STATE OF ALASKA
OFFICE OF VICTIMS' RIGHTS

House Representative Wes Keller
House Judiciary Committee Chairman
State Capitol, Room 118
Juneau, AK 99801

April 7, 2014

RE: Opposition to SB 108 – Limit Public Access to Criminal Records

Dear Repreentative Keller:

As the Director of the Alaska Office of Victims' Rights (OVR), I write this letter to express our opposition to and grave concerns about SB 108, Limit Public Access to Criminal Records, introduced on January 22, 2014. The bill is scheduled for a hearing before the House Judiciary Committee on Wednesday, April 9, 2014.

While the content of this letter is lengthy, I feel compelled to provide a further explanation of this opposition within the bolded points presented below. SB 108, if passed, will rewrite history. It will forever remove the factual record of events for many criminal cases from public view. It would have the effect of saying to our citizens that they do not have a right to know what its government and its institutions are doing. It would also send the message to our citizens that their government believes they are intellectually incapable of understanding that a dismissal or a "not guilty" verdict is not the same as a conviction.

The bill will negatively impact more citizens than it benefits. SB 108 will affect the ability of our citizens and businesses to protect themselves, will curtail the abilities of journalists to research and accurately report; will preclude academic research and will potentially aid in the creation of more crime victims in our state. This bill will significantly impede the ability of citizens to access information which could help them protect themselves, their children, their loved ones, their homes and their businesses. The effect of this bill is far-reaching and will have significant negative consequences for a vast number of Alaskans, while merely providing relief to a significantly small number of Alaskans.

OVR recognizes that the criminal justice system is imperfect and public records can and do contain information suggesting a person committed a crime when, in fact, that person was wrongfully charged. Before having the opportunity to serve as the Chief Victims' Advocate, I

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served as an Alaskan state prosecutor for 13 years. During my tenure, I predominantly handled cases of rape, sexual abuse of minors and domestic violence assaults. I have a deep and clear understanding of the criminal justice process and its principles. Having reviewed thousands of cases over my career and having made many though decisions regarding whether or not to charge a case, I understand the importance of charging people only when there is evidence to support the charge. I, however, also understand there is a vast difference between being innocent and having a case disposed of via a dismissal or a "not guilty" verdict. It is a noble goal to try to address this wrong through legislative action, but the action to date the Legislature has not addressed the negative consequences that riddle this bill.

Legislation should be written as narrowly as possible to address the concern but which minimizes the negative effects on citizens. SB 108, as is currently written, is so broad that its application in law would result in many more negative consequences for citizens than benefits. While the OVR strongly opposes SB 108, as written, OVR does not oppose the concept of fashioning a statute which attempts to alleviate the problem this bill tries to address. The OVR believes the bill could be amended to offer relief to some Alaskans who have been wrongfully accused, including Senator Dyson's constituent who, in part, prompted the introduction of the bill. It is paramount that a thoughtful and thorough examination of the bill's consequences and an intellectual discussion on how best to minimize the harm takes place. Below, OVR offers language which would address the issue but not be so broad as to cause the host of negative consequences discussed in the section, Points of Opposition to Current SB 108.

Proposed Amended Language:

"An Act relating to the confidentiality of certain records of criminal cases; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*Section 1. The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE INTENT. It is the intent of the legislature that, to the extent practicable, the Alaska Court System hold confidential records of criminal cases in cases where no charging document is filed by a prosecutor, or no probable cause to support the criminal charge is found by a judicial officer, or when a grand jury returns a "no true bill" on all counts presented to the grand jury to the to the same extent that records are held confidential under AS 22.35.030, enacted by sec. 2 of this Act.

* Sec. 2. AS 22.35 is amended by adding a new section to read:

Sec. 22.35.030. Records concerning criminal cases resulting in acquittal or dismissal confidential.

(a) A court record of a criminal case is confidential if 120 days have elapsed from the date

(1) no charging document is filed by a prosecutor;

(2) no probable cause to support the criminal charge is found by a judicial officer during an initial proceeding or as a result of a preliminary hearing; or

(3) when a grand jury returns a "no true bill" on all counts presented to the grand jury.

(b) Notwithstanding (a) of this section, the following persons may have access to records made confidential under this section:

(1) employees of the Department of Health and Social Services who are responsible for the health, safety, welfare, or placement of a child, a person with a physical or intellectual disability, or a person with a mental illness;

(2) the public guardian under AS 13.26.370 or a guardian ad litem supervised by the office of public advocacy;

(3) a person who is authorized to have access to the criminal justice information network maintained by the Department of Public Safety under AS 12.62.

(c) The Department of Health and Social Services shall adopt regulations to administer (b)(1) of this section.

* Sec. 3. The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. AS 22.35.030, enacted by sec. 2 of this Act, applies to criminal cases initiated on or after the effective date of this Act where there is no filing of a charging document, no finding of probable cause or by a finding of no true bill by the grand jury on all counts presented to the grand jury.

* Sec. 4. This Act takes effect October 1, 2014.

Points in Opposition to Current SB 108:

- **The bill is contrary to and significantly undermines a victim's constitutional right to be treated with dignity, fairness and respect.**

  In Alaska, victims have a constitutional right to be treated with dignity, fairness and respect. The removal of a case from the public eye is more like a spit in the victim's eye than respect, dignity or fairness. These words in our constitution should not be hollow words.

  One well-known example of a case that would be purged from public view because of SB 108 are the cases of *State v. Mechele Linehan*, 3AN-06 –10140CR and *State v. John Carlin,* 3AN-06-1-139CR, for the murder of Kent Leppink. Mr. Leppink left a note telling his parents that, if he was found dead, Mechele Linehan should be considered a prime suspect. He changed his life insurance beneficiary so that Mechele Linehan would not benefit from his death. After a criminal investigation, Mechele Linehan and John Carlin were charged with murder. The case garnered national media attention. Both were tried by jury and both were convicted and found guilty beyond a reasonable doubt.

  Linehan's case was reversed on appeal and eventually dismissed. Carlin died in prison while his appeal was pending. The court, relying on an old common law doctrine, called *abatement ab initio*, cancelled or voided the conviction due to Carlin's death before a final appeal decision was issued. The Office of Victims' Rights had the

privilege to work with Kent Leppink's parents, the crime victims, during the criminal justice process. The Leppinks, in their 80s now, were heartbroken that justice was not done for their murdered son. They took some comfort, for a while along the way, that the State Office of Special Prosecutions & Appeals, the Office of Victims' Rights, and the National Crime Victim Law Institute fought in the appellate courts for the court to end the *abatement ab initio* doctrine in Alaska. The Alaska Supreme Court decided, for the first time, to formally recognize the importance of crime victims' legal rights. The court specifically noted that crime victims have a state constitutional right to be treated with "dignity, respect, and fairness during all phases of the criminal justice process." And this constitutional guarantee was the reason that *the abatement ab initio* doctrine was unfair and must be abandoned. *Carlin v. State*, 249 P.3d 752 (Alaska 2001); Alaska Const., art. I, § 24. It was a great victory for crime victims, for the Alaska Office of Victims' Rights, and for the national crime victims' rights movement. Carlin's appeal was reinstated and continued through his estate, so no final disposition has occurred to date.

Under SB 108, as written, if Carlin's case is ultimately dismissed, all trial court records of both the Linehan case and the Carlin case will be removed from public view. Respectfully, this result would create a new, separate violation of the crime victim's constitutional right to be treated with dignity, respect, and fairness by taking all official court records, except the appeal decisions themselves—and essentially erasing them. What a slap in the face to Mr. & Mrs. Leppink after they spent their sunset years hoping and waiting for justice. They would be told by the State of Alaska that the rights of the accused are so important that nearly every trace of the criminal process, of history, must be hidden as if it never occurred.

- **The bill contradicts the efforts around the state to end domestic violence and sexual offenses.**

Attending a recent Choose Respect rally highlighted some of the ways that this bill contradicts efforts to stem the tide of interpersonal violence, which is at epidemic levels, in our state. Alaska has one of the highest per capita rates for sexual offenses and domestic violence in the country. The Green Dot Violence Prevention Strategy has been launched as an effort to help reduce this type of violence. One key component of this effort is to encourage every citizen to be involved not just be aware of the problem but to actively try to prevent an incident however possible. The Green Dot Violence Prevention Strategy promotes violence prevention by providing citizens with the skills needed to stop violence before it occurs. There are a hundred different ways to intervene and being able to have access to court records dovetails with the Green Dot initiative.

Alaskans all have a role to play The availability of criminal court records is one tool which can and is used to prevent someone from being a victim of a violent crime. Maybe it is just a friend telling another friend that the man she is seeing has a pattern of violence as seen in his court records. That caution alone could save a life. Perhaps it plays out when a mother checks Courtview to see if a new child care provider has any

concerning history. If her diligence to gather information and follow-through helps prevent her child from being abused or molested, that itself should be enough to say the information should remain open and accessible. The goal should be to keep people as safe as possible. If there is a choice is between whether someone should be kept safe from physical violence versus being made more marketable for employment, it seems like the choice is easy and obvious that the greater societal benefit is keeping a person, especially when it involves our most vulnerable citizens, safe. The bill works against preventing violence, as well as discouraging victims from reporting and participating in the criminal justice process.

- **A dismissal does not equate to an offender being "innocent" of the crime charged.**

As demonstrated with the earlier example of the Linehan and Carlin cases and as discussed more below, dismissals occur for a large variety of reasons, which don't in and of themselves negate the dangerousness of the person nor erase their actions. I will highlight a few examples:

1) Concurrent jurisdictions: In the case of concurrent jurisdiction, where the federal, state and/or military justice systems may all have jurisdiction over a criminal matter, the state may defer prosecution to another jurisdiction. Such an action does not show the state did not have sufficient evidence to prosecute. It often is a decision based on in which jurisdiction prosecution will be most effective or which jurisdiction will offer the greatest judicial efficiency. In a case in which the state charged a defendant then agreed to a federal prosecution of that defendant instead, the state dismissal would cause this record to be removed from the public's eye. One could foresee a case similar to Joshua Wade where the defendant could be charged in either jurisdiction and the discretionary decision later by the state to have it pursued federally would pull that state record from the public. How would this be defended as appropriate or an accurate reflection of the history of what happened? If California had the same rule, none of the OJ Simpson case would be available to citizens, the media, those victims' families or researchers.

2) Global plea agreements: Global plea agreements are common in our state and frankly a necessary component in our criminal justice system due to the strain of the volume of cases in the system. This type of plea agreement occurs when a defendant has more than one pending criminal case. The offer, for example, would allow the defendant to plead out in one case and the other cases would be dismissed. Such plea agreements benefit the criminal justice system as a whole because they provide an effective way for the defendants, courts and prosecutors to resolve a number of cases at the same time and lighten the burden on the criminal justice system. These are seen most frequently in cases involving as burglary, robbery or thefts but also can occur in cases involving domestic violence or sexual offenses. The fact that a defendant pleads to one case, does not mean he was innocent or false accused of the charges in the other pending cases. The prosecutor may have used the other cases to enhance his sentence in the plea case or to support aggravating factors for sentencing purposes. The current version of SB 108 only

preserves dismissals within the same case if a defendant pleads to or is found guilty of other counts in that case. In situations where a defendant has more than one pending criminal case, a plea in one case could result in all the other cases being dismissed and under SB 108 erased from the public's knowledge.

The prosecutor holds the power to dismiss cases. Victims cannot prevent a prosecutor from dismissing a case or cases, nor can the public prevent the dismissal. This is true regardless of the strength of the evidence. While we would hope it would not happen, the discretion to charge, prosecute, negotiate and dismiss lies with the prosecution not the victim, even in cases with confessions by the defendant. SB 108 gives a defendant an extra "reward" for his criminal behavior far beyond the benefits of the global plea agreement which already reduces his liability. With SB 108, the defendant will get to hide the facts of his other criminal acts from the public. At the same time the victim will be left empty, unacknowledged, unsupported and demoralized by the system. There will be no acknowledgement of what they went through emotional, financial or physically. The criminal justice system provides little restoration for the victim and, if SB 108 becomes law even the smallest, yet significant to victims, showing of their victimization will be removed from the public eye.

3)Deceased, recanting or missing key witnesses.

4)Judges decisions to suppress key evidence such as admissions or confessions to the crime(s).

These are all considerations in the prosecution of a case which could lead to a dismissal, but which do not mean the offender is innocent.

- **The bill demoralizes victims and sends the message once again that consequences to an offender far outweigh the harm to a victim, and that victims don't matter.**

For all the good laws put on the books to help victims, the reality is that victims often are forgotten, ignored, or worse vilified in the criminal justice system. False accusations happen, but those cases represent a very small percentage of all the cases entering the criminal justice system. While there are those who are falsely accused, the general idea that "victims lie" is a stereotype victims are confronted with daily whether it's a victim reporting a domestic violence assault or a rape, or a child victim reporting a sexual molestation. This bill perpetuates that myth. During my years as a prosecutor, and handling primarily sexual offense and domestic violence cases, I saw very few cases of where I had any evidence of a false accusation. Passage of this bill into law would send the message that you, as our legislators, don't support victims, and that you too believe that "victims lie." It also sends a message that consequences to an individual defendant related to a public record of charges filed is of more concern to you than the fact of the victim's suffering or the acknowledgement that a victim reported the harm perpetrated against them. To add insult to injury, with this bill, a crime victim of the reported crime who testified at trial would be barred access to her own testimony provided during what had been a public trial.

- **The bill prohibits citizens from having information which can help them protect their children, themselves, their homes and their businesses.**

  The government cannot protect its citizens day to day. The public should be empowered with access to information it can use for its own protection. For the most part, it is up to citizens to do what they can to prevent themselves from becoming victims of crime. While the government can make laws and implement policies to assist in the prevention, the most effective prevention requires citizen involvement or citizen policing. In general, the criminal justice system reacts to criminal events rather than prevents those acts.

  This bill takes a very paternalistic position that the government knows better than citizens about how to use information. It is lawmakers saying to the citizens that they are too stupid or too unsophisticated to understand the information. Every Alaskan should be empowered with the ability to have information available to them which could help protect them and others from harm and keep them from becoming one of Alaska's embarassing statistics.

- **The bill violates the spirit of the First Amendment and the Freedom of Information Act.**

  Historically, courtrooms and related court records have been open to the public. Courts have recognized a presumed right of access to both criminal and civil court records. Where decisions have been made to curtail public access to court records it is done on a case-by-case basis in light of facts and circumstances of that particular case, and rarely, if ever, results in the removal of the entire case from public view.

  The U.S. Supreme Court established a two-part test to determine whether the press and public have a First Amendment right of access to criminal proceedings. The first test is whether the place and process have been historically open to the press and public. The second test is whether public access plays a significant positive role in the functioning of the process in question. The answer to both these questions is "yes" in Alaska. Since the two-part test was established, courts have extended this test to establish a constitutional right of access to criminal and civil court proceedings and records. When the First Amendment right of access applies, the Supreme Court has held that a presumption of disclosure requires courts to grant access unless specific, on-the-record findings demonstrate that closure is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Our state's own public records act says that every person has the right to inspect a public record, except in a few limited circumstances. The public has a right that is exercised now. With this bill, the public's right will be snatched away because of SB 108. How schizophrenic is it to say on the one hand "yes" the public has a right to access a court record while pending, however long that is, whether it be 2 weeks or 6 years, but on the other hand that access must be terminated after a dismissal or acquittal. It makes no sense why it is allowed to be seen for a period then banned from the public's eye.

The argument has been made that a presumed is presumed innocent until proven guilty so if not proved guilty it should be removed. If this logic were really applied then no court record would be open to the public or press until after a person is found guilty. The court and its records have been open for the public to see the process. It is as important for the public, whether that means a victim, a journalist, a researcher or anyone else, to see, reflect upon and understand the whole process. Dismissals and acquittals are a component on the criminal justice process and the entire process should be open to public scrutiny.

- **The bill fails to acknowledge the significant difference between being "innocent" and being found "not guilty."**

  Verdict forms provided to jurors specifically use the phrase "not guilty" because the jury is not finding the person is innocent of the charge(s); only that the government failed to prove beyond a reasonable doubt each element of an offense charged. A verdict of "not guilty" does not mean a person is "innocent" of a crime, just that it wasn't proven to the jury beyond a reasonable doubt. Such a verdict may be because of the suppression of key evidence by a judge, jury nullification, witness intimidation, loss of witnesses due to death or relocation, or jury confusion. I have talked to jurors who rendered "hung" and "not guilty" verdicts, who have said that they believed the defendant did the crime but they didn't feel the evidence presented proved it to the high degree of beyond a reasonable doubt. "Not Guilty" at trial does not mean innocent of criminal wrongdoing.

  Regardless of how the jury comes to its decision, this bill would forever preclude the public, whether a victim, researcher or reporter, from reviewing the case that had been open to the public yet now is cloaked in secrecy.

- **The bill ignores safeguards currently within the criminal justice system and signals to the public that they cannot trust the process because our own law makers neither trust the process nor the public they serve.**

  The criminal justice process has numerous safeguards in place to ensure that there must be evidence to support criminal charges against a person. This bill ignores that well-established process. Those safeguards include: 1) an evaluation by an officer, based on specific facts and circumstances, that he has evidence that would lead a reasonable person to believe that the suspect has committed a crime, thus supporting probable cause; 2) a review by a judicial officer to determine if there is probable cause; 3) a review by a prosecutor who is ethically bound not to prosecute a charge not supported by probable cause; 4) a review of the sufficiency of the evidence supporting charge(s) by a grand jury made up of citizens in all felony matters; 5) a requirement that prosecutors must present any evidence which tends to negate guilt to the grand jury; 6) additional judicial review provided by the opportunity for the defendant to file motions with the court based of a lack of sufficient evidence to warrant the charge(s); 7) a trial where the prosecutor must present evidence which will show beyond a reasonable doubt that the defendant committed all the elements of the crime(s); 8) an opportunity at trial for the defendant to

cross-examine state witnesses and present his/her own evidence; and 9) an opportunity for the defendant to ask the judge having heard all the evidence to acquit the defendant prior to the jury receiving the case for deliberations. These aspects of the criminal justice system provide the safeguards to protect against baseless unsubstantiated charges. This bill, in essence, says to the crime victim and the community at large that process is inconsequential, irrelevant, and has no probative value.

- **The bill will make Alaska's children more vulnerable by blocking access to information, within the criminal justice system, that may be of great importance to citizens in their civil actions, especially family law matters or tort claims.**

  As it stands now a citizen can request information from the court system about any criminal case. That information may significantly aid them in evaluating whether or not to pursue a civil action or whether there is enough information to pursue the case. Blocking access to some criminal court records for victims, citizens, or their counsel could harm their ability to develop their case and locate valuable information, which could be key to their civil action.

- **The bills fails to recognize that Courtview presents information in an objective format.**

  Courtview reflects the charges, amendments to charges, hearing and litigation history, bail information and the disposition of a case – in other words just facts. The court system has gone a step further, than just reporting to facts, to emphasize a charge does not mean a person is "guilty" of a crime. Clearly a charge alone does not mean a person is guilty beyond a reasonable doubt but the information contained in the court record and reflected in Courtview is a factual history of the criminal case and provides the only public source where accurate information can be found about that case. It is imperative to have a source where facts can be reviewed, researched and relied upon instead resorting to relying on memory, rumor or the media. Availability of court records is critical to the ability to fact check. That opportunity will be eradicated by this bill.

- **The bill is contrary to the general policy goal of transparency of government institutions.**

  Transparency allows citizens of a democracy to check their government by holding their government accountable, as well as reducing government corruption, bribery and other malfeasance. This is based on the concept that citizens will be more trusting of their government if they can see what the government is doing; that the government exists for the good of the populous, and in a free country the government cannot operate in the shadows. A free and independent press is one a strong guarantor of transparency and perhaps stronger than any legislative checks and balances. With SB 108, not only will our citizens be denied this access and transparency, but so will the press. This bill proposes to hide government functions, which affect the many not just the few.

- **The bill rolls back in time to a place where we will be worse off as a community off.**

In decades past, communities were smaller. People connected face to face. They knew their neighbors' names at a minimum. This type of interpersonal association and communication allow people to "know" who was around them and to protect themselves. Those days are mostly gone. We are a more mobile society so the connections once easily forged in communities is now frayed by citizens on the move from village to village, village to the city and to other states. Instead of being dependent on our neighbors, families and fellow citizens for information, we are reliant upon the media and electronically available data. Our communities are frayed and many connections severed so that traditional methods of gathering information are all but gone. Now this bill threatens the access we once had and should have. It will leave people worse off than before the age of court technology. Our citizens should be given the freedom to collect information to better their lives and, in the case of court records, to allow them to be proactive in their own safety. SB 108 would be an unprecedented denial of public access to criminal records at our courthouses by the Alaska Legislature.

SB 108's consequences are far too broad and it should be abandoned as written. If the legislature wishes to provide a remedy for those falsely accused of a crime, it should draft a more narrowly-defined bill. OVR has offered amendment which would answer many of the concerns SB 108 attempts to cure but which would significantly decrease the ill effects. For those defendants not eligible for their criminal records being made confidential under OVR's suggested amendments to SB 108, A.S. 12.62.180, the statute which provides a process by which defendants can pursue sealing their criminal justice information, still exists. OVR, however, would encourage discussion and possible amendments to A.S. 12.62.180. While there is a process, it is not clearly defined and there is little likelihood of success as currently designed.

If the Legislature passes this bill as is, it is saying those defendants are innocent and any victims in those cases are not actual victims. The government, when considering reducing a citizen's freedom of information, should do so, if at all, in the most limited fashion possible to remedy the harm the law seeks to prevent, not rewrite history.

If you support freedom of information; the First Amendment; transparency of government, keeping our communities as safe as possible and the fair, dignified and respectful treatment of victims, then you cannot support SB 108 as currently written.

Respectfully,

Taylor E. Winston, Director
Alaska Office of Victims' Rights