SB 78

6-0419E
Lauterbach
1/20/89

Original sponsor: Halford

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 78 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to information concerning minors."

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

* Section 1. AS 47.10.090 is repealed and reenacted to read:

Sec. 47.10.090. RECORDS. (a) The court shall make and keep records of all cases brought before it. The court's official records are not public records and may be inspected only with the court's permission and only by persons having a legitimate interest in them. Parties and their attorneys or guardians may have access to the court file. Duly constituted foster care review boards doing case reviews under 42 U.S.C. 671 - 675 may have access to the court file on a case under review without court order. Other persons may have access to the court files as authorized by statute, or court order for good cause shown after notice to the parties, but conditions on their access or use may be set by the court. A person with access shall maintain the confidentiality of all information in the court's file.

(b) All information and social records pertaining to a minor under the jurisdiction of the court and prepared by an employee of the court or by a federal, state, or municipal agency or an agent, contractee, or licensee of a federal, state, or municipal agency, in the discharge of official duties, including those relating to driver's license action under AS 28.15.185 but excluding those relating to offenses listed in AS 47.10.010(b), are privileged and may not be disclosed directly or indirectly to anyone without the court's permission. However, the employee, agency, agent, licensee, or contractee

may exchange information without a court order with another employee, agency, or contractee who needs the information for a legitimate purpose. Exchanged information retains its privileged status. Notwithstanding this subsection, the court shall forward a record of adjudication of an offense described in AS 28.15.185(a) to the Department of Public Safety, if the court imposes a license revocation under AS 28.15.185. A need for information for a legitimate purpose is presumed in the following circumstances:

(1) giving or obtaining information to enforce a court order;

(2) giving or obtaining information to make a report to the court;

(3) giving or obtaining information for purposes of treatment;

(4) giving or obtaining information for purposes of placement of the minor;

(5) giving or obtaining information for purposes of fingerprinting under AS 47.10.097;

(6) furthering investigation or prosecution of crimes committed by or against a minor;

(7) furthering investigation of child abuse or neglect reports;

(8) enforcing licensing statutes and regulations; or

(9) when disclosure is authorized by statute, court rule, state agency protocol, or regulation.

(c) When a discovery request is made by a criminal defendant for the records of a child victim where the charge is child exploitation, sexual assault, physical assault, abuse, or neglect, the records shall be released to the court. The court shall review the records in

camera. The court shall release relevant material to the defense and the prosecution, and shall provide copies to the parties. In releasing the material, the court shall enter a written order that sets out the specific portions of the record that are released. The court may issue protective orders related to the material that are necessary to balance the child's right to privacy against the defendant's constitutional rights.

(d) Within 30 days of the date of a minor's 18th birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records pertaining to that minor, including records of all driver's license proceedings under AS 28.15.185, criminal proceedings against the minor, and punishments assessed against the minor except for traffic offenses. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use in making a presentencing report for the court. Prior felony convictions of the juvenile and prior adjudications of the juvenile as a delinquent for conduct that would have been a felony if committed by an adult shall be released for purposes of determining the length of a presumptive sentence under AS 12.55.155.

(e) The name or picture of a minor under the jurisdiction of the court may not be made public in connection with the minor's status as a delinquent child or a child in need of aid unless authorized by order of the court, except that the name of a minor who has committed more than one felony, has been adjudicated as a delinquent more than once for conduct that would have been a felony if committed by an adult, or has a combination of a felony and such an adjudication, shall be made public unless the court, for good cause, in certain

individual cases, enters an order prohibiting the disclosure. If a minor has escaped from a detention facility, the court may hold an expedited hearing to determine if the minor's name or picture should be disclosed in order to protect the minor or the public.

(f) A person who violates a provision of this section is guilty of a violation, and upon conviction is punishable by a fine of not more than $500.

Call re CS for Thursday

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6-0419E
Lauterbach
1/19/89

Original sponsor: Halford

IN THE SENATE

CS FOR SENATE BILL NO. 78 ( )

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(d) Within 30 days of the date of a minor's 18th birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records pertaining to that minor, including records of all driver's license proceedings under AS 28.15.165, criminal proceedings against the minor, and punishments assessed against the minor except for traffic offenses. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use in making a presentencing report for the court. Prior felony convictions of the juvenile and prior adjudications of the juvenile as a delinquent for conduct that would have been a felony if committed by an adult shall be released for purposes of determining the length of a presumptive sentence under AS 12.55.155.

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STATE OF ALASKA / STEVE COWPER, GOVERNOR

OFFICE OF PUBLIC ADVOCACY

900 W. 5TH AVENUE
SUITE 525
ANCHORAGE, ALASKA 99501
PHONE: (907) 274-1684

January 26, 1989

The Honorable Rick Halford
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

ATTN: Ms. Theresa Maser

RE: Senate Bill 78

Dear Senator Halford and Ms. Maser:

Pursuant to my telephone conversations of January 24th and 25th, with Ms. Maser, I have enclosed a copy of a brief the Office of Public Advocacy recently filed with the Alaska Supreme Court regarding the issue of confidentiality of a child's Division of Family and Youth Services (DFYS) records. Currently this case is being reviewed by the Alaska Supreme Court to determine whether or not the appeal is moot due to the Department of Law having recently decided not to initiate criminal proceedings.

The Office of Public Advocacy is committed to future litigation to protect the privacy rights of children who are in the legal custody of DFYS. It is OPA's position that a child's DFYS file contains highly sensitive information which should not be released for purposes other than the child in need of aid (CINA) proceeding unless there has been prior notice and court review of the file to determine what information, if any, can be released.

The Office of Public Advocacy will be sending a position paper in the near future after we have had an opportunity to fully review SB78 and recent amendments. Please apprise us ahead of time as

to when SB78 will be reviewed by the Senate Judiciary Committee. Thank you for your assistance and cooperation. Please do not hesitate to contact me if you have any questions.

Sincerely,

OFFICE OF PUBLIC ADVOCACY

Philip J. McCarthy, Jr.
Deputy Public Advocate

PJM:lgr

cc: Charles S. Christensen III
Counsel
Senate Judiciary Committee
P.O. Box V
Juneau, AK 99811

Brant G. McGee
Public Advocate
Office of Public Advocacy

Enclosure

THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter: [redacted],	)
A Minor Under the Age of Eighteen (18) Years.	)
[redacted] Appellant,	)
vs.	)
State of Alaska and [redacted],	)
Appellees	)

NO. S-2915

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT
HONORABLE JUDGE VICTOR D. CARLSON

BRIEF OF APPELLANT

OFFICE OF PUBLIC ADVOCACY

Brant McGee, Public Advocate

Philip J. McCarthy, Jr.,
Deputy Public Advocate
900 W. 5th Avenue, Suite 525
Anchorage, Alaska 99501
(907) 274-1684

Filed in the Supreme Court
for the State of Alaska this
25th day of November, 1988.

DAVID A. LAMPEN, Clerk
APPELLATE COURTS

Deputy Clerk

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES RELIED UPON

Constitutional Provisions

United States Constitution, Amendment I [1791] provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances.

Amendment IV [1791] provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV [1868], Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Constitution, Article 1, § 22 provides:

> The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Statutes

Alaska Statute 22.05.010(a) and (b)

> (a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.
>
> (b) Appeal to the supreme court is a matter of right only in those actions and proceedings from which there is no right of appeal to the court of appeals under AS 22.07.020 or the the superior court under AS 22.10.020 or AS 22.15.240.

Alaska Statute 47.10.070

> Hearings The court may conduct the hearing in an informal manner in the courtroom or in chambers. A hearing may be held before a young adult advisory panel in accordance with AS 47.10.075. The court shall give notice of the hearing to the department and it may send a representative to the hearing. The court shall also transmit a copy of the petition to the department. The representative of the department may also be heard at the hearing. The public shall be excluded from the hearing, but the court, in its discretion, may permit individuals to attend a hearing, if their attendance is compatible with the best interests of the minor. Nothing in this section may be applied in such a way as to deny a child's rights to a public trial and to a trial by jury. (§10(1) art I ch 145 SLA 1957; am § 1 ch 49 SLA 1966; am § 53 ch 71 SLA 1972)

Alaska Statute 47.10.080(c) and (i)

> (c) If the court finds that the minor is a child in need of aid, it shall

(1) order the minor committed to the department for placement in an appropriate setting for a period of time not to exceed two years or in any event past the date the minor becomes 19 years of age, except that the department may petition for and the court may grant in a hearing (A) two-year extensions of commitment which do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and (B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; the department may transfer the minor, in the minor's best interests, from one placement setting to another, and the minor, the minor's parents or guardian, and the minor's attorney are entitled to reasonable notice of the transfer;

(2) order the minor released to the minor's parents, guardian, or some other suitable person, and, in appropriate cases, order the parents, guardian, or other person to provide medical or other care and treatment; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor, but the court may dispense with the department's supervision if the court finds that the adult to whom the minor is released will adequately care for the minor without supervision; the department's supervision may not exceed two years or in any event extend past the date the minor reaches age 19, except that the department may petition for and the court may grant in a hearing

(A) two- year extensions of supervision which do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; or

(3) by order, upon a showing in the adjudication by clear and convincing evidence that there is a child in need of aid under

AS 47.10.010(a)(2) as a result of parental conduct and upon a showing in the disposition by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights, terminate parental rights and responsibilities of one or both parents and commit the child to the department or to a legally appointed guarding of the person of the child, and the department or guardian shall report annually to the court on efforts being made to find a permanent placement for the child.

(i) A minor, the minor's parents or guardian acting on the minor's behalf, or the department may appeal a judgment or order, or the stay, modification, setting aside, revocation, or enlargement of a judgment or order issued by the court under this chapter.

Alaska Statue 47.10.090(a)

(a) The court shall make and keep records of all cases brought before it. The court's official records may be inspected only with the court's permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared by an employee of the court or by a federal state or city agency in the discharge of the employee's or agency's official duty, including traffic offenses and driver's license action under AS 28.15.185, are privileged and may not be disclosed directly or indirectly to anycne without the court's permission. However, a state or city law-enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with making a preliminary investigation for the information of the court. The court shall forward a record of adjudication of a violation of an offense listed in AS 28.15.185(a) to the Department of Public Safety, if the court imposes a license revocation under AS 28.15.185. Within 30 days of the date of a minor's 18th birthday or, if the court

retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all driver's license proceedings under AS 28.15.185, criminal proceedings against the minor and punishments assessed against the minor except for traffic offenses. A person may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

Alaska Statute 47.17.020(c)

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the person shall make the report to a peace officer. The peace officer shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department.

Alaska Statute 47.17.025

(a) A law enforcement agency shall immediately notify the department of the receipt of a report of harm to a child from abuse. Upon receipt from any source of a report of harm to a child from abuse, the department shall notify the Department of Law and investigate the report and, within 72 hours of the receipt of the report, shall provide a written report of its investigation of the harm to a child from abuse to the Department of Law for review.

(b) The report of harm to a child from abuse required from the department by this section shall include:

(1) the names and addresses of the child and the child's parent or other persons responsible for the child's care, if known;

(2) the age and sex of the child;
(3) the nature and extent of the harm to the child from abuse;
(4) the name and age and address of the person known or believed to be responsible for the harm to the child from abuse, if known;
(5) information that the department believes may be helpful in establishing the identity of the person believed to have caused the harm to the child from abuse. (§ 6 ch 104 SLA 1982)

Alaska Statute 47.17.040(b)

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside Alaska, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who makes public information contained in confidential reports is guilty of a misdemeanor. (§ 1 ch 100 SLA 1971; am § 2 ch 222 SLA 1976)

Rules

Alaska R. Criminal P.16(a) and (b)(1)

(a) Scope of Discovery. In order to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system.
(b) Disclosure to the Accused.
(1) Information within Possession or Control of Prosecuting Attorney: Except as

is otherwise provided as to matters not subject to disclosure and protective orders, the prosecuting attorney shall disclose the following information within his possession or control to defense counsel and make available for inspection and copying:

(i) The names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements or summaries of statements.

(ii) Any written or recorded statements and summaries of statements and the substance of any oral statements made by the accused;

(iii) Any written or recorded statements and summaries of statements and the substance of any oral statements made by a co-defendant;

(iv) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons;

(v) Any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial which were obtained from or belong to the accused; and

(vi) Any record of prior criminal convictions of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

Alaska R. of Evidence 504(a)(3) & (4)

Physician and Psychotherapist-Patient Privilege

(a) Definitions. As used in this rule:

(3) A psychotherapist is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the

diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (B) a person licensed or certified as a psychologist or psychological examiner under the laws of any state or nation or reasonably believed by the patient to so be, while similarly engaged.

(4) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonable necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional conditions, including alcohol or drug addiction, among himself, his physician or psychotherapist, or persons who are participating in the diagnosis or

(d) Exceptions. There is no privilege under this rule:

(7) Criminal Proceeding. For physician-patient communications in a criminal proceeding. This exception does not apply to the psychotherapist-patient privilege.

Alaska R. of Evidence 510.

Waiver of Privilege by Voluntary Disclosure

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses

or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

STATEMENT OF JURISDICTION

[redacted] appeals to the Supreme Court from the Final Order of the Superior Court denying her motion for a protective order. The Superior Court's order was entered on July 26, 1988 by the Honorable Victor D. Carlson, Judge of the Superior Court at Anchorage, Alaska. (R. 55). Notice of Appeal was timely filed by [redacted] (R. 59).

This appeal is brought as a matter of right pursuant to AS 22.05.010(b) and AS 47.10.080(i). This court has jurisdiction pursuant to AS 22.05.010(a) and (b).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The trial court erred in holding that DFYS' policy of releasing, without prior notice or court approval, [redacted] DFYS records to the D.A.'s office is not in violation of AS 47.10.090(a).

2. The trial court erred in holding that DFYS' Policy of freely disseminating [redacted] DFYS records to the D.A.'s office, without notice or prior court approval, did not violate [redacted] constitutional right of privacy.

3. The trial court erred in holding that DFYS' policy of releasing [redacted] DFYS records to the D.A.'s office, without notice or prior court approval, did not violate [redacted] psychotherapist-patient privilege, A.R.E. 504.

4. Whether the Department of Law's civil and criminal divisions are separate and distinct for purposes of AS 47.10.090(a).

STANDARD OF REVIEW

The superior court reached its decision to deny [redacted] motion for a protective order as matter of law. Review of the legal analysis employed at the trial court level is predicated upon this court's independent judgement and the questions are afforded a de novo review. Wanberg v. Wanberg, 664 P.2d 568, 570 (Alaska 1983); Matter of J.M., 718 P.2d 150, 154 (Alaska 1986).

STATEMENT OF THE CASE

Statement of Facts

A petition alleging [redacted] to be a child in need of aid (hereinafter CINA) was filed on or about April 30, 1987. (R.1-2). The CINA petition requested [redacted], then age 17, be placed in the temporary custody of the State of Alaska, Department of Health and Social Services, Division of Family and Youth Services, (hereinafter DFYS) due to a history of being physically abused by her father, [redacted].

The CINA petition alleged the most recent incident of [redacted] physically abusing [redacted] was on April 28, 1987. The probable cause hearing, regarding the CINA petition, was held on May 1, 1987, whereupon the Children's Court Master recommended approval of the parties stipulation placing [redacted] in the temporary legal and physical custody of DFYS. (Tr. 3-9) An amended CINA petition was filed by DFYS on or about June 9, 1987, which corrected previous errors contained in the original CINA petition. The amended CINA petition recited the same factual basis for [redacted] being a child in need of aid as did the original CINA petition. (R. 6-7). An order placing [redacted] in the temporary custody of DFYS was signed by the Honorable

Peter A. Michalski, Judge of the Superior Court, on June 11, 1987. (R. 8-9).

A motion for an order requiring [redacted]. to file a Parental Financial Statement, to determine [redacted] ability to reimburse DFYS for the costs of [redacted] care, was filed by DFYS and an order was signed by the Honorable Peter A. Michalski, Judge of the Superior Court, on October 2, 1987. (R. 12-13). [redacted] opposed DFYS' motion for a Parental Financial Statement stating he was not the natural nor adoptive father of [redacted] (R. 14-15). DFYS filed a reply to [redacted] opposition asserting the doctrines of estoppel and res judicata barred [redacted] denial of parenting to [redacted] DFYS cited, as authority for invoking the doctrines of estoppel and res judicata, [redacted] declaration to being [redacted] natural parent in pleadings filed in 1983 with the Superior Court of New Jersey and said court's order granting a name change for the child [redacted], the appellant herein, now known as [redacted] (R. 20-21).

The parties reached a stipulation resolving [redacted] obligation to pay DFYS child support. (R 25-26). An order of adjudication and disposition, based upon the stipulation of the parties, was signed by the Honorable Peter A. Michalski, Judge of the Superior

Court, on February 12, 1988. (R-27).

Since April of 1987, [redacted] has continuously resided in DFYS foster care. Though not reflected in the CINA petition, [redacted] revealed to her foster parent in early June of 1987, that [redacted] had sexually abused her. Upon [redacted] reporting [redacted] had sexually abused her, a second report of abuse was filed by DFYS and a criminal investigation undertaken by State and military law enforcement agencies. Currently, there is an ongoing criminal investigation of [redacted] report of being sexually abused by [redacted] Because of the trauma experienced by [redacted], she was referred to Gary Lichtenstein, MSW, ACSW, Alaska Psychosocial Services for therapy.

[redacted] having turned eighteen years of age on April 13, 1988, requested the appointment of Office of Public Advocacy as her attorney and the termination of Office of Public Advocacy's guardian ad litem appointment. (R. 32). [redacted] request for an attorney appointment and termination of the guardian ad litem appointment was granted by the court. (R. 33).

The policies and procedures of the State of Alaska, Department of Law provide, in pertinent part, that upon a report of abuse, pursuant to AS 47.17.025,

that if "a criminal division attorney requests access to a child's file held by DFYS, or to information contained in that file, . . ., the AAG [assistant attorney general] should advise the social worker to cooperate in providing the requested access without first insisting on a court order for disclosure". (Emphasis added.) (R. 36-37). Prior to DFYS' release of [redacted] records to a Department of Law, Criminal Division attorney, (hereinafter D.A.), [redacted] filed a motion for a protective order. [redacted] motion requested a protective order which would prohibit DFYS from releasing her DFYS file or other information to the D.A.'s office without prior notice to [redacted] and court review. (R. 34-37).

DFYS, (not the Department of Law), filed an opposition to [redacted] motion for a protective order on May 10, 1988. (R 40-46) Oral argument on [redacted] motion for a protective order was held before the Honorable Victor D. Carlson, Judge of the Superior Court, on June 16, 1988. (Tr. 11-25) On July 26, 1988, Judge Carlson issued an order and memorandum of decision denying [redacted] motion for a protective order. (R. 55, 56-58). [redacted] filed a timely notice of appeal on July 29, 1988. (R. 59).

ARGUMENT

I. CONFIDENTIALITY OF TITLE 47 PROCEEDINGS

Legal proceedings relating to a minor under eighteen (18) years of age residing or found in the State of Alaska are governed by Title 47 of Alaska Statutes. If a minor is found to be (1) delinquent; or (2) a child in need of aid, due to abuse or neglect, they may be placed in the legal custody of DFYS. Because DFYS is mandated to protect the best interests of the child, and since proceedings pursuant to AS 47.10 and 47.17 are confidential, the psychotherapist-patient privilege is not applicable to these proceedings. State v. R.H., 683 P.2d 269, 281 (Alaska App. 1984).[1] AS.47.10.090(a) prohibits court records and/or social records pertaining to minor, which are prepared by an employee of the court or federal, state or city agency in the the discharge of their official duty, from being disclosed directly or indirectly to anyone without court approval.[2] [redacted] contends AS

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[1] State v. R.H., is more commonly referred to as the 'Wetherhorn' decision and will hereinafter be cited by its popular name.

[2] AS 47.10.090 Records (a): The court shall make and keep records of all cases brought before it.
(Footnote Continued)

47.10.090(a) prohibits the release of her DFYS records to the D.A.'s office without prior notice and court approval.

The principal purpose for the enactment of AS 47.10.090(a) is to protect the child from the adverse effects of unauthorized revelations of their social

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(Footnote Continued)
The court's official records may be inspected only with the court's permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared by an employee of the court or by a federal, state or city agency in the discharge of the employee's or agency's official duty, including traffic offenses and driver's license action under AS 28.15.185, are privileged and may not be disclosed directly or indirectly to anyone without the court's permission. However, a state or city law enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with making a preliminary investigation for the information of the court. The court shall forward a record of adjudication of a violation of an offense listed in AS 28.15.185(a) to the Department of Public Safety, if the court imposes a license revocation under AS 28.15.185. Within 30 days of the date of a minor's 18th birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all driver's license proceedings under AS 28.15.185, criminal proceedings against the minor and punishments assessed against the minor except for traffic offenses. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

records. In re P.N., 533 P.2d 13 (Alaska 1975). Title 47 mandatory reports of child abuse and neglect are intended for use in child protection proceedings and are not intended for use in criminal proceedings. Wetherhorn, 683 P.2d at 280. In Wetherhorn, the Alaska Court of Appeals explicitly reserved the issue regarding whether or not DFYS files may be made available to the D.A.'s office for criminal prosecution purposes. Wetherhorn, 283 P.2d at 282 n. 16. In Strehel v. State, 722 P.2d 226, 228, (Alaska App. 1986), the Alaska Court of Appeals held that reliance by the D.A.'s office on child abuse reports, (not complete DFYS files), pursuant to AS 47.17.025, for initiating a criminal prosecution is not prohibited.

In the context of criminal proceedings, recent U.S. Supreme Court and Alaska Court of Appeals decisions clearly establish a criminal defendant is not entitled by right to a child's social service records. These decisions establish that the trial court must conduct an in camera review of the child's records to determine if they contain relevant evidence which must be disclosed to the defendant. See Pennsylvania v. Ritchie, ___ U.S. ___, 107 S. Ct. 989, 94 L. Ed. 2d 690 (1987); Sledge v. State, ___ P.2d ___, Alaska App., opinion No. 866 (November 10, 1988). While the

Ritchie, Wetherhorn, Strehel and Sledge decisions provide guidance for the release of a child's social services records in criminal proceedings, they do not resolve the issues presented in [redacted] appeal: namely is it a violation of [redacted] constitutional and statutory rights to allow DFYS to disseminate her records, for purposes other than the CINA case, without prior notice or court approval.

II. THE TRIAL COURT ERRED IN HOLDING THAT DFYS' POLICY OF RELEASING, WITHOUT PRIOR NOTICE OR COURT APPROVAL, [redacted] DFYS RECORDS TO THE D.A.'S OFFICE IS NOT IN VIOLATION OF AS 47.10.090(a).

The Wetherhorn and Strehel decisions establish that: (1) mandatory reports of child abuse are intended for child protective procedures and not criminal proceeding; and (2) the initial report of child abuse may be utilized to initiate a criminal prosecution. The Wetherhorn and Strehel decision leave unanswered whether or not AS 47.10.090(a) prohibits DFYS from providing the D.A.'s office a child's DFYS records, without prior notice or court approval, to be reviewed in furtherance of a criminal case.

The Alaska Court of Appeals, in the context of addressing a criminal defendant's access to a child's DFYS and CINA files, stated access can only

occur with the court's approval and only by persons having a legitimate interest in the records. Sledge v. State,, ___ P.2d ____, Alaska App., Opinion No. 866, at P.11, n.2. (November 10, 1988). The Sledge decision, when considered with the Alaska Supreme Court decision, In re P.N. supports [redacted] contention that the court should strictly construe AS 47.10.090(a). [redacted] believes AS 47.10.090(a) requires the Department of Law and/or DFYS, (prior to the release of DFYS records to the D.A.'s office) to provide [redacted] notice and obtain court approval for releasing DFYS records or other information.

AS 47.10.090(a) has two categories of records which require court approval: (1) the court's official CINA or delinquency records; and (2) all information and social records regarding a child kept by the court and federal, state and city agencies. [redacted] DFYS records fall in this latter category. The state does not dispute that their policies, procedures and the normal day to day practice of DFYS is to provide, upon the request of the D.A.'s office, without notice or court approval, a child's DFYS file to the

D.A.'s office.[3] [redacted] believes that a straight forward interpretation of AS 47.10.090(a) prohibits this practice. As will be discussed in more detail herein, [redacted] request for this court's strict statutory interpretation of AS 47.10.090(a) is warranted to avoid a conflict with [redacted] constitutional right of privacy.

[redacted] interpretation of AS 47.10.090(a) will not inhibit law enforcement agencies and the D.A.'s office in pursuing a criminal proceeding. Nor, does a strict interpretation of AS 47 10.090(a) necessarily mean the child is not willing in all other ways, as is the case herein, to cooperate with a criminal investigation. [redacted] intentions are to protect personal and emotionally sensitive information, contained in [redacted] DFYS records, from being released without any safeguards to protect [redacted] privacy.

A child's DFYS records can contain sensitive information which has been gathered in the course of CINA or delinquency proceedings to assist the child in resolving their emotional problems. A child's DFYS file can contain statements to social workers or

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[3] See Department of Law, General Policies and Procedures on child sexual abuse cases, D., coordination with criminal case, at P.8. (R. 36-37).

therapists about the child's feelings of betrayal by the adult accused of abusing him or her. The DFYS records can contain therapist's reports or comments from the therapist which the social worker has recorded. A child's DFYS file can contain information regarding the child's fears which may go beyond the injuries for which a report of abuse was made pursuant to AS 47.17.025. A child's DFYS records can contain information on a child's sexual relationship with other youths or their rejection by a boyfriend or girlfriend. DFYS records can contain a child's statements revealing their low self-esteem and belief that they are ugly and different from other children. DFYS records can recite a child's feeling of betrayal and anger towards the non-abusive parent or their current custodian such as a foster parent. DFYS records can contain a child's statements concerning events which may be in violation of ordinances and laws. The DFYS records can contain the child's unfaltering statements about law enforcement personnel or even the assistant D.A. reviewing the DFYS records. The DFYS records can reveal the child's inner most fears and secrets.

In all the above-recited examples, the State can answer that should this information be contained in

DFYS records it would not be utilized in any criminal proceeding. This answer ignores the real issue and exemplifies that institutions often lack an understanding of the child's feelings. The breach of the child's trust and rights occurs when their DFYS records are released to persons other than those individuals involved in establishing or providing treatment for the child in the CINA or delinquency proceeding. The breach of the child's trust and constitutional and statutory rights is the release of DFYS records to the D.A.'s office without court approval, not when and if said records or information are used in a criminal proceeding.

Finally one must not forget, despite one's own individual views, that many children in DFYS custody may still love their abuser. The abused child will experience many conflicting feelings about their abuser, e.g., anger, betrayal, sorrow, and depression. Because so many children are abused by adults they love and trust, it is not inconceivable and frequently occurs that a child may want the adult to stop abusing them but does not want to testify against their abuser

or see them go to jail.[4] The purpose of CINA proceedings is to protect and provide treatment for children who have been physical or sexually abused or neglected. Thus, the practice of DFYS freely disseminating a child's record, without prior notice or court approval, violates and distorts the purpose of CINA cases. The policies of the Departments of Law and DFYS, which allow free access by the D.A.'s office to a child's DFYS records, ignore the fact that AS 47.10.090(a) requires the court and not other institutions to determine what information, if any, should be released. Likewise, it is the court who is to decide if the release of a child's DFYS records is to persons with a 'legitimate interest' in said

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[4]See Generally: Berliner and Barbieri, The Testimony of the Child Victim of Assault, J. Social Issues, Vol. 40, No. 2., 125, 128 (1984); Libai, The Protection of the Child Victim of Sexual Offense in the Criminal Justice System, 15 Wayne L.R. 977, 984 (1969); Melton, Child Witnesses and the First Amendment: A Psychological Delimma, J. Social Issues, Vol. 40, No. 2, 109 (1984); Meyers, When Children Take the Stand, 11 Student Lawyer 14, 15 (No. 1, Sept. 1982); Ramsey, Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity, Family L.Q., Vol. 17, No.3, 287, 316 (Fall 1983); Goodman, The Child Witness: An Introduction, J. Social Issues, Vol. 40, No.2, 1, 15 (1984); Wood, The Child as Witness, Family Advocate, Vol. 6, No.4, 14, 15 (Spring 1984).

records. The current policy of DFYS and the Department of Law ignores the abused child's needs of privacy and to have individuals in whom the child can place their trust. In a very real sense, the release of an abused or neglected child's DFYS records is just another example of the child's continued victimization.

III. THE TRIAL COURT ERRED IN HOLDING THAT DFYS' POLICY OF FREELY DISSEMINATING [redacted] DFYS RECORDS TO THE D.A.'S OFFICE WITHOUT NOTICE OR PRIOR COURT APPROVAL, DID NOT VIOLATE [redacted] CONSTITUTIONAL RIGHT OF PRIVACY.

A. [redacted] Right of Privacy Under the Alaska Constitution

The right to privacy is specifically set forth in Alaska Constitution, art. 1, § 22:

> The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

The court has defined the right to privacy as"....The right 'to be let alone,' the right of persons 'to determine for themselves when, how, and what extent information about them is communicated to others,' and the right which protects 'the individual's integrity as a human being.'" State v Glass, 583 P.2d 872, 880 (Alaska 1978).

Whereas [redacted] federal right of privacy is derived from a broad reading of the due process clause

of the fourteenth amendment and from "emanations" from other federal constitutional provisions,[5] [redacted] right of privacy is explicit in our state constitution. The express right to privacy in the Alaska Constitution is broader than that afforded by the United States Constitution. See: Messerli v. State, 626 P.2d 81 (1980). [redacted] relationship with her DFYS social worker and therapist, while not a relationship previously recognized as deserving of protection under the privacy guarantee of our state constitution, should in this instance be found to be protected by [redacted] right of privacy. Support for [redacted] position can be found in this court's previous determination that the physician-patient relationship is protected by the right of privacy under our state constitution. See Falcon v Alaska Public Offices Commission, 570 P.2d 469, 480 (Alaska 1977). The Alaska Court of Appeals has also recognized that requiring a psychologist to testify in a criminal proceeding, regarding confidential communications with a patient who had entered therapy as a result of a CINA proceeding, would

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[5] See [redacted] discussion of her federal constitutional right of privacy at P. 22 herein.

most certainly raise serious constitutional questions under out state's right of privacy. See Wetherhorn, 683 P.2d at 281 (Alaska App. 1984).

The test for what interests are protected under Alaska's constitutional right to privacy is stated in Hilbers v. Municipality of Anchorage, 611 P. 2d 31, 42 (Alaska 1980), quoting from Justice Harlan's concurrence in Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L.Ed. 2nd 576 (1967):

> First, that a person has exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as "reasonable".

See also Glass, 583 P.2d at 875.

There can be little doubt that [redacted] has both a subjective and an objective expectation of privacy which is reasonable under the circumstances. [redacted] having been placed in the legal custody of DFYS pursuant to a CINA proceeding, knew CINA proceedings were confidential and closed to the public. AS 47.10.070. Likewise, therapy for [redacted] was arranged by her DFYS social worker.

Under the Alaska constitution, the required level of state justification for its infringement of a citizen's right of privacy turns on the precise nature of the privacy interest involved. In [redacted] case, her

being an abused child and having her relationship with social workers and therapist initiated through a CINA proceeding, so as to insure she would receive treatment for her trauma, mandates an extremely high level of justification for state interference with these relationships.[6] Falcon, 570 P.2d at 476. In order for the state to invade the privacy of [redacted] relationship with her social worker and therapist, the state should be required to show that their policy is necessary to fulfill a compelling state interest.

In the context of CINA cases the state cannot justify their invasion of [redacted] privacy interests. Protecting [redacted] relationship with her social worker and therapist will in no way hinder the state in it's ability to initiate a criminal investigation. Nor is the state hindered from interviewing [redacted] for purposes of a criminal proceeding. In appropriate situations and upon a showing of justification, the state can request the court conduct an in camera review of [redacted] DFYS records to determine if any relevant information

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[6]Since [redacted] case clearly involves state action, she will not address this prerequisite requirement for triggering application of her constitutional right of privacy. See Allred v. State, 554 P.2d 411 (Alaska 1976).

contained therein should be released to the D.A.'s office. The current policies of the state show a total disregard for [redacted] privacy and do not allow for safeguards to protect [redacted] from the state's unwarranted invasion of her personal life.

The state's current policy of invading [redacted] relationship with her therapist and social worker, without any court imposed restrictions, means, pursuant to Rule 16 (a) and (b)(1), AK Rules of Criminal Procedure, that [redacted] abuser may request full access to [redacted] DFYS records at his criminal trial. Regardless whether or not a criminal defendant can successfully obtain [redacted] DFYS records,[7] [redacted] knowledge of the possible release of her records to the defendant is in and of itself further emotional trauma. Because of the importance of [redacted] constitutional right of privacy under our state constitution, the court should construe AS 47.10.090(a) in a manner which avoids a conflict with [redacted] right of privacy. Gunnerud v. State, 611 P.2d 69, 72 (Alaska 1980).

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[7] See Pennsylvania v. Ritchie, ___ U.S. ___, 107 S.Ct. 989, ___ L. Ed. 2d ___ (1987); Thorton v. State, 527 So. 2d 143 (Ala Cr. App 1987); Yarborough v. State, 514 So. 2d 1215 (Miss. 1987).

B. [redacted] Right of Privacy Under the U.S. Constitution

Although the United States Constitution has no express privacy provision, the United States Supreme Court has recognized the right of Privacy arising under the "penumbras" of the first, fourth and fourteenth amendments of our federal constitution. See Griswold v. Connecticut, 381 U.S. 479, 485-486 85 S. Ct. 1678, 14 L. Ed. 2nd 510 (1965). A child, merely on account of their minority, is not beyond the protection of our federal constitution. Though, clearly, children do not have the same constitutional protections as an adult. See In re: Gault, 387 U.S. 1, 13, 87 S. Ct. 1428, 1436, 18 L Ed. 2d 527 (1967); McKiever v. Pennsylvania, 403 U.S. 528, 547, 91 S. Ct. 1976, 1987, 29 L. Ed. 2d 647 (1971). The United States Supreme Court has on a number of occasions addressed the importance of a minor's right of privacy and has firmly delineated that, though not equal that of an adult, the state may not override a minor's privacy right without sufficient justification. See Carey v. Population v Population Services International, 431 U.S. 678, 97 S. Ct. 2010, 52 L Ed. 2d 675 (1977); Bellotti v. Baird, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).

Because a child does not necessarily have the same constitutional rights as an adult under our federal constitution, [redacted] case presents an unusual situation. Initially [redacted] was seventeen (17) years old when placed in the legal custody of DFYS. [redacted] turned eighteen (18) years of age while in state custody. Though for a time she remained in the legal custody of DFYS,[8] [redacted] has recently been released from DFYS' legal custody.[9] Because [redacted] turned eighteen (18) years old while in DFYS custody, she believes she is entitled to the full protection of our federal constitutional rights.

The United States Supreme Court has determined that the state's invasion of a person's privacy can only be allowed when necessary to further a compelling state interest and that the government's regulation must not sweep to broadly. Griswold, 381

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[8] See AS 47.10.080(c), which allows persons to remain in the legal custody of DFYS up to age nineteen.

[9] [redacted] was released from the legal custody of DFYS by order of the Honorable Victor D. Carlson, Judge of the Superior Court, on November 16, 1988. Though releasing [redacted] from the custody of DFYS, the Superior Court has continued the appointment of the Office of Public Advocacy as counsel for [redacted] for purposes of this appeal.

U.S. at 485, 85 S. Ct. at 1682, 14 L. Ed. 2d at 516; Roe v. Wade, 410 U.S. 113, 115, 93 S. Ct. 705, 728, 35 L. Ed. 2d 147, 178 (1973). In the instant case [redacted] federal constitutional right of privacy has been violated because the state refuses to follow the procedures set forth in AS 47.10.090(a) i.e., requesting court approval prior to the release of [redacted] DFYS records to the D.A.'s office.

IV. THE TRIAL COURT ERRED IN HOLDING THAT DFYS' POLICY OF RELEASING [redacted] DFYS RECORDS TO THE D.A.'S OFFICE, WITHOUT PRIOR NOTICE OR COURT APPROVAL, DID NOT VIOLATE [redacted] PSYCHOTHERAPIST-PATIENT PRIVILEGE, A.R.E. 504

Alaska Rule of Evidence 504(a)(3) & (4) state:

> (3) A psychotherapist is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (B) a person licensed or certified as a psychologist or psychological examiner under the laws of any state or nation or reasonably believed by the patient to so be, while similarly engaged. (Emphasis added.)
>
> (4) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonable necessary for the transmission of the communication, or persons who are

participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

Alaska Rule of Evidence 504(b) and (d)(7) State:

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional conditions, including alcohol or drug addiction, among himself, his physician or psychotherapist, or persons who are participating in the diagnosis or

Alaska Rule of Evidence (d)(7) states:
(d) Exceptions. There is no privilege under this rule: (7) Criminal Proceeding. For physician-patient communications in a criminal proceeding. This exception does not apply to the psychotherapist-patient privilege. (Emphasis added.)

[redacted] was referred to therapy with Gary Lichtenstein, MSW, ACSW, Alaska Psychosocial Services by her DFYS social worker while in the legal custody of DFYS. Though Mr. Lichtenstein is not a physician nor a psychologist, [redacted] contends that her therapy should be protected, pursuant to A.R.E. 504, because she reasonably believed Mr. Lichtenstein to be a psychotherapist. [redacted] reliance on Mr. Lichtenstein being a psychotherapist is analogous to the facts presented in Allred v. State 554, P.2d 411 (Alaska 1976). Allred asserted that his contact with a

psychiatric social worker was in essence a "poor man's psychiatrist" and that there was no justified reason for limiting the psychotherapist-patient privilege from protecting such a relationship. Id. at 411. Because Allred could have reasonably believed the psychiatric social worker would be his counselor, the court determined, in this instance, Allred's communications should be protected by the psychotherapist-patient privilege. Id. at 419-422.

In [redacted] case she was referred and required to go to therapy as part of the CINA proceeding. If ever a person had a reasonable expectation that their therapy would be protected by the psychotherapist-patient privilege, it should be here. [redacted] therapy was completely arranged by DFYS to provide [redacted] treatment for the abuse she had experienced while in [redacted] custody. [redacted] realized her therapy was to be arranged and coordinated between her therapist and social worker for the CINA proceeding but was not informed her records could be released for other purposes.

The psychotherapist-patient privilege belongs to [redacted] not DFYS or the Department of Law, and may not be waived by the social worker or attorneys with the Department of Law. A.R.E. 510. See Fox v. State, 685

P.2d 1267, 1273 n. 8 (Alaska App. 1984); Spencer v. State, 642 P.2d 1371, 1376 and n. 3 (Alaska App. 1982). If the court determines that [redacted] DFYS records are not protected from disclosure pursuant to AS 47.10.090(a), then [redacted] psychotherapist-patient privilege prohibits the release of these records. A minor's privilege under A.R.E. 504, while not applying to CINA 47 proceedings, is not waived to situations outside CINA cases. Wetherhorn, 683 P.2d at 275-76. This court should strictly and literally apply [redacted] privilege in the present case and require DFYS to provide notice and obtain court approval prior to the release of [redacted] DFYS records to the D.A.'s office. Id. at 280 n 12.

V. THE DEPARTMENT OF LAW'S CIVIL AND CRIMINAL DIVISIONS ARE SEPARATE AND DISTINCT FOR PURPOSES OF AS. 47.10.090(a)

The trial court's memorandum of decision found that because the assistant attorneys general and assistant district attorneys are part of a single Department and since the assistant attorneys general and infrequently the assistant district attorneys represent DFYS in CINA proceedings, DFYS could release [redacted] DFYS records to the D.A.'s office without prior

notice or court approval. (R. 56-58) The trial court rejected [redacted] reliance on In re Walton, 676 P.2d 1078, (Alaska 1983), appeal dism., 469 U.S. 801 (1984) for the proposition that the entire Department of Law should not be considered a single law office. (R. 58) [redacted] believes the trial court's decision is incorrect and that the court should find that [redacted] DFYS records should not have been provided to the D.A.'s office without prior notice and court approval.

[redacted] knows of no barrier preventing DFYS from solely producing confidential records to the civil division of the Department of Law. Arguendo, the existence of the disputed Department of Law policy,[10] means that it is not only possible to keep DFYS records solely with the civil division of the Department of Law, but that this is already occurring. [redacted] position is analogous to the Alaska Court of Appeals interpretation of AS 47.17.020(c). In Wetherhorn that court found that where local conditions prevent a report of abuse to DFYS, local law enforcement agencies, who receive the reports of abuse, are acting

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[10] Op. cit footnote 3 at P. 13

as the temporary agents of DFYS for instituting civil CINA proceedings Wetherhorn, 683 P.2d at 279.

The state has asserted that the policies and regulations promulgated by the Department of Law and DFYS,[11] allowing for the production of [redacted] DFYS records to the D.A.'s office, are supported by AS 47.17.040(b). [redacted] believes the state's reliance on this statute is misplaced and equally incorrect. As 47.17.040(b) states in pertinent part "...in accordance with department regulations, investigation reports may be used by appropriate government agencies with child-protection functions, inside and outside Alaska, in connection with investigations or judicial proceedings involving child abuse, neglect or custody." (Emphasis added.) The state's reliance on said statute is misplaced in light of the Alaska Court of Appeals holding that "judicial proceedings", refer to child protective proceedings by DFYS which are civil proceedings, not criminal. Wetherhorn, 683 P.2d at 278-280.

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[11]The state has set forth in their pleadings in the trial court numerous regulations they believe supercede that expressed language of 47.10.090(a). (R. 40-46).

This court has previously established that the Department of Law, as now organized in civil and criminal divisions is not a single law firm for conflict of interest purposes. Walton 676 P.2d, at 1084. [redacted] believes that the Walton decision is applicable to the issues presented by [redacted] herein. [redacted] believes that in light of her constitutional and statutory rights, that the trial court's denial of her motion for a protective order is incorrect and should be reversed.

VI. REMEDY

[redacted] is not seeking to foreclose under all circumstances the release of her DFYS records to the D.A.'s office. Rather, [redacted] believes that after proper notice and court review there may be appropriate reasons and circumstances which could allow the release of all or part of [redacted] DFYS records to the D.A.'s office. The proper procedure for resolving a request to release DFYS records should be for the court, prior to the release of the DFYS records, being apprised of the particular necessity for the release of the DFYS records and the unavailability of this information through non-privileged sources: See: In re J.R., 499 A.2d 1155 (VT. 1985). Before allowing the release of her DFYS records, the court should allow [redacted] to

respond to the state's request for the release DFYS records. [redacted] advocates, that the court next conduct a cautious in camera screening of the records to determine if the release of said records, pursuant to AS 47.10.090(a), would be to persons with a 'legitimate interest' in them. The court, in its review of the DFYS records, should ensure the redaction of the records to excerpt all information which should remain privileged. The court should also impose any additional safeguards deemed necessary to protect [redacted] privacy and the integrity of the juvenile system. See: Matter of Pet. for Cert Rec. of Mcleod Cty., 352 N.W. 22 24 (Minn. App. 1984); Howell v. New York City Human Res. Admin., 467 N.Y. 3.2d 359 (A.D. I Dept. 1983).

CONCLUSION

This court should reverse the Superior Court's order denying [redacted] motion for a protective order regarding the release of her DFYS records.

DATED at Anchorage, Alaska this 25th day of November, 1988.

OFFICE OF PUBLIC ADVOCACY

BRANT McGEE
PUBLIC ADVOCATE

By: Philip J. McCarthy, Jr.
PHILIP J. McCARTHY, JR.
DEPUTY PUBLIC ADVOCATE

MEMORANDUM

State of Alaska
Department of Law

TO: Peter Froehlich
A.G.'s Office
Juneau

DATE: August 12, 1988

FILE NO.:

TEL. NO.: 276-3550

SUBJECT: Changes to AS 47.10.090
Records of children's court

FROM: Pat Kennedy
Assistant Attorney General
Anchorage

For some years now the records section of AS 47.10, which contains a flat prohibition on the "release" of any information kept on a minor by any state, federal or municipal agency in the performance of its duty without a court order has been broken more than it has been followed. We have developed a number of protocols which allow for the exchange of information among agencies. DHSS has promulgated regulations which allow for the release of information in certain circumstances. The regulations allow for the sharing of information with treatment agencies, the police, native groups, the military, foster homes and licensed facilities. DHSS has an agreement with certain school districts which allow for the sharing of information. Yet every time a question comes up about a release of information we reinvent the wheel. The number of opinions about "confidentiality" and the number of problems concerning "confidentiality" are endless and time-consuming for us and our clients.

Recently the issue has come up again pertaining to the possible institution of a case management system for serious habitual juvenile offenders and in the requirements under PL 96-272 for continual review by boards which have to include a neutral party of children in care. In Anchorage we have started a program of early placement review -using citizen panels. Licensing has problems getting information on children in licensed care facilities so they can check on programs and possible abuses.

I have spoken to Yvonne Chase and Martha Holmberg from DFYS Central Office, Pam Montgomery and Jay McCarthy from OPA, Scott Taylor and Cammy Oechsli from the PDs office, the Anchorage Human Services Section, APD, various school district personnel, and Bill Hitchcock, standing master for children's court. They are all in agreement that the statute is outdated and unworkable. There is some trepidation that if we just continue to ignore it things can go on as they have for a while, but if we "fix" it it

might get worse. However, they are all willing to agree to support an attempt to try and fix it. It is possible that there might be some limited opposition from OPA and the PD central administration because of their defense of delinquents and parents who are abusers.

The only other option I can see is to try to get a standing order from the Supreme Court to release certain information in all cases. That might be the next attempt if this goes nowhere.

There should be no fiscal impact other than a negative one - that is it should save staff time, court time and paperwork.

I have not had time to research other state laws.

The only legislator I have spoken to (through his aide) is my own - Rick Halford. His aide thought he would be supportive, particularly if it were tied to a serious habitual offender project. I do not know of anyone right off hand who would object.

I hope the above information fits Bob Evans' memo. If you need further information, please let me know. I have attached for your information a rough draft of the kind of additions I am looking for. I have included most of the current law, and expanded what can be shared and with whom. In addition, I have stretched the confidentiality requirement to cover parents and other parties with whom we have traditionally had serious problems concerning the public release of information. That language is taken from Child in Need of Aid Rule 22.

Thank you for your consideration.

EPK/sd

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

REPLY TO

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January 17, 1989

The Honorable Rick Halford
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Dear Senator Halford:

On Thursday, January 12, 1989, I talked to Teresa Maser of your staff about amendments that the Criminal Division of the Department of Law believes should be made to SB78. The intent of the amendments is to ensure that the information needs of the Departments of Law and Public Safety are protected. In addition, we would suggest that the penalty for release of information be reduced from a misdemeanor to a violation.

The specific amendments we believe to be necessary are:

1. Insert the words, "but excluding those relating to offenses listed in AS 47.10.010(b)" after AS 28.15.185: "All information and social records pertaining to a minor and prepared by an employee of the court or by a federal, state, or municipal agency or an agent, contractee, or licensee of a federal, state or municipal agency, in the discharge of official duties, including those relating to driver's license action under AS 28.15.185 <u>but excluding those relating to offenses listed in AS 47.10.010(b)</u>, are privileged and may not be disclosed directly or indirectly to anyone without the court's permission."

Under AS 47.10.010(b), traffic and certain other offenses are excluded from the confidentiality provisions of Title 47. In order for the exclusion to continue in effect, SB78 must be amended.

2. Replace the word "is" with "shall be" on page 2, line 6: "A need for information for a legitimate purpose <u>shall be</u> [IS] presumed in the following circumstance:"

The purpose of this amendment is to clarify that the presumption is mandatory. Using "is" gives rise to a number of questions, such as, how a determination is made of the circumstances under which the presumption applies, and who makes the determination.

3. Insert the words "by or" on page 2, line 17: "(6)

furthering prosecution of crimes committed by or against a minor;"

Although subsection (5) allows for information to be released to further the investigation of crimes committed by a minor, the bill presently does not allow for a similar release of information to further the prosecution of such crimes. Since this information would be of critical importance in cases, for example, where the state is evaluating whether to seek waiver of juvenile jurisdiction to try a minor in adult court, it is important that the statute be amended.

4. Add an additional subsection to AS 47.10.090(b) as follows: "(10) giving or obtaining information for purposes of fingerprinting under AS 47.10.097."

Last session, the Legislature added a section to Title 47 that allowed law enforcement officers to "fingerprint a minor who is 16 years of age or older for reference to or entry into the Alaska automated fingerprint system without a court order when the minor is convicted of, or adjudicated a delinquent for, an offense that is a felony." However, the statute failed to address how a law enforcement officer would know whether a minor had been convicted of a felony. The Department of Public Safety has been unable to implement this law because they have not been able to gain access to confidential juvenile conviction records. The proposed amendment would correct this problem, and allow felony conviction records of minors over the age of 16 to be released to law enforcement officers.

5. Insert the words "shall enter a written order that sets out the specific portions of the record that is released, and" after the word "court" on page 2, line 29: "In releasing the material, the court shall enter a written order that sets out the specific portions of the record that is released, and may issue protective orders that are necessary to balance the child's right to privacy against the defendant's constitutional rights.

The files of records and information relating to a juvenile may be voluminous. As a precautionary measure, and in order both to avoid the inadvertent release of sensitive information, and to protect the privacy rights of juvenile records, the court should set out with specificity the records that are released to a criminal defendant.

6. Insert the words "or to the prosecution, and shall provide copies to the parties" on page 2, line 29: "The court shall release material that is relevant to the defense, or to the prosecution, and shall provide copies to the parties."

As currently drafted, the bill arguably allows confidential records to be released to a criminal defendant and not

to the prosecution. The proposed amendment clarifies that such materials are to be released to both parties in a criminal case.

7. Change the language of the last sentence of subsection (d) on page 3, lines 13-15 as follows: "Prior [FELONY] convictions, or adjudications, for felony offenses of the juvenile shall be released for purposes of determining the length of a presumptive sentence under AS 12.55.155.

The amendment is necessary since juvenile court convictions are often referred to as adjudications.

8. Change the language of subsection (e) on page 3 as follows: "(e) The name or picture of a minor under the jurisdiction of the court may not be made public in connection with the minor's status as a delinquent child or a child in need of aid unless authorized by order of the court, except that the name of a minor who is convicted of, or adjudicated a delinquent for, a second felony offense [FOUND FOR THE SECOND TIME TO HAVE VIOLATED A LAW, WHICH IF VIOLATED BY AN ADULT WOULD BE A FELONY], shall be made public unless the court, for good cause, in certain individual cases, enters an order prohibiting the disclosure."

As currently drafted, the bill arguably allows for disclosure of the name of an offender who has committed the same crime twice, and not the name of an offender who has committed a different crime for the second time. Thus, if a minor had committed the crime of first degree sexual assault and later committed the crime of manslaughter, the minor's name could not be released. On the other hand, if the minor had committed the crime of burglary twice, the minor's name could be disclosed. The proposed amendment clarifies that conviction for any two felony offenses potentially triggers disclosure of the minor's name.

9. Change the penalty provision in subsection (f) on page 3 from a misdemeanor to a violation: "A person who violates a provision of this section is guilty of a violation [MISDEMEANOR], and upon conviction is punishable by a fine of not more than $500 [OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BY BOTH]."

The current penalty does not fall within the class of criminal penalties defined in Title 12, but rather is a hybrid. The penalty should conform to Title 12, and should be classified as either a violation, a class A misdemeanor, or a class B misdemeanor. For the reasons stated below, we would recommend that the penalty be a violation.

Although it is appropriate to penalize a person who releases confidential records in violation of the statute, and misdemeanor penalties are provided under present law for this type of behavior, neither the Department of Law nor the rest of the

criminal justice system have the resources to pursue such cases as misdemeanors. By reducing the penalty from a misdemeanor to a violation, the need for a jury trial and court-appointed counsel for persons illegally releasing records is eliminated, and the likelihood that such cases will be prosecuted is increased.

I very much appreciate your consideration of the Department of Law's requested amendments. If I can answer any questions, or provide you with any additional back-up materials, please do not hesitate to contact me immediately.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

cc: Gayle Horetski, Deputy Commissioner
Department of Public Safety

Bob Evans

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907-465-3800

M E M O R A N D U M January 14, 1989

SUBJECT: Sectional Analysis of SB 78
(Work Order No. 6-0419A)

TO: Senator Rick Halford

FROM: Terri Lauterbach
Legislative Counsel

The following is a sectional analysis of SB 78, a bill which, in general, clarifies under what circumstances and with whom court records on juveniles may be released or shared.

AS 47.10.090(a). The new language in this subsection consists of "are not public records" on line 11 and all the language found on lines 13 - 20. The new language on lines 13 - 20 allows access to records by parties and their attorneys or guardians, foster care review boards, and other persons as authorized by statute or court order. Persons with access must maintain the confidentiality of the information.

AS 47.10.090(b). The new language in this subsection includes the reference in lines 23 - 24 to "agent, contractee, or licensee of a federal, state, or municipal agency." This clarifies that these groups may also have access to information about minors if they are acting on behalf of the federal, state, or municipal government. New language in this section also starts in the middle of line 27 and continues on to the end of the subsection. This language specifies when a contractee may share information with another contractee without a court order. The new language includes a list of circumstances under which a legitimate purpose for the information can be presumed.

AS 47.10.090(c). This subsection is all new language. It pertains to the particular situation of a discovery request by a criminal defendant for the records of a child victim in

abuse cases. Records would be released to the court, which would decide which ones to release to the defendant.

AS 47.10.090(d). This subsection does not include two phrases that are found in present law. On page 3, line 7, where there is a reference to the court's "official records," present law also refers to "information and social records." On page 3, line 12, present law restricts the "use" of the records to "an officer of the court" in making a presentencing report. The last sentence of this subsection is also new language. This sentence clarifies that prior felony convictions of a juvenile will be released for purposes of determining the length of a presumptive sentence.

AS 47.10.090(e). The only new language in this subsection is the last sentence. It allows for expedited hearings in situations of escape of a minor in order to determine if the minor's name or picture should be disclosed.

AS 47.10.090(f). There is no new language in this subsection.

I hope you find this description of the bill helpful. If I can be of further assistance, please let me know.

TL:lmb
L6/148

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907·465·3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 20, 1989

SUBJECT: Comparison of SB 78 to CSSB 78(Judiciary)
(Work Order No. 6-0419)

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Terri Lauterbach Terri
Legislative Counsel

You have asked for a comparison between SB 78 and CSSB 78(Judiciary), noting the changes made by the CS.

AS 47.10.090(a). In this subsection, the phrase "Duly constituted" has been added on page 1, line 14, and the phrase "or use" has been added on page 1, line 19.

AS 47.10.090(b). In this subsection, the phrase "but excluding those relating to offenses listed in AS 47.10.010(b)" has been added on page 1, lines 26 - 27; paragraph (5) has been added on page 2, lines 17 - 18; paragraph (6) on page 2 has been changed so that records may be exchanged that are helpful in both the prosecution and investigation of crimes committed both by and against a minor; and "protocol" on page 2, line 25, has been limited to "state agency protocol."

AS 47.10.090(c). In this subsection, the sentence that begins on page 3, line 1, has been clarified so that relevant material may be released to both the defense and the prosecution. Also, the court is required to enter a written order that sets out the specific portions of the record that are released; this requirement was not in the original bill.

AS 47.010.090(d). The last sentence of this subsection has been rewritten to clarify that adjudications of delinquency for acts that would have been felonies if committed by an

adult will be released for purposes of presumptive sentencing.

AS 47.10.090(e). Page 3, lines 25 - 28, have been rewritten to clarify that adjudications of delinquency are covered and that there need only be two offenses, not two violations of the same law.

AS 47.10.090(f). The penalty in this subsection has been changed from a misdemeanor to a violation, punishable only by a fine with no imprisonment.

TL:gc
WKG6/014

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPT. OF HEALTH AND SOCIAL SERVICES

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DIVISION OF FAMILY AND YOUTH SERVICES

January 19, 1989

The Honorable Rick Halford
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Dear Senator Halford:

Enclosed are this Division's recommendations on SB 78. A Division of Family and Youth Services staff person, Frank Barthel, has also contacted Teresa Maser and verbally given her these recommendations to assure that you had them prior to the first committee hearing.

Recommendations:
Section 1, page 1, line 14 specifies that "foster care review boards doing reviews under 42 U.S.C. 671-675" have access to court files without court orders. In order to be more precise, the bill should read "duly constituted review boards doing reviews under P.L. 96.272." This would help avoid a group of persons proclaiming to be a review board and hence eligible to obtain juvenile records.

On page 1, line 18, the words and use should be placed after the words "access" and before the word "may". The court should not only have some control over the access but should also be able to review and control the use of the minor's records.

A further restriction should be added to page 1, line 21. After the word "minor", the words under the jurisdiction of the court should be added. In AS 47.10.090(a), it is only the records brought to the court that are under consideration. Section (b) of AS 47.10.090 is too broad and as stated could include any record of a minor prepared by the agencies listed.

To be consistent with the language in Section 1, page 1, line 21, the words "pertaining to a minor under jurisdiction of the court" should be added to Section 1, page 1, line 28 between the words "information" and "without".

The language on page 2, line 16 should read:

> (6) furthering prosecution of crimes committed by or against a minor; This change would be consistent with the language of (5) which allows sharing information to "further investigation of crimes by or against a minor".

The Division has a concern about the use of the word "protocol" on page 2, line 23. The term is not defined in the bill nor in AS 47.10. The intent of the bill seems to be to allow sharing of information to further the purposes under such agreements as the Statewide Child Sexual Abuse Protocols. The Division believes that is covered under other "legitimate purposes", specified in the same subsection. The Division suggests removing the word protocol from the bill to avoid the broad effect its inclusion may have.

Another suggestion concerns the language on page 3, line 14 relating to release of "prior felony convictions of the juvenile . . . for the purposes of determining the length of a presumptive sentence". This language is incorrect.

The language which should be used is contained in AS 12.55.125(c)(19). A "defendant's prior criminal record" which "includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult" must be considered as an aggravating factor by the court in imposing sentence under the criminal code. It does not serve as a "prior conviction" for the purpose of enhancing sentences under AS 12.55.125 as the language in SB 78 suggests. In fact, juvenile delinquency adjudications are specifically not considered convictions by statutory definition [AS47.10.080(g)]. Therefore, the language should read: "Prior [felony] convictions, or adjudications as a delinquent for conduct that would have been a felony if committed by an adult shall be released for purposes of determining the length of a presumptive sentence under AS 12.55.155."

The Division appreciates the opportunity to comment and should you need additional input from the Department, please contact us.

Sincerely,

Yvonne M. Chase, ACSW
Director

YMC/FB/skb
Enclosure
cc: Elizabeth Shaw
Assistant Attorney General
Juneau
Laurie H. Otto
Assistant Attorney General
Criminal Division
Juneau

Sec. 47.10.084. Legal custody, guardianship, and residual parental rights and responsibilities.

NOTES TO DECISIONS

The phrase "reasonable visitation" in subsection (c) does not imply an absolute right to visitation; this section should be read in conjunction with the rest of the chapter to allow parental visits to be barred when the visits are not in the best interests of the child. K.T.E. v. State, Sup. Ct. Op. No. 2877 (File No. S-50), 689 P.2d 472 (1984).

The following procedures should be followed when visitation rights are denied prior to the termination of parental rights: first, the Department of Health and Social Services, Division of Family and Youth Services should have primary authority to set visitation based on the best interests of the child, since the division is in the best position to make this decision in the first instance; and secondly, either the guardian ad litem or the parents should be entitled to request an expedited evidentiary hearing of a denial of visitation, which would consist of an independent determination by the superior court that clear and convincing evidence showed that the child's best interests were served by disallowing parental visitations. K.T.E. v. State, Sup. Ct. Op. No. 2877 (File No. S-50), 689 P.2d 472 (1984).

De facto determination of natural parent's visitation rights. — Where the Department of Health and Social Services decided to allow minor children, who had been adjudicated as children in need of aid, to move from Alaska to Alabama with their foster care family, the state's action constituted a de facto termination of a natural parent's visitation rights; the natural father was unemployed and virtually penniless, the state would not provide airfare so that the father could visit his children on a regular basis, and the father would be limited to phone "visits" because of his lack of funds. D.H. v. State, Sup. Ct. Op. No. 3104 (File No. S-1451), P.2d (1986).

Standard of review of state action constituting de facto termination of natural parent's right of reasonable visitation. — The appropriate standard of review for state decisions which essentially terminate a natural parent's right of reasonable visitation under subsection (c) is an independent determination of whether the state has proved by clear and convincing evidence that termination of parental visitation is in the child's best interest. D.H. v. State, Sup. Ct. Op. No. 3104 (File No. S-1451), P.2d (1986).

Applied in In re B.L.J., Sup. Ct. Op. No. 3039 (File No. S-648), 717 P.2d 376 (1986).

Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.090. Records. (a) The court shall make and keep records of all cases brought before it. The court's official records may be inspected only with the court's permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared by an employee of the court or by a federal, state or city agency in the discharge of the employee's or agency's official duty, including traffic offenses and driver's license action under AS 28.15.185, are privileged and may not be disclosed directly or indirectly to anyone without the court's permission. However, a state or city law-enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with making a preliminary investigation for the information of the court. The court shall forward a record of adjudication of a violation of an offense listed in AS 28.15.185(a) to the Department of Public Safety, if the court imposes a license revocation under AS

28.15.185. Within 30 days of the date of a minor's 18th birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all driver's license proceedings under AS 28.15.185, criminal proceedings against the minor and punishments assessed against the minor except for traffic offenses. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

(b) The name or picture of a minor under the jurisdiction of the court may not be made public in connection with the minor's status as a delinquent child or a child in need of aid unless authorized by order of the court, except that the name of a minor who is found for the second time to have violated a law, which if committed by an adult would be a felony, shall be made public unless the court, for good cause, in certain individual cases, enters an order prohibiting the disclosure.

(c) A person who violates a provision of this section is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $500 or by imprisonment for not more than one year, or by both. (§ 10(3)(4) art I ch 145 SLA 1957; am § 1 ch 124 SLA 1972; am § 1 ch 90 SLA 1975; am § 20 ch 63 SLA 1977; am § 4 ch 130 SLA 1988)

Effect of amendments. — The 1988 amendment, effective September 1, 1988, in subsection (a), inserted "including traffic offenses and driver's license action under AS 28.15.185" in the third sentence and "driver's license proceedings under AS 28.15.185" in the next-to-last sentence, and inserted the fifth sentence.

Sec. 47.10.097. Fingerprinting of minors. (a) Except as provided in (b) of this section, a minor in the custody of the department or of a law enforcement agency may not be fingerprinted for reference to or entry into the Alaska automated fingerprint system without a court order upon good cause shown.

(b) A law enforcement officer may fingerprint a minor who is 16 years of age or older for reference to or entry into the Alaska automated fingerprint system without a court order when the minor is convicted of, or adjudicated a delinquent for, an offense that is a felony.

(c) Fingerprint records under this section are not subject to AS 47.10.090. (§ 3 ch 121 SLA 1988)

CHAPTER 36. CONFIDENTIALITY OF CLIENT RECORDS

7 AAC 36.010. SCOPE. This chapter applies to the use or disclosure of information concerning applicants and recipients of services from the division of family and youth services. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.020. INFORMATION TO BE SAFEGUARDED. Information to be safeguarded by the division includes the following:

(1) names and addresses of applicants and recipients of services from the division;

(2) information contained in applications, reports of investigations, evaluations, medical examinations, correspondence and court reports, and other information concerning the condition or circumstances of any person from whom information is obtained, whether or not this information is recorded;

(3) division evaluation of and action taken on the information; and

(4) the identity of any person who reports child abuse or neglect. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.030. PROHIBITIONS AGAINST DISCLOSURE OF INFORMATION. (a) The division shall limit the use of all safeguarded information to purposes directly connected with the administration of family and youth services programs.

(b) The division may not disclose any safeguarded information obtained by a representative, agent, volunteer, or employee of the division in the course of discharging the duties of the division to anyone outside of the department, other than in the administration of the family and youth services programs and as provided in this chapter. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.040. AUTHORIZATION FOR DISCLOSURE OF INFORMATION. The department has exclusive control and custody of the information collected by the division. Any request for disclosure of information not covered by this chapter, or requiring a special determination, should be addressed to the director of the division of family and youth services. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.050. DISCLOSURE OF INFORMATION AT CLIENT'S REQUEST. (a) Upon receipt of written authorization from an adult client, the division shall disclose the requested information concerning the adult to the adult or the adult's designee.

(b) Upon receipt of written authorization from

(1) a child client, the division shall disclose the requested information concerning the child to the child or the child's designee, except that the child may not authorize disclosure of information acquired while the child was the subject of a child-in-need-of-aid or delinquency petition or was a ward of the state;

(2) the parent, guardian, or custodian of a child client of the division, the division shall disclose requested information concerning that child to the parent's, guardian's or custodian's designee, except that

(A) the parent, guardian, or custodian may not authorize disclosure of information acquired while the child was the subject of a child-in-need-of-aid or delinquency petition or was a ward of the state, and

(B) the parent, guardian, or custodian may not, over the objections of the child, authorize disclosure of information which infringes on the right of privacy of the child. Eff. 5/15/83, Register 86)

Authority: AS 09.25.120 AS 47.05.010
AS 25.20.120 AS 47.10.080(f)
AS 47.05.010 AS 47.10.090
AS 47.05.015 AS 47.17.010
AS 47.05.020 AS 47.35.060
AS 47.05.030

7 AAC 36.060. DISCLOSURE OF INFORMATION TO A PARENT OF A CHILD. (a) The division shall disclose information concerning a child client receiving services, acquired while the child was the subject of a child-in-need-of-aid or delinquency petition or was a ward of the state, to the parent or guardian upon the parent's request only

(1) when the information has been procured as part of a court-ordered evaluation program;

(2) when the information is necessary to the parent for the parent's participation in court-ordered treatment, if the right of privacy of the child is not infringed;

(3) when the information is necessary to allow the parent to exercise residual parental rights, as provided under AS 47.10.084(c); or

(4) when the court has ordered that the information be disclosed.

(b) The division shall disclose information concerning a child client receiving services, acquired while the child was not the subject of a child-in-need-of-aid or delinquency petition and was not a ward of the state, to the parent, upon the request of the parent, if the right of privacy of the child is not infringed. (Eff. 5/15/83, Register 86)

Authority: AS 09.25.120 AS 47.05.040
AS 25.20.120 AS 47.10.080(f)
AS 47.05.010 AS 47.10.081(c)
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.070. DISCLOSURE OF INFORMATION TO GUARDIAN AD LITEM. When a recipient of or applicant for services is the subject of a court proceeding in which a guardian ad litem is appointed for that client, the division may release information concerning the client to the client's guardian ad litem. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.10.050
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.030(e)
AS 47.05.030 AS 47.17.010
AS 47.05.040

7 AAC 36.080. DISCLOSURE OF INFORMATION TO ACQUIRE CONSULTATION OR SERVICES FOR A CLIENT. (a) When the division requests consultation or services for an adult client,

the division may disclose information to the agency or person asked to provide that consultation or service only upon authorization from the adult client.

(b) When the division requests consultation or services for a child client who is committed to the care of the department or is a ward of the state, the division may disclose the information concerning the child client as is necessary to acquire the provision of consultation or services.

(c) When the division requests services for a child client who is not committed to the care of the department and is not a ward of the state, the division shall disclose information only upon authorization of the child, or the child's parent, guardian, or custodian.

(d) The division shall require the recipient of safeguarded information to maintain confidentiality standards comparable to those in this chapter as to information disclosed. (Eff. 5/15/83, Register 86)

Authority: AS 25.20.120 AS 47.10.080(f)
AS 47.05.010 AS 47.10.090
AS 47.05.015 AS 47.10.230
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060
AS 47.05.040

7 AAC 36.090. DISCLOSURE TO PERSON IN DANGER. When an employee of the division learns of a threat by a client to the physical safety of another person, and it appears possible that such a threat might be carried out, the employee shall give notice to that person or a law enforcement officer as soon as possible, and in a way that will cause the least damage to the client's confidentiality. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.100. DISCLOSURE TO CRIMINAL JUSTICE OFFICIALS. (a) The division may not disclose safeguarded information, in the absence of a court order, to federal, state, or local law enforcement officers, or other criminal justice officials unless that information will be used for purposes directly connected with the administration of family and youth services programs. Included in those purposes may be requests for assistance from law enforcement officers in obtaining physical custody of a child, requests for assistance in investigation of harm to an adult or child, and requests for assistance where disclosure is necessary to protect the safety of the client or the public.

(b) When a court order is issued directing the division to disclose information not otherwise disclosable under this chapter to a law en-

forcement or criminal justice agency, the division shall apprise the court of the statutes and regulations concerning confidentiality and ask the court to rule on disclosability before disclosing the information. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.010
AS 47.05.030 AS 47.35.060

7 AAC 36.110. DISCLOSURE IN HEARINGS RELATED TO THE OPERATION OF FAMILY AND YOUTH SERVICES PROGRAMS. A division employee may voluntarily appear, and, if required by a court, shall appear, and give testimony in a hearing which is directly related to the operation of family and youth services programs, including the following:

(1) in a children's, mental commitment, guardianship, or conservatorship proceeding, if a recipient of or applicant for services from the division is the subject of the proceeding;

(2) in a child support, custody, or divorce proceeding to testify concerning the minor children involved; or

(3) in a prosecution for fraud against the program or for a criminal act against a child. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.120. DISCLOSURE IN HEARINGS NOT RELATED TO OPERATION OF FAMILY AND YOUTH SERVICES PROGRAMS. No division employee may testify in a hearing not related to the operation of family and youth services programs with respect to any safeguarded information except where

(1) an adult client has authorized the disclosure of the information; or

(2) a court, having been informed of the existence of the statutes and regulations prohibiting disclosure, orders the disclosure. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.130. DISCLOSURE FOR RESEARCH PURPOSES. The division may disclose otherwise nondisclosable information to a person or organization doing research or maintaining health statistics, if the anonymity of the client is assured, and the division recognizes the project as a bona fide research or statistical undertaking. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

7 AAC 36.140. DISCLOSURE TO STATE OFFICIALS AND LEGISLATORS. (a) The division may disclose safeguarded information, including lists of clients, to other branches of state government and to municipalities, which fund programs or services used by division clients, if the disclosure is necessary to ensure continued levels of funding and the recipient of the information has confidentiality standards equivalent to those in this chapter.

(b) The division may disclose safeguarded information to a committee of the state legislature only under the following conditions:

(1) the commissioner has approved the disclosure;

(2) only information necessary to accomplish the purpose of the investigation may be disclosed; and

(3) the committee has standards equivalent to the standards of the division for safeguarding the information revealed and restricting the use of the information to purposes directly connected with the purpose of the committee.

(c) The division may make safeguarded information available to auditors working under the authority of the legislature or state administration, if the auditors have written guidelines for safeguarding the confidentiality of information thus obtained.

(d) The division may make safeguarded information available to the state office of the ombudsman if the office of the ombudsman has regulations for safeguarding the confidentiality of information thus obtained. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.040
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030 AS 47.35.060

Editor's notes. — From the time of the adoption of 7 AAC 36.140 in 1983 until its correction in Register 102 (July 1987), this section jumped from subsection (b) to subsection (d) with no subsection (c) in between. As of Register 102, what was designated (d) became (c) and what was (c) became (d).

7 AAC 36.150. DISCLOSURE OF INFORMATION TO OTHER STATES. The division may disclose to an out-of-state governmental agency with child protection functions information which has a direct bearing on an investigation or judicial proceeding in which the protection of a child from child abuse or neglect or the custody of a child is at issue. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.010
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030

7 AAC 36.900. DEFINITIONS. In this chapter

(1) "child" means a person under 18 years of age, and . . 18 or 19 years of age who is a ward of the state;

(2) "division" means the division of family and youth services in the Department of Health and Social Services;

(3) "department" means the Department of Health and Social Services. (Eff. 5/15/83, Register 86)

Authority: AS 47.05.010 AS 47.05.010
AS 47.05.015 AS 47.10.090
AS 47.05.020 AS 47.17.040
AS 47.05.030

CHAPTER 37. PUBLIC ASSISTANCE

Section
10. Safeguarding information
20. Information to be safeguarded
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40. Authorization for disclosure of information
50. Disclosure to law enforcement officers
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7 AAC 37.010. SAFEGUARDING INFORMATION. The regulations of the Department of Health and Social Services must provide safeguards which restrict the use or disclosure of information concerning applicants for and recipients of public assistance to purposes directly connected with administration of the assistance programs. (In effect before 7/28/59; am 8/15/82, Register 83)

Authority: AS 47.05.010 AS 47.05.030
AS 47.05.020 AS 47.05.040

7 AAC 37.020. INFORMATION TO BE SAFEGUARDED. Information which must be safeguarded includes the following, whether recorded or not:

(1) names and addresses, including lists, of applicants for and recipients of assistance;

(2) information contained in applications, reports of investigations or medical examinations, correspondence, and other records concerning the condition or circumstances of any person from whom, or about whom, information is obtained; and

(3) records of agency evaluations of the information described in this section. (In effect before 7/28/59; am 8/15/82, Register 83)

Authority: AS 47.05.010 AS 47.05.030
AS 47.05.020 AS 47.05.040

7 AAC 37.030. PROHIBITIONS AGAINST DISCLOSURE OF INFORMATION. The use of all public assistance information and records, including all lists of names and addresses, will be limited to purposes directly connected with the administration of public assistance programs. These purposes include establishing eligibility, determining amounts of assistance, and providing services. No disclosure of any information or list, obtained by any representative or employee of the department, in the course of discharging its duties, may be made directly or indirectly, other than in the administration of assistance programs. (In effect before 7/28/59; am 8/15/82, Register 83)

Authority: AS 47.05.010 AS 47.05.030
AS 47.05.020 AS 47.05.040

7 AAC 37.040. AUTHORIZATION FOR DISCLOSURE OF INFORMATION. (a) The commissioner of health and social services has exclusive control and custody of all public assistance information. For purposes of facilitating administration of public assistance programs, the commissioner delegates authority to the eligibility staff of the department to disclose information. Any request for information not clearly covered by this delegation, or requiring a special determination, will be referred to the director of the division of public assistance by the eligibility staff.

(b) All public assistance information procured by or available to division of public assistance staff, both professional and clerical, may be used by staff members only, in accordance with 7 AAC 37. (In effect before 7/28/59; am 8/15/82, Register 83)

Authority: AS 47.05.010 AS 47.05.030
AS 47.05.020 AS 47.05.040

7 AAC 37.050. DISCLOSURE TO LAW ENFORCEMENT OFFICERS. Public assistance information may not be released to federal, state, or local law enforcement officers, including district attorneys, U.S. marshals, or local police officers, without a court order,

Alaska Foster Parents Association

P. O. BOX 140651 ◦ ANCHORAGE, ALASKA 99508

January 13, 1989

Dear Legislators and Friends of Foster Care:

On the next few sheets, you will find the legislative priorities of Alaska Foster Parent Association for this year. There are many -- too many some might say. But the needs of foster children are many and have been neglected for so long; the needs of those who provide volunteer care and treatment for these children are many and have been forgotten for years. When children must live outside their own family homes, it is everyone's responsibiity to insure they get the best care, treatment, and services possible. In order to insure a good resource of quality foster parents, they must be treated with respect, kindness, and have fair and consistent treatment. These items have been identified over the years, and nationally recognized, to insure the best quality care for children in foster care or fair and equitable treatment for those foster parents who care for them.

Please support these issues. If you need or would like further information, packets are available by writing or call Miriam at 745-2196 days or 373-5239 evenings. Please consider introducing legislation on these items--or cosponsoring. **YOU DON'T HAVE TO BE A FOSTER PARENT TO HELP A FOSTER CHILD.** You can help by insuring the best possible laws and services are available.

Thank you for caring.

Sincerely,

Miriam Sumner, President

necessity) from other agency staff functions, definitions of what foster parents can be investigated for, and clear procedures to be followed. This can be accomplished by contracting out investigative functions, licensing, or contracting all foster care with DFYS retaining investigative functions.

CIVIL LIABIITY OF FOSTER PARENTS:

At this time, all liability of foster parents is in question, so legislation is necessary in at least 3 areas:

1. Covering foster parents under the good samaritan laws.
2. Providing immediate reimbursement for damage or theft by a foster child
3. Providing legal assistance (attorney) as needed for foster parents (lawsuits, licensing actions, etc.)

Since foster parents provide such a valuable, yet volunteer service, we must protect their person, reputation belongings, and sanity through limiting their liability.

CONFIDENTIALITY LAW REVISIONS:

At this time, confidenciality laws make it difficult for DFYS to provide the needed full and accurate information about a youth when placing them in foster care. Without this information foster parents may be taking unnecessary or unwarranted risks, have limited information to work from, may cause harm without knowing, and are excluded from decisions, meetings, psychological/therapy information, etc. that is all vital to meeting the treatment needs of youth in foster care.

Legislation is necessary to revise existing laws to allow for information sharing with foster parents.

CHILD/YOUTH OMBUDSMAN:

We believe the creation of an ombudsman specifically related to children would help insure all children and youth receive necessary services and enable all concerned to guarantee the bests interests of that child are met. Specifically, it would be vital that the Child Ombudsman office have the power to intervene in situations with children and youth in out-of-home care, to investigate, and make necessary changes. This office would/could be located under the states Ombudsman Office to reduce costs but the person hired as Ombudsman must have a strong background in chld welfare issues.

Legislation to create the Office of Child/Youth Ombudsman would provide accountability and higher quality of care and services to youth.

FOSTER CARE ADVISORY BOARD:

Please consider legislation to create a volunteer foster care advisory board on local, regional and statewide levels. These boards must have the authority to make and pursue recommendations regarding all facets of foster care

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M January 19, 1989

SUBJECT: CSSB 78 ( )
(Work Order No. 6-0419E)

TO: Senator Rick Halford

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a draft of CSSB 78( ). It includes the changes requested by Teresa Maser and the AG's office, with the following exceptions:

(1) In the first sentence of AS 47.10.090(a), I have added a clarification that this section covers cases "involving minors".

(2) On page 2, in line 8, I have retained the word "is" instead of making the AG's requested change to "shall be." In this context, "shall be" would be an archaic legalism, called a false imperative. Its use, in fact, would create doubt about whether the presumption would be self-executing, the very doubt the AG's office was seeking to avoid. The phrase "shall be" is a future tense implying that there might need to be some intervening action or determination; the word "is" is in the active present tense and declares a legal result that inures without action on anyone's part. Because I understand the committee's intention to be that this presumption be automatic in the listed circumstances, I have retained the word "is." If you do not wish the presumption to be automatic, I would be happy to change the phrase to "shall be" and insert whatever type of determination procedures the committee wishes to have.

(3) On page 2, I have combined the former paragraphs (5) and (6) so that "investigation" and "prosecution" are now covered together in paragraph (6). Since the AG wanted both paragraphs to refer to crimes committed by or against a

minor, there is no longer any reason to have separate paragraphs for "investigation" and "prosecution."

(4) In subsections (d) and (e), I have altered the AG's language about felonies and adjudications of "felony offenses" to the language used to describe those offenses in AS 12.55.155(c)(19). I believe the language achieves the AG's purpose.

In addition to these noted exceptions to requested language, I have one comment. It pertains to the changes requested by the AG for subsection (c). It is unclear to me whether the phrase "to the defense or prosecution" is intended to pertain to the kind of relevancy the released material must have or whether it is intended to describe the persons to whom any relevant material is released. The AG's reasoning seemed to indicate the latter interpretation while the suggested language could be construed the first way. The committee should clarify its intent here.

I hope you find this discussion helpful. If I can be of further assistance, please let me know.

TL:gc:kb
WKG6/004

Enclosure