

# LEGAL SERVICES

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## MEMORANDUM

March 8, 2011

**SUBJECT:** Public records exception for the Alaska Gasline Development Corporation (Work Order No. 27-LS0621\A)

**TO:** Representative Mike Chenault  
Speaker of the House  
Attn: Tom Wright

**FROM:** Lisa Moritz Kirsch   
Legislative Counsel

I have drafted the enclosed bill creating a public records exception for the Alaska Gasline Development Corporation (AGDC). I am writing to explain why I chose a different approach than the one you suggested.

The broad purpose of the public records act, which appears at AS 40.25, is to provide public access to public records. AS 40.25.110 provides in part that:

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.

This provision has been interpreted by the Supreme Court which noted that:

There is a strong public interest in disclosure of the affairs of government and [sections AS 40.25.110 and 40.25.120] articulate a broad policy of open records. The right of citizen access to public records has been characterized as a fundamental right.<sup>1</sup>

While this fundamental right has not been directly linked to a specific constitutional provision, it appears likely the Alaska courts would include it in the penumbral rights under the constitution given that the Alaska Supreme Court has opined that public access is a fundamental right and applied a balancing test consistent with those used for

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<sup>1</sup> *Gwich'in Steering Committee v. State, Office of the Governor*, 10 P.3d 572, 578 (Alaska 2000) (citing *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1323-24 (Alaska 1982) (quoting *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413, 421-22 (1961) (en banc))).

constitutional rights when analyzing a decision to withhold public records. The Alaska Supreme Court cited this Oregon test with approval in *City of Kenai*:

In balancing the interests referred to above, the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference. The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records sought should not be furnished. Ultimately, of course, it is for the courts to decide whether the explanation is reasonable and to weigh the benefits accruing to the agency from non-disclosure against the harm which may result to the public if such records are not made available for inspection. (Citation omitted).<sup>2</sup>

The legislative findings and intent added to the public records act in 1990 support this interpretation:

[P]ublic access to government information is a fundamental right that operates to check and balance the actions of elected and appointed officials and to maintain citizen control of government[.]<sup>3</sup>

The request I received protected all information in the possession of the public corporation from release under the public records act. I am concerned that the sweeping approach you requested may be inconsistent with the intent of the act and the fundamental right of access to public documents acknowledged by the courts. This sweeping exception may also cause difficulties for the corporation if a provider of information relied on the exception to keep all of their information confidential and later contested AGDC's decision to release.

At Tom Wright's request, I spoke to attorney Ken Vassar. He expressed that the intent of the legislation was to give the public corporation the ability to release information at its discretion, as a private corporation would. I would argue that the right of the public access to information is so strong that even if the AGDC were a private corporation it might be compelled to release its documents.<sup>4</sup> However, AGDC is not a private corporation. Its documents are public records, and while AS 40.25.110 does allow for

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<sup>2</sup> *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d at 1323.

<sup>3</sup> Ch. 200, § 1, SLA 1990.

<sup>4</sup> *Federal Communications Commission v. AT & T Inc.*, WL 691243, 2011 U.S. LEXIS 1899 (March 1, 2011) (holding AT&T does not have a personal privacy interest in records provided to a public entity).

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exceptions, it allows for them only where "specifically provided otherwise." When interpreting those specific exceptions to the public records act the courts have always narrowly construed them.<sup>5</sup> It is true that the public records act is only a statute, and can be subsequently amended by legislation, but the amendments or new provisions must harmonize with the unchanged existing law.

My second concern is that an exception for all information in the possession of AGDC might mislead the entity providing information into believing that everything provided to the corporation would remain confidential. It is true that an exception under AS 40.25.120 does not actually create confidentiality by its provisions, instead it typically excepts specific material that is confidential under some other law or rule. While it is not unreasonable to interpret a blanket exception to the release statute as a means of preventing mandatory release and allowing the AGDC discretion to release only when it chooses to release, it is also reasonable that a provider of information might rely on that exception to prevent any release at all.

My solution was to create an exception for information covered by a confidentiality agreement. This allows the parties involved to decide up-front what they consider confidential so there is less likelihood of confusion or contested releases. It also creates specificity as to what is excepted from the act, which I believe better matches the underlying intent of the public records act.

Please feel free to contact me if you have questions or concerns.

LMK:ljw:plm  
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Enclosure

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<sup>5</sup> *Anchorage School Dist. v. Anchorage Daily News*, 779 P.2d 1191, 1193 (Alaska 1989); quoting, *Doe v. Alaska Superior Court*, 721 P.2d 617, 624 (Alaska 1986).