

**ALASKA STATE LEGISLATURE**  
**SENATE JUDICIARY STANDING COMMITTEE**

March 12, 2003

1:31 p.m.

**MEMBERS PRESENT**

Senator Ralph Seekins, Chair  
Senator Scott Ogan, Vice Chair  
Senator Gene Therriault  
Senator Johnny Ellis  
Senator Hollis French

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

SENATE BILL NO. 45

"An Act relating to the Legislative Budget and Audit Committee."

HEARD AND HELD

SENATE JOINT RESOLUTION NO. 5

Urging the President of the United States and the Congress to act to ensure that federal agencies do not retain records relating to lawful purchase or ownership of firearms gathered through the Brady Handgun Bill instant check system.

MOVED CSSJR 5(STA) OUT OF COMMITTEE

SENATE JOINT RESOLUTION NO. 8

Relating to the division of the Ninth Circuit Court of Appeals.

MOVED SJR 8 OUT OF COMMITTEE

CS FOR HOUSE BILL NO. 12(JUD) am

"An Act relating to the crime of harassment committed by use of electronic communication."

MOVED CSHB 12(JUD) am OUT OF COMMITTEE

**PREVIOUS ACTION**

SB 45 - No previous action to record.  
SJR 5 - See State Affairs minutes dated 2/11/03.  
SJR 8 - No previous action to record.  
HB 12 - No previous action to record.

**WITNESS REGISTER**

Senator Lyda Green  
Room 516, State Capitol  
Juneau, AK 99801-1182

**POSITION STATEMENT:** Sponsor of SB 45

Mr. Stephen Branchflower, Director  
State of Alaska Office of Victims' Rights  
1007 West 3rd Avenue, Suite 205  
Anchorage, AK 99501-1936

**POSITION STATEMENT:** Supported SB 45

Ms. Pat Davidson,  
Legislative Auditor  
Division of Legislative Audit  
333 Willoughby Ave, 6th Floor  
PO Box 113300  
Juneau, AK 99811-3300

**POSITION STATEMENT:** Testified on SB 45

Ms. Amy Seitz  
Staff for Senator Thomas Wagoner  
Room 427, State Capitol  
Juneau, AK 99801-1182

**POSITION STATEMENT:** Introduced SJR 5

Mr. Brian Hove  
Staff for Chair Seekins  
Room 125, State Capitol  
Juneau, AK 99801-1182

**POSITION STATEMENT:** Introduced SJR 8

Representative Kevin Meyer  
Room 513, State Capitol  
Juneau, AK 99801-1182

**POSITION STATEMENT:** Introduced HB 12

Sergeant Curt Harris  
Alaska State Troopers  
5700 E. Tudor Road  
Anchorage, AK 99507

**POSITION STATEMENT:** Supported HB 12

#### **ACTION NARRATIVE**

**TAPE 03-07, SIDE A**

**CHAIR RALPH SEEKINS** called the Senate Judiciary Standing Committee meeting to order at 1:31 p.m. Present were Senators Ogan, French and Chair Seekins. Senators Therriault and Ellis arrived shortly thereafter.

**SB 45-LB&A CRIMES AND COOPERATION**

SENATOR LYDA GREEN introduced SB 45 saying it's helpful that the Legislative Budget and Audit Committee (LB&A) has been able to obtain and compile information, present it to the Legislature and make recommendations. In the past, there has been reluctance to provide full information and some employees have been told not to provide the information. It is a very difficult step for an employee to disobey the employer even though they are required by law to participate with LB&A

Currently there are no penalties for withholding information, but SB 45 sets in statute first and second degree penalties for withholding information. This also includes persons serving on committees or in appointed positions who may not be considered employees but have public affiliation and are required to provide full and truthful information. This legislation points out the importance of the requirement to provide information.

This bill adds two sections to Section 1. AS 11.56.

- Sec. 11.56.870 Hindering the Legislative Budget and Audit Committee in the first degree.
- Sec. 11.56.880 Hindering the Legislative Budget and Audit Committee in the second degree.

SENATOR GREEN explained page 2, line 11, amends Sec. 2 AS 24.20.201, and would provide the process when a person has requested privilege and the procedure to follow once the claim is made that the information is privileged. A superior court judge would determine whether the claim is complete and truthful.

SENATOR FRENCH said Senator Green's experience must have convinced her this proposed law has been broken in the past. He asked her to elaborate, without disclosing names.

SENATOR GREEN said she did not want to compromise the person that shared the information with her because it was an awkward moment in that individual's life. All government employees are supposed to be truthful and ethical and some in professional positions are professionally prohibited from bringing information forward and to do so would be an additional

violation. She said she was convinced the information she received was true and complete.

SENATOR FRENCH asked why this was confined to the LB&A. He questioned why this wouldn't it be just as egregious for a state employee to block or withhold information from someone on the Finance Committee or the Judiciary Committee.

SENATOR GREEN replied she didn't know if that was covered under another statute. She feels the committee process is quite compelling and it is a requirement to come forward with the truth. The committee chair with the concurrence of the presiding officer has the ability to swear in witnesses. Perhaps that is the mechanism one would use if they felt that the information was not forthright and complete. She couldn't speak to expanding the scope of the bill.

SENATOR FRENCH commented that once he started thinking about that he questioned why this wouldn't apply more broadly. Being a former prosecutor, he went to the statute books and found five statutes that would cover different aspects of this noncompliance or information-hiding problem.

Sec. 11.56.850. Official misconduct. [(a) A public servant commits the crime of official misconduct if, with intent to obtain a benefit or to injure or deprive another person of a benefit, the public servant

(1) performs an act relating to the public servant's office but constituting an unauthorized exercise of the public servant's official functions, knowing that that act is unauthorized; or

(2) knowingly refrains from performing a duty which is imposed upon the public servant by law or is clearly inherent in the nature of the public servant's office.]

Sec. 11.56.510. Interference with official proceedings. [(a) A person commits the crime of interference with official proceedings if the person

(1) uses force on anyone, damaged the property of anyone, or threatens anyone with intent

(A) improperly influence a witness or otherwise influence the testimony of a witness;]

Sec. 11.56.540 Tampering with a witness in the first degree. [(a) A person commits the crime of tampering with a witness in the first degree if the person knowingly induces or attempts to induce a witness to

- (1) testify falsely, offer misleading testimony, or unlawfully withhold testimony in an official proceeding; or
- (2) be absent from a judicial proceeding to which the witness has been summoned.]

Sec. 11.56.610. Tampering with physical evidence. [(a) A person commits the crime of tampering with physical evidence if the person

- (1) destroys, mutilates, alters, suppresses, conceals, or removes physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation;

- (2) makes, presents, or uses physical evidence, knowing it to be false, with intent to mislead a juror who is engaged in an official proceeding or a public servant who is engaged in an official proceeding or a criminal investigation;

- (3) prevents the production of physical evidence in an official proceeding or a criminal investigation by the use of force, threat, or deception against anyone; or

- (4) does any act described by (1), (2), or (3) of this subsection with intent to prevent the institution of an official proceeding.]

SENATOR FRENCH said this is if someone actually took a piece of paper and hid it so some other employee could not find it.

Sec. 11.56.820. Tampering with public records in the second degree. [(a) A person commits the crime of tampering with public records in the second degree if the person

- (1) knowingly makes a false entry in or falsely alters a public record;

- (2) knowingly destroys, mutilates, suppresses, conceals, removes, or otherwise impairs the verity, legibility, or availability of a public record, knowing that the person lacks the authority to do so; or

- (3) certifies a public record setting out a claim against a government agency, of the property of a government agency, with reckless disregard of whether the claim is lawful, or that payment of the claim is not authorized in the budget of the government agency.]

SENATOR FRENCH said, in looking at the issue as a former prosecutor, it seems like there is some way to punish people who are actively subverting the public process with the statutes currently on the books. He said he would share that and see if there is something he is missing, something special about the LB&A that really needs its own statute.

SENATOR GREEN replied the purpose of LB&A is unique in state government. It is the agency the Legislature relies on for oversight, review, specific questions, a general direction, a suspicion that someone might have, information to be gathered on the functioning of an agency or department or a particular function being carried out. Employees are required to cooperate with Legislative Budget and Audit, but there is no penalty if the employee does not participate or if an employer tells an employee they are not to participate and give full information. This legislation provides a penalty and that is loss of employment.

CHAIR SEEKINS noted the legislation said hindering and hindering has a broader scope than hiding, destroying or defrauding. He asked if this is where someone is deliberately setting out to hinder an investigation by LB&A.

SENATOR GREEN said that was correct.

SENATOR OGAN said a class C felony is the penalty for hindering in the first degree. He referred to Sec. 11.56.610. Tampering with physical evidence. He said there was a shocking case in the valley [Mat-Su] where one person was murdered and dismembered and a number of teenagers spread the body around the valley. He thought the teenagers were charged with tampering with evidence and that was a serious crime. He pointed out this legislation has the same degree of felony. He was concerned the ramifications of being a convicted felon for hindering the LB&A don't rise to the same level as hiding body parts of somebody that was hacked up with a chainsaw. He asked if a person with a class C felony would lose the right to own a weapon, vote and things like that. He had concerns the penalty was a little tough.

SENATOR GREEN said she thought the Legislature had an expectation when information is required about finances or how programs are being run. When auditors go into an office with the sole purpose of finding information the least they can expect is being given full, complete and true information. Perhaps this crime does not rise to the occasion of other very heinous crimes but other white-collar crimes are also class C felonies.

SENATOR OGAN paraphrased Sec. 11.56.850. Official misconduct. A person commits the crime of official misconduct if, with intent to obtain a benefit or to injure or deprive another person or a

public servant does a couple of things knowing the act is unauthorized or does something that refrains from performing a public duty and that is a class A misdemeanor. He said he was used to being lied to by people. That is part of what this is about and it should not be condoned. He thought the LB&A has the power to subpoena and if a person lied under a subpoena that might raise it to the level of a felony.

SENATOR GREEN informed the committee there was someone on line to answer questions.

**1:45 pm**

MR. STEVE BRANCHFLOWER, Director, Office of Victims' Rights, told committee members he was a prosecutor in Anchorage for almost 30 years. Over the years and specifically during the last three years as the Director of the Alaska Medicaid Fraud Control Unit, there have been times when he strongly suspected or had positive proof that individuals within state government, in the executive branch, instructed subordinate employees to either disregard specific requests made by the LB&A or to not cooperate. One instance was pretty egregious. He checked the statutes to see if there was a remedy and was disappointed to find it was not commensurate to the offense. He said one question that was asked was what are the present tools to deal with the situation.

MR. BRANCHFLOWER stressed this issue does exist, not only for the LB&A but also for the entire Legislature. It is a problem that is endemic to the system. There are a couple of statutes that deal with it, but in his view they are inadequate. He gave the example of AS 24.25.040, which deals with subpoenas issued by the Legislature. The enforcement mechanisms identified are limited to the arrest of the person by the sergeant-at-arms to take the person before the Legislature. Criminally prosecuting the person for disobeying the subpoena is in Sec. 24.25.080 and requires the cooperation and initiative of the executive branch. He knew of no means within the legislative body to enforce the subpoenas.

MR. BRANCHFLOWER said he looked at the statutes Senator French mentioned and:

While I can tell you that while they are pretty sharp tools, that is pretty efficient tools, they don't - none of them really addresses the situation that I experienced that is where behind-the-scenes conduct

was engaged in by supervisors to discourage cooperation.

MR. BRANCHFLOWER said if you look at official misconduct in Sec. 11.56.850, the problem is that the defendant has to act with intent to obtain a benefit. That could be difficult to show because often times the motivation of superiors within state government is difficult to ascertain. If it were something physical such as money or a gift, it might be easier. Often times low-level supervisors are following instructions or enforcing the will or pleasure of their supervisor thereby creating layers that must be worked through.

Sec. 11.56.610 Tampering with physical evidence deals with physical evidence. This criminalizes a defendant who tampers with some physical evidence like a bloody garment or maybe a check. What SB 45 is intended to reach are people who engage in conduct and bring to bear forces that they ought not to bring to bear in terms of persuasion and intimidation.

He thought Senator French also mentioned Sec. 11.56.540. Tampering with a witness in the first degree. The problem he saw was this requires the dependency of a judicial proceeding, which is defined somewhere in the statutes. Absent that, there would not be a condition precedent to charging someone with tampering with a witness; the person is not a witness so there is no judicial proceeding.

MR. BRANCHFLOWER reiterated the kind of conduct SB 45 is intended to reach is behind the scenes. An employee is put in a precarious situation if they are told not to cooperate or not to provide information. Should the employee cooperate, he or she may lose their job and although they may have some protection in terms of the Whistleblower Act, it complicates their life significantly. They would be marked and their future would be in doubt.

He said there were some other statutes as well that were mentioned that he didn't catch, but in each instance the present tools are inadequate.

With regard to the difference between witness tampering and SB 45, he gave the example where a person commits first degree if he commits the second degree and certain other circumstances are present such as the presence of a dangerous instrument or weapon. The same is true in burglary in the second degree versus breaking into a warehouse. Certain things are present

for an increase in severity from a burglary second to a burglary first.

MR. BRANCHFLOWER said hindering a witness is the same. The lesser crime, which is the class A misdemeanor, is called hindering the LB&A Committee in the second degree. SB 45 lists the conduct.

The reason the first degree is a C felony is because it is aimed not at the conduct but at the kind of person who engages in the conduct. The only difference between second degree and first degree appears on line 7 of page 1. If the perpetrator, if the defendant is a public servant, that term is defined in 11.81.900, then that person is culpable of a C felony.

If you look at 11.81.900... sub-section 53 defines the term public servant very, very broadly and it includes those people who would be in a sort of a supervisory position.... The legislative intent between making the distinction between a misdemeanor and a C felony would be to... to a greater degree people who are supervisors who discourage their underlings or their people they supervise from cooperating. That is not to say that tampering with physical evidence should not also be a C felony but tampering with physical evidence deals with physical evidence, this deals with conduct on the part of supervisors.

MR. BRANCHFLOWER said SB 45 fixes another problem. When LB&A requests information from the executive branch they are occasionally met with claims of privilege. There is no mechanism present in the law to arbitrate those claims of privilege and the information is never passed on. SB 45 sets out the procedure.

MR. BRANCHFLOWER summarized saying SB 45 puts some teeth into the language of Sec. 24.22.01 that gives LB&A the right to ask for full cooperation and would give an enforcement mechanism in the form of a new criminal statute.

CHAIR SEEKINS asked if he knew of any other statutes that might cover hindering an investigation.

MR. BRANCHFLOWER said when he had the experience where it was very clear a supervisor had instructed an employee not to

cooperate and not to provide information, he looked at state and federal statutes and contemplated going to the U.S. Attorney's Office and providing information. At that time, he became convinced of the need for SB 45.

CHAIR SEEKINS said a public employee is defined in 39.52.960 (20). "Public employee means a permanent, probationary, seasonal, temporary, provisional, or non-permanent employee of an agency, whether in the classified, partially exempt or exempt service." He asked if that was a big enough lasso to catch everybody.

MR. BRANCHFLOWER said it is, it is the lowest common denominator. The next level up would be public servant. That is the reason for the use of the words "public servant in the first degree" and "public employee in the second."

SENATOR OGAN asked what is associated with a class C felony.

MR. BRANCHFLOWER said a class C felony is the least serious felony. It is a non-presumptive felony with the possible range of zero jail time to a maximum of five years. There is also provision for a fine, which is frequently imposed. Absent some serious conditions, a person convicted of a class C felony who is a first offender with no criminal history will receive a probationary term as opposed to jail time. If serious conditions were present, it would probably result in a higher conviction than a C felony.

He inserted a provision in SB 45 that states that if a public employee is convicted, they immediately forfeit their office or position. If someone is convicted, they ought to immediately have nothing else to do with state government independent of what else may happen to them in terms of the criminal prosecution.

SENATOR OGAN asked what the ramifications are for voting and owning weapons for class C felons.

**2:00 pm**

MR. BRANCHFLOWER assumed they were talking about first offenders because otherwise they probably would not be state employees. He also assumed most state employees don't have any prior felony convictions although there may be some exceptions. First offenders get a probationary sentence with a suspended imposition of sentence. There may be some conditions attached

such as attending an alcohol rehabilitation program or some sort of a rehabilitative program, abide by conditions of probation and make restitution. At the end of their probationary term the conviction is set aside and the person is restored to his status prior to the conviction.

If the person was required to fill out an application that asks if they stand convicted of any crime the truthful answer is no because the conviction has been set aside. A lot of times, depending upon what the circumstances are, the application is worded in a way to take into account those people who have had a suspended imposition of sentence. The wording is a little different in order to capture the true content of what has happened. For example, in the state trooper application not only does it ask if they had any prior convictions it will also ask if they have ever been convicted of a crime and had the conviction set aside. The short answer is convictions for a C felony not only result in mostly probationary time but almost always, unless there is some physical injury or something unusual, result in suspended imposition of sentence.

SENATOR OGAN said, "That was a very skilled answer by an obviously skilled attorney. You didn't answer my question though."

MR. BRANCHFLOWER said, "OK I'll try my best. As far as the weapons?"

SENATOR OGAN asked whether a person convicted of a C felony could lose their right to vote or own weapons.

MR. BRANCHFLOWER said a person loses their right to vote during the penancy of the probationary term. Assuming they receive a suspended imposition of sentence then they have a right to vote. People who have had convictions and the convictions were set aside have served on juries, grand juries and trial juries.

With regard to possessing weapons, there is a provision in the misconduct involving weapons section that says people who have had a suspended imposition of sentence may possess weapons if their conviction has been set aside. He added that may be different under federal law.

SENATOR OGAN said the other answer to that is yes they could lose their weapons if the conviction is not set aside.

MR. BRANCHFLOWER said if the conviction is not set aside, under state law they may not possess concealable weapons.

SENATOR OGAN said it took awhile but he finally got his answer.

SENATOR THERRIAULT said they talked about who gets caught in the lasso and he wanted to clarify who can throw the rope. He asked if only the professional audit staff of the committee could trigger this.

MR. BRANCHFLOWER predicted that if a request is made and if conduct that falls within the statute occurs, then it would be a crime just like any other crime. The incident would be investigated by whatever appropriate police agency happens to be involved. The Alaska State Troopers or the municipal police would do their report and submit it to the district attorneys office in that particular district. The legislative branch could not bring a criminal action because that is a function of the executive branch, but reporting the crime would start on the legislative side.

SENATOR THERRIAULT said he was wondering about the trigger. He has been Chairman of LB&A for the past two years and had a committee staff person and four people working in the office. He asked if it would be triggered by anybody in his office making a request or would it have to be a request that was actually approved by the committee.

MR. BRANCHFLOWER said anyone from the office who was operating within the normal course of business and in the scope his or her work might make a request. For example, Senator Therriault made a request to the Department of Health and Social Services asking for an audit report regarding Medicaid members and some effort was made to suppress disclosure of the information. If the committee had reason to believe there was improper conduct going on and there was no assertion of a privilege then the information would go up the chain of command to Senator Therriault. As head of the committee, he would have the option of reporting the incident to some police agency for investigation at which time an investigation would take place as in any other criminal investigation.

SENATOR THERRIAULT pointed out he had staff that worked for him at his direction and were paid out of the LB&A budget. If he told his staff to request information from the Department of Health and Social Services and his staff reported the department

would not give them the information he questioned whether that was enough to trigger the process.

MR. BRANCHFLOWER replied somebody would have to make a telephone call and find out what the circumstances were regarding the refusal.

SENATOR THERRIAULT questioned whether any person that worked for him as chairman had the right to ask for and receive information and if the information was not given did the refusal serve as the trigger. Could any member of the committee request information or did the request have to be approved by the full committee as it is for audits? When the full LB&A committee approves an audit, the professional and confidentiality-bound staff requests information to undergo their work. He asked if it takes that kind of committee action to trigger this whole thing or could it simply be a request by either his staff or another committee member's staff.

MR. BRANCHFLOWER answered he did not think the statute addressed that question. He said he did not know if that question was answered anywhere.

SENATOR THERRIAULT asked how he proposed that question should be answered.

MR. BRANCHFLOWER pointed out that Sec. 24.20.201 speaks in terms of the Legislative Budget and Audit Committee having the power as opposed to the divisions within the committee. He analogized that it has the power to require information from all state officials.

SENATOR THERRIAULT said that is kind of fussy. When the agency had the ability to "just shine us on" that was one thing, but if there is going to be some kind of a sanction it needs to be clearly understood who has the power to trigger the whole mechanism.

MR. BRANCHFLOWER said,

It may be that the kind of conduct I'm trying to reach happens in such a way that it will become known to members, to someone who is not on the committee and probably that is the way it will come about.

It will come about on the part of some employee who has received the request for information. It might be someone who works

within the Medicaid Program or someone who works for Department of Health and Social Services that is the agency that has been asked to provide the information so LB&A may not even know about it. This statute would permit the employee to bring that conduct to the attention of the proper authorities who would then investigate it.

**2:12 pm**

SENATOR THERRIAULT said they probably do need this sanction, but he wanted to be careful about when it gets triggered and who can trigger it.

MR. BRANCHFLOWER said he understood and added that the kind of conduct he is concerned about does not occur openly. It occurs behind closed doors between supervisor and the person supervised and those are very difficult circumstances to disclose to anyone. There is no crime scene and it is a very difficult crime to detect.

SENATOR GREEN asked Senator Therriault and Mr. Branchflower if this was not really referring to the LB&A Committee as much as when a LB&A auditor is proceeding to do the actual audit. The audit has been authorized and is out of the committee's control until they receive the completed audit. She said she assumed the auditor is primarily the person who would be doing the investigation and not the committee. She asked if that was correct.

SENATOR THERRIAULT answered it is generally the auditor. There is an extra level of protection for sensitive information if it is given to the audit staff.

SENATOR GREEN asked if Senator Therriault saw a need to change the language to be more specific to the auditor.

SENATOR THERRIAULT said he would like to question Ms. Davidson. He was thinking if they actually have sanctions they may want to clean this language up to clarify exactly when somebody may have to respond or suffer a sanction.

SENATOR GREEN agreed.

MR. BRANCHFLOWER advised that when he drafted the legislation what he had in mind was a situation in which an audit was in progress. Some information was requested by LB&A and a specific order issued to an employee not to provide the requested

information, not to answer telephone calls or emails and not to cooperate.

At-ease was taken from 2:15 to 2:16.

CHAIR SEEKINS noted they were discussing a Committee Substitute (CS) for SB 45.

SENATOR OGAN moved the committee adopt the work draft 23-LS0205\H version as the CSSB 45 (JUD). The motion carried with no objection.

SENATOR FRENCH pointed out Mr. Branchflower thought about going to the U.S. Attorney regarding someone thwarting a Medicaid investigation he was conducting. Senator French asked if some U.S. code was parallel to this legislation.

MR. BRANCHFLOWER answered there are a number of obstruction of justice statutes such as the statute that made it a crime to obstruct a health care investigation. There are some tools there, but he had trouble with obstruction of justice because the term obstruct is difficult to define or quantify. Instead of coming up with an obstruction statute, he came up with specific conduct that shows up on line 2, page 2. Orders, discourages, threatens, restrains, coerces, forces, or prevents all of which amount to obstruction. He thought it would be helpful and add constitutional muster if there was specific conduct. There are some federal crimes but there are problems with them.

SENATOR FRENCH thought he and Mr. Branchflower saw the sentencing under the C felony the same way. With a first time white-collar offender in front of a superior court judge the chances are that person is going to get a very short suspended imposition of sentence. If he or she obeys the law for the next 12 to 18 months the conviction is set aside and that person goes on their way. He said it strikes him the chief sanction that is going to happen to a person that breaks this law is they are going to lose their state employment and their benefits and salary.

MR. BRANCHFLOWER said that is correct. Usually a supervisor would have some period of longevity with the state and have quite a bit to lose. Once it becomes known among supervisors that there are some teeth to the statute and they risk losing a career with the state, they might think twice before following instructions from their supervisor or engaging in the kind of

conduct the statute disallows. Part of the reason for even having the statute is the deterrent.

SENATOR FRENCH referred to Sec. 11.56.540 - Tampering with a witness in the first degree. He said his read of the statute is that a person commits the crime of tampering with a witness in the first degree if the person knowingly induces or attempts to induce a witness to (1) testify falsely, offer misleading testimony, or unlawfully withhold testimony, "which is kind of what it sounds like you encountered there," in an official proceeding. He said the operative word there is "official proceeding not judicial but official." He pointed out when he read the definition of official proceeding in 11.81.900 (40) "official proceeding" means a proceeding heard before a legislative, judicial, administrative, or other governmental body. He said it strikes him that a person who tells another employee to not hand over evidence or not go testify or to testify to X when the situation is actually Y that person could be charged.

MR. BRANCHFLOWER said there would have to be dependency or some sort of a legislative proceeding under the definition of official proceeding. By the time it gets to the stage where there is a hearing it gets less likely that someone would hinder the work of the Legislative Budget and Audit Committee. The kind of conduct he had in mind is an event that occurs outside the scope of an official proceeding before the Legislature.

CHAIR SEEKINS said, as he understood it, an audit would not really be an official proceeding and hindering that audit might be nothing more than saying do not cooperate with the auditors.

MR. BRANCHFLOWER agreed and added that was the circumstance he encountered.

CHAIR SEEKINS said putting a burden on the underling is in conflict with this statute. He read page 1, line 11. A public employee who is convicted under this section immediately forfeits the employee's office or position. In his business they would also say, "ineligible for rehire as a public employee."

MR. BRANCHFLOWER said he thought that was a good observation. Conviction for hindering a Legislative Budget and Audit Committee in the first degree is not the kind of thing that looks good on a resume. He added it would not hurt to add the finishing language to make sure the person does not come back.

CHAIR SEEKINS said sometimes strange things happen in the political world. He asked Senator Green if that was a good idea.

SENATOR GREEN replied it was a fine idea.

SENATOR OGAN asked what actions Mr. Branchflower brought before LB&A when he became aware of the incident he referenced. He asked whether Mr. Branchflower asked LB&A to subpoena them or to hold a hearing and bring the people forward. He asked if an auditor could not do that under those circumstances.

MR. BRANCHFLOWER replied not without the risk of being fired especially if employees serve at the pleasure of the commissioner. There are a number of employees who serve at the pleasure of the commissioner and this is precisely what Senator Green was talking about. People with families and financial obligations are more apt to agree to follow specific instructions from their boss and not take any action - particularly if they serve at-will.

SENATOR OGAN said there was a former LB&A Chairman present. He said it seems to him if an LB&A Chairman felt there were shell games going on he could get the employee or the employee's supervisor before the committee and ask them to raise their right hand then ask them about the issue. He said there seems to be some other modalities in law perhaps under a different chapter. It seems there was another modality there, it just wasn't done, and now they want to make it a felony. He added he didn't have a problem with people losing their jobs and becoming ineligible for rehire, but wasn't there some way the chairman could have called these people forward?

**2:25 pm**

MR. BRANCHFLOWER said the problem, especially for at-will employees, is once the instruction is disregarded there is the very real potential of ending that employee's career regardless of how the audit turns out. It places the employee in a position of having to make very difficult choices and more often than not the employee is going to error on the side of preserving their job. That means the information sought is never going to come to light. He said he knows this goes on and it would never get to the stage where the chairman of some committee would say they knew about this intent of hindering or obstructing the flow of information and the chairman would take

the step of issuing a subpoena and someone would be brought in and take the oath. By the time it gets to that stage the cat is out of the bag and that at-will employee is very much at risk.

SENATOR OGAN said so the answer is yes, there is that modality. He said Mr. Branchflower is making his point.

I'm asking a question, a specific question, your kind of giving me good answers, but they're not quite round about it. I mean I don't think that there is any culpability to not answer my question and in an audit it's the same kind of situation. There are lots of gray area about questions and answers.... You have to have a culpable mental state to be convicted of a felony - that you deliberately had a certain type of behavior. And you know it gets kind of subjective in this realm of politics we're in and what's the right answer. You know I don't always like the answers that people give me and sometimes I think they're the wrong answer because I didn't like them.... These are some major ramifications here. And the committee chairmen have a lot of power and the power of subpoena and the power to put people under oath and there are serious violations, not as serious as this, but there's violations for ignoring that. So anyway I guess that's the statement we're going to question.

SENATOR THERRIAULT said it seems like there are two different scenarios. He agreed it is a problem with the at-will employee if the supervisor tells them to not cooperate because they may be the only two people that are privy to that decision. If the Chairman of LB&A starts calling the supervisor to ask him to take an oath the supervisor is going to know who leaked the information so that employee is put at risk. The way to get around that is offer that employee whistleblower protection.

There also is the scenario where the supervisor and the employee are working in conjunction and they decide to thwart the LB&A. Maybe the only way to get to the bottom would be to call people forward and tell them to raise their hand and swear. So there are two different possibilities and it might be sensible to make all of that applicable when there has been a request through the operation of an official audit being done.

SENATOR THERRIAULT added when a formalized audit is taking place you might want to have these sanctions to keep public employees

from thwarting the will of the committee, but perhaps this section shouldn't apply for informal requests.

The extra twist on that is the legislation says at the specific direction of the committee and the committee does take action to approve audit requests. A number of audits are triggered by statute not by action of the committee. The statutes just say the Legislative Budget and Audit Committee shall once every two years or once a year perform X audit. This mechanism should also apply to that.

SENATOR GREEN asked if sunset audits should apply as well.

SENATOR THERRIAULT said sunset audits, financial audits and some of the things that are just triggered by the operation.

**2:31 pm**

MS. PAT DAVIDSON, Legislative Auditor, Division of Legislative Audit, explained she did not have any prepared testimony, but was available for questions. She was interested in listening to all the testimony because they are the people that have to conduct the audit. She said it is weak to have a statute that requires, but provides no enforcement. There are a lot of statutory avenues that might be pursued to encourage and put teeth in the encouragement.

At ease was called from 1:33 to 1:38.

CHAIR SEEKINS informed Ms. Davidson the committee would like to hear any comments she may have because their intent was to roll some of the ideas they have talked about to Senator Green and come back with a CS for further discussion. Any input she could give at this point would be greatly appreciated.

MS. DAVIDSON said she was unaware of the specific issue Mr. Branchflower was addressing. As the legislative auditor for the last five years, she knew of just one occasion where she had conversations with the Chairman of the Budget and Audit Committee regarding the potential need to issue subpoenas for non-cooperation. There is a gamut of non-cooperation, but she has very well trained staff and they are aware when that is going on. Having the LB&A Committee power to subpoena has been an important element and backstop in getting cooperation.

MS. DAVIDSON said another point was the discussion about differentiating the actions of a supervisor from those of an

employee when the employee wants to cooperate. The attorneys in Legislative Legal and Research Services probably have a keener understanding of the implications. They want to encourage everybody to cooperate and specifically identify the whistleblower's statute. Cooperation with the LB&A Committee or the Division of Legislative Audit is specifically covered as opposed to them wondering or even asking the division whether it is covered might be helpful on the positive side. In terms of trying to look at that supervisor who is taking that overt action of trying to hinder there are a gamut of remedies.

With regard to the discussion about felonies, she asked how likely it might be to have troopers come as opposed to getting the Department of Law to move on an executive branch ethics complaint. She said those are the things she really did not know but did expect the Judiciary Committee would like to hear more about.

SENATOR THERRIAULT said the audit staff was present, but Legislative Finance also is a branch that is under LB&A. The committee probably should have Mr. Teal from Legislative Finance weigh in on the issue also and see exactly what kind of interaction the finance staff has with state agencies.

CHAIR SEEKINS said they would do that. He understood the committee was going to concentrate on the following for a CS.

- Who throws the rope and when.
- Whistleblower protection for someone who may need that to get the complaint filed.
- Continue looking at this as a felony or as a misdemeanor.
- Adding whether the employee who is dismissed would be eligible for rehire.

SENATOR ELLIS asked if there was anyone from the Department of Law signed up to testify and give their perspective.

CHAIR SEEKINS said they did not have anyone, but Mr. Hove was going to ask someone from the Department of Law to attend the next hearing on SB 45.

CHAIR SEEKINS announced SB 45 would be held in committee.

**2:41 pm**

**SJR 5-DESTROY BRADY BILL RECORDS**

CHAIR SEEKINS announced the next business before the committee would be SJR 5.

MS. AMY SEITZ, staff for Senator Wagoner, introduced SJR 5. When the Brady Handgun Bill was adopted it established an instant check system to ensure individuals with a criminal background could not obtain firearms. Those individuals who are disqualified from purchasing firearms would have a permanent record on file. However, if an individual is approved for purchasing a firearm, the "national instant criminal background check system" is supposed to destroy all records of that individual except the transferred number and the date of the transfer.

The Federal Bureau of Investigation has decided to keep these records for audit purposes, which is against the letter and intent of the Brady Handgun Bill. The intent of SJR 5 is to urge the President of the United States and Congress to prevent federal agencies from maintaining these records. It also requests statutory changes be made so this does not happen in the future.

SENATOR OGAN moved to adopt Senate CS for SJR 5(STA) \I version as the resolution before the committee. There being no objection, it was so ordered.

SENATOR THERRIAULT asked Ms. Seitz to highlight the changes in the CS from the original bill.

MS. SEITZ pointed out on page 2, line 9, after "United States to" the original version said "prevent" and in the CS it is changed to "ensure". After "federal agencies" the words "comply with the law prohibiting them" was added in the CS. She said that is a wording preference.

SENATOR OGAN stated for the record:

I really believe that the second amendment was the first Homeland Security Bill. And I'd like to see an attempt to tinker with it and maybe say that we should allow these people that have these innocent background checks to carry weapons on planes to repel terrorists, but I won't go there.

SENATOR THERRIAULT made a motion to move Senate CS for SJR 5(STA) from committee with individual recommendations and

attached zero fiscal note(s). There being no objection, it was so ordered.

**SJR 8-DIVISION OF 9TH CIRCUIT CT OF APPEALS**

MR. BRIAN HOVE, staff for Chair Seekins, explained that SJR 8 relates to splitting the 9th Circuit Court. He noted that twelve days ago the 9th Circuit Court of Appeals upheld a controversial decision, which essentially declared the Pledge of Allegiance unconstitutional. This ruling clearly demonstrates the disconnect the court has with Alaska. SJR 8 respectfully calls upon Congress to divide the 9th Circuit Court. This action is necessitated for a variety of reasons not the least of which includes the vast geographical and philosophical distance separating Alaska from the San Francisco based court.

The 9th Circuit Court adjudicates a caseload far beyond that which is reasonably manageable. In total, there are eleven Circuit Courts of Appeal throughout the country, yet the 9th Circuit Court oversees nearly 20 percent of the U.S. population. In other words, the 9th Circuit Court is twice the ideal size. This size disparity is cited as the primary reason for the 9th Circuit Court's relatively high reversal record in cases heard before the U.S. Supreme Court.

SJR 8 endorses legislation previously introduced in Congress by Senators Ted Stevens and Frank Murkowski. This legislation would reconfigure the 9th Circuit Court to encompass Arizona, California and Nevada. The proposed new 12th Circuit Court would take in Alaska, Hawaii, Idaho, Montana, Oregon and Washington. Senator Lisa Murkowski recently introduced similar legislation in Congress.

SJR 8 simply seeks to accomplish two objectives: (1) to correct a considerable imbalance in the 9th Circuit Court's caseload, and; (2) provide the disparate regions falling within the 9th Circuit Court's current purview with a better informed panel of judges. These objectives are best accomplished by splitting the 9th Circuit Court.

MR. HOVE welcomed questions.

2:47 p.m.

SENATOR OGAN said splitting the court is not necessarily going to make the judges better because they are there for life. He pointed to the "one nation under God" portion for the Pledge of

Allegiance and said he was always perplexed why a lot of judges, especially the 9th Circuit Court judges, seem to look at the establishment clause of the 1st Amendment that disallows the establishment of religion, but seem to totally ignore the second part that says "nor prohibit the free exercise thereof." He said it seems that this resolution is not about the Pledge of Allegiance ruling, but that might be some of the catalyst for the resolution. Although he wished that splitting the court would get rid of some of those judges, attrition would probably have to take care of that. He opined that it is fortunate that the U.S. Supreme Court would overturn the 9th Circuit Court decision once again.

SENATOR OGAN asked Mr. Hove if he knew the running tally of 9th circuit cases overturned by the U.S. Supreme Court because the last time he counted, approximately 29 out of 31 cases were overturned.

MR. HOVE said he didn't know the precise number.

SENATOR OGAN said it is extremely high and splitting the court is not going to get rid of those judges.

MR. HOVE said splitting the court might give an opportunity to play a larger role in the process.

SENATOR OGAN agreed.

MR. HOVE added that whatever the Legislature could do to that extent would certainly be a benefit.

SENATOR OGAN informed committee members he attended a hearing at the 9th Circuit Court a couple of years earlier involving the Katie John case and found it fascinating. [Katie John et al vs. United States of America No. 93-35295]

CHAIR SEEKINS read from page 2, line 23. The 9th Circuit Court was reversed five of the first six times it was reviewed in the October 2002 term. He said one of the things they are very concerned about and one of the reasons SJR 8 was proposed is a 9th Circuit Judge cannot attain necessary familiarity with federal legislation affecting Alaska because a 9th Circuit Court judge may only sit on the panel of Alaska once every ten years. It is hard to get any continuity for a little state like Alaska with that number of cases and that number of justices. Because of Alaska's extraordinary size, no one ever has a chance to

build up any familiarity with federal laws that affect the State of Alaska.

SENATOR ELLIS asked how many judgeships were currently vacant on the 9th Circuit Court.

MR. HOVE said he didn't have that information, but could provide it if desired.

SENATOR ELLIS said he would like that information provided.

SENATOR THERRIault moved SJR 8 from committee with individual recommendations. There being no objection, it was so ordered.

**2:52 pm**

**HB 12-HARASSMENT BY ELECTRONIC COMMUNICATION**

REPRESENTATIVE KEVIN MEYER introduced HB 12 saying it lists electronic communication as a method of harassment. Current statutes do not allow for electronic communication as a means of harassment, which has been a problem for Alaska law enforcement agencies. With the low cost and ease of access to computers, more and more harassment is being done via the computer and electronic communication. An individual who may not want to confront a person personally or on the telephone may feel very comfortable doing it via email. In fact some people are so good on computers they can program their computer to automatically send harassing messages at regular intervals 24 hours a day, 7 days a week.

Online harassment or harassment in general really is not a serious crime but it often is a prelude to more serious crimes so the sooner the perpetrator can be caught the better. It is a relatively new problem for Alaska's law enforcement agencies yet it is growing as more people get access to computers. Law enforcement has been catching people who are harassing via the Internet, but there is no statute to prosecute the perpetrators. Law enforcement personnel approached him with their frustration last summer and that is why the bill is before the committee.

The bill evolved relatively quickly through the House with a couple of amendments. House Judiciary felt harassment by use of electronic communication was too difficult to define in statute so they added a letter of intent as to what it is and kept the definition fairly broad so it would be able to evolve as electronic communication evolves.

The second amendment was made on the floor of the House of Representatives by the Minority Leader. That amendment adds the words "or sexual contact" on page 1, line 14. There was quite a bit of debate on the issue. Representative Meyer felt that, on page 1, line 12 and 13, that says "an obscene electronic communication" would cover "sexual contact." There are quite a few lawyers in the House and they each pulled out their different definition of obscene. They decided it would be covered if the words "sexual contact" were included. The addition does not change the bill and if anything it makes the bill stronger so the amendment was accepted.

SENATOR OGAN moved CSHB 12(JUD) am \Q.A as the bill before the committee. There being no objection, it was so ordered.

SENATOR THERRIAULT said he was a little leery of amendments made on the floor. He asked if Representative Meyer received any kind of memo from the drafters cautioning him on the use of the wording.

REPRESENTATIVE MEYER conferred with his staff and reported they were in contact with the drafter and there was no problem with the amendment.

SENATOR OGAN thought the issue of obscene electronic communication is one with which all parents grapple. He has always been concerned about unsolicited obscene material because everybody who has been on a computer has unwittingly visited some obscene site. He is concerned this is a snare that is used by pornographers to snare children into antisocial behavior that is destructive to their moral fiber. He asked if this was a vehicle by which they might be able to address that problem.

REPRESENTATIVE MEYER informed the committee HB 82 is currently scheduled with the Labor and Commerce Committee and deals specifically with unsolicited sexual explicit material. It is going to make the material illegal unless the subject line contains adult material. That way children will know not to open the email or better yet the computer can be set to filter out the word adult so the children will not receive that type of material. HB 12 deals strictly with harassment and putting electronic communication as a means of harassment in statute. When people are sending out emails saying, "I want to kill you" or threatening things like that, Alaskan law enforcement agencies can do something about it. Right now they cannot.

SERGEANT CURT HARRIS, Alaska State Troopers, said he did not have any specific testimony, but was available for questions. He said the Alaska State Troopers are supportive of the legislation.

SENATOR OGAN asked if the Alaska State Troopers have people with the training to specialize in electronic crimes with the ability to detect these crimes and trace the origins.

SERGEANT HARRIS answered yes. The Alaska State Troopers address electronic crimes through their white-collar crime section. It is a portion of the Criminal Investigation Bureau. He obtained that training and has experience in that area. There are two other investigators in the unit that are coming up to speed with that capability.

SENATOR THERRIAULT moved CSHB 12(JUD) am from committee with individual recommendations and attached zero fiscal notes. There being no objection, it was so ordered.

SENATOR ELLIS noted he was also a sponsor of legislation on unsolicited spam email of various kinds. Spam email clogs up small businesses and private parties to the tune of billions of dollars a year. It may be something the committee also wants to consider.

There being no further business to come before the committee, Chair Seekins adjourned the meeting at 3:00 p.m.