

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE

March 23, 2011

1:39 p.m.

MEMBERS PRESENT

Representative Carl Gatto, Chair
Representative Steve Thompson, Vice Chair
Representative Bob Lynn
Representative Lance Pruitt
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

Representative Wes Keller
Representative Mike Chenault (alternate)

COMMITTEE CALENDAR

HOUSE BILL NO. 87

"An Act relating to penalties for antitrust violations."

- MOVED CSHB 87(L&C) OUT OF COMMITTEE

HOUSE BILL NO. 23

"An Act relating to criminal use of a computer."

- HEARD & HELD

HOUSE BILL NO. 6

"An Act authorizing the governor to remove or suspend a member of the Board of Regents of the University of Alaska for good cause; and establishing a procedure for the removal or suspension of a regent."

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 168

"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

- BILL HEARING CANCELED

PREVIOUS COMMITTEE ACTION

BILL: HB 87

SHORT TITLE: ANTITRUST VIOLATION PENALTIES

SPONSOR(S): REPRESENTATIVE(S) OLSON, HOLMES

01/18/11	(H)	PREFILE RELEASED 1/14/11
01/18/11	(H)	READ THE FIRST TIME - REFERRALS
01/18/11	(H)	L&C, JUD
02/28/11	(H)	L&C AT 3:15 PM BARNES 124
02/28/11	(H)	Scheduled But Not Heard
03/07/11	(H)	L&C AT 3:15 PM BARNES 124
03/07/11	(H)	Moved CSHB 87(L&C) Out of Committee
03/07/11	(H)	MINUTE(L&C)
03/09/11	(H)	L&C RPT CS(L&C) NT 4DP 2NR
03/09/11	(H)	DP: THOMPSON, HOLMES, MILLER, OLSON
03/09/11	(H)	NR: CHENAULT, JOHNSON
03/23/11	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 23

SHORT TITLE: COMPUTER PRIVACY

SPONSOR(S): REPRESENTATIVE(S) PETERSEN, HOLMES

01/18/11	(H)	PREFILE RELEASED 1/7/11
01/18/11	(H)	READ THE FIRST TIME - REFERRALS
01/18/11	(H)	JUD, FIN
03/23/11	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

JAMES R. WALDO, Staff
Representative Lindsey Holmes
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented HB 87 on behalf of one of the bill's joint prime sponsors, Representative Holmes.

CLYDE (ED) SNIFFEN, JR., Senior Assistant Attorney General
Commercial/Fair Business Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska

POSITION STATEMENT: Responded to questions during discussion of HB 87.

REPRESENTATIVE PETE PETERSEN
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented HB 23 as one of the bill's joint prime sponsors.

DAVID BREMER, Staff
Representative Pete Petersen
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Assisted with the presentation of HB 23 on behalf of one of the bill's joint prime sponsors, Representative Petersen.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: Suggested changes to HB 23 and responded to questions.

GERALD LUCKHAUPT, Assistant Revisor of Statutes
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency (LAA)
Juneau, Alaska

POSITION STATEMENT: Speaking as the drafter, responded to questions during discussion of HB 23.

QUINLAN STEINER, Director
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska

POSITION STATEMENT: Expressed concerns with Section 2 of HB 23.

ACTION NARRATIVE

[1:39:48 PM](#)

CHAIR CARL GATTO called the House Judiciary Standing Committee meeting to order at 1:39 p.m. Representatives Gatto, Thompson, Gruenberg, Holmes, and Lynn were present at the call to order. Representative Pruitt arrived as the meeting was in progress.

HB 87 - ANTITRUST VIOLATION PENALTIES

1:40:07 PM

CHAIR GATTO announced that the first order of business would be HOUSE BILL NO. 87, "An Act relating to penalties for antitrust violations." [Before the committee was CSHB 87(L&C).]

1:40:39 PM

JAMES R. WALDO, Staff, Representative Lindsey Holmes, Alaska State Legislature, on behalf of Representative Holmes, one of the bill's joint prime sponsors, explained that HB 87 would update the penalties for certain violations of Alaska's antitrust laws. Currently, violations of AS 45.50.562 and AS 45.50.564 - combinations in restraint of trade unlawful, and monopolies and attempted monopolies unlawful, respectively - constitute a misdemeanor with a maximum fine of \$20,000, or a maximum prison sentence of one year, or both, if committed by a natural person, and constitute a misdemeanor with a maximum fine of \$50,000 if committed by an entity other than a natural person. By amending AS 45.50.578, Section 1 of the bill would make such violations a class C felony with a maximum fine of \$1,000,000, or a prison sentence as provided for in AS 12.55, or both, if committed by a natural person, and a class C felony with a maximum fine of \$50,000,000 if committed by an entity other than a natural person. Section 2 of the bill would add a new subsection (b) to AS 45.50.578 authorizing civil actions by the attorney general against those who violate AS 45.50.562; AS 45.50.564; AS 45.50.568 - mergers and acquisitions unlawful when competition unlawful; AS 45.50.570 - interlocking directorates and relationships; or an injunction issued under AS 45.50.580 - injunction by attorney general. The maximum civil penalty authorized under this new subsection (b) would be \$1,000,000 for a violation committed by a natural person, and \$50,000,000 for a violation committed by an entity other than a natural person.

MR. WALDO mentioned that the joint prime sponsors obtained input from the Department of Law (DOL) regarding the bill's language; that the proposed penalties are far less than those imposed for violating [similar federal law]; that the proposed penalties are merely maximum amounts, rather than mandatory amounts, and so the court would have the same discretion under the bill as it has now in determining how high a penalty to impose; and that making the bill's civil penalty section congruent with its criminal penalty section is meant to ensure that if the state is one of the prevailing parties in a multi-state antitrust suit,

that the damages awarded the state won't be limited to just its existing criminal penalty amounts.

1:45:20 PM

CLYDE (ED) SNIFFEN, JR., Senior Assistant Attorney General, Commercial/Fair Business Section, Civil Division (Anchorage), Department of Law (DOL), in response to questions, concurred that the proposed penalty amounts would be maximum amounts, not mandated amounts, and that damage award amounts in multi-state antitrust cases hinge on a state's existing penalties; ventured that the bill's proposed changes would provide the DOL with the flexibility and strength to pursue "bigger" cases; and explained that the bill would apply to the person/entity that commits the wrongdoing and not necessarily to a parent company, subsidiary company, or other affiliated company unless such was actually responsible for the conduct, that he is not aware of anything illegal going on in Alaska with regard to gasoline pricing, and that although there are a few "local" antitrust investigations underway, most of the DOL's antitrust investigations pertain to multi-state antitrust cases. For example, currently the state is involved in a multi-state case involving shipping, one involving liquid crystal displays (LCDs), and one involving computer memory chips.

REPRESENTATIVE GRUENBERG, in response to comments and a question, noted that AS 01.10.060(a)(8) defines the word, "person" as:

(8) "person" includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person;

CHAIR GATTO, after ascertaining that no one else wished to testify, closed public testimony on HB 87.

1:58:39 PM

REPRESENTATIVE HOLMES, speaking as one of HB 87's joint prime sponsors, moved to report CSHB 87(L&C) out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 87(L&C) was reported from the House Judiciary Standing Committee.

The committee took an at-ease from 1:59 p.m. to 2:02 p.m.

HB 23 - COMPUTER PRIVACY

2:02:30 PM

CHAIR GATTO announced that the final order of business would be HOUSE BILL NO. 23, "An Act relating to criminal use of a computer."

2:03:00 PM

REPRESENTATIVE PETE PETERSEN, Alaska State Legislature, speaking as one of the bill's joint prime sponsors, explained that HB 23 would update Alaska's statutes regarding criminal use of a computer - AS 11.46.740 - in order to keep up with new technology such as keyboard loggers, devices which record keystrokes as they are being entered into a computer. Specifically, Section 1 of HB 23 - amending AS 11.46.740(a) - would make it a crime for a person to install a keystroke logger or other device or program that has the ability to record someone else's keystrokes or entries - whether transmitted wirelessly or not - in order to access information that the person has no right to. Currently, obtaining someone's personal information via software or "spyware" is illegal, but not when done via the use of a keystroke logger, and HB 23 would [fix this loophole].

2:04:51 PM

DAVID BREMER, Staff, Representative Pete Petersen, Alaska State Legislature, on behalf of Representative Petersen, one of HB 23's joint prime sponsors, additionally offered his understanding that some new technology can enable a person to record someone else's keystrokes from as far away as 100 yards. In response to questions, he assured the committee that the bill wouldn't apply to law enforcement, and noted that the Alaska Cabaret, Hotel, Restaurant, & Retailers Association (Alaska CHARR) is in support of HB 23.

REPRESENTATIVE PETERSEN mentioned that in addition to protecting the personal information of individuals, the bill would also protect the proprietary information of businesses.

MR. BREMER, in response to questions, said that although a person using a keystroke logger to steal information wouldn't necessarily know the context of the keystrokes that were recorded, he/she could look for common patterns such as 16 numeric keystrokes in a row, possibly indicating a credit card number, or some alphabetic keystrokes that include letters

spelling "gmail.com", possibly indicating an e-mail account; and offered his understanding that there is not yet a way to steal information entered on a computer via touchscreen technology.

[2:09:12 PM](#)

REPRESENTATIVE THOMPSON expressed concern that the affirmative defense provided for via Section 2 of the bill could be misused by perpetrators of domestic violence (DV) who install a keystroke logger on their home computers in order to obtain information entered by their victims. He questioned whether this provision - which would add a new subsection (d) to AS 11.46.740 - would conflict with [Alaska's DV laws, either existing or proposed].

MR. BREMER - noting that without passage of the bill, anyone, even a perpetrator of DV, can use a keystroke logger to obtain information he/she has no right to - explained that Section 2 of the bill was included so as to address instances in which parents install a keystroke logger on their home computer in order to monitor what their children are doing on it. He offered [his understanding that the joint prime sponsors] would not be opposed to amending the bill [to address the concern about perpetrators of DV]. In response to comments, he mentioned that in addition to keystroke loggers that obtain information remotely, there are also ones that attach to the computer itself, looking much like a simple cable extension, and thus a person would have to inspect the wiring on his/her computer prior to every use in order to ensure that no such device had been installed. Keyboard loggers are readily available over the Internet, and range in price from \$50-\$200, he added.

REPRESENTATIVE PRUITT asked whether HB 23 would impact companies that use such technology to monitor their employees.

MR. BREMER relayed that it wouldn't because companies have the right to access information on the computers they own. In response to other questions, he clarified that Section 2 of HB 23 provides an affirmative defense for those installing or enabling a keystroke logger on their own computer, and explained that the bill's current title - "An Act relating to criminal use of a computer." - was chosen because the catch line of the section of statute being amended is, "Criminal use of computer."

REPRESENTATIVE GRUENBERG suggested that the joint prime sponsors consider narrowing the title in order to ensure that [unrelated] provisions aren't added to the bill.

REPRESENTATIVE PETERSEN indicated that narrowing the title to that effect would be fine with him.

[2:19:51 PM](#)

ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), suggested dividing the language of proposed AS 11.46.740(a)(2) into two parts in order to clarify that this new language is addressing both the installation of hardware/software, and the accessing of information remotely, and suggested deleting Section 2 as being unnecessary, since the State would already have to prove beyond a reasonable doubt that the person had no right to engage in the proscribed behavior. She noted, though, that Section 2 wouldn't conflict with [Alaska's DV laws, either existing or proposed], because it specifically says that application of its affirmative defense is limited to prosecutions resulting from a violation of AS 11.46.740(a)(2), and AS 11.46 addresses property crimes, not crimes against a person. So if the committee chooses to retain Section 2, the language should at least be changed to reflect that it applies to both presently-owned and formerly-owned computers.

CHAIR GATTO relayed that a proposed committee substitute (CS) addressing the aforementioned concerns would be forthcoming.

REPRESENTATIVE GRUENBERG mentioned that he supports the bill.

[2:28:19 PM](#)

GERALD LUCKHAUPT, Assistant Revisor of Statutes, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), speaking as the drafter of HB 23, relayed that he would draft language clarifying that what is now proposed AS 11.46.740(a)(2) would address both the installation of hardware/software, and the accessing of information remotely; and that he would change the title. He concurred that the title currently merely reflects the catch line of the section of AS 11.46 being amended - a section addressing computer crimes, both those committed against individuals and those committed against businesses and other entities; that the affirmative defense provided for via Section 2 would address situations in which parents wish to monitor

their children's computer activity, and situations in which a company wishes to monitor its employees' computer activity; that in a prosecution under AS 11.46.740(a)(2), the state would have to prove that the person had no right to engage in the proscribed behavior; and that Section 2 wouldn't conflict with [Alaska's DV laws, either existing or proposed], because it specifically says that its application is limited to prosecutions resulting from a violation of AS 11.46.740(a)(2), which addresses the wrongful use of keystroke loggers, not domestic violence.

MR. LUCKHAUPT offered his belief, though, that Section 2 would provide greater protection for someone who installs or enables a keystroke logger on a computer that he/she owns. In response to questions, he again pointed out that proposed AS 11.46.740(a)(2) is intended to address both the installation of keystroke logger hardware/software, and the accessing of keystroke information remotely; offered his belief that HB 23 would fill a gap in the state's laws pertaining to computers and their usage; and explained that under the bill, the activity outlined in proposed subsection (a)(2) would still be a crime regardless that the person failed to actually obtain the information he/she was seeking via the use of keystroke logger technology.

[2:42:03 PM](#)

QUINLAN STEINER, Director, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), expressed concern that the affirmative defense provided for via Section 2 of HB 23 would place the burden on the defendant to prove, by a preponderance of the evidence, that he/she owned the computer, and this could be difficult to do. Also, Section 2 is confusing because the affirmative defense relates to an element of the offense itself, thereby obfuscating what the State would have to prove. And although the best solution would be to eliminate Section 2 altogether, as suggested by the DOL, another solution might be to make lack of ownership an actual element of the offense, thereby placing the burden on the State to prove that the defendant didn't own the computer. Mr. Steiner also concurred with Ms. Carpeneti that the language of proposed AS 11.46.740(a)(2) ought to be divided into two parts in order to provide clarity.

CHAIR GATTO, in response to comments, noted members' continuing concern with Section 2 of HB 23.

REPRESENTATIVE PETERSEN, in response to a question, indicated that the intent is for the bill to apply in situations where the person committing the behavior outlined in proposed AS 11.46.740(a)(2) doesn't own the computer in question.

MS. CARPENETI cautioned against making a lack of ownership an element of the offense, reiterating that [under the language of AS 11.46.740(a)], the State would already have to prove beyond a reasonable doubt that the person had no right to engage in the proscribed behavior, and that it would be best to simply delete Section 2 and divide the language of proposed AS 11.46.740(a)(2).

[2:52:07 PM](#)

REPRESENTATIVE GRUENBERG concurred with Ms. Carpeneti that under proposed AS 11.46.740(a) as currently written, the State would have to prove that the person had no right to engage in the proscribed behavior outlined in proposed paragraph (2), acknowledging that owning a computer does give a person the right to do as he/she wishes with it.

MS. CARPENETI concurred, and ventured that making a lack of ownership an element of the offense could also prove problematic in situations involving a business or entity that provides its customers with access to its computers or and/or its Internet service - such a business or entity shouldn't have a right to use keystroke logger technology to obtain its customers' personal information simply because it owns the computers and/or Internet service. She again recommended deleting Section 2 of the bill. In response to further questions, she too noted that businesses and other entities do have the right to monitor what their employees are doing on company-owned computers. However, if such computers were being used by both employees and customers, then it would be up to the State to prove beyond a reasonable doubt that the business or entity didn't have the right to incidentally monitor its customers' computer activity while monitoring its employees' computer activity.

MR. BREMER relayed that the joint prime sponsors would be deleting Section 2.

CHAIR GATTO, after ascertaining that no one else wished to testify, closed public testimony on the bill, and announced that HB 23 would be held over while the committee awaits a forthcoming proposed CS addressing the aforementioned concerns.

2:57:50 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:57 p.m.