November 25, 1994

The Honorable Richard L. Burton, Commissioner
Department of Public Safety
450 Whittier Street
Juneau, Alaska 99811

Public Release of Police Records
A.G. file no: 663-93-0039
1994 Op. Att'y Gen. No. 1

Dear Commissioner Burton:

You have asked for guidelines to follow in responding to requests for public release of various law enforcement records kept by the department. In view of the amendments that were made to the public records statutes in 1990 and 1994, it is appropriate for us to review what records must be kept confidential and what records should be released to the public.[1]

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[1] This opinion was researched and written by Assistant Attorney General Margot O. Knuth; final edits were provided by Chief Assistant Attorney General Dean J. Guaneli.

REQUESTS BY PARTIES IN LITIGATION WITH THE STATE

At the outset, we note that different rules apply when requests for documents are made by a party in litigation *with the state or one of its agencies* than when requests are made by the general public.[2] Alaska Statute 09.25.122, enacted in 1990, specifies:

> LITIGATION DISCLOSURE. A public record that is subject to disclosure and copying under AS 09.25.110 - 09.25.120 remains a public record subject to disclosure and copying even if the record is used for, included in, or relevant to litigation, including law enforcement proceedings, involving a public agency, *except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with applicable court rules.* In this section, "involved in litigation" means a party to litigation or representing a party to litigation, including obtaining public records for the party.

(Emphasis added.) This requirement ensures that the state and its agencies are given the same protections afforded all litigants by the court rules governing discovery even when the documents sought are public records.[3] Thus, when a request for records is made, your department should

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[2] For purposes of this letter, the term "general public" means anyone who is not seeking the records in aid of pending litigation involving the state or one of its agencies, and it thus includes reporters.

[3] There has been uncertainty as to whether this "litigation exception" should be interpreted to apply only to records related to on-going litigation *against the state*. It appears that this was the legislature's intent when enacting the statute; thus, the Attorney General stated in his bill review letter to Governor Cowper that AS 09.25.122 "is consistent with current 6 AAC 95.150 and does not change existing law." *Letter from General Baily to Governor Cowper* (883-90-0175; June 18, 1990). Former 6 AAC 95.150 provided:

> If the requestor or the requestor's principal is in litigation *with an agency* in a judicial or administrative forum, disclosure of any agency's records relevant to that litigation or reasonably likely to lead to the discovery of relevant evidence is governed by the rules or orders in that forum and not by this chapter. (Emphasis added.)

Although AS 09.25.122 does not contain the same limiting language ("with an agency"), and it is "'a fundamental principle of statutory interpretation . . . that a statute means what its language reasonably conveys to others,'" *Flisock v. State*, 818 P.2d 640, 643 (Alaska 1991) (quoting *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 540 (Alaska 1978)), nonetheless the Alaska

inquire whether the records are being sought in aid of pending litigation -- either civil or criminal -- against the State of Alaska or one of its agencies. If so, the request must be denied and the person told why the request is being denied.

REQUESTS BY THE GENERAL PUBLIC -- AN OVERVIEW

Alaska has two primary public records statutes, AS 09.25.110 and AS 09.25.120, which govern the release of records to the general public. Alaska Statute 09.25.110(a) states in relevant part: "Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours."

Alaska Statute 09.25.120(a) expands upon this as follows:

> Every person has a right to inspect a public record in the state, including public records in recorders' offices except (1) records of vital statistics and adoption proceedings which shall be treated in the manner required by AS 18.50; (2) records pertaining to juveniles unless disclosure is authorized by law; (3) medical and related public health records; (4) records required to be kept confidential by a federal law or regulation or by state law; (5) to the extent the records are required to be kept confidential under 20 U.S.C. 1232g and the regulations adopted under 20 U.S.C. 1232g in order to secure or retain federal assistance; (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.

Supreme Court has rejected blind adherence to the "plain meaning rule" for statutory construction, *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d at 540 & n.1. Considering all of the surrounding circumstances, we conclude that AS 09.25.122 creates an exception to the public records act for records sought in conjunction with *litigation involving the State of Alaska*. As for the possible applicability of this statute to municipalities, *see City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1318-23 (Alaska 1982).

Under these statutes, the government must initially presume that the records in its possession are subject to inspection by the public; this presumption must be given effect unless a law can be identified that authorizes or requires the record to be kept confidential. M. Knuth, *Inspection and Discovery of Public Records in Alaska*, 4 ALASKA LAW REVIEW 277, 310 (1987).

Nondisclosure of police records will most often be based on the exceptions in AS 09.25.120(2), (4), and (6). The second exception (juvenile records) has now been clarified in AS 47.10.090 and AS 47.10.093. The sixth exception specifically relates to law enforcement records.[4] Both of those exceptions will be discussed in later sections of this letter. The fourth exception, however, requires special comment about the term "state law."

Alaska Statute 09.25.120(4) authorizes the withholding of "records required to be kept confidential by a federal law or regulation or by *state law*." (Emphasis added.) The term "state

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[4] Paragraph 6, which was added by the legislature in 1990, tracks Exemption 7 of the Freedom of Information Act, 5 U.S.C. § 552(b)(7), which exempts from disclosure:

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of the law enforcement records or information
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> (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.

law" includes: any statute[5] or constitutional provision[6] requiring or authorizing confidentiality, the executive privilege doctrine[7] and perhaps other privileges,[8] and the common law "public interest" exception.[9] *Inspection and Discovery of Public Records in Alaska*, at 280-81 and 293.

We turn next to consider several different types of records. These are: (A) investigative reports in ongoing and completed criminal cases, (B) drivers' records, including accident reports and driver's license photographs, (C) "police blotters," (D) criminal history records, (E) records relating to juveniles, and (F) miscellaneous records. We also have provided advice on the handling of requests and court orders, and have provided a general summary.

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[5] Apart from AS 09.25.120, there are currently five statutes requiring or authorizing the withholding of police records: AS 28.15.151 (drivers' records and traffic reports), *see* section B of this letter; AS 12.62.035 (conviction records of an employee with authority over children), *see* note 37 of this letter; AS 12.62.030 (records of a criminal justice information system funded by a certain federal agency), *see* note 34 of this letter; and AS 12.62.160 (release of "criminal justice information," *see* section D of this letter.

[6] The most frequently applicable constitutional provision is Article I, section 22, of the Alaska Constitution, protecting the right of privacy. This provision requires law enforcement records to be withheld from public inspection when the subject's interest in personal privacy outweighs the public's interest in disclosure. *See* section A.3 of this letter.

[7] *Doe v. Alaska Superior Ct., Third Jud. Dist.* 721 P.2d 617 (Alaska 1986) (executive privilege doctrine explained).

[8] If other evidentiary privileges, chief among them being the attorney-client privilege, are used to justify nondisclosure, that should be decided on a record-by-record basis upon advice from the Department of Law.

[9] In *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1323-24 (Alaska 1982), the Alaska Supreme Court recognized a common law "public interest" exception to the public records act, whereby records may be withheld from disclosure whenever a demonstrable need for confidentiality outweighs the public interest in disclosure. *See also Municipality of Anchorage v. Daily News*, 794 P.2d 584, 590 (Alaska 1990) ("In the absence of an express exception to the disclosure laws, a balance must be struck between the public interest in disclosure on the one hand, and the privacy and reputational interests of the affected individuals together with the government's interest in confidentiality, on the other").

A. Police Investigative Reports

Alaska Statute 09.25.120(6) provides certain exemptions for "records or information compiled for law enforcement purposes," which for your department consist largely of police investigative reports of criminal offenses.[10] Certain information contained in these reports will be confidential whether the investigation is ongoing or completed, and this will be discussed first. Thereafter, however, different analyses must be used to determine if a report is subject to disclosure or not, depending upon whether the investigation is ongoing or completed.

A.1. Information to be Withheld Regardless of Whether Investigation Is Ongoing or Completed

Alaska Statute 09.25.120(6) sets out exceptions for several types of information in police reports that must be withheld regardless of whether the investigation is ongoing or completed.

A.1(a) Confidential Sources

Alaska Statute 09.25.120(6)(D) authorizes the withholding of law enforcement records, regardless of the status of the investigation, if the disclosure "could reasonably be expected to disclose the identity of a confidential source." It is apparent under this section that the department may withhold a record revealing the identity of *informants*, although whether other persons may also be considered a confidential source is an uncertain issue in Alaska.

A.1(b) Confidential Techniques and Guidelines

Alaska Statute 09.25.120(6)(E) and (F) authorize the withholding of records if their release "would disclose confidential techniques and procedures for law enforcement investigations or prosecutions," or "would disclose guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law." Thus, records revealing "drug profiles," for example, need not be disclosed to the public.

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[10] As discussed in section F.1 of this letter, the exemption also applies to reports of investigations for administrative proceedings.

A.1(c) Information That Could Endanger a Person's Safety

Finally, AS 09.25.120(6)(G) authorizes the withholding of records, regardless of the status of the investigation, when their disclosure "could reasonably be expected to endanger the life or physical safety of an individual." Any such information clearly should be withheld from public disclosure. This exception applies to the safety of police officials as well as the public, thus the department need not disclose information about undercover officers.

A.2. Investigative Reports in Ongoing Investigations

Records that "could reasonably be expected to interfere with enforcement proceedings" are exempt from disclosure under AS 09.25.120(6)(A). Courts have uniformly held that this protects police reports and other records relating to ongoing investigations. *See, e.g., Cox Arizona Publications v. Collins*, 818 P.2d 174 (Ariz. App. 1991); *Wells v. Sarasota Herald Tribune Co.*, 546 So. 2d 1105 (Fla. App. 1989). Accordingly, such records can be withheld from the general public. Furthermore, unless and until criminal charges are filed, a defendant has no greater right to a copy of an investigative report than any other member of the public. Once charges are filed, a defendant's access to investigative materials is governed by Criminal Rule 16, relating to discovery in criminal cases.

Some courts have recognized an exception, however, allowing victims to obtain copies of their own statements, even if the investigation has not yet been concluded. *See Pinkava v. Corrigan*, 581 N.E.2d 1181, 1182 (Ohio App. 1990) (twelve-year-old rape victim could obtain copy of her statement).[11] Victims, however, are not automatically entitled to the entire report in an ongoing investigation. In *Little v. Gilkinson*, 636 P.2d 663 (Ariz. App. 1981), the police had investigated the murder of the plaintiff's son, but were unable to develop a case. The father sought copies of the reports, which he wanted to turn over to a private investigator. The police claimed release would hinder their investigation. The appellate court concluded it was necessary to apply the public interest balancing test to determine whether the report should be released.

We believe that the Alaska courts may well adopt a similar balancing approach. A complicating factor, however, is the defendant's right to a fair trial. Alaska Statute 09.25.120(6)(B) specifically exempts from disclosure records that "would deprive a person of a right to a fair trial or an impartial adjudication." Rarely, if ever, will the state be able to adequately assess the impact that disclosure to a victim would have on a defendant's right to a fair trial. Thus this provision essentially authorizes the withholding of all records in cases in which criminal judicial proceedings have not begun or are still pending. This exemption applies to the records of a case until no further court action is expected; e.g., the case is dismissed or a defendant is sentenced.

We conclude that these competing interests must be resolved by the judiciary. Accordingly, except for a victim's own statement, a victim's request for records while the

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[11] Some states' statutes, however, exempt *all* investigative reports from disclosure. *See, e.g., Sullivan v. City of Pittsburgh*, 561 A.2d 863 (Pa. Commonwealth 1989), which affirmed the denial of a victim's request for the investigative report regarding her assault, even though no action had been taken in the matter for 18 months. The court specifically contrasted the language of its laws with that of the federal act, stating: "[W]hile we deeply sympathize with the victim of a criminal act who wishes to be assured that all possible steps are being taken by law enforcement officials to solve the crime we cannot conclude that our Right-to-Know Act provides any relief." 561 A.2d at 866.

investigation is ongoing should be denied unless the victim obtains a court order compelling the disclosure.

A.3. Investigative Reports in Completed Criminal Cases

Once a criminal investigation and any related prosecution are completed, a police report can more readily be disclosed. If, however, there remains a realistic possibility of discovery of additional evidence, a case can nonetheless be deemed to be ongoing (and thus not subject to disclosure), even if it has been reviewed for prosecution and no charges have been filed or prosecution has been declined.

Assuming that the records do not involve a juvenile[12] or any of the exceptions enumerated in section A.1, reports in completed cases are generally subject to disclosure unless release "could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness." Alaska Statute 09.25.120(6)(C). This appears to be a legislative codification of the right to privacy protected by the state constitution.[13]

This privacy exception requires that you separately analyze the different documents that make up the investigative file, as well as the different types of information contained within those documents. It is quite possible that some parts of an investigative file will be subject to disclosure, while other parts are not. *See Lame v. United States Department of Justice*, 654 F.2d 917, 923 (3d Cir. 1981) ("There can be no question that the 7(C) balancing test must be conducted with

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[12] Alaska Statute 09.25.120(2) specifies that "Every person has a right to inspect a public record in the state . . . except . . . records pertaining to juveniles unless disclosure is authorized by law." *See* AS 47.10.090 and AS 47.10.093, relating to juvenile records, discussed in section E of this letter.

[13] 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." This statute, as well as AS 12.62.035 (relating to conviction records for those working with children) and AS 28.15.151(f) (relating to driving records and traffic reports), may be considered legislative implementations of the right of privacy.

regard to each document, because the privacy interest and the interest of the public in disclosure may vary from document to document. Indeed these interests may vary from portion to portion of an individual document.") There may also be instances in which *summaries* of reports are deemed disclosable, but *transcripts* of interviews are not. This is because the transcripts may be more likely to contain statements that are speculative, unsubstantiated, defamatory, or simply irrelevant to the investigation, thus leading to the conclusion that releasing the transcript would constitute an unwarranted invasion of the privacy of various persons.

In completed investigations, there are separate categories of information that require separate consideration: information about victims and witnesses, information about defendants charged with a crime, and information about suspects *not* charged with a crime.

A.3(a) Victim and Witness Information

Information about victims and witnesses may be partially protected by either the Victims' Rights Act of 1991 or by a promise or expectation of confidentiality or privacy.

A.3(a)(i) Information Protected by Victims' Rights Act

In 1991, the legislature enacted the Victims' Rights Act, part of which addresses victim and witness information confidentiality. Alaska Statute 12.61.100 -- 12.61.150. Alaska Statute 12.61.110 requires the department to "delete" the *residence and business addresses* and *telephone numbers* of all victims and witnesses from reports or documents made available for public inspection. Additionally, the *name of a victim* of an offense under AS 11.41.300(a)(1)(C) (kidnapping with intent to sexually assault) or 11.41.410 -- 11.41.460 (sexual assault, sexual abuse of a minor, incest, unlawful exploitation of a minor, and indecent exposure) is not to be disclosed to the public and should be deleted from any record made available for public inspection.

Although a victim's or witness's name, address, and telephone number should be deleted from the report, usually the content of the witness's statement remains subject to disclosure. *See, e.g., Providence Journal Co. v. United States Dep't of Army*, 781 F. Supp. 878, 886 (D.R.I.

1991). Courts have recognized, however, that redacting names may not be sufficient to protect the witnesses' identities. In such situations, withholding of their statements has been upheld. *Brady v. Ottaway Newspapers, Inc.*, 467 N.Y.S.2d 417, 418 (Sup. Ct. App. Div. 1983), *aff'd*, 484 N.Y.S.2d 798 (Ct. App. 1984) (local police scandal that did not result in prosecutions). *See also Hawkins v. Kurlander*, 469 N.Y.S.2d 820 (Sup. Ct. App. Div. 1983) (where names of witnesses had been revealed already, substance of their testimony had to be withheld).

There may be instances when even nondisclosure of the person's statement is insufficient to protect that person's identity, e.g., cases in which the underlying facts make it apparent who the victim was. In these instances, we believe that the entire report should be withheld from public release absent a specific court order compelling the disclosure or advice received from the Department of Law.

A.3(a)(ii) Promise or Expectation of Confidentiality/Privacy

Courts from other jurisdictions have grappled repeatedly with whether it is proper to assume that victims or witnesses were promised or expected confidentiality when they cooperated in an investigation and what the result should be if such confidentiality was promised or expected.[14] In *United States Department of Justice v. Landano*, 508 U.S. ____, 113 S.Ct. ____, 124 L.Ed.2d 84 (1993), the United States Supreme Court acknowledged the common understanding that a "statement can be made 'in confidence' even if the speaker knows the communication will be shared with limited others, as long as the speaker expects that the information will not be published

[14] Most of the cases cited in this section focus on the FOIA exception provided for "confidential sources," rather than on the exception protecting the subject's right of privacy. *But see Lieverman v. United States Dep't of Justice*, 597 F. Supp. 84, 88 (E.D. Pa. 1984) (even if there is no blanket exemption for names of all third parties mentioned in FBI investigatory records, all such persons have privacy interests that can be protected after court has balanced privacy interest against public interest and disclosure of names). There is an analytical difference between the two exceptions, but as a matter of practice, Alaska's exceptions for confidential sources and for unwarranted invasions of privacy both protect from disclosure the identity of witnesses or victims and the information they have provided when its disclosure could reveal their identities.

indiscriminately." 124 L.Ed.2d at 95. Accordingly, a "source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." *Id.* at 95-96.[15]

The Court rejected, however, an argument that a promise of confidentiality should *always* be implied for anyone who cooperates with a criminal investigation. *Id.*[16] Nonetheless, it left the door open for such presumptions to be used in narrower circumstances. *Id.* at 98-99. Whether a promise of confidentiality should be implied or not will depend upon "factors such as the nature of the crime that was investigated and the source's relation to it," which should provide evidence as to whether a fear of retaliation is reasonable or not. *Id.* at 99.[17] Examples of cases in

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[15] *See also Brant Construction Co. v. United States EPA*, 778 F.2d 1258 (7th Cir. 1985), holding that even an unsolicited letter could be considered a confidential source depending upon the circumstances; in this case, the author's allegations regarding a contractor's illegal and improper activities suggested an expectation of confidentiality.

[16] Other courts have reached different conclusions when considering this issue. Some have required an explicit promise of confidentiality. *See Ragusa v. New York State Dep't of Law*, 578 N.Y.S.2d 959, 964 (Sup. Ct. 1991) ("That future prospective witnesses might be discouraged from cooperating with the Attorney General in the face of promises not kept is quite irrelevant; for no promises have been alleged making such a speculation a matter of no consideration in this case."). Others have required a showing that confidentiality was expected even if not promised. *See Faulkner v. Del Giacco*, 529 N.Y.S.2d 255, 257 (Sup. Ct. 1988) ("In this case, the statements were given by the alleged victims wherein they identified their alleged assailants. There is no indication that confidentiality was promised or expected."). Yet others have been willing to invariably imply a promise of confidentiality. *See Dow Jones & Co. v. Department of Justice*, 917 F.2d 571, 577 (D.C. Cir. 1990) ("Since the FBI typically promises confidentiality and rarely -- if ever -- will a source not desire it, only the starkest and most conclusive evidence of non-confidentiality will rebut the presumption" of confidentiality); *Powell v. United States Dep't of Justice*, 584 F. Supp. 1508, 1528 (N.D. Cal. 1984) (those who supply information about criminal suspects' conduct do so under implied assurance of confidentiality).

[17] An additional argument that may be given some weight by the court is that disclosure will have a chilling effect on the willingness of other people to cooperate with future investigations. *Hawkins v. Kurlander*, 469 N.Y.S.2d 820 (Sup. Ct. App. Div. 1983); *Tacoma News v. Tacoma-Pierce Health Dep't*, 778 P.2d 1066, 1070 (Wash. App. 1989), *review denied*, 785 P.2d 825 (Wash.

which it is reasonable to categorically assume assurances of confidentiality include investigations relating to drug trafficking, gang-related violence, or organized crime.

In other circumstances, an implicit promise or expectation of confidentiality may exist, but cannot be categorically presumed from the nature of the offense, and the witness's willingness to testify is not dispositive.[18] In these cases, protection under this exception will still exist, but it will be incumbent upon the government to establish that the victim or witness held an actual and reasonable expectation of such confidentiality. Thus, the government should withhold the records, but be prepared to make an *in camera* demonstration of an expectation of confidentiality, relying on affidavits from the subject. *Id.*

A.3(a)(iii) Effect of Witness's Death

Courts have differed on the impact resulting from the death of the suspect and/or a witness. In *Kiraly v. Federal Bureau of Investigation*, 728 F.2d 273, 277-78 (6th Cir. 1984), the court rejected the argument that the right to privacy ends upon a witness's death, concluding that it remained inappropriate to reveal the witness's identity. *See also Keys v. United States Dep't of*

1990) ("Disclosing the identities of sources will discourage potential sources from providing important information in the future, and will therefore frustrate the investigative process"). *But see Scott v. County of Nassau*, 252 N.Y.S.2d 135, 138 (Sup. Ct. 1964) ("Here no informer is involved and the criminal prosecution is at an end. The only public interest in preventing disclosure, therefore, would be to encourage frankness in the making of official reports, and that is not sufficient reason to deny the disclosure to which plaintiffs are otherwise entitled.").

[18] Courts have disagreed on the legal significance of a victim's or witness's willingness to testify at trial if that should become necessary. The U.S. Supreme Court left this issue unresolved in *Landano*. In *Irons v. FBI*, 811 F.2d 681, 686 (1st Cir. 1987), the court held that a willingness to testify does not amount to a waiver of confidentiality. It noted that "it is the subjective intent of the informer -- whether or not he intended to abandon the safeguards of the exemption -- which controls; the mere (uncommunicated) fact that the agency considers him to be a likely witness is beside the point." 811 F.2d 681, 686 (1st Cir. 1987). In *Cornell University v. N.Y. Police Dep't*, 544 N.Y.S.2d 356, 358 (Sup. Ct. App. Div. 1989), however, the court relied on the possibility that the witness could be called at trial as evidence that any expectation of confidentiality was unreasonable.

Justice, 830 F.2d 337 (D.C. App. 1987) (forty-year-old investigation still protected by deceased subject's right of privacy).

In *Ferguson v. Federal Bureau of Investigation*, 762 F. Supp. 1082, 1098 (S.D.N.Y. 1991), however, the court held that the right of privacy ceases to exist upon the witness's death. Similarly, in *Schmerler v. Federal Bureau of Investigation*, 700 F. Supp. 73 (D.D.C. 1988), despite the FBI's argument that its witnesses must have a perpetual promise of confidentiality, the court ruled that information gathered in the 1930s under an assumption of confidentiality was subject to release. *See also Silets v. Federal Bureau of Investigation*, 591 F. Supp. 490 (N.D. Ill. 1984) (release would not cause unwarranted invasion of privacy).

This issue has not been resolved yet in Alaska. We conclude that in these circumstances it is better to err on the side of protecting privacy than disclosing information that cannot be "undisclosed" thereafter. Please contact this office if presented with an unusual case.

A.3(b) Defendants (Charges Filed)

With respect to criminal defendants, we believe that the disclosure of investigative reports does not constitute "an unwarranted invasion of [the defendant's] personal privacy" when charges have been filed or an arrest has been made, because the public nature of the proceedings eliminates any reasonable expectation of privacy.[19] Thus, subject to the victim/witness information constraints noted above, we believe that investigative reports from a case in which charges have been filed or an arrest has been made must be made available for inspection by the public *once the proceedings have ended*; i.e., the charges have been dismissed or the defendant has been sentenced. This will ensure that the disclosure does not "deprive a person of a right to a fair trial or an impartial adjudication" pursuant to AS 09.25.120(2). As the court stated in *Tennessean Newspaper, Inc. v. Levi*, 403 F. Supp. 1318 (D.C. Tenn. 1975):

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[19] As to the APSIN computer database of criminal history records, however, *see* section D of this letter.

> [I]ndividuals who are arrested or indicted become persons in whom the public has a legitimate interest, and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest. . . . [T]his right [of privacy] becomes limited and qualified for arrested or indicted individuals, who are essentially public personages.

403 F. Supp. at 1321. *See also Hudgens v. Renton*, 746 P.2d 320 (Wash. App. 1987) (acquitted defendant's right of privacy did not outweigh public's interest in disclosure of police report).

Nonetheless, a defendant's right to privacy may support a regulation authorizing reports to be kept confidential in cases in which the charges were dismissed more than a certain number of years ago; e.g., ten years. It seems reasonable to conclude that, with the passage of time, the defendant's expectation of privacy in dismissed charges increases, while the public's interest in disclosure decreases. *See Napper v. Georgia Television Co.*, 356 So.2d 640, 644 (Ga. 1987) (remoteness in time of events is a relevant factor). *But see Church of Scientology v. Phoenix Police Dep't*, 594 P.2d 1034 (Ariz. App. 1979) (twenty-year-old records subject to disclosure). We note that AS 12.62.160(b)(9), which will become effective July 1, 1995, will authorize the disclosure of "past conviction information . . . if less than 10 years has elapsed from the date of unconditional discharge to the date of the request." This suggests a legislative finding that, in at least one context of computerized criminal justice information, after 10 years has elapsed a defendant's expectation of privacy is greater than the public's interest in the disclosure of the information.

A.3(c) Suspects (Charges Not Filed)

A more difficult question is presented when a criminal investigation is completed and does *not* result in charges being filed or an arrest being made. As the Alaska Supreme Court has noted: "The right to privacy is not absolute. . . . Rather, 'there must be . . . a balancing of conflicting rights and interests.'" *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990) (quoting *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1981)). This balancing test must be performed each time a report is requested in a case closed without an arrest or charge being made.

The competing factors are apparent: On the one hand, the suspect would probably choose to keep confidential the fact that he or she was once under suspicion. On the other hand, the public may have a right to know about the investigation, at least to assure itself that its public servants are performing their duties properly and not inappropriately letting criminals go.

Alaska Statute 09.25.120(6)(C) replicates an exception to the federal Freedom of Information Act that exempts records when their disclosure would "constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness." 5 U.S.C. § 552(b)(7)(C). This exception has been broadly interpreted by some federal courts.[20] A prominent example is *Fund for Constitutional Government v. National Archives & Record Service*, 656 F.2d 856, 864 (D.C. Cir. 1981), which arose when the government denied a request for the reports prepared during the Watergate investigation. The appellate court affirmed the denial, stating that there could be no clearer example of an unwarranted invasion of personal privacy than to "announce to the world" that a person had been the target of an investigation. At the same time, however, the court concluded that it could not adopt a *per se* rule, in every case where individuals have been investigated but not charged with a crime, that information is properly exempt from disclosure under

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[20] It has not, however, been held to extend to commercial interests by federal courts or state courts interpreting similar exceptions. *See Ragusa v. New York State Dep't of Law*, 578 N.Y.S.2d 959, 963 (Sup. Ct. 1991) (rejecting claim that records should be held confidential because they contained trade secrets or economically sensitive information); *Tacoma News v. Tacoma-Pierce Health Dep't*, 778 P.2d 1066, 1069 (Wash. App. 1989), *review denied*, 785 P.2d 825 (Wash. 1990) (rejecting claim that ambulance company's "right of privacy" would be invaded by disclosure of an investigation conducted against it because "this particular exemption is commonly understood to pertain only to the intimate details of one's personal and private life"; court concluded that disclosure of the investigation "might cause inconvenience or embarrassment to the service under investigation and the sources of information, but will not invade any person's privacy"). *See also Cohen v. Environmental Protection Agency*, 575 F. Supp. 425, 429 (D.D.C. 1983) (court held that privacy exception is inapplicable to information about professional or business activities and thus identities of those who received notice letters from the EPA regarding necessary toxic waste dump cleanups were not exempt from disclosure).

Exemption 7(C). 656 F.2d at 866 (footnote omitted). *See also Struth v. Federal Bureau of Investigation*, 673 F. Supp. 949, 965 (D. Wis. 1987).

Other federal courts have also rejected the suggestion that investigative reports should be presumed exempt from disclosure if charges were not filed. *See, e.g., Weiner v. Federal Bureau of Investigation*, 943 F.2d 972, 985 (9th Cir. 1991). In *Landano v. United States*, 758 F. Supp. 1021, 1026 (D.N.J. 1991), *aff'd*, 956 F.2d 422 (3rd Cir. 1992), *rev'd on other grounds*, 508 U.S. ____, 113 S.Ct. ____, 124 L.Ed.2d 84 (1993), the court recognized that the public has an interest in reviewing investigative reports to determine whether its servants are fulfilling their duty to prosecute those who have violated the law.

State courts have similarly recognized that the public has an interest in the disclosure of investigative records. In *Irvin v. Macon Telegraph Publishing Co.*, 316 S.E.2d 449 (Ga. 1984), the Supreme Court of Georgia affirmed a trial court's decision holding that records of an investigation were subject to disclosure. The court quoted from an earlier opinion in which it had stated:

> "Generally, the public records that are prepared and maintained in a current and continuing investigation of possible criminal activity should not be open for public inspection. On the other hand, and again, generally, public records prepared and maintained in a concluded investigation of alleged or actual criminal activity should be available for public inspection."

316 S.E.2d at 452 (quoting *Houston v. Rutledge*, 229 S.E.2d 624 (Ga. 1976)). The court noted that members of the public have an interest in having "information openly available to them so that they can be confident in the operation of their government," and in ensuring that "the conduct of those public employees who investigate the suspects is open to public scrutiny." 316 S.E.2d at 452.[21] *See also Donrey of Nevada, Inc. v. Bradshaw*, 798 P.2d 144, 148 (Nev. 1990) (public has right to inspect

[21] It should be noted, however, that the public's interest in disclosure was heightened in the *Macon Telegraph* case because the suspects were governmental employees, whose conduct must be "open to public scrutiny." 316 S.E.2d at 452.

report generated by investigation into dismissal of criminal charges for contributing to the delinquency of a minor); *Cornell University v. New York Police Dep't*, 544 N.Y.S.2d 356 (Sup. Ct. App. Div. 1989) (university brought action against city police department, seeking to discover documents pertaining to investigation of sexual assault by security guard against student; records held subject to disclosure).

This recognition of the public's interest has been echoed by the Alaska Supreme Court, although in the context of a civil suit against public employees, rather than a request for public information. In *Jones v. Jennings*, 788 P.2d 732 (Alaska 1990), a civil rights litigant sought access to the personnel files of the defendant police officers and to the records documenting the department's internal investigations of complaints filed by citizens. In considering whether the officers' right of privacy under the constitution compelled confidentiality of the records, the supreme court noted:

> The cornerstone of a democracy is the ability of its people to question, investigate and monitor the government. Free access to public records is a central building block of our constitutional framework enabling citizen participation in monitoring the machinations of the republic. Conversely, the hallmark of totalitarianism is secrecy and the foundation of tyranny is ignorance.

Id. at 735 (footnote omitted). Ultimately, the court concluded in *Jennings*: "We find the public policy considerations of openness, free access to the workings of government, insuring the effective operation of our judicial system, and preservation of our democratic ideals compelling." *Id.* at 739 (footnote omitted).

We believe that the balancing of competing interests involved when an investigation does not result in charges being filed lends itself to three categories. If the charge that was investigated carries a strong social stigma, as do the offenses of sexual assault or sexual abuse, then the presumption should be in favor of nondisclosure to protect the suspect's (and in large measure also the victims') rights of privacy. At the other end of the spectrum, if the charges are relatively

minor, such as traffic offenses or traffic accident cases, the presumption should be in favor of disclosure, which is what the law requires in the absence of an identifiable exception. Cases in between these two extremes should turn upon the probable truthfulness of the allegations. Note, however, that a suspect's status as a public figure, or allegations of a crime that involves a breach of the public trust, will likely slide the balancing scales in the direction of disclosure, even if the crime alleged involves a serious social stigma.

A.3(c)(i) Probable Truthfulness of Allegations

A growing number of courts have acknowledged that the probable truthfulness of the allegations against the suspect should be weighed when deciding whether the subject's privacy interests outweigh the public's interest in disclosure. Thus, in *Abramson v. Federal Bureau of Investigation*, 566 F. Supp. 1371, 1375 (D.D.C. 1983), the court upheld the nondisclosure of "unverified derogatory information to the public." In *Napper v. Georgia Television Co.*, 356 So.2d 640, 644 (Ga. 1987), the court stated:

> Various factors weigh on the question of whether personal privacy protects information from disclosure. Among other things, the court should consider whether the information is unsubstantiated and based on hearsay, whether it does not relate or relates only incidentally to the subject matter of the public record and the remoteness in time of the events referred to.

In *City of Tacoma v. Tacoma News, Inc.*, 827 P.2d 1094, 1097 (Wash. App. 1992), a newspaper sought access to police department records regarding allegations of child abuse made by an anonymous hearsay informant against a mayoral candidate. The police and prosecutors concluded that the allegations could not be substantiated. The newspaper argued that because the suspect was a public figure, the information -- if true -- would be a matter of legitimate public concern. Furthermore, it argued that for purposes of analysis, the court should assume that the allegation was true. The court disagreed with this point, stating "the information here is surely of less concern to the public if it is false than if it is true." *Id.* at 1099. Beyond that, the court stated that if the

"information remains unsubstantiated after reasonable efforts to investigate it, that fact is indicative though not always dispositive of falsity." *Id.* at 1099.

In *Common Cause v. National Archives & Records Service*, 628 F.2d 179, 183 n.10 (D.C. Cir. 1980), the court recognized that the public may have a significant interest in a full airing of potentially serious abuses by political candidates, and one factor in determining whether to release the reports was the reliability of the requested information, which would depend upon whether the witnesses had direct knowledge of the incidents, whether the events were recent or remote, and the nature and extent of any corroboration. 628 F.2d at 185-86.

The public's interest in disclosure of allegations is greatly reduced when those allegations are unreliable or probably untrue. We therefore conclude that the probable truthfulness of the allegations is an important factor when balancing the suspect's right of privacy against the public's interest in the disclosure of investigations in this middle category of offenses when charges are not filed. On the other hand, the suspect's expectation of privacy is greatly diminished, and disclosure is appropriate, when the lack of prosecution is the result of technical problems, such as an expired statute of limitation or an unavailable witness, rather than because of uncertainty as to the truth of the allegations.

A.3(c)(ii) When Suspect Is Public Figure or Employee

Beyond the public's general interest in knowing how its government has handled an investigation, the public has a heightened interest in the disclosure of an investigation that did not result in charges being filed if the suspect is a "public figure," such as a government official or prominent citizen. In a case involving a request for access to the applications submitted for the position of chief of police, the Alaska Supreme Court has stated: "'Public officials must recognize their official capacities often expose their private lives to public scrutiny.'" *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1324 (Alaska 1982) (quoting *Advisory Opinion on*

Constitutionality of 1975 PA 227, 242 N.W.2d 3, 19 (Mich. 1976)).[22] These considerations may tilt the scales in favor of disclosing investigative reports into the activities of public officials.

In *Sullivan v. Veterans Administration*, 617 F. Supp. 258 (D.D.C. 1985), the court concluded that the public's interest in an investigation into whether a Veterans' Administration official misused government property and funds outweighed the official's interests in keeping the matter confidential. The official had allegedly "borrowed" a government vehicle for his personal use, then involved it in an accident, and thereafter used government funds for repairs to the vehicle he struck. The court weighed the competing factors in disclosure: "[T]he privacy interests at stake are limited to whatever embarrassment or reputational injury plaintiff might suffer as a result of being associated unwarrantedly with the alleged wrongdoing which is the subject of the report. . . . On the other side of the balance is the public's interest in knowing what public servants may be involved in wrongdoing." *Id.* at 260.

> [T]he privacy interests of plaintiff, in his capacity as a federal employee, are diminished due to the public interest in knowing how public employees are performing their jobs -- "in order to hold the governors accountable to the governed." . . . This is particularly true where, as here, the federal employee in question holds a high level position . . . . Furthermore, this is not a case where plaintiff was associated unwarrantedly with wrongdoing. While plaintiff continues to protest his innocence of any criminal wrongdoing, he has never denied the essential facts underlying the allegations made . . . .

Id. at 261.

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[22] *See also South Coast Newspapers v. City of Oceanside*, 206 Cal. Rptr. 527 (Cal. App. 1984), in which a newspaper sought disclosure of the police reports generated in an investigation into allegations that a high school principal had failed to report an incident of child abuse, following the local prosecutor's decision not to charge the principal. The defending city argued that the records were exempt from disclosure as "investigative reports." The California court of appeals rejected this argument, concluding that the "investigatory records exemption is *not* an absolute exemption." 206 Cal. Rptr. at 531. Turning next to the principal's claim of privacy, the court found his status as a "public figure" dispositive. It accordingly ruled that the newspaper was entitled to inspect and copy the records.

In *Common Cause v. National Archives & Records Service*, 628 F.2d 179, 183 n.10 (D.C. Cir. 1980), the court recognized that the public may have a significant interest in a full airing of potentially serious abuses by political candidates. The case centered around a request for documents from the national archives that would reveal the identity of candidates to whom nineteen corporations admitted making unlawful campaign contributions. The trial court ordered the material withheld because it "might subject the alleged recipients to embarrassment and public obloquy without the benefit of formal judicial proceedings." *Id*. at 180-81. On appeal, the government argued that in virtually every case it would constitute an unwarranted invasion of privacy to identify persons not subsequently charged with a crime or otherwise publicly associated with the events under investigation. *Id.* at 183. It further argued that the information sought in this case was in "most instances unsupported and uncorroborated." *Id.* The court of appeals concluded that, although there were good policy reasons for protecting uncharged persons, it nonetheless was "not prepared to state this as the rule for every case and we do not know enough about the documents at issue here to make any more refined ruling than that." *Id.* at 184. Factors that the court identified as important in deciding whether the records should be released included: the subjects' candidacy for public office, the public nature of the contributions at issue, and the reliability of the requested information. *Id.* at 185-86.

In *Jensen v. Schiffman*, 544 P.2d 1048 (Or. 1976), the sheriff's department had completed an investigation into the city police department that resulted in no charges being filed, and several citizens sought access to the report. When considering the subjects' privacy interests, the court stated: "As for invasion of privacy, the report deals primarily, if not exclusively, with the conduct of public servants (the members of the Reedsport Police Department) in the performance of their public duties. . . . [A]ny privacy rights that public officials have as to the performance of their public duties must generally be subordinated to the right of the citizens to monitor what elected

and appointed officials are doing on the job." 544 P.2d at 1052. Accordingly, the court ordered the documents to be released.[23]

Based on these authorities, in the case of an investigative report of a public figure who has not been arrested or charged, the balancing should be weighted toward disclosure. Other

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[23] *See also Providence Journal Co. v. United States Dep't of Army*, 781 F. Supp. 878 (D.R.I. 1991) (public's interest in knowing of public servant's possible criminal wrongdoing outweighed suspects' -- Rhode Island Army National Guard officials -- interest in privacy). *But see Ray v. United States Dep't of Justice*, 778 F. Supp. 1212 (S.D. Fla. 1991), in which the court concluded that revealing information concerning an official investigation of a government employee (an INS examiner) could unnecessarily damage his good standing in community; *Bast v. United States Dep't of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (while public has interest in knowing whether the Department of Justice properly exercised its prosecutorial discretion, government officials do not surrender all rights to personal privacy when they accept a public appointment).

An additional factor at issue when the suspect is a public figure or employee is the possibility that the law enforcement agency was biased in the suspect's favor. In *City of Tacoma v. Tacoma News, Inc.*, 827 P.2d 1094, 1100-01 (Wash. App. 1992), a newspaper was attempting to obtain copies of an investigative report, arguing in part that the public had a significant interest in ensuring that the investigation had been conducted properly. The court found that factor unpersuasive in the particular case, stating as follows:

> The Tribune argues that the records should be released because the public has a legitimate right to know how diligently the police investigated the information provided by the anonymous informant, and that that is particularly important if in fact the information pertains to a candidate who was being supported by the police union. While we do not rule out the possibility this type of argument might override the need for privacy in a particular case, it is not persuasive here. The records give no hint of a less than adequate investigation. . . . [A]ny inference that police bias affected the outcome is substantially negated by the fact that three other professional agencies reviewed the case and reached the same conclusion as the police.

In *Stern v. Federal Bureau of Investigation*, 737 F.2d 84, 92 (D.C. Cir. 1984), however, the court noted that the public has a significant interest in knowing that a government investigation is comprehensive, that a report thereof is accurate, that disciplinary measures are adequate, and that those who are accountable are dealt with in an appropriate manner. Weighing the competing factors in the case before it, the court ruled that the public's interest in the disclosure of the name of an FBI employee investigated for knowingly covering-up illegal surveillance activities exceeded the employee's privacy interests.

factors making disclosure appropriate include the probable truthfulness of the allegations, whether the person holds an elective or high-level appointed position, and whether the allegations relate to performance of official functions.

A.3(c)(iii) Access by Victims

The last factor that could have an impact on the balancing process used to determine whether to release investigatory reports where no charges were filed is whether the person requesting the records, such as a victim, has a specialized need for the records. Generally speaking, the particular interest of the person requesting the record is not entitled to consideration in the balancing process. As the U.S. Supreme Court stated in *United States v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772, 109 S. Ct. 1468, 103 L. Ed. 2d 774, 795 (1989), when interpreting a provision of FOIA, "whether disclosure of a private document is warranted must turn on the nature of the requested document . . . rather than on the particular purpose for which the document is being requested." Members of the press have no greater or lesser interest in obtaining records than members of the general public.

The more difficult question is what special rights, if any, a victim has to obtain a copy of not only his or her own statements but also other parts of an investigative file being held confidential to protect the suspect's right of privacy. A victim may have a civil claim against a suspect who cannot be prosecuted by the state[24] and may need the information contained in the investigative report to be able to assert that claim. We conclude that, even if the balancing process otherwise would result in the conclusion that the records should be withheld from disclosure, in this special situation, the victim should be provided with copies of the suspect's statements, if any, as well as the results of any tests performed on physical evidence. Statements of other victims and

[24] The inability to prove the case beyond a reasonable doubt or the lapse of the applicable statute of limitation for the criminal offense are both situations in which it is possible for a civil claim, but not a criminal case, to be pursued.

witnesses in these cases, however, should remain confidential and be produced only if the victim files a civil suit and makes a proper request under the civil rules of discovery.

A.3(c)(iv) Action to Take Before Disclosure Is Made

In minor cases such as traffic offenses and traffic accidents, or routine misdemeanor offenses, reports can readily be disclosed to the public after a case is completed if the suspect is not charged. Naturally there must be some consideration of the exemptions discussed in sections A.1 and A.3(a) of this letter.

In other more serious cases, however, we suggest that when the department determines that disclosure will be made of a report in a case in which charges were not filed, because the public's interest outweighs the subject's right of privacy, the department should attempt to notify the subject to give that person an opportunity to seek a court order prohibiting the release of the records.[25] By so doing, the department may successfully avoid ringing a bell that cannot be unrung. The notification should be in writing and the person should be advised that the record will be released two weeks from the date of mailing unless the person contacts the department and states in writing that he or she will seek judicial relief. The person who requested the record should be advised that this procedure is being used and that there will be a two-week delay in responding to the request. If the department is unable to contact the subject because the subject's current address is unknown, the department should document its attempts to notify the subject and then release the record.

B. <u>Drivers' Records</u>

Alaska Statute 28.15.151, relating to drivers' records, provides as follows:

> RECORDS TO BE KEPT BY THE DEPARTMENT. (a) The department may maintain a file of

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[25] In *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 n.13 (Alaska 1990), 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 the opportunity to present argument to a court as to whether disclosure would constitute an unwarranted invasion of the subject's privacy.

> (1) every driver's license application, license or permit and duplicate driver's license issued by it;
>
> (2) every license that has been suspended, revoked, canceled, limited, restricted, or denied, and the reasons for those actions; and
>
> (3) all accident reports required to be forwarded to the department under this title.
>
> (b) The department may also maintain a file of all accident reports, abstracts of court records of convictions of vehicle, driver, and traffic offenses, and other information which the department considers necessary to carry out the purposes of this chapter.
>
> . . .
>
> (d) The department shall, upon request and payment of a fee determined by the commissioner, furnish a driver or a person designated by the driver with an abstract or the original copy of the computer printed record of the driver's record as provided in (c) of this section.
>
> . . .
>
> (f) Except as provided otherwise in this section, information and records under this section are declared confidential and private.

By the terms of paragraph (d) of this statute, abstracts of driving records may be provided to the driver, a person designated by the driver, or to a governmental agency; otherwise, these records are made confidential by paragraph (f) and may not be released to the public.

B.1. Traffic Accident Reports

Alaska Statute 28.15.151 permits the department to maintain files that contain accident reports "required to be forwarded to the department under" AS 28. Such reports, which are required to be submitted under AS 28.35.070 -- 28.35.100, are ordinarily one-page summaries written on departmental accident report forms. Although AS 28.15.151 does not explicitly authorize *any* disclosure of traffic accident reports, these statutorily required reports have historically been released upon request to those who were either involved in the accident or whose property was involved in the accident, or to their authorized agent, such as their attorney or insurance company.

This administrative interpretation of the regulation is reasonable and should be continued.[26] Other than these limited disclosures, however, these accident reports should not be released unless the requesting party has obtained a court order compelling production of the report.[27] These statutorily required accident reports should, however, be distinguished from a police report summarizing the results of a criminal investigation arising out of a motor vehicle collision. Access to criminal investigative reports is discussed in section C of this letter.

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[26] We believe that this is the proper interpretation of the language used in AS 28.15.151(f), which specifies that these records are "confidential and private." In particular, the use of the term "private" suggests that the legislature's concern was with disclosure to the general public, rather than disclosure to the involved parties. *See* M. Knuth, *Inspection and Discovery of Public Records in Alaska*, 4 ALASKA LAW REVIEW 277, 289 (1987). Laws authorizing the withholding of public records are to be interpreted narrowly so as to allow the greatest disclosure possible. *Id.* (citing *Doe v. Alaska Superior Court*, 721 P.2d 617, 622 (Alaska 1986)).

[27] In 1978, we noted some uncertainty as to whether traffic reports were to be kept confidential under this statute because, as originally enacted, it contained a reference to a nonexistent chapter 26 in title 28. 1978 Inf. Op. Att'y Gen. (Oct. 13; 663-78-0000). That reference has since been deleted, resulting in AS 28.15.151 simply declaring "confidential and private" all "information and records under this section," which includes accident reports.

Although Alaska has foresworn blind allegiance to the "plain meaning" rule of statutory interpretation, a party asserting a different meaning bears a heavy burden of demonstrating a contrary legislative intent. *Zoerb v. Chugach Electric Ass'n*, 798 P.2d 1258 (Alaska 1990); *Helton v. State*, 778 P.2d 1156 (Alaska 1989). There is no longer any evidence indicating that the legislature intended accident reports to be other than "confidential and private." Thus, to the extent that the 1978 memorandum advised that AS 28.15.151(f) "should not be interpreted to prevent the release of these accident reports," we specifically overrule that advice. *See also* 1988 Inf. Op. Atty Gen. (Mar 30; 663-88-0232).

As to the adequacy of a subpoena to obtain this type of record, *see* section in this memorandum entitled "Handling of Requests and Court Orders."

B.2. Driver's License Photographs

At the time that a person obtains or renews a driver's license, two photographs are taken. One is placed on the person's license, while the other is retained by the state. This second photograph is a part of the license application under AS 28.15.111 and it is thus a "confidential and private" record under AS 28.15.151(f). As such, it may not be released to the public or to the press except in those circumstances in which it is apparent that the person would authorize the release if the person could be asked. Thus, the department may release for publication the photograph of a person who has been kidnapped or is otherwise missing and believed to be in danger, when publication of the photograph may facilitate the subject's safe recovery. The department may not, however, release to the news media the photograph of a person who simply is the subject of a story; e.g., a person who has been involved in an accident or is the victim of a crime.

It is our understanding that these "second" photographs are also used for photo line-ups by law enforcement agencies within the state. When a suspect's photograph is to be shown to witnesses for identification, it is common practice to create a "line-up" by including the photographs of persons with a similar appearance. The driver's license photographs are used for this purpose because they constitute the largest available source of photographs. This practice appears to be a permissible disclosure of confidential records to other governmental agencies because the disclosure "will be helpful in achieving an important public purpose," i.e., the lawful apprehension of criminals, and "confidentiality can be maintained by the receiving agency," i.e., the photographs will remain within the custody and control of the receiving agency. M. Knuth, *Inspection and Discovery of Public Records in Alaska*, 4 ALASKA LAW REVIEW 277, 296-97 (1987).[28]

[28] There is no statute or regulation specifically governing use of these photographs to identify to the public a wanted suspect, but we believe that this practice would be approved by Alaska's courts under a "necessity" analysis.

C. "Police Blotter" Information

A "police blotter" is a contemporaneous listing of arrests of adults, made by a law enforcement agency, that identifies the charges and the name of the person arrested. Courts have categorically ruled that police blotters are public records that must be made available for inspection. *See, e.g., State v. Lancaster Police Dep't*, 528 N.E.2d 175, 178-79 (Ohio 1988); *Oklahoma Publishing Co. v. Moore*, 682 P.2d 754 (Okla. 1984); *Caledonian Record Publishing Co. v. Walton*, 573 A.2d 296 (Vt. 1990); *Newspapers, Inc. v. Breier*, 279 N.W.2d 179 (Wis. 1979).

In *Caledonian*, the court noted: "The general consensus is that an arrest is the result of the detection and investigation of crime, but is not part of such detection and investigations. Therefore, the courts have found arrest records to be public records and not included in the crime detection and investigation exception." 573 A.2d at 300.

In *Breier*, the court ruled that "an arrest is a matter of legitimate public interest." 279 N.W.2d at 186, 188. The court emphasized the importance in a free country of not having "secret arrests," noting that "curbing abuse of the arrest power is only possible if the public can learn how that power is exercised." *Id.* at 188. It continued:

> Information concerning the operations of the police department in making arrests and the charges upon which arrests are made is vital to the democratic system; and presumptively, by statute, the records are to be open. While in some cases involving police functions there is an overriding public interest in preserving secrecy (*e.g.*, in the investigation of pending or proposed criminal charges), no overriding public-interest concern is discernible when the executive act of arrest has been completed. An arrest is the exercise of the government's power to deprive an individual of freedom. The government is required to have probable cause whenever it deprives an individual of personal liberty, and it is offensive to any system of ordered liberty to permit the government to keep secret its reason for depriving an individual of liberty.
>
> . . .
>
> We hold as a matter of law that the harm to the public interest in the form of possible damage to arrested persons' reputations does not outweigh the public interest in allowing inspection of the police records which show

> the charges upon which arrests were made. The police "blotter" shall be open for inspection by the public . . . .

Id. at 189-90.

In accordance with these authorities, we conclude that police blotters, i.e., the contemporaneous listing of arrests of adults that identifies the name of the person arrested and the charges, should routinely be made available for inspection by the public to the extent that they are retained by and in the possession of the agency.[29] This is not to say that your department must create or retain such police blotters. As always, Alaska's public records statutes do not dictate what types of records must be kept by governmental agencies; instead, they only address the disclosure of records that an agency retains.

D. <u>Criminal History Records</u>

In contrast to police blotters, which courts have ruled are subject to disclosure,[30] "rap sheets," or criminal history records, have been historically withheld from inspection by the public to protect the subject's privacy interests. The two types of records were distinguished by the court in *Breier* as follows:

> The police "blotter" is an approximately chronological listing of arrests, recorded at the time of booking at the police station. A "rap sheet" is a record which the police department keeps on each individual with an arrest record. "Rap sheets" are filed in alphabetical order and purport to show on a single document all arrests and police contacts of an individual.

279 N.W.2d at 186.

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[29] We note that 6 AAC 60.070(g)(2), applicable to LEAA-funded information systems (*see* note 34 of this letter), authorizes the disclosure of police blotters, which it identifies as the "original records of entry maintained by criminal justice agencies, if the records are routinely organized on a chronological . . . basis."

[30] *See* section C of this letter.

> If one were to use the police "blotter" to seek information on arrests of a particular individual, it would be necessary to know the approximate date on which the arrest occurred. While the arrest list is useful to the news media in determining on a daily basis whether any arrests of legitimate public interest have occurred on a particular day, the arrest list is of little use to employers or credit agencies who seek to check the arrest records.

Id. at 182-83.[31]

The issue of whether criminal history records should be subject to disclosure to the public upon request reached the U.S. Supreme Court in 1989 in *United States v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). The Court relied on several factors in concluding that disclosure would constitute an "unwarranted invasion of personal privacy" as that term is used in the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(B)(7)(C).[32]

First, although the Court acknowledged that much of the information contained in a criminal history record, such as arrests and convictions, is "public information," it agreed that this information enjoys "practical obscurity." 103 L. Ed. 2d at 788. It stated, "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 790.

Next, the Court noted Congress's "careful and limited pattern of authorized rap-sheet disclosure," which "evidence[s] a congressional intent to protect the privacy of rap-sheet subjects, and a concomitant recognition of the power of compilation to affect personal privacy that outstrips the combined power of the bits of information contained within." *Id.* at 790-91.

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[31] *See also Houston Chronicle Publishing Co. v. Houston*, 531 S.W.2d 177 (Tex. Civ. App. 1975), *aff'd*, 536 S.W.2d 559 (Tex. 1976) (police blotter must be made available to the public, while rap sheets must be kept confidential).

[32] Alaska Statute 09.25.120(6)(c) uses the same language as this FOIA exception.

Finally, the Court emphasized that the purpose of FOIA is to enhance the public's understanding of the operations or activities of the government. It stated:

> In other words, although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.

Id. at 796-97.[33] Ultimately, the Court ruled as follows:

> [W]e hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

Id. at 800.

For the reasons given by the U.S. Supreme Court, we conclude that the routine disclosure of information from the Alaska Public Safety Information Network (APSIN)[34], apart from

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[33] Also, although not specifically relied upon as a factor, the Court noted that, because of their volume, rap sheets "are sometimes incorrect or incomplete and sometimes contain information about other persons with similar names." 103 L. Ed. 2d at 782.

[34] The Criminal Justice Information Systems Security and Privacy Act, set out in chapter 62 of title 12, by its own terms only restricts access to criminal justice information contained in systems funded by the federal Law Enforcement Assistance Administration (LEAA). Alaska Statute 12.62.070(3). Although the state's initial computerized databank of individuals' criminal histories -- the "Alaska Justice Information System" (AJIS) -- was funded by LEAA, the system in current use -- the "Alaska Public Safety Information Network" (APSIN) -- is not. 1986 Inf. Op. Att'y Gen. (Dec. 10; 663-86-0479) at 1-3. Thus, although the statutory restrictions apply to systems that are still funded at least in part by LEAA (which include the Prosecutor's Management Information System and the Offender-Based State Correctional Information System), the Act's restrictions on disseminating criminal history records from AJIS are not directly applicable to criminal history records contained in APSIN. Nonetheless, the restrictions were developed to protect individuals' rights of privacy. They accordingly may serve as useful guidelines for the dissemination of APSIN information.

those disclosures authorized by statute, is prohibited by the subject's statutory and constitutional rights of privacy.[35]

As previously noted, these rights of privacy are not absolute; instead, they must be balanced against the public's interest in the information. Thus, for example, the public's interest in the apprehension of fugitives and wanted persons is sufficiently great that the department can disclose information from APSIN about these persons to promote their arrest even before the effective date of AS 12.62.160(a)(3).[36]

In most instances, however, the legislature performs the necessary balancing test and through its enactments determines the circumstances in which the public's interest in information is greater than the subject's right to privacy. Until 1995, the only type of information specifically authorized by the legislature to be disclosed is records of convictions for employees who work with dependents. Alaska Statute 12.62.035.[37]

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[35] We continue to conclude that the Division of Family and Youth Services, Department of Health and Social Services, may be granted access to adult criminal arrest records for the purposes of conducting background investigations of prospective foster parents, day care operators, or others who work with children. 1989 Inf. Op. Att'y Gen. (Jan. 1; 663-89-0142).

[36] *See* 6 AAC 60.070(g), which authorizes the release of this type of information from LEAA-funded systems.

[37] This statute requires the department upon request to provide to an interested person:

> the records of all felony convictions, convictions involving contributing to the delinquency of a minor, and convictions involving any sex crimes of a person who holds or applies for a position of employment in which the person has or would have supervisory or disciplinary power over a minor or dependent adult.

The department is also required to notify the person who is the subject of the request and provide that person with a copy of the information that will be released. Although located within chapter 62 of title 12, AS 12.62.035 relates not to federally funded record systems, but instead to any conviction records held by the Department of Public Safety, e.g., APSIN records. This statute will be repealed on July 1, 1995, at which time a new statute (AS 12.62.160) covering the same issue will become effective.

Commencing on July 1, 1995, several new statutes relating to the release and use of criminal justice information will become effective. Alaska Statute 12.62.160 -- 12.62.180. Under AS 12.62.160, criminal justice information will remain confidential and exempt from disclosure under AS 09.25 except to the extent that disclosure is authorized in these sections. Two straightforward exceptions allow disclosure of information requested by the subject of the information (AS 12.62.160(b)(11)) and allow disclosure of information as necessary to comply with a court order compelling the disclosure (AS 12.62.160(b)(2)).

The majority of the remaining exceptions in AS 12.62.160(b) reflect a common-sense application of the public interest balancing test; e.g., (b)(1) information necessary to avoid imminent danger to life or extensive damage to property; (b)(3) information commonly used to identify, locate, or apprehend fugitives or to recover stolen property; (b)(4)-(6) governmental sharing of information for law enforcement purposes; and (b)(10) past conviction information relating to a serious offense, which may be provided to an interested person to determine whether the subject should be granted supervisory or disciplinary power over a minor or dependent adult.

The remaining exceptions, however, will constitute a rather significant change from current law and practice in Alaska. Exception (b)(8) will allow "current offender information" to be released unless it would "unreasonably compromise the privacy of a minor or vulnerable adult." Exception (b)(9) will allow "past conviction information" to be released if less than 10 years has elapsed from the date of unconditional discharge to the date of the request. Thus, any conviction information will be subject to disclosure if it is not too remote in time and current arrest information will also be subject to release unless it involves a minor or a vulnerable adult. Regulations implementing these sections have yet to be adopted.

E. <u>Records Relating to Juveniles</u>

Alaska Statute 09.25.120(2) requires that juvenile records not be released to the public unless "authorized by law." In 1994 the legislature amended AS 47.10.090 and enacted

AS 47.10.093 to clarify what disclosures may be made of juvenile records. Alaska Statute 47.10.090 now only addresses juvenile *court records*; other records relating to juveniles are governed by AS 47.10.093. In accordance with AS 47.10.093, records relating to juveniles may be disclosed if they fall within one of the statute's express exceptions. Subsection (b) relates to the disclosure of records by a state or municipal agency and allows disclosure of information to the police "as may be necessary for a specific investigation being conducted by that agency or for disclosures by that agency to protect the public." Thus, absent a statutory change, law enforcement agencies cannot be granted *routine* access to Department of Health and Social Services' records -- computerized or otherwise -- relating to juveniles. Instead, access must be necessary for a specific investigation or so that the law enforcement agency is able to make an authorized disclosure to protect the public safety.

Subsection (c) addresses what disclosures may be made by state or municipal *law enforcement* agencies. The five specific disclosures authorized are: (c)(1) information for preliminary Title 47 investigations; (c)(2) information to the public about an offense if the minor is not identified by the disclosure; (c)(3) information to school officials about a case as may be necessary to protect the safety of students and staff; (c)(4) information to the public as necessary to protect its safety; and (c)(5) information to a victim as necessary for civil litigation or insurance claims. These are the only disclosures that can be made by law enforcement agencies. Furthermore, if the documents are "records or information compiled for law enforcement purposes," then the limitations of AS 09.25.120(6) apply, as well (e.g., no disclosure if it would interfere with an ongoing investigation or criminal case, etc.).

F. <u>Miscellaneous Records</u>

Finally, there are a few other, miscellaneous types of records that you have asked us to address briefly.

F.1. Investigations in Administrative Proceedings

Records relating to non-personnel investigations for the purpose of administrative proceedings should be treated the same as records relating to investigations that may result in judicial proceedings. Thus, before the administrative hearing is held, the records generally are not subject to disclosure. *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 57 L. Ed. 2d 159 (1978) (administrative agency need not release its records before concluding a hearing, considered to be an enforcement proceeding). Conversely, any records relied upon in the formulation of the agency's final administrative decision are generally subject to disclosure, except as outlined in this letter.

F.2. Grand Jury, Pre-Sentence, and Mental Health Reports

Next, there are some records that are not produced by law enforcement agencies, but that may become a part of an agency's files during the course of an investigation. These include grand jury reports, pre-sentence reports, and various mental health records.

The release of grand jury records and reports is governed by Alaska Criminal Rule 6.1, which makes disclosure a decision for the judiciary. If a judge orders the release of the record, it becomes a public document; otherwise, the records remain confidential.

The release of pre-sentence reports is governed by Alaska Criminal Rule 32.1(b). This rules imposes significant restrictions on the release of pre-sentence reports. Generally speaking, such reports may only be released to the judge, an attorney for the state, and the attorney for the defendant. Further disclosure requires a court order or statutory authorization, except that copies may be provided to agents for the attorneys, to reviewing courts, and to "agencies having charge of the defendant's rehabilitation." Alaska Crim. R. 32.1(b)(1).

The release of court-ordered psychiatric reports is governed by AS 12.47.070(e) and Criminal Rule 16(c)(5), both of which specify only that a report shall be filed with the court and made available to counsel for the state and for the defendant. We believe that these reports

constitute privileged medical records that should not be disclosed to the public. Thus, even if the report includes a statement by the defendant that might otherwise be subject to disclosure, the statement should be withheld unless the requester has obtained a court order compelling the disclosure.

In addition, other statutes prohibit the release of other types of mental health records and the records of alcohol commitments. For example, see AS 47.30.360 (records and reports relating to mental health commitments to be kept confidential); AS 47.30.590 (records and information about recipients of mental health services to be "safeguarded"); AS 47.37.210 (records of treatment facilities for alcoholics and intoxicated persons to be kept "confidential and privileged to the patient"). *See also* AS 47.37.170(I), which prohibits the making of records of arrest for persons taken into protective custody for being incapacitated by alcohol.

F.3. Personnel Records

The disclosure of personnel records is governed by AS 39.25.080, providing:

> AS 39.25.080. PUBLIC RECORDS. (a) State personnel records, including employment applications and examination materials, are confidential and are not open to public inspection except as provided in this section.
>
> (b) The following information is available for public inspection, subject to reasonable regulations on the time and manner of inspection:
>
> (1) the names and position titles of all state employees;
> (2) the position held by a state employee;
> (3) prior positions held by a state employee;
> (4) whether a state employee is in the classified, partially exempt, or exempt service;
> (5) the dates of appointment and separation of a state employee; and
> (6) the compensation authorized for a state employee.
>
> (c) A state employee has the right to examine 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.

Thus, except as to the employee, who may examine his or her file or authorize its release to another person, only those limited types of information identified in AS 39.25.080 may be disclosed to the public. 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. *Cf.*, *Jones v. Jennings*, 788 P.2d 732 (Alaska 1990).

F.4. Records in Aid of Research Projects

Finally, you have indicated that you also receive various requests for access to information for research projects undertaken by students or public service organizations. Generally, these requests should be treated the same as requests made by the public; in particular, you should avoid permitting records to be copied that contain the addresses and telephone numbers of victims or witnesses. There may be circumstances, however, in which it is appropriate for you to authorize the inspection of records that would not be disclosed to the general public. Although not directly applicable, 6 AAC 60.090(c) -- 60.090(g), which governs "research use of criminal justice information," may provide useful guidelines for the disclosure of information for research purposes. Also note that AS 12.62.160(b)(7), which will become effective on July 1, 1995, specifically authorizes "criminal justice information" to be released "in aggregate form" for criminal justice research, subject to conditions that assure "the security of the information and the privacy of individuals to whom the information relates."[38]

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[38] *See* AS 12.62.160, set out in section D of this letter.

HANDLING OF REQUESTS AND COURT ORDERS

The mechanics involved in requests for records under the public records act are governed by regulations set out in 6 AAC 95. In addition, as discussed in section A.3(c)(iv) of this letter, we have suggested a special procedure for notifying the subject of a report when the department determines that disclosure will be made in a case in which charges were not filed, because the public's interest outweighs the subject's right of privacy.

If, however, it is determined that a document cannot be released without a court order, the next issue that must be resolved is what type of order will suffice. Two types that will almost always be sufficient are (1) an order prepared and signed by a judge or issued orally from the bench in a particular proceeding, and (2) a subpoena duces tecum requiring appearance at a *court hearing*. If compliance with the order or subpoena to a court proceeding seems inappropriate, e.g., the disclosure could impede an ongoing investigation, an attorney at the Department of Law should be contacted to review the matter.

The only other type of order likely to be used is a subpoena duces tecum that commands the recipient to appear at a *deposition*. These subpoenas should be considered sufficient *if* all of the suspects and victims are parties to the case *and if* the subpoena is accompanied by documentation -- such as a notice of deposition -- showing that the adverse party or parties have been notified of the deposition. In these instances, the parties will be able to assert and protect their own rights of privacy. Once again, however, if disclosure of the record seems inappropriate for some reason, such as interference with an ongoing investigation, an attorney at the Department of Law should be contacted for review. If the circumstances are such that the Department of Public Safety can comply with the subpoena, the person to whom the subpoena is directed should feel free to contact the attorneys for all parties and explore whether the documents can be provided without the

person appearing at the deposition. This may be an efficient and welcome option for all of the parties involved.

If not all of the victims or suspects are involved in the litigation, the Department of Public Safety should attempt to notify the unnamed victims or suspects to allow them the opportunity to assert their interests in confidentiality. A Department of Law attorney should be contacted to prepare an objection to the subpoena under Civil Rule 45, indicating what course of action is being taken by the Department of Public Safety and when the department will likely be able to comply with the subpoena. If the Department of Public Safety is unable to contact one or more of the victims or suspects because their location is unknown, references to these persons should be redacted from the reports unless and until a specific order by a judge is obtained by the requesting party compelling the disclosure.

SUMMARY

The first step when a request for records is received is to determine whether the requestor is involved in litigation, or is representing someone involved in litigation, with the state or one of its agencies. If so, the request must be denied. The person should be advised that the records can only be produced in response to a subpoena or discovery order.

If the person is not involved in litigation with the state, the next step is to determine what type of record is being sought. Drivers' records are "confidential and private" in AS 28.15.151. We conclude, however, that traffic accident reports may be released to the subject of the report or to the subject's agent, such as an attorney or insurance adjuster.

The disclosure of investigative reports is governed by AS 09.25.120(6). These reports are generally subject to disclosure, except for:

1. reports relating to juvenile offenses;

2. information about confidential sources, confidential techniques and guidelines, or information that could endanger a person's safety;

3. pending investigations or criminal cases, although victims, witnesses, and suspects may review their own statements;

4. reports from a closed investigation in which charges were filed and relate the identity of a victim of a sex offense or identify a victim or witness who reasonably expected to remain confidential or who is now deceased or relate to a very old case that does not involve a public figure; the report should be released if the identities of victims and witnesses can be protected by removing their names and any other information that could lead to their identities being disclosed;

5. reports from a closed investigation in which charges were *not* filed and the charges investigated carry a significant social stigma (e.g., sexual assault or rape) or the truthfulness of the allegations is in serious doubt; however, the suspect's status as a public figure can tilt the analysis toward disclosure. If the department concludes that it is appropriate to release all or part of an investigative report in which charges were not filed, we recommend that the department first notify the subjects of the report so that those persons may seek a court order prohibiting disclosure on the basis that it would violate their right of privacy.

With other types of law enforcement information, "police blotters" should be consistently released to the public, while access to criminal history records should be denied until the effective date of AS 12.62.160 in July 1995, except in the narrow circumstances enumerated in this letter. Release of juvenile records is governed by AS 47.10.093. Investigative reports for non-personnel administrative proceedings are comparable to investigations that may result in judicial proceedings and the same considerations apply. The disclosure of grand jury, pre-sentence, and mental health reports are governed by statutes and court rules, which must be consulted as appropriate. Similarly, the release of personnel information is governed by statute. Research requests should generally be treated the same as other requests, although AS 12.62.160 will change this and exceptions may be allowed if sufficient assurances of confidentiality can be made.

Finally, we conclude that a specific court order or a subpoena duces tecum commanding the witness to appear at a court hearing with department records will always satisfy the

requirement for a court order authorizing the disclosure. A subpoena duces decum to appear at a deposition should be honored only if all of the parties involved in the underlying criminal matter (e.g., suspect and victims) are parties to the new litigation. If not, the unnamed parties should be notified by the Department of Public Safety, while the Department of Law files an objection to the subpoena.

The conclusions in this letter have not been set out in any comprehensive way before now, and are likely to generate a number of questions as your department proceeds to apply these guidelines to specific records. As questions arise, members of your department should not hesitate to contact the Department of Law for specific advice.

Very truly yours,

Bruce M. Botelho
Attorney General