the fact that "[n]umerous courts, both Federal and State, that have considered the question have reached the same conclusion." The Court explained further, "Interpreting the analogous Federal Freedom of Information Act, 5 U.S.C. s. 552(b)(6), Federal courts have determined that disciplinary reports are a component of an employee's personnel records, and should be so regarded in judging whether they are subject to disclosure."[48]

Local 71 and APEA/AFT acknowledge there could be policy arguments in favor of the disclosure of certain disciplinary records. While this case may be resolved on the statutory language alone, there are also policy arguments supporting the legislature's drafting of the current statutory language. For instance, another court noted, "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."[49] A guarantee of "confidentiality to those who voluntarily participate in such investigations likely produces candor."[50]

In conclusion, because state employee disciplinary records are confidential "personnel records" under the State Personnel Act, revealing the most intimate personal

---

48 *Id.* at 798 (citing *Fed. Labor Relations Auth. v. United States Dep't of the Navy*, 966 F.2d 747, 761 (3d Cir. 1992)) (disciplinary records are an element of personnel records); *Schonberger v. Nat'l Transp. Safety Bd.*, 508 F. Supp. 941, 943 (D.C. 1981) (information regarding employee discipline considered part of an employee's personnel file); *Associated Dry Goods Corp. v. NLRB*, 455 R Supp. 802, 815 (S.D.N.Y. 1978) (disciplinary records, work evaluations, and similar material constitute the "essence" of personnel file)).

49 *Id.* at 802 (internal citations omitted).

50 *Id.* (internal citations and quotation marks omitted).

details about one's work history, disciplinary records are not subject to disclosure under the Alaska Public Records exception precluding disclosure of "records required to be kept confidential by a . . . state law."[51]

II. Even if the State Employee Disciplinary Records Were Somehow Deemed Not Personnel Records Under the State Personnel Act, State Employees Have a State Constitutional Privacy Interest Playing a Role in Whether Such Records Might Be Produced Under the Alaska Public Records Act.

Given that there is an express exception to the Alaska Public Records Act applicable to state employee disciplinary records, the Court need not reach the issue of the appropriate balance that must be struck between the public interest in disclosure, on the one hand, and the privacy and reputational interests of the employee together with the state's interest in confidentiality, on the other. Even if the Court reaches the constitutional right-to-privacy issue, it is clear that state employees have a constitutional privacy interest in their disciplinary records. This privacy interest must therefore play a role in assessing whether such records might be produced under the Alaska Public Records Act. To justify infringing on a constitutional right, the state must meet the substantial burden of showing the infringement, in the form of disclosure, serves a compelling state interest. In such a compelling-state-interest inquiry, there are balancing considerations, including whether a high public office is involved, the potential for embarrassment, the damage to reputation, and the possibility that the details would substantially add to the public understanding of a legitimate inquiry, that must be addressed on a case-by-case basis.

---

51 AS 40.25.120(a)(4).

A. There is little doubt that state employees have a state constitutional privacy interest playing a role in whether those records might be produced under the Alaska Public Records Act.

Article I, section 22 of the ALASKA CONSTITUTION provides: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." The Court has established the following three-prong test for applying the state constitutional right to privacy:

> (1) does the party seeking to come within the protection of the right to confidentiality 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 confidentiality?[52]

Using this framework, the Court has addressed the scope of Alaska's right of privacy in several decisions. To show that disclosure of disciplinary records would infringe on state employees' constitutional right to privacy, first it must be established that the state employees have a "legitimate expectation that the materials or information will not be disclosed."[53] And that expectation "is one that society is prepared to recognize as reasonable."[54] This first prong of the constitutional inquiry is readily met: State employees have a legitimate and societally reasonable expectation that their disciplinary records,

---

52 *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990).

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

54 *Id.* (internal quotation marks omitted) (citing *Nathanson v. State*, 554 P.2d 456, 458-59 (Alaska 1976)).

which contain some of the most intimate details of one's work history, will not be disclosed.

A consistent "thread woven into this Court's decisions is that privacy protection extends to the communication of 'private matters,' or, phrased differently, 'sensitive personal information,' or 'a person's more intimate concerns.' "[55] Given the personal nature of this information, if disclosed, it "could cause embarrassment or anxiety."[56]

The confidentiality protection in the Alaska Personnel Act has informed this Court's analysis of the constitutional right to privacy in the state employment context.[57] This Court held in *Jones v. Jennings*,[58] an excessive force tort case, that police officers had a legitimate expectation of privacy in their personnel records, explaining that personnel files "contain the most intimate details of an employee's work history."[59] Relatedly, in *Alaska Wildlife Alliance*, this Court concluded that disclosure of time sheets did not offend the state employees' constitutional right to privacy because time sheets are not "private facts of a personal nature."[60] It is well-established that work history is personal information and that it includes information such as examination materials but not base salary and benefits.[61] This Court reasoned that, "[w]hen *Jones* and *Alaska Wildlife Alliance* are read together, it

---

55 *Doe v. Alaska Super. Ct.*, 721 P.2d 617, 629 (Alaska 1986) (internal citations omitted).

56 *Id.* (citing *Falcon v. Alaska Public Offices Commission*, 570 P.2d 469, 480 (Alaska 1977)).

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

58 788 P.2d 732, 738-39 (Alaska 1990).

59 *Id.* at 738-39.

60 948 P.2d 976, 979-80 (Alaska 1997).

61 *Int'l Ass'n of Fire Fighters, Local 1264 v. Mun. of Anchorage*, 973 P.2d 1132, 1135 (Alaska 1999) (citing A*laska Wildlife Alliance*, 948 P.2d at 979-80).

is clear that employees only have a legitimate expectation of privacy in the personal information contained in their personnel records."[62]

The specific constitutional issue before the Court now is, if disciplinary records are not confidential "personnel records" under the Alaska Personnel Act, whether state employees have a state constitutional privacy interest playing a role in whether those records might be produced under the Alaska Public Records Act. Given this Court's conclusions that "[w]ork history is personal information" and that work history includes "examination materials," the necessary inference is that disciplinary records, which involve some of the most intimate details about work history, in fact constitute personal information that is shielded by the constitutional right to privacy. As to a state employee's perspective surrounding privacy expectations, this Court has stated that "[i]t is plausible for an employee to expect that the details contained within his personnel file are confidential and not subject to public scrutiny."[63] Like the police officer in *Jones v. Jennings*, the excessive tort case, state employees have a legitimate expectation that the material or information will not be disclosed and "[s]uch expectation is one that 'society is prepared to recognize as reasonable.' "[64] As a result, the first prong of the constitutional inquiry is easily satisfied: There is little doubt that state employees have a legitimate and reasonable expectation of privacy in their disciplinary records.

---

62 *Id.*

63 *Jones*, 788 P.2d at 738.

64 *Int'l Ass'n of Fire Fighters, Local 1264*, 973 P.2d at 1134 (quoting *Nathanson v. State*, 554 P.2d 456, 458-59 (Alaska 1976)); *see also Jones*, 788 P.2d at 738.

B. There are several balancing considerations in assessing whether there is a compelling state interest to justify infringement of constitutionally protected privacy rights of state employees.

The second prong of the constitutional inquiry is whether disclosure of constitutionally protected information is nonetheless necessary to serve a compelling state interest. This Court has explained that, in cases involving the government's impairment of a fundamental right under the Alaska Constitution, "then the government must come forward and meet its substantial burden of establishing that the abridgment in question was justified by a compelling governmental interest."[65]

The Court has described the balancing process in the context of the Alaska Public Records Act as follows:

> In determining whether the records should be made available for inspection in any particular instance, the court must balance the interest of the citizen in knowing what the servants of government are doing and the citizen's proprietary interest in public property, against the interests of the public in having the business of government carried on efficiently and without undue interference. . . .
>
> In balancing the interests referred to above, the scale must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference. The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records sought should not be furnished. Ultimately, of course, it is for the courts to decide whether the explanation is reasonable and to weigh the benefits according to the agency from non-disclosure against the harm which may result to the public if such records are not made available for inspection.[66]

---

65 *Jones*, 788 P.2d at 739 n.15.

66 *Anchorage v. Anchorage Daily News*, 794 P.2d 584, 590-91 (Alaska 1990) (citing *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413, 421-22 (1961) (En Banc)).

And while there is an interest in public access, it is "well established . . . that government officials do not surrender all rights to personal privacy when they accept a public appointment."[67] In assessing whether there is a compelling state interest justifying infringement of a state employee's privacy right, the appropriate balancing factors include: (1) whether the employee holds or is seeking a high public office;[68] (2) whether the records would reveal potentially embarrassing, personal, or intimate information;[69] (3) whether the records would threaten the employee's "reputation and good standing in the community";[70] and (4) whether the details in the records would add substantially to a general understanding of a legitimate public inquiry.[71]

First, an important balancing factor is whether the individual holds or is seeking a high public office. In *Kenai v. Kenai Peninsula Newspapers*, the Court held that employment applications for city manager and the chief of police were subject to public disclosure, relying on the fact that individuals had voluntarily provided the information and that they

---

67 *Bast v. U. S. Dep't of Justice*, 665 F.2d 1251, 1254-55 (D.C. Cir. 1981) (citing *Lesar v. Department of Justice*, 636 F.2d 472, 487 (1980)).

68 *See Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1324 (Alaska 1982); *see also Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 n.11 (Alaska 1990).

69 *See Anchorage*, 794 P.2d at 591 (considering whether the record dealt with the "personal, intimate, or otherwise private life" of the head librarian).

70 *Ray v. United States Dep't of Justice, INS*, 778 F. Supp. 1212, 1214 (S.D. Fla. 1991) (citing *Miller v. Webster*, 661 F.2d 623 (7th Cir. 1981)); *see Anchorage*, 794 P.2d at 590 (balancing the "privacy and reputation interests of the affected individuals" under the Alaska Public Records Act).

71 *Bast*, 665 F.2d at 1255; *see also Miller*, 661 F.2d at 629 (considering whether there was a "countervailing showing of substantial public interest in disclosure" under FOIA exemption 7(C) covering investigatory records compiled for law enforcement purposes to the extent that production of such records would constitute an unwarranted invasion of personal privacy).

were seeking "high public office," thus opening themselves to public scrutiny.[72, 73] Individuals holding and seeking high public office have a lesser expectation of privacy and should be more directly accountable to the public.

Second, this Court has repeatedly considered whether the information would be embarrassing if publicly revealed.[74] The Court has also considered whether the information dealt with personal or intimate matters[75] and has agreed that personnel files "contain the most intimate details of an employee's work history."[76] The right to privacy protects "sensitive personal information . . . which, if disclosed even to a friend, could cause embarrassment or anxiety."[77] An individual's mistakes, alleged mistakes, and personal weaknesses referenced in disciplinary records all go to the heart of embarrassing, intimate, and personal information held in disciplinary records. As a result, those defining attributes should be a balancing consideration when courts weigh whether information should be open to public inspection.

---

72 *Id.*

73 The Alaska Personnel Act, which covers state employees, does not apply to municipal officers. AS 39.25.080.

74 *Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1342 (Alaska 1982); *see also Int'l Ass'n of Fire Fighters, Local 1264 v. Mun. of Anchorage*, 973 P.2d 1132, 1134 (Alaska 1999) (right to privacy protects information that, if disclosed, could cause embarrassment or anxiety); *Doe v. Alaska Super. Ct.*, 721 P.2d 617, 629 (Alaska 1986).

75 *Anchorage*, 794 P.2d at 591 (considering whether the record dealt with the "personal, intimate, or otherwise private life" of the head librarian).

76 *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990) (internal citations and quotation marks omitted).

77 *Doe*, 721 P.2d at 629.

Third, whether the records would threaten the employee's "reputation and good standing in the community" is another relevant consideration in balancing the public interest in disclosure with the privacy and reputational interests of the affected individuals. This factor addresses the potential harm to the individual resulting from disclosure.[78]

Fourth, in a case involving the privacy exemption to the federal Freedom of Information Act, a federal appellate court considered whether the details contained in a set of requested documents would enhance a legitimate public inquiry, concluding in that case that the "details add little to a general understanding of the investigation, and their utility to a legitimate public inquiry is minimal."[79] This consideration should take into account whether there is related information that is open to public inspection and if the added value of a specific disciplinary record implicating an employee's privacy interest would outweigh the infringement on such privacy interests.

On this compelling-state-interest prong of the constitutional inquiry, it is notable that the facts of this case diverge from *Jones v. Jennings*, which involved discovery during the course of litigation. There, the Court addressed the question whether the order granting discovery contravened the police officer's right to privacy under the Alaska Constitution concluding that the state had a strong interest in providing a remedy to an individual

---

78 *Ray v. United States Dep't of Justice, INS*, 778 F. Supp. 1212, 1214 (S.D. Fla. 1991) (citing *Miller v. Webster*, 661 F.2d 623 (7th Cir. 1981)); *see Anchorage*, 794 P.2d at 590 (balancing the "privacy and reputation interests of the affected individuals" under the Alaska Public Records Act).

79 *Bast v. U. S. Dep't of Justice*, 665 F.2d 1251, 1254-55 (D.C. Cir. 1981).

tortiously injured by a public employee as well as ensuring effective functioning of the judiciary.[80]

By contrast, the question before the Court here is whether there is a compelling state interest in the disclosure of state employee disciplinary records in response to an Alaska Public Records Act request, a request that can be made by "[e]very person."[81] While the Court in *Jones* acknowledged the role of public access to documents in preserving democracy and enabling the effectiveness of the judiciary in adjudicating disputes, the state's interests in an Alaska Public Records Act case are more likely to be outweighed by the fundamental privacy rights of state employees. In cases such as *Jones* involving tort litigation, the right of an injured person to access information such as law enforcement disciplinary records during litigation is much more compelling than the right of any citizen to request any state employee disciplinary record without even a minimal showing of interest to justify impairing the state employee's right to privacy.

In addition, another court pointed to competing government interests in the context of personnel files, noting that protecting personnel files "has, among other benefits, the protection of the government's ability to function effectively as an employer."[82] The

---

80 *Jones*, 788 P.2d at 738-39.

81 AS 40.25.120(a).

82 *Wakefield Teachers Ass'n v. Sch. Comm. of Wakefield*, 431 Mass. 792, 802 (Mass. 2000) (internal citations omitted); *see also Cowles v. Pub. Co. v. State Patrol*, 748 P.2d 597, 608 (Wash. 1988) ("Internal investigations depend upon the trust and cooperation of the law enforcement officers within the agency. In many situations, the cooperation of the officers is available because they know the incident will be kept confidential.").

effective functioning of the judiciary was one factor in *Jones* that justified the compelling state interest in disclosure. Here, the effective functioning of the state as an employer favors concluding that there is not a compelling state interest in impairing state employees' privacy rights through Alaska Public Records Act requests. Protecting the right to privacy of disciplinary records enhances the likelihood of candor and cooperation in disciplinary investigations.[83]

To the extent Basey points to the Court's statements in *Jones* about the value of public access to citizen complaints against police officers to foster public trust and democratic values, such a purpose—information about law enforcement accountability—can be achieved through access to other law enforcement documents outside of confidential personnel files.[84] In addition, as in *Jones*, there will be broader access during discovery in the course of litigation. For instance, Basey stated "I would be interested in seeing if there were any other instances of Fourth Amendment violations in these officers' personnel files."[85] While disciplinary records are confidential, there would be other law enforcement records of the searches that pique Basey's interest.[86] Under Basey's theory, there could be sweeping consequences with "[e]very person" having a right to inspect sensitive

---

83 *Id.*

84 *See generally* AS 40.25.120(a)(6) (reference to information compiled for law enforcement purposes).

85 Transcript 16.

86 *See generally* AS 40.25.120(a)(6) (reference to information compiled for law enforcement purposes).

disciplinary records of state employees, from law enforcement to Department of Law employees. As another court warned in the context of a public school teacher's suspension,

> in an era where even a hint of impropriety in the relations between teachers and young students may produce a public reaction wholly disproportionate to the actual or suspected nature of the impropriety, forced public disclosure of investigatory reports like this one, regardless of the conclusions and judgments the reports reach, may have a decidedly negative effect on the quality and quantity of student/teacher interactions.[87]

The balancing considerations must therefore carefully account for the unintended consequences of exposing all state employees' disciplinary records to public view through a simple public records act request.

In short, this Court has concluded that there is little doubt that a state employee has a constitutional privacy interest in their personnel files. In balancing both the privacy interests and government interest in confidentiality with the public's interest in disclosure, there is a substantial burden of establishing a compelling state interest in abridging privacy rights.[88] Finally, the balancing considerations in the inquiry should include (1) whether the employee holds or is pursuing a high public office; (2) the impact on the individual of revealing embarrassing, personal, or intimate information; (3) the likelihood the information would damage the individual's reputation and good standing in the

---

87 *Wakefield Teachers Ass'n*, 431 Mass. at 803.

88 *Jones v. Jennings*, 788 P.2d 732, 739 n.15 (Alaska 1990) (explaining that in cases involving the impairment of fundamental rights, "the government must come forward and meet its substantial burden of establishing that the abridgment in question was justified by a compelling governmental interest.").

community; and (4) the potential for the details to add substantially to a general understanding of a legitimate public inquiry.

CONCLUSION

Because disciplinary records constitute the very essence of a state employee's personnel file, such disciplinary records are shielded from disclosure by the express confidentiality protection in the Alaska Personnel Act. The Court therefore need not reach the constitutional right-to-privacy question. But if the Court ultimately reaches this constitutional issue, then it is clear that state employees have a legitimate and reasonable privacy interest in their disciplinary records. The balancing considerations should include (1) whether the employee holds or is seeking a high public office; (2) whether the records would reveal potentially embarrassing, personal, or intimate information; (3) whether the records would threaten the employee's reputation and good standing in the community; and (4) whether the details in the records would add substantially to a general understanding of a legitimate public inquiry.

DATED at Anchorage, Alaska on May 31, 2019.

PUBLIC EMPLOYEES LOCAL 71 & APEA/AFT

By: _____

Khalial Withen
General Counsel
Alaska District Council of Laborers
Counsel for Public Employees Local 71 & APEA/AFT
Alaska Bar No. 1311092