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MEMORANDUM

February 11, 2015

SUBJECT: Definition of "reasonably likely" CSHB 65
(Work Order No. 29-LS0070-E.1)

TO: Representative Mike Hawker
Attn: Juli Lucky

FROM: Daniel C. Wayne
Legislative Counsel

You have asked for a succinct statement as to the meaning of the phrase "would be reasonably likely to," in the context of CSHB 65, draft version "E." The term is not defined in the bill or in AS 39.50, the chapter the bill would amend.

When terms are undefined in statute, AS 01.10.040(a) directs that they be construed "according to their common and approved usage." The Alaska Supreme Court has said:

Dictionaries provide a useful starting point for determining what statutory terms mean, as they provide the common and ordinary meaning of words. When a popular or common word is used in a statute, but is not defined, the word should be given its common meaning.¹

The term "reasonably likely" is used elsewhere in the Alaska Statutes, (as is "reasonable probability") which suggests that its meaning in those instances is left to common understanding. About the term "likely, one authority -- the United States Court of International Trade -- has said:

Although the word "likely" is not defined by statute, its meaning is not ambiguous. "[U]ndefined terms in a statute are deemed to have their ordinarily understood meaning." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1571 n. 9 (Fed.Cir.1994) (citing *United States v. James*, 478 U.S. 597, 604 (1986)). The common dictionary meaning of likely is probable. See, e.g., *Webster's Third New International Dictionary* 1310 (1981) ("[O]f such a nature or so circumstanced as to make something

¹ *Alaskans For Efficient Government, Inc. v. Knowles*, 91 P.3d 273, 276 n. 4 (Alaska 2004), quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.28 (6th ed. 2000).

probable....”); *Merriam–Webster's Collegiate Dictionary* 673 (10th ed. 2001) (“[H]aving a high probability of occurring or being true....”); *Black's Law Dictionary* 925 (6th ed. 1990) (“Probable.”).²

The Supreme Court of California has said:

We ourselves consistently have given a similar flexible interpretation to the statute requiring a change of venue in any criminal case where there is a “reasonabl[e] likel[ihood]” the defendant cannot otherwise receive a fair trial. (Pen.Code, § 1033, subd. (a).) As we have indicated, “[i]n this context, ‘reasonably likely’ ‘means something less than ‘more probable than not’ ” and “something more than merely ‘possible.’ ”³

A "reasonably likely" standard is a subjective standard that allows weight to be given to the context of surrounding facts and circumstances when measuring the risk or harm. In the context of the CSHB 65 version "E," the burden of proof would be on the person requesting a waiver from the disclosure requirements of AS 39.50 to show that disclosure of information "would be reasonably likely to materially diminish the commercial value of the information to the person or adversely affect the competitive position of the person."⁴

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² *Nippon Steel Corp. v. United States*, 26 C.I.T. 1416, 1420 (2002).

³ *People v. Superior Court (Ghilotti)*, 27 Cal. 4th 888, 916-19, 44 P.3d 949, 968-70 (2002) (Internal citations omitted).

⁴ *Work Order 29-LS0070\E*, page 3, lines 17 - 19.