The Hon. Darrel J. Rexwinkel
Commissioner
Department of Revenue

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Access to certain Child Support Enforcement Division files

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This is in response to your request for advice concerning a third-party request for information contained in an inactive Child Support Enforcement Division (CSED) client file, where the obligor is a high-level public official who is currently responsible for supervisory oversight of the CSED program.[1] The short answer to your question is that portions of the file should be released.

The current request for release of information differs significantly from prior requests discussed in previous Attorney General opinions. Previous opinions have dealt only with release of the names and amounts of arrearage of delinquent obligors in active agency cases.[2] This current request seeks information from a closed

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[1] A separate question you asked is whether the confidentiality provisions of AS 09.25.100 apply to CSED client records. This statute has previously been addressed in two informal opinions and was found to be applicable only to the release of tax information. See 1989 Inf. Op. Att'y Gen. at 1 n. 1 (May 30; 661-89-0405); 1987 Inf. Op. Att'y Gen. at 2 (July 15; 663-87-0598).

[2] The first opinion, issued in 1983, was in response to a proposed regulation by CSED that would allow the agency, on its own initiative, to release names of obligors and amounts of their child support arrearage. The opinion expressed concerns about the individual right of privacy under the Alaska Constitution. 1983 Inf. Op. Att'y Gen. (July 11; 366-688-83) (Attachment A) (hereafter: 1983 opinion).

The second opinion was written in 1989 and dealt with a request from the press for the names of delinquent obligors and amounts of arrearage. The 1989 opinion concluded that, based upon a strong public interest in the operation of the child support agency, names of obligors in arrears and the amount of the arrearage could be released to the public with the disclaimer that the arrearage may be contested in individual cases. 1989 Inf. Op. Att'y Gen. (May 30; 661-89-0405) (Attachment B) (hereafter: 1989 opinion).

file, focuses on a single obligor who currently occupies a high-level administrative position in state government with oversight responsibility for the CSED program, and asks not merely for limited information, but seeks the entire contents of the file.

Alaska Open Records Law

Unless specifically provided otherwise, all records of state and local government agencies are open to inspection by the public. AS 09.25.110. Among the exceptions to this statute are "records required to be kept confidential by a federal law or regulation or by state law." AS 09.25.120(4).

There are many other state statutes that prohibit release of specific pieces of information contained in CSED files, particularly information obtained from other agencies. For example, records obtained from the Division of Family and Youth Services within the Department of Health and Social Services may not be disclosed. *See* 1989 opinion.

There are no federal laws or regulations[3] or state statutes providing explicit

[3] Federal regulations implementing the child support program include a directive to states that information relating to applicants or recipients (custodial parents and their children) of CSED services should be "safeguarded" under state law from disclosure, except for purposes directly related to the administration of the program. 45 C.F.R. 303.21 (1987). No such state statute exists in Alaska. The background surrounding this regulation is a bit complicated. When the child support program (Title IVD of the Social Security Act) was initially enacted by Congress, it applied only to families receiving Aid to Families with Dependent Children (AFDC) under Title IVA of the Social Security Act. 42 U.S.C. 601 et seq. Because confidentiality of information contained in AFDC files is required by 42 U.S.C. 602(a)(9), previous federal regulations also required states to safeguard information regarding AFDC applicants and recipients in child support programs. Later the federal child support program was expanded to include non-AFDC families. In 1982, in recognition of the fact that the federal child support statutes had no confidentiality requirement similar to that contained in the AFDC statutes, the federal regulations protecting child support information about AFDC families were changed so as to also apply to information about non-AFDC families. In making that change, however, the mandatory language in the previous regulation was dropped in favor of a directive to the states to enact legislation safeguarding the information. Federal officials responsible for oversight of the child support program were contacted and verified that the safeguarding requirement is not mandatory.

exceptions to AS 09.25.110 for records generated by CSED. Therefore, with CSED records that are not protected by other confidentiality laws, justification for non-disclosure may be based only on the constitution, especially the right of privacy, and on the common law "public interest."

> As noted by one commentator,
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> > The term "state law," used in the fourth exception, obviously refers to any statute requiring records to be kept confidential. The term also refers to any constitutional provision, most notably the right of privacy, which requires confidentiality. Finally, as the Alaska Supreme Court has twice indicated in recent opinions, the reference to "state law" in this statute also includes the common law. The common law on public inspection of government records, as developed in other jurisdictions and acknowledged in Alaska, provides that inspection should be denied when such an inspection would be against the "public interest".

Margot O. Knuth, *Inspection and Discovery of State Records in Alaska*, 4 Alaska L. Rev. 277, 280 (1987).

This view finds support in *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316 (Alaska 1982), in which the court acknowledged the "public interest" exception to disclosure of government records and indicated that it would recognize an exception to the requirement of disclosure when a demonstrable need for confidentiality outweighs the public interest in disclosure. *Id*. at 1323-24. At the heart of the public interest exception is a balancing test, which requires that

> a balance be struck between the public interest in disclosure on the one hand and the privacy and reputation interests of the affected individuals and the government's interest in confidentiality, on the other. The process of balancing has been described as follows:
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> > 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 interest of the public in having

> the business of government carried on efficiently and without undue interference. The initial decision as to whether inspection will be permitted must, of course, rest with the custodian of the records. And since the justification for refusal to permit inspection will depend upon the circumstances of the particular case, we can offer no specific guide for that administrative decision.

Id. at 1323 (citing *MacEwan v. Holm*, 359 P.2d 413, 421-22 (Or. 1961) (en banc)).

Therefore, in this case, as in *City of Kenai*, the crucial question is whether the individual right of privacy and the government's interests in nondisclosure outweigh the public's interest in knowing how its government is functioning. We note at the outset that "the legislature has expressed a bias in favor of public disclosure [and that d]oubtful cases should be resolved by permitting public inspection." *Id*. at 1323.

The Privacy Interests

The first possible justification for not disclosing CSED records is article I, section 22, of the Alaska Constitution, which specifies in part: "The right of the people to privacy is recognized and shall not be infringed." As the Alaska Supreme Court has noted,

> A common thread woven into our decisions is that privacy protection extends to the communication of "private matters," *State v. Glass*, 583 P.2d 872, 880 (Alaska 1978), or phrased differently, "sensitive personal information," *Falcon v. Alaska Public Offices Commission*, 570 P. 2d 469, 480 (Alaska 1977), or "a person's more intimate concerns," *Pharr v. Fairbanks North Star Borough*, 638 P.2d 666, 670 (Alaska 1981) (quoting *State v. Oliver*, 636 P.2d 1156, 1167 (Alaska 1981)). This is the type of personal information which, if disclosed even to a friend, could cause embarrassment or anxiety. *Falcon*, 570 P.2d at 479. We have also recognized that article I, section 22 affords special protection to the privacy of the home. See *Ravin v. State*, 537 P.2d at 503-04.

Doe v. Alaska Superior Court, 721 P.2d 617, 629 (Alaska 1986).

In addition to privacy interests that have been recognized in the home and family, the Alaska Supreme Court has found that personal finances is also a type of "information within an individual's expectation of privacy." *Oliver*, 636 P.2d at 1166.[4] The court has even found that a person may have a privacy interest in his or her name, if the identity of the person could be linked to stigmatizing personal information. *Falcon*, 570 P.2d at 479.[5]

CSED files contain information relating to details of the family finances, family communications, and other personal family matters that seems to clearly fall within the sphere of privacy described in Alaska cases.[6] CSED files contain information not only about the obligor, but also the recipient and the children, and therefore the privacy rights of several individuals are involved in any single CSED matter.[7]

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[4] The cases of *Oliver v. State*, 636 P.2d 1156 (Alaska 1981), and *Pharr v. Fairbanks North Star Borough*, 638 P.2d 666 (Alaska 1981), recognize the privacy interest in financial records. Those cases found that the government interest in tax collection outweighed the privacy interest, and that such records were subject to government access. The cases do not hold that the records would be subject to public access.

[5] The recipient of the child support in the CSED file in issue has specifically requested that the department not release information about the family that is contained in the file, based upon an expectation of privacy in communications with the agency and also out of concern regarding the use to which the information may be put and the possible effect it may have upon relationships among family members.

[6] In light of the sensitive nature of the information collected in a CSED file, most recipients, and perhaps most obligors, may believe that the matter will remain confidential, especially if no court or administrative proceedings result. In light of the purposes of the program and the federal directives (see footnote 3), such an actual, subjective expectation may also be one that society is willing to recognize as reasonable. *State v. Glass*, 583 P.2d 872, 875 (Alaska 1978) (explaining that a right to privacy requires both a subjective and objective expectation).

[7] In *Doe v. Alaska Superior Court*, 721 P.2d 617, 629 (Alaska 1986), the court found no expectation of privacy when one voluntarily communicates an opinion to a public agency. However, much of the detailed information relating to financial and family affairs contained in CSED files is not volunteered, but rather is solicited by the agency to assist in the administration of the program. The mere fact that a person seeks the

The Alaska Supreme Court gives utmost protection to private matters within the home, and also gives special protection to certain relationships:

> Under the Alaska Constitution, the required level of justification [to compel disclosure of information] turns on the precise nature of the privacy interest involved. We have stated that, like interference with rights of privacy within the home, interference with certain relationships . . . ordinarily mandates a very high level of justification.

Falcon, 570 P.2d at 476 (doctor-patient relationship). It is likely that the court would also find that the family relationship, and even a family relationship following a divorce, is deserving of privacy protection.

Therefore, as recognized in prior attorney general opinions, CSED files give rise to a right of privacy under the state constitution. The Alaska Supreme Court has made it clear, however, that the right of privacy protected by article I, section 22, is not absolute. When there is a conflict between that right and a competing interest, a balance must be struck between the interests involved.

Effect on Agency Operations

In addition to privacy interests, the other factor weighing against disclosure may be the agency's interest in seeing that "the business of government [is] carried on efficiently and without undue interference." *City of Kenai*, 642 P.2d at 1323. Indeed, the supreme court also recognizes this as "the interest of the public." *Id*. Whether the agency will be aided or hindered by release of client information often depends on what information is released and the context in which the release is made.

Release of extensive agency records could interfere with operations of the agency. The division has a strong interest in management of the program so as not to discourage voluntary participation by the custodial parent or the obligor out of concern that their personal family difficulties may one day be made public. Indeed, the agency has a responsibility under a federal regulatory directive to safeguard
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assistance of a government agency does not automatically make all subsequent records open to the public.

information about applicants and recipients unless release of the information is for purposes directly related to the agency's operations. While Alaska has not enacted a statute specifically protecting CSED records from disclosure, the court would surely recognize the federal directive as a factor establishing a strong agency interest in preventing public disclosure of CSED files when not related to the agency's functions.

On the other hand, the public release of limited information, such as the identities of obligors and the amounts they owe, could assist in collecting past-due child support payments in active CSED cases. When child support payments are delinquent, the state's interest in obtaining the voluntary cooperation of obligors obviously has much less weight; and the public release of the information, either to the press or in the context of litigation, is less likely to interfere with agency operations.

The Public's Interest in the Functioning of Government

As discussed above, when the government must decide, in the absence of specific statutory guidance, whether to protect the privacy interests of an individual in response to a request from a third party for release of information about that individual, the factors favoring nondisclosure are (a) the individual's privacy interests, and (b) the agency's interest in seeing that "the business of government [is] carried on efficiently and without undue interference." *Id*. On the other side of the scale, the primary factor favoring public disclosure is the public's interest in the operation of its government.

As explained in the 1989 opinion, with obligors who are delinquent in their child support payments, the public interest in the operation of government compelled limited disclosure. As a result, the 1989 opinion concluded that the names of obligors and the amounts of arrearage (along with a disclaimer that the amount may be in dispute) must be released upon request.

In the present situation, the public not only has an interest in how the agency functions, but also has an interest in the background and qualifications of high-level officials who oversee the program. For example, in *City of Kenai*, the Alaska Supreme Court affirmed the order releasing personnel applications for the position of city manager, finding "a strong public interest in disclosure of the affairs of government generally, and in an open selection process for high public officials in particular." *Id*. The court found the public interest in disclosure outweighed the city's expressed interest in ensuring that persons of high caliber would not be discouraged

from applying for government positions. However, the court permitted applicants to avoid disclosure by withdrawing their applications. *Id.* at 1324.

In another opinion, the court ruled that the personnel evaluation of the head municipal librarian was open to the public because "public officials are properly subject to public scrutiny in the performance of their duties." *Mun. of Anchorage v. Daily News*, 794 P.2d 584, 591 (Alaska 1990). However, the court noted that "the performance evaluation did not in any way deal with the personal, intimate, or otherwise private life of [the official]." *Id.; see also Jones v. Jennings*, 788 P.2d 732 (Alaska 1990) (granting litigant's access to police personnel files).

Striking the Balance

If this were an ordinary case involving a third-party request for a closed agency file, we believe a court would strike the balance in favor of the right of privacy and the interest of the agency in not discouraging voluntary cooperation, and therefore you would be entitled to withhold disclosure of even the name of the obligor. This, we believe, is consistent with Alaska case law and the advice provided in prior opinions of this office, which authorizes release only of the name of the obligor and amount of arrearage, and only in cases of delinquencies.

However, this case involves the records of a person at the assistant commissioner level who has direct control over the agency and its personnel. "'Public officials must recognize their official capacities often expose their private lives to public scrutiny.'" *City of Kenai*, 642 P.2d at 1324 (citations omitted).

Moreover, this matter not only affects one individual family, but potentially affects many other families through the operation of the child support agency. As explained in the 1989 opinion, in weighing privacy rights the supreme court often looks to whether the private matter will "adversely affect persons beyond the actor" because "[w]hen a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated." *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975).

Under these unique circumstances, we believe a court would most likely find that information in the file *does* affect the public "directly or indirectly." *Id.* In light of the citizenry's interest in the functioning of government, other interests are outweighed, and a court would therefore order much of the information to be released so as to permit the public or the press to inquire further into the matter and "to seek

additional information which may be relevant to" the background and qualifications of the official. *City of Kenai*, 642 P.2d at 1324. This will require release of information showing, among other things, the extent of the agency's prior involvement with the official.

However, a court would also likely conclude that extensive details about family finances and intra-familial difficulties need not be released, because that could unnecessarily involve the "personal, intimate, or otherwise private life of [the official]", *Mun. of Anchorage*, 794 P.2d at 591, or could unnecessarily involve matters that would be "particularly embarrassing if publicly revealed." *City of Kenai*, 642 P.2d at 1324 (footnote omitted).

Based on this analysis, other than information which is required by a specific statute to be kept confidential, the file involving the official should be released, with the exception of documents and information disclosing family finances, personal intra-familial matters, and attorney-client communications between the agency and the Department of Law. If a particular document requires so much redaction that it becomes incomprehensible, that document also need not be released. Copies of public court documents (i.e., those not filed "under seal" or *in camera*) can be released without redaction.

We also suggest that the department may wish to give the official, as well as the recipient of the child support, an opportunity (for example, five days) to seek a court order prohibiting the release of the information.[8]

Please contact us if you have further questions.

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[8] In *Mun. of Anchorage v. Anchorage Daily News*, 794 P.2d at 591 n.13, the supreme court indicated that it is "desirable" for the subject of a public record to be notified of its pending release and thus be given an opportunity to present argument to a court as to whether disclosure would constitute an unwarranted invasion of the subject's privacy.