

Ms. Kris Perry was served with her subpoena on September 23, 2008, in Wasilla, Alaska.

Ms. Janice Mason was served with her subpoena on September 21, 2008, in Juneau, Alaska.

All of the subpoenas listed above commanded the witness to appear here today, September 26, 2008, at 10:00 a.m., to give testimony to the Judiciary Committee. None of the witnesses have appeared.

Alaska Statute 24.25.030 sets out our procedure in this particular situation. The statute reads as follows: "If a witness neglects or refuses to obey a subpoena ... the senate or the house of representatives may by resolution entered on its journal commit the witness for contempt. If contempt is committed before a committee, the committee shall report the contempt to the senate or house of representatives, as the case may be, for such action as may be considered necessary." Please consider this letter as satisfying the dictates of the statute.

Sincerely,

A handwritten signature in black ink, appearing to read "H. French", written over a horizontal line.

Senator Hollis French

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sarah Palin, Governor

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-2133
FAX: (907) 465-2075

September 25, 2008

The Honorable Kim Elton
State Senate
State Capitol, Room 506
Juneau, Alaska 99801-1182

Re: Your September 19, 2008 Letter

Dear Senator Elton:

I understand the frustration expressed in your letter of September 19. But your expression of that frustration fails to account for the fact that, while lawyers may advise their clients, those clients must decide whether, for example, to appear and testify voluntarily. The Department of Law represents seven individual state employees, each of whom decided not to testify voluntarily under threat of subpoena. Given the circumstances, their choice is understandable.

I do not, of course, believe that responding to properly issued subpoenas is voluntary. But I do believe that subpoenaed persons have the right to challenge the validity of the subpoenas when that validity is suspect. We have stated our legal concerns about the validity of the Senate Judiciary Committee's subpoenas in other correspondence, most recently in the September 19 letter to Senator Wielechowski that you also received. We have also filed in superior court, on behalf of our seven subpoenaed clients, a complaint for declaratory relief, seeking a declaration on the validity of the subpoenas.

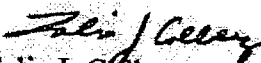
Contrary to the media reports you cited, the Department of Law did not contract with Mr. Van Flein because my contact with former Commissioner Monegan about Trooper Wooten created a conflict of interest. I have confirmed with bar counsel that my contact with former Commissioner Monegan did not create a conflict of interest.

Senator Kim Elton
Re: September 19, 2008 Letter

September 25, 2008
Page 2

Finally, as you noted in your letter, I did not respond to your questions concerning specific advice and conversations. As I hope you can appreciate, my obligations to my clients prevent me from disclosing such information.

Sincerely,


Talis J. Colberg
Attorney General

cc: Senator Bettye Davis
Senate President Lyda Green
Senator Lyman Hoffman
Senator Gary Stevens
Senator Gary Wilken
Representative Nancy Dahlstrom
Representative John Coghill
Representative David Guttenberg
Speaker of the House John Harris
Representative Ralph Samuels
Representative Bill Stoltze
Representative Peggy Wilson
Senator Hollis French

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595



Committee Members:
Senator Charlie Huggins
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Gene Therriault

Senate Judiciary Committee

September 19, 2008

Dear Senator Green,

On September 12, 2008, the Senate Judiciary Committee authorized the issuance of fourteen subpoenas; thirteen were for witnesses and the last was for Mr. Frank Bailey's cell phone records. By your signature on those subpoenas, you concurred in that action, thus satisfying the statutory requirements of Alaska Statute 24.25.010(b). The purpose of the subpoenas was to assist Mr. Stephen Branchflower in his investigation into the events and circumstances surrounding the termination of former Public Safety Commissioner Walt Monegan.

Since that time, six of the witness subpoenas were served and seven were not. The subpoenas that were served commanded the witnesses to appear at 10:00 am today, September 19th, 2008, before the Judiciary Committee. Subpoenas were served on attorneys representing Mr. Frank Bailey, Ms. Ivy Frye, Mr. Todd Palin, Mr. Randy Ruaro, and Ms. Murlene Wilkes. By an agreement between Mr. Branchflower and Mr. Bailey's attorney, a copy of the sworn statement that Mr. Bailey gave to Mr. Thomas Van Flein has been given to Mr. Branchflower and will satisfy Mr. Bailey's obligation to comply with his subpoena. Mr. John Bitney was served personally by Mr. Branchflower and Mr. Bitney, accompanied by his attorney, elected to give a statement to Mr. Branchflower in his office, thus satisfying Mr. Bitney's obligation under his subpoena. The subpoena for Mr. Bailey's cell phone records was served on ACS, Inc., and that company has turned the records over to Mr. Branchflower. Finally, Ms. Wilkes, through her attorney, has agreed to give a statement to Mr. Branchflower this afternoon, thus satisfying her obligations under her subpoena.

Ms. Frye, Mr. Palin, and Mr. Ruaro, all having been served with subpoenas through their legal counsel, have neither given statements, nor appeared today in compliance with their subpoenas. Alaska Statute 24.25.030 sets out our procedure in this particular situation. The statute reads as follows: "If a witness neglects or refuses to obey a subpoena ... the senate or the house of representatives may by resolution entered on its journal commit the witness for contempt. If contempt is committed before a committee, the committee shall report the contempt to the senate or house of representatives, as the case may be, for such action as may be considered necessary." Please consider this letter as satisfying the dictates of the statute.

Subpoenas were not served on Ms. Dianne Kiesel, Ms. Annette Kreitzer, Ms. Nicki Neal, Mr. Brad Thompson, Mr. Michael Nizich, Ms. Kris Perry and Ms. Janice Mason. The reason that those seven subpoenas were not served is because Mr. Branchflower relied on the written offer of cooperation that Assistant Attorney General Michael Barnhill issued in a letter to Chairman of the Legislative Council Committee, Senator Kim Elton, dated September 9, 2008. Senator Elton accepted the offer in a letter sent to Mr. Barnhill on Friday, September 12, 2008, which was the same day the Senate Judiciary Committee issued its subpoenas. Mr. Barnhill spoke to Mr. Branchflower late that Friday afternoon, to begin scheduling depositions.

The next day, Saturday, September 13, 2008, Mr. Barnhill sent an e-mail to Mr. Branchflower, confirming the details of their phone conversation. The e-mail in relevant part reads as follows:

Steve - this shall confirm our phone conversation of late yesterday afternoon.

As a consequence of Sen. Elton's letter to me of 9/12/08, Law agrees that the depositions of the four Department of Administration employees, Annette Kreitzer, Dianne Kiesel, Nicki Neal and Brad Thompson, may proceed. Law appreciates the Legislative Council's willingness to agree with our interpretation of the laws governing confidential state employee personnel files as set forth in our letter of 9/9/08.

Each of these four individuals has confirmed that they wish to proceed with their deposition without service of a subpoena, and that they have elected to have representation from Law at their deposition. Law will provide that representation.

As I explained during our call, Tom van Flein requested on Friday (9/12) that the Department of Law resume representation of these employees in the Office of the Governor who have not sought private counsel. At this point, my understanding is those employees include Mike Nizich, Kris Perry and Janice Mason. When you return on Tuesday, please give me a call and I will report on the status of Law's representation of those employees within the Office of the Governor who have not secured private counsel and their availability for deposition.

That cooperation agreement was abrogated by the Tuesday, September 16, 2008, letter from Attorney General Talis Colberg. The Judiciary Committee's, and Mr. Branchflower's, reliance on the two written promises of the Department of Law is regrettable. Because the subpoenas were not served, there is no legal basis upon which to take any action today regarding them. The original, unserved subpoenas are still in the hands of Mr. Branchflower. He will begin the process of serving them on the seven remaining witnesses, with a return date of Friday, September 26, 2008.

Sincerely,



Senator Hollis French



SENATOR KIM ELTON

September 19, 2008

Talis Colberg, Attorney General
Department of Law
P.O. Box 110300
Juneau, AK 99811-0300

Dear Attorney General:

I'm in receipt of your letter dated today. I expect that continued dialogue can lead to a quick resolution of the impasse.

I want to begin by thanking you for your straight-forward acknowledgement that I met the condition set by you on interpretation of law. I thank you also for your additional acknowledgement that you recognize that my acceptance constituted a deal that allowed state employees to testify.

You then note in today's letter: "However, a new circumstance intervened—supporting the Governor's decision to cooperate only with the Personnel Board investigation." That is a shorter reiteration of your statement in the September 16 letter. On September 16, you wrote:

"As state employees, our clients have taken an oath to uphold the Alaska Constitution and for that reason they respect the legislature's desire to carry out an investigation in support of its law-making powers. However, our clients are also loyal employees subject to the supervision of the governor. Your subpoena places them in the difficult position of choosing either to support the Governor's decision to cooperate only with the Personnel Board investigation or to voluntarily comply with the subpoenas issued by the committee."

My short response is: 1) I hope you are not asserting that being a loyal employee subject to the supervision of the governor is of equal weight to the constitution or the rule of law; 2) I trust you really don't want to suggest to folks who are subject to the Department of Law's power to subpoena that response to any subpoena is voluntary in nature; and 3) I

hope you have weighed the consequences of cancelling this written agreement and its potential chilling effect upon the willingness of other parties in the vast array of complex civil and criminal matters you deal with (if you can break this deal, can you break their deals?).

I'm very puzzled also by any argument that suggests you had to break the deal because a "new circumstance intervened." That circumstance, you say in today's letter, is "supporting the Governor's decision to cooperate only with the Personnel Board investigation." A September 2 press release from the law firm Clapp, Peterson, Van Flein, Tiemessen, Thorsness quotes the governor saying: "(L)ast night, I initiated a proceeding before the state personnel board because that is the agency charged by law with addressing the complaints about hiring and firing matters." The complaint filed by the governor the night before, on September 1, says the personnel board "is the only body in Alaska with the legal authority to do so."

So, prior to the consummation of our deal on September 12, you knew she felt the board was the agency she wanted to investigate the circumstances surrounding the dismissal of Commissioner Walt Monegan and you knew she was alleging the board was the only entity with the legal authority.

Your knowing, 11 days prior to consummating the agreement with the Legislative Council, that the governor felt the board was the only entity with legal authority makes it difficult to assert, as you do, that you need to break the deal because after the deal the governor decided to cooperate only with the board's investigation. Let me be absolutely clear—you made the deal 11 days after the governor made the claim that only the board had authority. Why would you argue you had to break a deal because that "new" circumstance intervened?

It's important I note here that I also disagree strongly with any assertion by the executive branch that limits the legislature's power in this instance. Our legal authority is clear.

At this point, I must raise a difficult issue so that I can better understand the nature and scope our correspondence. The *Anchorage Daily News* reported September 2 the Department of Law hired Thomas Van Flein "because Attorney General Talis Colberg has a potential conflict of interest and shouldn't represent the governor, Van Flein said Monday." The national news service *Bloomberg* reported September 11 that "Attorney General Talis Colberg, a Palin appointee, recused himself." And NBC news September 1 reported the "Department of Law had a potential conflict of interest, because Mr. Colberg, Attorney General Colberg, made contact with Mr. Monegan about Trooper Wooten, Van Flein said."

Given the analysis by Mr. Van Flein, an attorney first hired by the Department of Law, and given the reporting by *Bloomberg*—which is unchallenged as far as I know—that you recused yourself, I'm confused when you refer to the state employees in both the September 16 letter and the September 19 letter as "our clients."

I ask for clarification of your status without challenging your ability to fairly represent state employees. I understand that serving at the pleasure of the governor and statements made through the media by others can morph into extremely unfair character challenges. I have a visceral understanding of how difficult that can be given that I'm accused of bias in this matter. In short, I feel your pain but do think it is important to understand what may have changed since the comments about your conflict of interest were made.

Finally, I note that my letter dated September 17 asked for further information on two points: "when and where the governor, as you note in your letter, 'so strongly stated that the subpoenas issued are of questionable validity;'" and for any advice you may have given her that would raise a question of the validity of subpoenas. I trust you have set in motion a review of these two explicit requests and hope you can respond quickly.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Elton", with a long horizontal flourish extending to the right.

Sen. Kim Elton
Chair, Legislative Council

Cc: Legislative Council
Sen. Hollis French

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

Sarah Palin, Governor

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-2133
FAX: (907) 465-2075

September 19, 2008

The Honorable Kim Elton
State Senate
State Capitol, Room 506
Juneau, Alaska 99801-1182

Re: Your September 17, 2008 Letter

Dear Senator Elton:

We sincerely appreciate your clarification of a very important concern of this office—settling on the meaning and requirements of AS 39.25.080, which was being interpreted (wrongly in our view) to prohibit certain employees in the executive branch from viewing state personnel records. We were troubled by exposing Department of Administration employees to interviews with Mr. Branchflower when we were hearing misrepresentations in the media about the law's requirements with implicit threats that some of these employees may have criminal exposure. We communicated to you that once this point was clarified the four employees we then represented were willing and available to meet with Mr. Branchflower and would do so voluntarily.

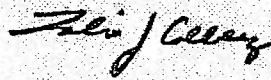
However, a new circumstance intervened—supporting the Governor's decision to cooperate only with the Personnel Board investigation. Our September 16 letter to Senator French was an effort to communicate the difficult position this places our clients in—having to choose between supporting the Governor's position and voluntarily complying with the subpoenas. Withdrawing those subpoenas (and the demand for the interviews) would relieve our clients of that difficult choice. However, we made clear in our letter that we continue to have reservations about the validity of the subpoenas. These reservations exist—regardless of the level of cooperation you are provided.

Senator Kim Elton
Re: Your September 18, 2008 Letter

September 19, 2008
Page 2

I acknowledge our position has changed—because our clients are no longer willing to participate voluntarily in your process. In light of these circumstances, our clients' decisions should be understandable.

Sincerely,



Talis J. Colberg
Attorney General

cc: Senator Bettye Davis
Senate President Lyda Green
Senator Lyman Hoffman
Senator Gary Stevens
Senator Gary Wilken
Representative Nancy Dahlstrom
Representative John Coghill
Representative David Guttenberg
Speaker John Harris
Representative Ralph Samuels
Representative Bill Stoltze
Representative Peggy Wilson
Senator Hollis French



SENATOR KIM ELTON

September 17, 2008

Talis Colberg, Attorney General
Department of Law
P.O. Box 110300
Juneau, AK 99811-0300

Dear Attorney General:

This is a response to your letter dated yesterday and received by my office via email at 3:27 p.m.

I want to remind you of previous correspondence from your office to me in my capacity as chair of Legislative Council. On September 9, Senior Assistant Attorney General Michael Barnhill signed a letter for you that made a substantive offer. That offer was:

“(T)he Department of law wishes to confirm that the Legislative Council agrees with the department’s reading of the law. If we cannot reach agreement on the proper interpretation of the State Personnel Act, the Department of Law is prepared to seek declaratory judgment in court on this issue. But if the Legislative Council will acknowledge in writing its agreement with the Department of Law’s interpretation the Department of Law will drop its objections and the depositions may proceed without subpoenas.”

That offer is clear—acknowledge in writing and depositions may proceed without the need for subpoenas. On September 12, as chair of the Legislative Council and on behalf of the Council, I noted in writing that, after consultation with the legal staff at Legislative Affairs, Legislative Council agreed with the legal analysis put forward by you in your capacity as attorney general. My precise response to the offer made by the Department of Law was:

“I stipulate in my role as chair of the Legislative Council and on behalf of the Council, that your interpretation of the law is correct.”

I further noted:

“Given our agreement on this important point, and given your offer on page 4 of your letter to drop your objections and allow the depositions to

proceed 'if the Legislative Council will acknowledge in writing its agreement with the Department of Law's interpretation,' I'd appreciate it if you would contact Mr. Branchflower so that depositions may proceed in a timely manner."

Mr. Barnhill, after receipt of the letter and after the Senate Judiciary Committee issued subpoenas, on the same day contacted Mr. Branchflower so that depositions from the state employees could be scheduled. I was grateful for the breakthrough

Your letter yesterday quite clearly breaks that deal. Bluntly, I feel like Charlie Brown after Lucy moved the football.

Not only was the letter of September 9 explicit in its offer, it had further strength given the public pronouncements by the governor, including:

"We would never prohibit, or be less than enthusiastic about any kind of investigation. Let's deal with the facts and you do that via an investigation;" and

"I'm happy to comply, to cooperate. I have absolutely nothing to hide. No problem with an independent investigation."

Further, staff and others speaking for the governor said: the governor will fully cooperate and her staff will cooperate also (Leighow, July 29); the governor "has directed all her staff to cooperate fully with Branchflower" (press release, August 13); Frank Bailey will fully cooperate with the investigation (McAllister, August 19); that with Frank Bailey still a state employee the governor "can direct him to assist Mr. Branchflower, thereby fulfilling her pledge to Alaskans to cooperate fully with the investigation" (Leighow, August 20); and the governor's office welcomes the inquiry and will cooperate (the governor's private attorney, September 2).

Despite your previous offer, explicitly stated and accepted, and despite repeated assertions of cooperation, you now are not allowing state employees encouraged to cooperate to do so. In four paragraphs, you've broken a deal that was accepted by your office and received by Mr. Branchflower after the Senate Judiciary Committee issued subpoenas. Further, your brand new position eviscerates weeks of comments on the record by several parties, including the governor.

I'd note, also, that while subpoenas have been requested, the only witnesses served with subpoenas are witnesses not employed by the executive branch. I understood the legislature's investigator did not feel the need to serve them following his conversation with Mr. Barnhill. A decision to not serve the subpoenas made sense given the fact it was: not necessary; and, since it was unnecessary, could give the appearance of confrontation where none was apparent.

Given the statements of cooperation by you on September 9, by the governor, and by spokespeople for the governor, it may help me to understand when and where the governor, as you note in your letter, "so strongly stated that the subpoenas issued by (the Senate Judiciary Committee) are of questionable validity." If you have so advised the governor before she made a statement I don't recall, I'd appreciate it if you could make that advice part of the public record so that we can understand the rationale behind the statement.

Sincerely,


Sen. Kim Elton

cc: Legislative Council members
Sen. Hollis French

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

Sarah Palin, Governor

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-2133
FAX: (907) 465-2075

September 16, 2008

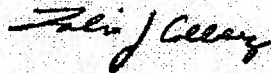
The Honorable Kim Elton
State Senate
Alaska State Legislature
State Capitol, Room 506
Juneau, AK 99801-1182

Re: Executive Branch Subpoenas

Dear Senator Elton:

Please see the attached letter, which was sent today to the members of the
Judiciary Committees.

Sincerely,



Talis J. Colberg
Attorney General

Attachment

cc: Senator Bettye Davis
Senate President Lyda Green
Senator Lyman Hoffman
Senator Gary Stevens
Senator Gary Wilken
Representative Nancy Dahlstrom
Representative John Coghill
Representative David Guttenberg
Speaker of the House John Harris
Representative Ralph Samuels
Representative Bill Stoltze
Representative Peggy Wilson

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sarah Palin, Governor

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-2133
FAX: (907) 465-2075

September 16, 2008

The Honorable Hollis French, Chair
Senate Judiciary Committee
Alaska State Legislature
716 West Fourth Avenue, Suite 420
Anchorage, Alaska 99501-2133

Re: Executive Branch Subpoenas

Dear Senator French:

Your committee has subpoenaed certain employees of the executive branch of state government represented by the Office of the Attorney General. These persons serve within the exempt and partially exempt service at the will of their employer, the State of Alaska. As you know, the State Personnel Board has undertaken a separate ethics investigation into the same matter for which the subpoenas were issued. For this and other reasons, such as separation of powers, the Governor has declined to participate in the investigation initiated by the Legislative Council.

As state employees, our clients have taken an oath to uphold the Alaska Constitution and for that reason they respect the legislature's desire to carry out an investigation in support of its law-making powers. However, our clients are also loyal employees subject to the supervision of the Governor. Your subpoena places them in the difficult position of choosing either to support the Governor's decision to cooperate only with the Personnel Board investigation or to voluntarily comply with the subpoenas issued by the committee.

You can appreciate that this is an untenable position for our clients because the Governor has so strongly stated that the subpoenas issued by your committee are of questionable validity. Moreover, two lawsuits have been filed challenging the legitimacy of the investigation. On behalf of our clients, we respectfully ask that you withdraw the subpoenas directed to our clients and thereby relieve them from the circumstance of having to choose where their loyalties lie.

The Honorable Hollis French
Re: Executive Branch Subpoenas

September 16, 2008
Page 2

If the subpoenas are not withdrawn by the Senate Judiciary Committee, our clients will not appear in response to the subpoenas until either the Senate or the full legislature convenes to issue a resolution requiring their presence before the appropriate legislative committee.

Sincerely,



Talis J. Colberg
Attorney General

cc: Senator Kim Elton, Chair, Legislative Council
Senator Charlie Huggins
Senator Lesil McGuire
Senator Gene Therriault
Senator Bill Wielechowski
Senator Bettye Davis
Senate President Lyda Green
Senator Lyman Hoffman
Senator Gary Stevens
Senator Gary Wilken
Representative Nancy Dahlstrom
Representative John Coghill
Representative David Guttenberg
Speaker of the House John Harris
Representative Ralph Samuels
Representative Bill Stoltze
Representative Peggy Wilson
Stephen Branchflower

Alaska State Legislature

Senate



Official Business

September 12, 2008

State Capitol
Juneau, AK. 99801-1182

Michael Barnhill
Senior Assistant Attorney General
Attorney General's Office
123 4th St., 6th Floor
Box 110300
Juneau, AK 99811-0300

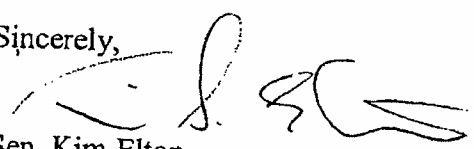
Dear Mr. Barnhill:

After receipt of your letter to me dated September 9, I asked the Legislature's Legal staff to review your interpretation with the law regarding the appropriate handling of state employee personnel records. I also shared a copy of your letter with Sen. Hollis French and investigator Stephen Branchflower.

Following this review of your legal analysis of the laws governing personnel records, I stipulate in my role as chair of the Legislative Council and on behalf of the Council, that your interpretation of the law is correct.

Given our agreement on this important point, and given your offer on page 4 of your letter to drop your objections and allow depositions to proceed "if the Legislative Council will acknowledge in writing it's agreement with the Department of Law's interpretation," I'd appreciate it if you would contact Mr. Branchflower so that depositions may proceed in a timely manner.

Sincerely,


Sen. Kim Elton
Chair, Legislative Council

Cc: Members of Legislative Council
Sen. Hollis French

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sarah Palin, Governor

P.O. BOX 110300
DIAMOND COURT HOUSE, 6TH FLOOR
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

September 4, 2008

Via e-mail: sebranchflower@gmail.com

Stephen E. Branchflower
310 K Street Suite 200
Anchorage, AK 99501

Re: Depositions of Department of Administration Personnel
Our File: 223-09-0013

Dear Mr. Branchflower:

The Department of Law has become increasingly concerned that the legislative investigation is no longer solely concerned with the reasons why Governor Palin terminated Commissioner Monegan, but rather whether the Alaska Personnel Act was violated. As you know, under AS 39.25.900, conviction of a willful violation of the Alaska Personnel Act carries the penalties of a misdemeanor and forfeiture of the employee's position.

In an August 16 phone call with me, you first raised the issue of whether Mr. Bailey had violated the Alaska Personnel Act. More recently, Senator French has apparently publicly expressed his view that if the Governor's Office obtained confidential information from Trooper Wooten's personnel file, "it would be a violation of state law." *"October Surprise Over Palin Investigation?"* ABC News, Sept. 2, 2008. Yesterday, the Anchorage Daily News reported Senator French disclosing that the scope of the investigation has now expanded to include whether other persons within the Palin administration have abused power. *"Palin Seeks Review of Monegan Firing Case,"* Anchorage Daily News, Sept. 3, 2008.

The Alaska Personnel Act provides that personnel records "are confidential and are not open to public inspection." AS 39.25.080(a). The Department of Law believes that it is not a violation of the Alaska Personnel Act for the governor or members of the governor's staff within the course and scope of their official responsibilities to review a confidential personnel file. The governor is the ultimate employer of every employee in the executive branch. Review by the governor or members of the governor's staff within the course and scope of their official responsibilities of a confidential personnel file is not a violation of employee confidentiality nor does it constitute a public inspection.

It appears from Senator French's reported comments in the press that he disagrees with this reading of Alaska law and his legal opinion differs from that of the Department of Law. While we disagree with his legal position, to the extent that Senator French is correct,

Stephen Branchflower
Re: Dept. of Administration Depositions

September 4, 2008
Page 2

it would therefore follow that individuals within the Department of Administration who have disclosed matters related to an employee's personnel file to the Office of the Governor have potentially violated AS 39.25.080, and could theoretically have personal criminal exposure under AS 39.25.900.

Given the fact that the focus of this investigation has now apparently expanded beyond the governor's termination of Commissioner Monegan, the fact that Senator French appears to believe that the Office of the Governor may not review confidential employee files or perhaps even discuss matters pertaining to a state employee's employment, and the fact that this view of the law, if correct, could potentially expose individuals in the Department of Administration to criminal sanctions including forfeiture of their employment, we must inform you of the following:


- The Department of Law must re-assess this matter in order to determine whether Department of Administration employees should be advised to seek private counsel.
- All depositions of Department of Administration employees are cancelled until further notice.
- Unless we notify you otherwise, the Department of Law is, for purposes of your investigation, representing all Department of Administration employees who had involvement with Trooper Woofen's personnel or workers' compensation files.

I regret to inform you of these actions, but we believe we have no choice given the recent evolution of this investigation. The Department of Law will continue to work with you on your requests for records as we have previously discussed.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By:


Michael Barnhill

Senior Assistant Attorney General

MAB/krk

cc: Commissioner Annette Kreitzer
Senator Hollis French
Senator Kim Elton
Representative Nancy Dahlstrom

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3887 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

September 3, 2008

SUBJECT: Investigations by the legislature (Work Order No. 26-LS0088)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Tamara Brandt Cook
Director

TBC

You have supplied me with a letter from Mr. Thomas V. Van Flein and Mr. John J. Tiemessen, who are representing the Governor and various staff members, and asked me to consider points raised in the letter.

[REDACTED]

To the extent that the thrust of this comment in the letter goes to the power of the legislature to investigate, I observe that the legislative power of investigation is limited to obtaining information on matters which fall within its field of legislative action. (Mason's Manual, Secs. 795(6) and 797(7)) Lawmaking is a central legislative activity, but there are other legislative activities that may justify investigatory pursuits. It is stated in Mason's Manual, sec. 795(10):

[REDACTED]

The Alaska Supreme Court has acknowledged that the legislature has broad powers of investigation relating to its lawmaking activities and has also specifically identified the confirmation power as carrying with it an implied power and duty to investigate both the status of the relevant appointed offices and the qualification of individuals appointed to fill them. (Cook v. Botelho, 921 P.2d 1126 (Alaska 1996))

[REDACTED]

legislative activities also carry with them the implied power to investigate. (See for example, Art X, sec. 12 (power of the legislature to disapprove certain local boundary changes; Art. II, sec. 20 (power of the legislature to impeach civil officers of the State))

If this comment is intended to precisely apply to the power of the legislative council to investigate, it would seem that the legislative council could investigate any matter that falls within its duty to provide administrative services to the legislature (AS 24.20.00) as

~~well as its power to participate in the law-making function through the introduction of legislation~~ (AS 24.08.060(b)). The legislative council does not have explicit authority to investigate activities of executive branch agencies or officers. [It is not clear to me whether the broad power to provide administrative services would be considered to be sufficient authority for the legislative council to undertake a preliminary investigation that might lead to the need for other actions on the part of the legislature or another legislative committee, but it might. In addition, it is possible that the recommendations contained in the report prepared under the investigation contract will consist of proposed statutory changes and fall squarely within the law-making function exercised by the legislative council when it considers the introduction of legislation.]

(2) *The legislature may lack jurisdiction to spend public monies to investigate a co-equal branch of government.*

Clearly, expenditure of public money appropriated to the legislative branch must be used for a legislative purpose as well as for a public purpose. If the legislature does have the power to conduct the investigation in question, then it has the authority to spend money for that purpose. Mason's Manual notes in sec. 795(13) "In the exercise of its power to make investigations, a legislature may incur reasonable, necessary expenses payable out of the public funds."

(3) *The general legislative power to issue subpoenas is clearly prohibited relative to the Legislative Council. (See AS 24.25.010(e))*

It is correct that the legislative council is not authorized to issue a subpoena under AS 24.25.010. It has separate subpoena authority under AS 24.25.060(2). That power is granted "when consistent with the powers and duties assigned to the council by AS 24.20.010-24.20.140." (As I previously noted, it is not clear whether the investigation at issue is consistent with those powers and duties.)

(4) *Art. I, sec. 7 entitles the Governor to "fair and just treatment" in the course of legislative investigations.*

This is correct. I have attached a discussion of this provision from the Alaska Constitutional Convention Proceedings, Part 4, pages 1446-1450 and pages 1464-1471. As you can see, the delegates did not reach an understanding of what "fair and just treatment" might be with regard to a legislative investigation. It appears that the expectation was that the legislature would adopt specific procedures that apply to ensure that investigations are fair or that, through court challenges based on actual legislative investigations, a body of law would evolve to clarify the matter. However, the legislature has not adopted specific procedures for investigations and the case law dealing with the last sentence of Art. I, sec. 7 that I found in a quick search has involved executive branch investigations (administrative procedures) rather than legislative branch investigations.

(5) *A complaint has been filed with the Personnel Board under the executive branch ethics law which gives the Board jurisdiction over this investigation. Will you suspend your investigation pending the outcome of the Personnel Board investigation?*

The investigation of an incident by one governmental entity does not normally deprive another governmental entity of authority to look into the matter also, although one of the entities might agree to curtail its activities out of deference to the other. Assuming that a complaint has been filed under the executive branch ethics law, both the complaint and all information regarding an investigation as a result of the complaint are confidential until the initiation of formal proceedings. (AS 39.52.340) An investigation can only involve alleged violations of the ethics law and there is no way to tell what the scope of the investigation in this situation might be. It certainly cannot be determined that the legislature's investigation will be identical with an investigation being conducted under the executive branch ethics law.

~~_____ other branch of~~
~~_____~~ legislative branch. (*Cook v. Botelho*, 921 P.2d 1126 (Alaska 1996) quoting from *Barrett v. Duff*, 217 P. 918 (Kan. 1923) pages 925 - 926)

I caution you not to mention any complaint or investigation that may be in progress under the executive branch ethics act in a letter you make public because these complaints are confidential. I have no comment with respect to whether the legislature should suspend its investigation.

(6) *The letter calls into question keeping certain aspects of the legislative investigation secret.*

It is usual for the investigatory stage to be conducted on a confidential basis before any formal charge is made or formal proceeding initiated. This protects the privacy of individuals who may be under investigation, of witnesses, and of the investigatory process itself. After all, an investigation may not uncover facts that lead to a formal proceeding. (See generally AS 40.25.120(a)(4); AS 45.50.521; AS 45.66.190; AS 47.30.845; AS 47.32.180) Under the public records law, in determining whether a particular record is subject to public disclosure, the court will weigh the public interest in disclosure against the interest in confidentiality. (*Gwich'in Steering Comm. v. State Office of the Governor*, 10 P.3d 572 (Alaska 2000); *Fuller v. City of Homer*, 75 P.3d 1059 (Alaska 2003)) A reasonable argument can be made for the proposition that the interest in protecting the legislature's investigatory function and the privacy interest of potentially innocent parties outweighs the public interest in disclosure, particularly when the investigation may not lead to any formal procedure.

(7) *There is no reason to conduct ex parte interviews with represented parties.*

This seems to be a fair assertion.

Senator Hollis French
September 3, 2008
Page 4

(8) Mr. Branchflower attempted to contact Mr. Todd Palin on a secure line which represents a security breach. The letter requests immediate disclosure of the names of persons who provided the secure phone number.

The letter suggests that the security breach may be reported to the Secret Service. I have no knowledge of federal security laws or how they may interface with an ongoing legislative investigation.

(9) If "you agree to submit to proper jurisdictional process, we can check the Governor's schedule to see when she and the First Gentleman are available for an interview."

Does this mean that, despite the objections in the rest of the letter, an interview will be granted in the course of the legislative investigation? I think you will have to consult with Mr. Thomas V. Van Flein on the meaning of his last two paragraphs.

With respect to all this, I observe that if a person refuses to provide information to the investigator or to respond to a subpoena by a legislative committee, it may be that the lack of cooperation must simply be noted in the report. Because the power to investigate is a legislative power that has not been clearly delegated in this instance to a committee, ultimately, the House or Senate or legislature as a whole may have to decide whether to formally initiate an investigation through the adoption of a resolution charging a committee to conduct it.

~~the legislature must use its own disciplinary powers; formal censure through adoption of a resolution or impeachment proceedings. (See AS 24.25.030)~~
~~the legislature may not itself enforce criminal sanctions.~~

TBC:lmb
08-210.lmb

Enclosure.

★
?

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LLC

ANCHORAGE

Matthew K. Peterson
Thomas V. Van Flein
John B. Thorsness
Linda J. Johnson
Monique R. Renner
Eric J. Brown
Liam J. Moran, Of Counsel
James D. Gilmore, Of Counsel
Jonathan P. Hegna, Of Counsel

FAIRBANKS

John J. Tiemessen
Lisa C. Hamby
Marcus R. Clapp, ret.

September 2, 2008

Stephen Branchflower, Esq.

EMAIL: sebranchflower@gmail.com

Re: *In Re: Investigation Into The Termination Of Walt Monegan*

Dear Mr. Branchflower:

As you are no doubt aware, Senator French sent a letter to our office on September 1, 2008. Although Senator French is an attorney, we do not believe a client can waive the prohibition on *ex parte* contact without confirmation from his counsel. Accordingly, please consider this letter a response to your client's September 1, 2008 letter. If you would prefer in the future that we correspond directly with Senator French, please advise in writing and we would be happy to do so. Until you confirm this, our correspondence will be with you.

As attorneys, we feel that it is our job to keep our clients focused on the objective goals of this process, finding out the truth about what happened. While our clients may have political differences, we would like to think that our offices can rise above those differences and remain focused on a fair, deliberate inquiry that is consistent with the laws and constitution of the State of Alaska and the principles of due process. Unfortunately, Senator French's letter seems to be advocating a different direction. We will rely on you to focus him in a more positive direction.

As you are now aware, a complaint has now been filed with the Personnel Board. This would seem to render Senator French's objection moot. Now that the complaint has been filed, it appears that the Board has jurisdiction over this matter. Will you suspend your investigation pending the outcome of the Personnel Board investigation or resolution of the jurisdictional issue? If not, please explain why. If the stated goal of the Legislative Council is a fair and neutral investigation, then we believe it will embrace the process the Legislature itself created.

While the Legislative Council does have some limited investigatory power, those powers seem to be limited to investigations related to proposed or current laws. We are not aware of any such proposed legislation. In fact, we are suggesting that the Legislature may lack jurisdiction to

411 Fourth Avenue, Suite 300 • Fairbanks, Alaska 99701-4712
phone • 907-479-7776 email • fair@cplawak.com fax • 907-479-7966

Page 2 of 3

spend public monies to investigate a co-equal branch of the government. While Governor Palin does not have anything to hide, you certainly can appreciate why she would insist that the investigation be conducted fairly, consistent with Alaska Statutes, and free from even the suggestion of political influence. Senator French suggests that this position is somehow "at odds with our state's constitution." We are not aware of which provision of the constitution he refers to but would be happy to reconsider this position if you point us to it. In fact, Mr. French may have overlooked this part of the State Constitution:

The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Art. I, Sec. 7. The Governor is a "person" and is entitled to "fair and just treatment" as part of this investigation. Following state law, including the personnel board process, would comply with the Constitution. However, even if the Legislative Council has some plenary power to conduct secret investigations—which it does not—due process is still required. The Governor is entitled to notice of the allegation, discovery, and subpoena powers (all set forth in the Legislative Council's statute, which as adopted the civil rules for its process). We remain perplexed why Mr. French would want a secret proceeding, in violation of the Legislative Council's own enacting statute.

As a further example, the general legislative power to issue subpoenas is clearly prohibited relative to the Legislative Council. See AS 24.25.010(e) ("This section does not apply to the legislative council or to the Legislative Budget and Audit Committee").

We believe that it would benefit the truth-seeking goal of any investigation if the parties disclosed witness statements and other information they independently gather. There is certainly precedent for this in the Civil Rules which would require such disclosure. However, it is our understanding that you have already agreed to informal sharing of information with the Attorney General's office. Surely you and Mr. French are not the sort of gentlemen where we must confirm agreements in writing. Again, if this understanding is in error, please advise.

We appreciate the scheduling problems that our recent appearance in this case may have caused. However, that is no reason to conduct *ex parte* interviews with represented parties. Simple professional courtesy as well as the prohibition against *ex parte* contact requires that these interviews and depositions be coordinated with all counsel and parties. Many of these staffers have their own counsel as well, and we need to coordinate with them.

Further, we are informed that Mr. Branchflower attempted to directly contact Todd Palin on a secure and confidential line. This represents a serious security breach that we may be obligated to report to the Secret Service. We ask that you immediately disclose the names of any person who provided you with Mr. Palin's secure phone number.

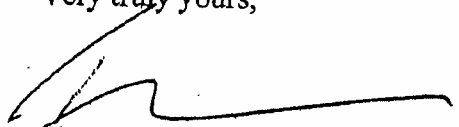
We ask again that neither you nor any of your staff have *ex parte* contact with any represented parties as this is a significant violation of Alaska Rule of Professional Conduct 4.2. If you desire a formal list of the represented parties, we will provide one. Suffice it to say that we represent the Governor and the Office of the Governor and all persons associated with that office. Many staff members have private counsel with whom we need to coordinate.

Please confirm your willingness to shift this process to the Personnel Board. We can then use it's procedures to coordinate interviews. We understand that you have a self-imposed deadline of the Friday before the general election. In addition to complying with state law, we think that you would agree that the concerns of finding the truth and not violating anyone's right to counsel or due process trump any desire to create a pre-election media event.

Assuming you agree to submit to proper jurisdictional process, we can check the Governor's schedule to see when she and the First Gentleman are available for an interview. Per Senator French's letter, we will check on possible late September dates. In order to avoid some date conflicts, both I and Mr. Tiemessen will be available to attend these interviews. We will need your dates of availability also. We will also check the schedules of Mr. Nizich and Mr. Ruraro. It seems to make little sense to throw dates at you unless we know your schedule. Perhaps a conference call to schedule these would be the best way to coordinate these deposition and other jurisdictional and procedural concerns? We ask for your prompt cooperation.

Please do not hesitate to call if you have any questions or concerns.

Very truly yours,



Thomas V. Van Flein and
John J. Tiemessen, for
Clapp, Peterson, Van Flein
Tiemessen & Thorsness, LLC

Cc: Governor Sarah Palin
Mike Nizech, Chief of Staff
Lisa Hamby, Esq.
Talis Colberg, Attorney General
Michael Barnhill, Assistant Attorney General

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595



Committee Members:
Senator Charlie Huggins
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Gene Therriault

Senate Judiciary Committee

September 1, 2008

Mr. Thomas V. Van Flein
Clapp, Peterson, Van Flein, Tiemessen and Thorsness, LLC
711 H Street, Suite 620
Anchorage Alaska 99501

Dear Mr. Van Flein:

I am in receipt of your letter dated August 29, 2008, sent to Stephen Branchflower on August 30, 2008. It's worth pointing out that we have not received any notice from the Department of Law that the Governor was retaining private counsel. Given the nature of your letter, it seemed more appropriate that I reply to it, rather than Mr. Branchflower.

You assert in your letter that you believe that the Personnel Board is "statutorily mandated to oversee these proceedings." I don't see it that way. The Personnel Board oversees complaints brought against the Governor under the state's ethics laws. While the Board may be engaged now in investigating an ethics complaint, that process is held confidential until the Board makes a finding of probable cause. Indeed, the Board would not have jurisdiction unless someone has filed a complaint. I am unaware of one being filed. Perhaps you know differently.

Your letter goes on to request that Mr. Branchflower work with you "in adhering to state law and submitting these issues to the body properly vested with primary jurisdiction." I confess that I may be misunderstanding your point. The Legislature, of course, has its own separate powers of investigation. I hope you are not suggesting that the Legislature does not have the authority to investigate potential violations of law by members of the Executive Branch. Governor Palin has repeatedly stated that she has nothing to hide and that she and her administration will cooperate fully with this investigation. Is your client aware that you seem to be challenging the Legislature's jurisdiction? Such a position is at odds with our state's constitution, and with your client's public statements.

Mr. Thomas V. Van Flein
September 1, 2008
Page Two

Your letter also requests a copy of all witness statements that Mr. Branchflower has secured. I have instructed him to not comply with that request. I think you will agree that it would be highly unusual for an investigator to share information with one of the targets of the investigation. I am unaware of any precedent for such an arrangement. Furthermore, the Attorney General is conducting his own inquiry into this matter on behalf of the Governor. As the Governor's lawyer, I feel sure that you will have access to information developed through General Colberg's efforts.

Likewise, I have instructed Mr. Branchflower to adhere to the witness interview schedule that he has worked assiduously to set up. It is very important that the interviews take place as previously arranged by Mr. Branchflower. Delays in witness interviews will jeopardize the timely conclusion of this investigation. Indeed, delays would cause me to convene a meeting of the Judiciary Committee and ask that subpoenas be considered.

With regard to the Governor's deposition, Mr. Branchflower made his initial request for an interview with the Governor last Thursday morning. There has not been a response to his request. Clearly the Governor's new political role will make it more challenging for her to make time for this investigation. Nevertheless, her repeated promises to cooperate fully with the investigation, as well as her statements that her new role as the Republican Vice Presidential nominee will not interfere with the day-to-day functioning of state business, should result in a concrete willingness to schedule and conclude her deposition. In sum, I am requesting that you set a September date for the Governor's deposition, as well as the deposition of Mr. Mike Nizich, and Mr. Randy Ruaro, by the close of business this Friday, September 5, 2008.

I appreciate your stated willingness to cooperate with the Legislature's investigation. Please keep in mind that it was the initial cooperation from the Administration with regards to witness depositions that allowed us to avoid the issuance of subpoenas. I have stated publicly that while the Governor's new status raises the profile of this investigation, it does not change the steps we must go through to see to its completion. I trust that the Governor feels the same way.

Sincerely yours,



Senator Hollis French

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ANCHORAGE

Matthew K. Peterson
Thomas V. Van Flein
John B. Thorsness
Linda J. Johnson
Monique R. Renner
Eric J. Brown
Liam J. Moran, Of Counsel
James D. Gilmore, Of Counsel
Jonathan P. Hegna, Of Counsel

FAIRBANKS

John J. Tiemessen
Lisa C. Hamby
Marcus R. Clapp, ret.

August 29, 2008

Stephen Branchflower, Esq.

VIA EMAIL sebranchflower@gmail.com

Re: *In Re: Investigation Into The Termination of Walt Monegan*

Dear Mr. Branchflower:

We have been retained to represent the Governor and the Governor's Office relative to the Legislative Council's investigation into the termination of Mr. Monegan, the alleged Executive Branch Ethics violation, and the alleged Personnel Act violation.

We fully welcome a fair inquiry into these allegations, and believe that the Personnel Board is statutorily mandated to oversee these proceedings. We trust you have no objection to following state law in that regard and will work with us in adhering to state law and submitting these issues to the body properly vested with primary jurisdiction.

We have considerable information to review to get up to speed. The Attorney General is forwarding to us information it collected and already shared with you. It is my understanding that there is an informal agreement to share information the parties obtain through their own inquiries. Accordingly, I would appreciate a copy of all witness statements you have (if not transcribed, then we can copy the CD), all documentary evidence you have, any witness list you have, and a copy of the complaint or other charging document upon which you are basing your investigation. The obvious exception to this is I do not expect you to exchange your communications with Sen. French, as you no doubt would not expect, nor be entitled to, our communications that are protected by the attorney client privilege.

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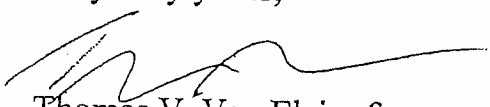
Page 2

Further, please know that we intend to cooperate with this investigation and will reciprocate the exchange of information consistent with our duty to ensure compliance with due process and within constitutional parameters. I would like to review our calendars to schedule depositions of witnesses (and, of course, we need to coordinate with those witnesses as well, particularly as hunting season is here). For those witnesses outside of the Governor's Office, but within the employ of the State, we will have to coordinate with Mr. Barnhill as well, as those State employees are entitled to representation. I will be representing members of the Office of the Governor at any deposition.

If you are in town, I think a sit down meeting with you would be beneficial so we can map out the logistics. In the meantime, I would ask that you have no *ex parte* contact with members of the Governor's Office, and we will not contact Sen. French. If you consider anyone to be your client in addition to Sen. French, please identify them for us so we do not inadvertently have *ex parte* contact as we perform our own due diligence.

We are looking forward to resolving this matter as expeditiously and fairly as possible.

Very truly yours,



Thomas V. Van Flein, for
**Clapp, Peterson, Van Flein
Tiemessen & Thorsness, LLC**

Cc: Sarah Palin, Governor
Michael Nizich, Chief of Staff
Kris Perry, Governor's Anchorage Office Director
Michael Barnhill, Esq.
John Tiemessen, Esq.
Lisa Hamby, Esq.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

August 13, 2008

SUBJECT: Senate Judiciary Committee issuance of subpoenas relevant to the Legislative Council-initiated investigation of alleged improper actions of executive branch officers and employees.

TO: Senator Hollis French
Chair of the Senate Judiciary Committee

FROM: Jack Chenoweth
Assistant Revisor

The Legislative Council has authorized the above-captioned investigation and entered into an agreement with Stephen E. Branchflower to undertake it. The contract with Mr. Branchflower indicates that you are to serve as "project director," "authorized to oversee and direct the activities of [Mr. Branchflower] under [the] contract." I've been told, though it is not reflected in the draft minutes of the Council's July 28th meeting at which that activity was authorized, that the Legislative Council understood that the Senate Judiciary Committee would serve as the entity through which the Council's contractor could expect to secure and enforce the production of documentary evidence and witnesses relevant to the investigation.

Cindy Smith of your office has requested our consideration of each of the following questions in conjunction with the above-captioned matter.

1. May the Senate Judiciary Committee authorize issuance of one or more subpoenas for the production of records, some of which may be held in the custody of a state employee, relevant to the above-captioned investigation?

Yes. The legislature has broad authority to investigate and an investigation may be conducted through a legislative committee.

Accordingly, Uniform Rule 21(c) grants to standing committees the power to meet between sessions. A committee that meets between sessions may consider "any legislative matter which is consistent with the jurisdiction of the committee." Alone among standing committees,

Uniform Rule 20 declares that the standing Judiciary Committee has jurisdiction as to the legal and substantive review of bills referred to it for that purpose. It suggests that the Judiciary Committee is the logical body by which to secure completion of a successful investigation.

Under AS 24.25.010(b), a legislative standing committee has broad statutory power to subpoena a witness including, under AS 24.25.030, a witness who can produce "upon reasonable notice any material and proper books, papers, or documents in the possession or under the control of the witness[.]"

~~The subpoena must be authorized by a majority of the membership of the committee and because this is an action to be taken by a standing committee of the state senate with the concurrence of the president.~~

2. May the Senate Judiciary Committee meet by teleconference to authorize issuance of the subpoena(s)?

Yes. Action by teleconference is authorized by AS 44.62.310(a), part of the so-called Open Meetings Act (AS 44.62.310 - 44.62.312). This provision is made applicable to standing committees of the legislature by AS 24.60.037's directive that legislative committees abide by open meetings guidelines. This office has consistently taken the position that, absent an explicit prohibition against a standing committee meeting by teleconference, consistent legislative practice has been to allow standing committees to conduct business by teleconference.

3. To avoid public disclosure of the identities of the person or persons to whom subpoenas may issue, may the committee act to authorize the subpoenas in executive session?

No. Certain matters may be considered in executive session:

(c) The following subjects may be considered in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential;

(4) *matters involving consideration of government records that by law are not subject to public disclosure.*

I'm assuming, for reasons examined and discussed later in this memo, that paragraph (c)(4) would provide the basis for an executive session in which committee members may discuss the propriety of authorizing subpoenas for specific witnesses and records. However, for purposes of legislative business, open meetings principles, applicable to legislative standing committees by AS 24.60.037, fairly require that the committee's decision and vote to approve or withhold issuance of a subpoena be conducted in public. Under AS 24.60.037(b),

(b) For purposes of the legislative open meetings guidelines, a meeting occurs when a majority of the members of a legislative body is present and *action, including voting, is taken or could be taken*, or if a primary purpose of the meeting is the discussion of legislation or state policy.

There must be a formal record that the authority for the committee chair to issue the subpoena was given "by a majority of the membership of the committee." AS 24.25.010(b). For each subpoena to be authorized, if you conduct the committee meeting by teleconference, you must call the roll of the yeas and nays of the committee members attending ["The vote at a meeting held by teleconference shall be taken by roll call." -- AS 44.62.310(a)]; if all committee members participating are physically present in one place, you may ask for and obtain the members' unanimous consent.

4. To avoid public disclosure of the identities of the person or persons to whom subpoenas may issue, may the committee issue the subpoena addressed in a way that does not name the person?

Unless the committee is prepared to act creatively, probably not. The procedural requirement relating to issuance of a subpoena, including a subpoena to a witness who can produce "upon reasonable notice any material and proper books, papers, or documents in the possession or under the control of the witness," is explicit. Under AS 24.25.010(d),

- (d) The subpoena is sufficient if
- (1) it states before whom the proceeding is held;
 - (2) *it is addressed to the witness*;
 - (3) it requires the attendance of the witness at a time and place certain;
 - (4) it is signed
 - (A) , or
 - (B) by the committee chairman with the concurrence of the president or the speaker under (b) . . . of this section.

As you well know, common practice is to enter the name of the person to whom the subpoena is addressed at the appropriate place on the face of the subpoena. I am not aware of any authority by which a subpoena may be issued "generically" ("to the person having custody of the following described records: ____") or using an identifier intended to mask the subpoena recipient's actual identity so as to prevent the subpoena recipient's identity from being otherwise disclosed.¹

¹ I have had one thought about taking a public vote as to the issuance of the subpoena without identifying the person to whom the subpoena will issue. If each subpoena to be approved for service on a prospective witness were to have, in addition to

*

This conclusion may prompt the question as to whether a subpoena itself is to be considered and treated as a public record, disclosable to the press and public.

Among exceptions to the public records provisions, under AS 40.25.125(a)(6), certain "law enforcement related records or information" are exempt from disclosure:

(6) records or information compiled for law enforcement purposes [are excepted from disclosure], 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;

the name of the witness, an identifying number unique to that witness subpoena, it might be possible, it seems to me, to have the committee's approval motion expressed in terms of approving subpoena number 1, or subpoena number 2, rather than referring to the name of the individual. In the public session, the motion would be expressed in terms of an approval of subpoena number ____ ("I move that the committee approve the issue of the subpoena identified as 'subpoena no. 1'") rather than by a motion expressing the names of the individual who would be served. This approach would work, however, only if you are able to reasonably ensure that committee members attending by teleconference have the drafted and numbered subpoenas at hand, so that each committee member would readily understand that the subpoena identified as number 1 or number 2, as appropriate, would be issued to a specific witness for production of specific materials ["Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable." -- AS 44.62.310(a); "[a]ction taken contrary to this section is voidable." -- AS 44.62.310(f)]. At the conclusion of the meeting, it would be in order to collect from the participants the draft documents for disposal.

I have no idea whether this would be a practical solution, though I think it is legally defensible so long as the subpoena to be served does bear the identity of the witness on whom it is to be served.

You'd be well advised to consider this and any other reasonable alternatives with Mr. Branchflower; he has more experience in securing evidence under subpoena than I.

(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[.]

While some may argue that subparagraph (6)(A) may provide the committee sufficient authority, none of these, in my judgment, would authorize an exception from disclosure for a document such as a subpoena. Additionally, it is not clear to me that records and information secured in the course of a legislative investigation would qualify as material "compiled for law enforcement purposes" within the meaning of the exception. } *

If the information compiled in the course of the committee's investigative efforts is to enjoy protection against disclosure as a public record, it appears that the protection would have to be provided under one or more constitutional provisions as suggested by a 1987 Opinion of the Attorney General. That opinion considered whether the file of a then-active Alaska Public Offices Commission investigation would be available for review by the press. The Attorney General's office declined the press request (except as to certain material that were made expressly available for review by statute or commission regulation), relying on state common law precedents. With apologies for its length, set out below is the text of the relevant portion of the opinion:

As you know, AS 09.25.110 [now AS 40.25.110], commonly known as the "Public Records Act," provides generally that all records of an agency of state government "are public records and are open to inspection by the public under reasonable rules during regular office hours." A second statute, AS 09.25.120 [now AS 40.25.120], sets out limited exceptions to the general rule of disclosure. The only exception relevant here is for "records required to be kept confidential by a federal law or regulation or by state law" This office has consistently concluded that the phrase "state law" includes state common law. 1985 Inf. Op. Att'y Gen. (Oct. 21; 366-202-84); 1985 Inf. Op. Att'y Gen. (Sept. 24; 366-113-86); see *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1319 (Alaska 1982); see also AS 01.10.010.

The Alaska Supreme Court has recognized a common law exemption from disclosure where a demonstrable need for confidentiality outweighs the public's proprietary interest in public records and its interest in knowing what government officials are doing. *Kenai Peninsula Newspapers*, 642 P.2d at 1319. In our view, there are at least three demonstrable public and private interests which, at least in the aggregate, outweigh the public's right to have access to APOC's active investigation files.

First, numerous courts have recognized that the agency and the public have an interest in preserving the integrity and effectiveness of law enforcements investigations, and that that interest may be jeopardized by the release of active investigative files. *State ex rel. City of Bartow v. Public Employees Relations Commission*, 341 So. 2d 1000 (Fla. Ct. App. 1976); *Stone v. Consolidated Publishing Company*, 404 So.2d 678 (Ala. 1981); *Church of Scientology v. City of Phoenix Police Department*, 594 P.2d 1034 (Ariz. 1979); *Grodjesk v. Faghani*, 487 A.2d 759 (N.J. App. Div. 1985). Release of active investigation files creates the possibility that the subject of the investigation will interfere with the investigation by, among other things, destroying documents or discouraging witnesses from cooperating with the agency. *Public Employees Relations Commission*, 341 So. 2d 1000. In the agency's experience, witnesses contacted in the course of an active investigation are often reluctant to provide sworn testimony or agree to "go public" with their information unless they are satisfied that independent investigation by the agency tends to substantiate their testimony. Such witnesses would be more reluctant to provide information to the APOC if their information is immediately subject to public scrutiny. See *People ex rel. Better Broadcasting Council, Inc. v. Keane*, 309 N.E.2d 362, 364 (Ill. 1973); *Lopez v. Fitzgerald*, 390 N.E.2d 835 (Ill. 1979).

Second, the investigatory information you seek has not yet been subject to full administrative evaluation, and no decision has yet been made whether there is substantial evidence indicating that any laws have been violated. Release of such unevaluated information to the public may unfairly impair the reputation of the subjects of the investigation, and may come perilously close to violating their due process rights guaranteed by the state and federal constitutions. *Lopez v. Fitzgerald*, 390 N.E.2d at 840-41. The courts have recognized that "the public good is not served by disclosures which undermine the sense of security for individual rights." *Lopez v. Fitzgerald*, 390 N.E.2d at 840 (citing with approval *Craemer v. Superior Court*, 265 Cal. App. 2d 216, 222, 71 Cal. Rptr. 193, 199 (Cal. 1968)).

Third, we believe that Alaska's constitutional right to privacy requires APOC to use extreme caution in disclosing unverified or unevaluated charges or materials obtained by the agency in the course of an investigation. *Lopez v. Fitzgerald*, 390 N.E.2d at 840; see *Falcon v. Alaska Public Offices Commission*, 570 P.2d 469 (Alaska 1977); *Messerli v. State*, 626 P.2d 81 (Alaska 1980). The persons whose privacy rights are at stake can waive the right. In this case, the subjects of the investigation have declined to do so.

In reaching the conclusion that the public and private interests in nondisclosure of these investigative files outweigh the public's interest in disclosure, we are influenced by the fact that, under 2 AAC 50.460(d), investigation reports will be prepared by the APOC staff upon conclusion of the investigations. Investigation reports are generally made available to the public, and are always provided to the persons whose complaints triggered an investigation. Because an investigation report will be produced in due course, we believe the public's interest in early disclosure of the information is not great. See *Public Employees Relation Commission*, 341 So. 2d 1000.

1987-1 Op. (Inf.) Atty. Gen. Alas. 291, April 30, 1987, at 2 - 6 (notes omitted). Although the Council-initiated investigation may not properly be characterized as one made for "law enforcement purposes," nonetheless the principles identified and discussed in the preceding opinion as warranting confidential treatment of an active investigation -- most significantly, considerations bearing on the release of "unevaluated information" as bearing on the due process rights of the investigation's subjects -- would appear to apply equally to the matter that the Council has under consideration. Significantly for your purposes, as with the outcome of the APOC investigation noted in the quoted portion of the opinion, the Council's contract with Mr. Branchflower anticipates completion of an investigative report and contemplates eventual release of the report in a form that may be disclosed to the public.

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