H B
452

6-0829J
Cook
3/27/90

Original sponsor(s): Rules/Legislative Council

1 IN THE HOUSE BY THE RESOURCES COMMITTEE

2 SENATE CS FOR CS FOR HOUSE BILL NO. 452 (Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the office of the ombudsman and
7 to the powers and duties of the ombudsman."

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

9 * Section 1. AS 24.55.040(b) is amended to read:

10 (b) If the term of an ombudsman expires without the appointment
11 of a successor under this chapter, the incumbent ombudsman may con-
12 tinue in office until a successor is appointed. If the ombudsman
13 dies, resigns, becomes ineligible to serve, or is removed or suspended
14 from office, the person appointed as [DEPUTY OMBUDSMAN BECOMES] acting
15 ombudsman under AS 24.55.070(a) serves until a new ombudsman is ap-
16 pointed for a full term.

17 * Sec. 2. AS 24.55.070(a) is amended to read:

18 (a) The ombudsman shall [MAY] appoint a person to serve as
19 acting [DEPUTY] ombudsman in the absence of the ombudsman. The om-
20 budsman shall also appoint assistants and clerical personnel necessary
21 to carry out the provisions of this chapter.

22 * Sec. 3. AS 24.55.070(b) is amended to read:

23 (b) The ombudsman may delegate to the [DEPUTY OR] assistants any
24 of the ombudsman's duties except those specified in AS 24.55.190 and
25 24.55.200, however, during the ombudsman's absence from the principal
26 business offices, the ombudsman may delegate the duties specified in
27 AS 24.55.190 and 24.55.200 to the acting ombudsman [DEPUTY] for the
28 duration of the absence. The duties specified in AS 24.55.190 and
29 24.55.200 shall be performed by the acting [DEPUTY] ombudsman when

1 serving [AS ACTING OMBUDSMAN] under AS 24.55.040(b).
2 * Sec. 4. AS 24.55.080(a) is repealed and reenacted to read:
3 (a) Subject to restrictions and limitations imposed by the
4 executive director of the Legislative Affairs Agency, the administra-
5 tive facilities and services of the Legislative Affairs Agency, in-
6 cluding computer, data processing, and teleconference facilities, may
7 be made available to the ombudsman to be used in the management of the
8 office of the ombudsman and to carry out the purposes of this chapter.
9 * Sec. 5. AS 24.55.080(c) is amended to read:
10 (c) The ombudsman shall submit a budget for each fiscal year to
11 the Alaska Legislative Council [FINANCE COMMITTEES OF THE LEGISLATURE]
12 and the council shall annually submit an estimated budget to the
13 governor for information purposes in the preparation of the executive
14 budget. After reviewing and approving, with or without modifications,
15 the budget submitted by the ombudsman, the council shall submit the
16 approved budget to the finance committees of the legislature.
17 * Sec. 6. AS 24.55.090 is amended to read:
18 Sec. 24.55.090. PROCEDURE. (a) The ombudsman shall, by regula-
19 tions adopted under the Administrative Procedure Act (AS 44.62),
20 establish procedures for receiving and processing complaints, conduct-
21 ing investigations, [AND] reporting findings, and ensuring that confi-
22 dential information obtained by the ombudsman in the course of an
23 investigation will not be improperly disclosed.
24 (b) The [HOWEVER, THE] ombudsman may not charge fees for the
25 submission or investigation of complaints.
26 * Sec. 7. AS 24.55.130 is amended by adding a new subsection to read:
27 (c) Notice given under this section may be oral but the om-
28 budsman shall state in writing the reasons for not investigating a
29 complaint if requested by the complainant.

1 * Sec. 8. AS 24.55.140 is amended to read:
2 Sec. 24.55.140. NOTICE TO THE AGENCY. If the ombudsman decides
3 to investigate a complaint, the ombudsman shall notify the agency of
4 the intention to investigate unless the ombudsman believes that ad-
5 vance notice will unduly hinder the investigation or make it ineffec-
6 tual. Notice given under this section may be oral or written, at the
7 discretion of the ombudsman.
8 * Sec. 9. AS 24.55.160 is amended to read:
9 Sec. 24.55.160. INVESTIGATION PROCEDURES. (a) In an inves-
10 tigation, the ombudsman may
11 (1) make inquiries and obtain information considered neces-
12 sary;
13 (2) enter without notice to inspect the premises of an
14 agency, but only when agency personnel are present; [AND]
15 (3) hold private hearings; and
16 (4) notwithstanding other provisions of law, have access at
17 all times to records of every state agency, including confidential
18 records, except sealed court records, production of which may only be
19 compelled by subpoena, and except for records of active criminal
20 investigations and records that could lead to the identity of
21 confidential police informants.
22 (b) The ombudsman shall maintain confidentiality with respect to
23 all matters and the identities of the complainants or witnesses coming
24 before the ombudsman except insofar as disclosures may be necessary to
25 enable the ombudsman to carry out duties and to support recommenda-
26 tions. However, the ombudsman may not disclose a confidential record
27 obtained from an agency.
28 * Sec. 10. AS 24.55.170(a) is amended to read:
29 (a) Subject to the privileges that [WHICH] witnesses have in the

1 courts of this state, the ombudsman may compel by subpoena, at a
2 specified time and place the
3 (1) [COMPEL BY SUBPOENA, AT A SPECIFIED TIME AND PLACE,
4 THE] appearance and sworn testimony of a person who the ombudsman
5 reasonably believes may be able to give information relating to a
6 matter under investigation; and
7 (2) production by [COMPEL] a person of a record or object
8 that [, BY SUBPOENA, TO PRODUCE DOCUMENTS, PAPERS, OR OBJECTS WHICH]
9 the ombudsman reasonably believes may relate to the matter under
10 investigation.
11 * Sec. 11. AS 24.55.180 is amended to read:
12 Sec. 24.55.180. CONSULTATION [WITH AGENCY]. Before giving an
13 opinion or recommendation that [WHICH] is critical of an agency or
14 person, the ombudsman shall consult with that agency or person. The
15 ombudsman may make a preliminary opinion or recommendation available
16 to the agency or person for review, but the preliminary opinion or
17 recommendation is confidential and may not be disclosed to the public
18 by the agency or person.
19 * Sec. 12. AS 24.55.190 is amended by adding a new subsection to read:
20 (c) The report provided under (a) of this section is confiden-
21 tial and may not be disclosed to the public by the agency. The om-
22 budsman may disclose the report under AS 24.55.200 only after provid-
23 ing notice that the investigation has been concluded
24 (1) to the agency; and
25 (2) if the investigation was conducted in response to a
26 complaint, to the complainant under AS 24.55.210.
27 * Sec. 13. AS 24.55.310 is amended to read:
28 Sec. 24.55.310. CONFLICT OF INTEREST. The ombudsman, the acting
29 [DEPUTY] ombudsman and their professional staff are subject to AS 39.-

1 50 (conflict of interest).

2 * Sec. 14. AS 24.55.320 is amended to read:

3 Sec. 24.55.320. MUNICIPALITIES AND SCHOOL DISTRICTS. A
4 municipality or school district may [BY ORDINANCE] elect to become
5 subject to the jurisdiction of the ombudsman appointed under this
6 chapter. If a municipality or school district so elects, it shall
7 notify the ombudsman of that election and shall thereafter be con-
8 sidered an agency for the purposes of this chapter. If a municipality
9 or school district subjects itself to the jurisdiction of the ombuds-
10 man, the municipality or school district shall pay its pro rata share
11 of the cost of the operation of the office of the ombudsman based on
12 the number of complaints or the case load emanating from that munic-
13 ipality or school district, as prescribed by the ombudsman. If a
14 municipality or school district elects to remove itself from the
15 jurisdiction of the ombudsman, it [SHALL DO SO BY ORDINANCE,] shall
16 notify the ombudsman of that election and shall not thereafter be
17 considered an agency for the purposes of this chapter. A municipality
18 that elects to become subject to the jurisdiction of the ombudsman or
19 to remove itself from that jurisdiction must do so by ordinance. A
20 school district that elects to become subject to the jurisdiction of
21 the ombudsman or to remove itself from that jurisdiction must do so by
22 resolution.

23 * Sec. 15. AS 24.55.330 is amended by adding a new paragraph to read:

24 (4) "record" means a document, paper, memorandum, book,
25 letter, file, drawing, map, plat, photo, photographic file, motion
26 picture, film, microfilm, microphotograph, exhibit, magnetic or paper
27 tape, punched card, or other item developed or received under law or
28 in connection with the transaction of official business, but does not
29 include an attorney's work product, material that is confidential as a

1 privileged communication between an attorney and client under rules
2 adopted by the supreme court, or confidential oil and gas geological
3 and geophysical data.
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MEMORANDUM

TO: Senator Bettye Fahrenkamp

FROM: Staff jh

DATE: March 21,1990

__SUMMARY OF CHANGES IN SENATE RESOURCES CS HB 452__

Page	Lines	Statute Reference	Summary of Changes
2	9-17	24.55.080(c)	This change was requested by Senator Frank. It brings the Ombudsman's budget under the purview of the Legislative Council for purposes of review and submission to the Finance Committee.
3	26-27	24.55.160(b)	This change was proposed by the Ombudsman, to clarify in statute that confidential information received by the Ombudsman in the course of an investigation may not be disclosed by the Ombudsman.
5	29	through	
6	2	24.55.330	This change was proposed by the Ombudsman as the result of a request by the Public Defender that items that would be considered falling under the attorney-client privilege be excluded from the purview of the Ombudsman.
6	2-3	24.55.330	In order to ensure the highest possible confidentiality of oil and gas geophysical and geological data, this is here excluded from the purview of the Ombudsman.

State of Alaska
Ombudsman
Duncan C. Fowler

Reply to:

- P.O. Box 102636
  Anchorage, AK 99510-2636
  (907) 563-3673
  (800) 478-2624
- P.O. Box WO
  Juneau, AK 99811-3000
  (907) 465-4970
  (800) 478-4970
- P.O. Box 74358
  Fairbanks, AK 99707
  (907) 452-4001
  (800) 478-3257

March 9, 1990

Senator Steve Frank
Senate Finance Committee
Post Office Box V
Juneau, Alaska 99811-3100

RE: CSHB 452(SA)am

Dear Senator Frank:

You asked my opinion about amending the Ombudsman Act to require my budget submission be given to the Legislative Council each year. Current law requires submission be directly to the House and Senate Finance Committees for review. I not only see advantages to your suggestion but support it.

I surveyed other states with legislative ombudsman to learn their practice. Nebraska and Iowa ombudsman do submit their budgets to bodies similar to our council. Hawaii does not have a council but is establishing one in response to recommendations by the National Council on State Legislatures. The Hawaii Ombudsman will have her budget reviewed by the new body.

Personally, I would enjoy the opportunity to work more closely with the legislative leadership. I believe it would benefit both this office and the work of the legislature if more members of the legislature understood and could support the work we do. This has not always been the case.

I would be happy to answer any additional questions you may have regarding the impact of your amendment on our operation. We both know it is important this office remain a nonpartisan and independent agency. This reputation allows our work to be viewed as credible by both the public and those agencies we investigate.

Sincerely,

Duncan C. Fowler
Ombudsman

DCF:pjc

State of Alaska
Ombudsman

Duncan C. Fowler

Reply to:

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  Fairbanks, AK 99707
  (907) 452-4001
  (800) 478-3257

March 26, 1990

Senator Bettye Fahrenkamp, Chairman
Senate Resources Committee
Post Office Box V
Juneau, Alaska 99811-3100

RE: CSHB-452(SA) am,
Proposed Amendments

Dear Senator Fahrenkamp:

During the past two weeks several questions have been raised about a provision in HB 452 intended to guarantee ombudsman access to confidential documents. It is the intent of this legislation to clarify that access issue. It is important that the ombudsman maintain the authority needed to fulfill its responsibility as the legislatures independent investigating agency to review citizen complaints about government. Access to information is a key to that ability.

Over the past 15 years, the issue of ombudsman access to various kinds of information has been challenged many times. In fact, it is the single most common reason Attorney General (AG) opinions have been issued about the ombudsman. It is curious that the agency responsible for providing legal advice to the executive branch is also in the position of determining which documents the legislatures ombudsman may review thru its opinions. But, with few exceptions, AG opinions have supported our access. AG opinions did cause this office to implement tight regulations relating to ombudsman handling of confidential information. This has resulted in access to confidential personnel and child protection files. Currently, two opinions of this nature are pending completion by the AG's office.

Thru out the world, ombudsman offices have been given wide sweeping investigative authority. It has been the intent of their legislative bodies that the ombudsman should be a powerful fact finder but they have typically balanced these powers with two common themes. First although ombudsman offices have subpoena power and access to confidential information and documents, *they may not release the contents of those confidential documents* or information *to those not authorized by law*. Second, although the ombudsman has great investigative power, it may only *recommend* changes to government practices. It can not force an agency to implement those recommendations. A program manager must be convinced that an ombudsman recommendation will improve the fairness or operation of an agency before implementing it. That assures that an over zealous ombudsman could not force an agency to implement an inappropriate or illegal recommendation.

There is always concern that those with access to confidential data can abuse that privilege. Existing state criminal law, AS 11.56.860 (attached), provides for harsh penalties

to a "public servant" who misuses that information *even after leaving their office*. They are liable for a $5,000 fine and 1 year in jail. Additionally, ombudsman staff are exempt employees. Misuse of confidential information would be considered a serious violation of office policy and violations would result in termination. Should the appointed ombudsman violate this law, the legislature has the power in AS 24.55.050 to remove that person from office through a roll call vote for misconduct.

AMENDMENTS

Two AMENDMENTS are offered to further allay concerns about this offices' handling of confidential information. The first is offered to make it clear in the Alaska Ombudsman Act that the ombudsman is not a source for obtaining confidential information it obtained from agencies. This amendment, essentially adds a sentence to AS 24.55.160(b). It would read:

> "(b) The ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before the ombudsman except insofar as disclosures may be necessary to enable the ombudsman to carry out duties and to support recommendations. However, the ombudsman may not disclose a confidential record obtained from an agency."

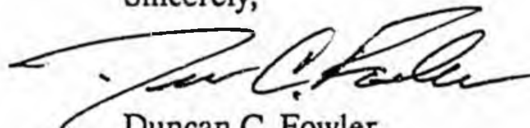
John Salemi, Alaska's Public Defender was concerned the proposed bill would let the ombudsman review materials which could potentially place defense attorneys in violation of the Rules of Court relating to the Lawyer-Client Privilege. We have agreed the following language added to Section 14 of this bill would resolve that problem:

> Page 5 line 14, after the word "product" add "or material privileged under court rule relating to the lawyer-client privilege."

This language would allow defense attorneys such as those in the Public Defender's office or Office of Public Advocacy to protect records they believed were covered under the Alaska Rules of Court. Additionally, in the unlikely event a dispute ever arose regarding a particular file or record, the court could quickly determine if the record met the definition as set out by the Alaska Rules of Court.

I will be calling your office before the meeting in case you have questions about this bill. I am anxious to work with you and the committee to assist the passage of this bill. I would appreciate your support of what I believe to be important improvements to Alaska's Ombudsman Act.

Sincerely,



Duncan C. Fowler
Ombudsman

DCF:pjc
Enclosure

Article 6. Abuse of Public Office.

Section
850. Official misconduct
860. Misuse of confidential information

Collateral references. — 63 Am. Jur. 2d, Public Officers and Employees, §§ 346-359.

67 C.J.S., Officers, §§ 120-126, 255-263.

Infamous crime or one involving moral turpitude constituting disqualification to hold public office, 52 ALR2d 1314.

Official oppression, what constitutes offense of, 83 ALR2d 1007.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest law breaker, 41 ALR3d 700.

Removal of public officer for misconduct during previous term, 42 ALR3d 691.

Validity and construction of statute authorizing grand jury to submit report concerning public servant's noncriminal misconduct, 63 ALR3d 586.

Sexual misconduct or irregularity as amounting to "conduct unbecoming an officer," justifying officer's demotion or removal or suspension from duty, 9 ALR4th 614.

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

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

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

(b) Official misconduct is a class A misdemeanor. (§ 6 ch 166 SLA 1978)

Sec. 11.56.860. Misuse of confidential information. (a) A person who is or has been a public servant commits the crime of misuse of confidential information if the person

(1) learns confidential information through employment as a public servant; and

(2) while in office or after leaving office, uses the confidential information for personal gain or in a manner not connected with the performance of official duties other than by giving sworn testimony or evidence in a legal proceeding in conformity with a court order.

(b) As used in this section, "confidential information" means information which has been classified confidential by law.

(c) Misuse of confidential information is a class A misdemeanor. (§ 6 ch 166 SLA 1978)

Section
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6-0829Hb
Cook

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSHB 452 (SA) am

Page 2, line 29:

Delete "AS 24.55.160(a)"

Insert "AS 24.55.160"

Page 3, line 1, before "(a)":

Insert "Sec. 24.55.160. INVESTIGATION PROCEDURES."

Page 3, after line 12:

Insert

"(b) The ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before the ombudsman except insofar as disclosures may be necessary to enable the ombudsman to carry out duties and to support recommendations. <u>However, the ombudsman may not disclose a confidential record obtained from an agency.</u>"

3/23/90

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSHB 452 (SA) am

Page 5, line 14, after "product":

Insert "or material that is confidential as a privileged communication between an attorney and client under rules adopted by the supreme court"

April 28, 1990

Honorable Bettye Fahrenkamp
Alaska State Legislature
P.O. Box V (MS3100)
Juneau, Alaska 99801

Re; HB 450 Sam Cotten re: easements State Parks
Proposed additional language (d) AS 41.21.020

Dear Senator Fahrenkamp,

Thank you and your committee for your interest in our circumstances and litigation with the State concerning an easement through our Rabbit Creek property located within the boundaries of the Chugach State Park.

It is our understanding that you were shocked to learn that the State would bring such an action against a private citizen. We hasten to assure you that our interest in the proposed addition to the above bill was that of public concern and not a special interest.

The litigation has been in progress now for over a year and a half and is currently pending a trial date. Our costs to defend this clearly unconstitutional attempt to obtain property without compensation has cost us over $100,000 in attorney fees and months of our own full time efforts in research.

We have been made aware that the State intends this to be a test case to determine if the State can acquire property for public use by threat of litigation or in actuality though the courts, by various theories of adverse possession (without compensation).

This is clearly a dangerous precedent for all property owners near, bordering or within State lands. This could apply to large Native holdings as well as the little 5 acre tract that has been in private ownership for 30, 40 or more years!

The State has sued us, under not one, but every known theory of adverse possession to obtain our property except the constitutionally correct method of eminent domain. This "shotgun" approach, to date, has been permitted by the court, requiring us to research back in detail some 30 years of the property history.

This has resulted in an expensive and complex litigation of very simple facts at issue. Regardless of an outcome favorable to the state as to adverse possession, they

will still face the final determination of a public taking without compensation as being constitutional and a very limited use of the property contrary to the needs and compatibility of Park use.

This will create further expenses for the State and damages to us in a continued cloud of our title which makes our investment unmarketable.

We are concerned something must be done by the legislature to minimize future conflicts between the State and private owners that result in expensive and frustrating litigation such as we are experiencing.

We are no match for the States' unlimited power and financial resources regardless of the merits. Little guy like us can be defeated by the sheer financial burden of defending such litigation. Our case is only one small example of the problem. There are similar horror stories past and present.

We negotiated for four and one half years to effect a trade with the state. Expenses of over $125,000 were incurred in attorney fees alone, only to discover at the time of the final contract, the State had made a deal with Rogners' Eagle River Ski Resort Project for one of the same parcels offered and accepted by us months before Rogners Proposal was even submitted!

Mr. Neil Johansen was very misleading in his testimony on the proposed additional language. He apparently stated the proposed language would be special interest to our benefit only, which is not the case. I also understand he stated he was going to purchase the easement implying that such arrangement were forthcoming which is not true.

The loss of a portion of the property for the easement he desires would destroy the value of the entire 160 acre parcel to the highest and best use, and therefore is not a satisfactory solution for us.

The entire parcel should be purchased and included as park for public enjoyment. This has always been Neil Johansens position. According to him, he has been unable to accomplish this through his budget system. The unique qualities of the parcel with numerous beautiful waterfalls, which are not found elsewhere in proximity of Anchorage, would be a great asset to the Chugach Park for Alaskans and tourists alike.

Senator, you and your committee expressed a desire to resolve the situation administratively. There is several

possibilities, of which I am sure you are already aware, that could be pursued if there is interest.

One could be legislative action and appropriation for an outright purchase and inclusion as park. This public desire has been well demonstrated and expressed.

Another could be the existing authority of the DNR Commissioner to make such a purchase on behalf of the Park. An appropriation would be required, and could be so designated for the specific purpose. Action by both the Commissioner and an appropriation this session is not unrealistic and would be necessary under the circumstances.

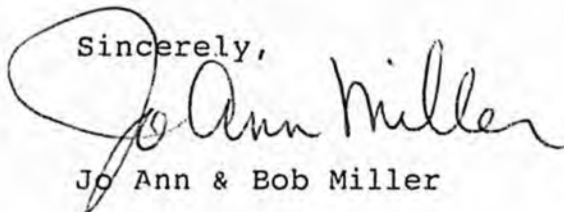
Perhaps the most expedient and simple solution and within the authority of the Department of Law, would be an out of court settlement. As you know, such settlement by the State would not require an immediate legislative appropriation.

Direct contact with Doug Baily as to this solution might be of benefit to both the State and ourselves to negate this ridiculous ongoing farce which merely keeps adding expense and frustration for all concerned. The litigation outcome will not accomplish acquisition of the property as desired by both the Park Department and the public.

In any event, even if one of these solutions were effected now to assist us, it would not resolve the possibilities of this happening to someone else. We therefore urge and implore you to consider legislation in the future for public protection.

We can not begin to express our appreciation for your interest, concern and willingness to assist in this matter. Resolution of this situation to a satisfactory conclusion at this time would be a great service to the State, public and ourselves. We thank you for your efforts.

Sincerely,



Jo Ann & Bob Miller

P.O. Box 220770
Anchorage, Alaska
99522

(907) 783 2874

Encl:

CC: Honorable Steve Cowper; Governor
    Edgar Paul Boyko, Esq.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

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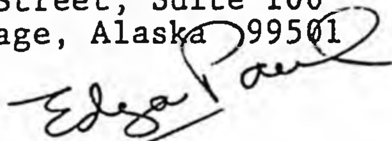
BOYKO, BREEZE & FLANSBURG

September 25, 1989

Edgar Paul Boyko, Esq.
Boyko, Breeze, and Flansburg
840 K Street, Suite 100
Anchorage, Alaska 99501



Re: Joanne Miller

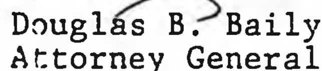
Dear Mr. Boyko:

I have had two letters during recent weeks from our friend and your client, Joanne Miller, relating to her difficulties on her property above Rabbit Creek. Since the matter is in litigation, I have elected to reply to you.

I have watched the developments of the saga of the Miller property in the version reported by the newspapers for some years. While I'm sure the matter of the litigation is troubling to them, as it would to be anyone, I am most concerned with her suggestions of inappropriate conduct by lawyers working for the state. In the event that you concur with Joanne's evaluation, I would appreciate your letting me know the particulars involved. However, prior to making an independent inquiry, I would prefer to have a lawyers analysis of the problem as one step removed from the view of the litigant.

I would be pleased to discuss this matter and other matters involving the Department of Law in which you have recently indicated an interest at such time as our visits to Anchorage next coincide.

Sincerely,



Douglas B. Baily
Attorney General

03-C32LH

BOYKO, BREEZE & FLANSBURG

LAW OFFICES

Edgar Paul Boyko
Robert A. Breeze
Ronald D. Flansburg
Robert L. Breckberg

Of Counsel:
John S. Breeze

November 15, 1989

Honorable Douglas B. Baily
Attorney General
P.O. Box K-State Capitol
Juneau, AK 99811-0300

Re: Jo Ann Miller
Case No. 3AN88-10139 Civil

PERSONAL & CONFIDENTIAL

Dear General Doug:

This letter is in response to your letter of September 25, regarding the above-referenced case.

I do appreciate very much your courtesy in contacting me about these communications. I am, moreover, somewhat hesitant to address the matter, since my knowledge of it is almost entirely based on information received from my associate, Robert Breckberg and from the Millers. I have carefully timed my response so as to make it after oral argument in the case on pending summary judgment motions, but before any rulings thereon, since I wanted to give Assistant Attorney General Ken Powers, the principal representative of the Department of Law in this litigation, every reasonable opportunity to clear up what we perceive to have been the state's mishandling of the Aldrich matter discussed in detail below. I was also quite concerned about the facts set forth in Mrs. Miller's letters, alleging inappropriate conduct by members of the department; and although I had no advance notice of her direct communication with you, I have since looked into the matter and have come to agree, at least tentatively, with the various points raised in her two letters.

It should be noted, that the Millers have performed extensive personal labor in the preparation of this case, acting as de facto investigators or paralegals, to help keep their costs in this complex and expensive litigation as low as possible, so they are far more aware of the details of the case than most clients

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would be.

After extensive discovery and full scale litigation for just over one year, several facts stand out:

First, the state's claimed reason behind the filing of this lawsuit is inconsistent with the facts developed through discovery. Thus, for instance, representatives of the State claimed (in newspaper accounts) that the suit was brought because of a report of "gun play" having erupted in a dispute over the contested right-of-way. Discovery revealed that the decision to sue had been made months prior to the date on which this incident is alleged to have happened. Incidentally, although there was supposed to have been an investigation by State Troopers, no charges of any kind were brought arising out of the alleged gun incident, which the Millers categorically deny ever took place. The state also has claimed that it would become immediately aware of any on-site developments in the Rabbit Creek Valley area, yet the Millers moved their trailer off of the site, closed the fences, and landscaped the former "road", without the state being aware of those details for periods ranging from weeks to months.

This lack of knowledge by the state appears to have led to time consuming and expensive litigation, in two separate attempts by the state to obtain temporary restraining orders, neither of which had merit and neither of which was granted. Although the Millers have continued to permit people to go across their property, their landscaping efforts have been interfered with lately, with someone hauling a chain saw and gas to cut through alders for approximately 1300 feet along the former "road bed". Since there is a locked state gate over ½ mile from the beginning of the landscaped area, it would appear that there may have been some "unofficial" state involvement in this particular damage to the Miller property, just as some "unofficial" state actions had to be present to have the first letter to you, by Jo Ann Miller, given to Craig Medred of the Anchorage Daily News, enabling the state to continue to try its case in the press, as it has from the time of the first false press reports, referred to above, concerning the claimed reason for the suit.

Second, the state failed to check with the original homesteader (Eddie Beroldo) concerning his road closing habits prior to the initiation of the suit, notwithstanding the fact that state officials were aware at the time, of allegations that he had closed the "road" annually. It appears that some assistant attorney general jumped the gun, and filed a lawsuit,

without adequate investigation of the facts. Since we have been informed that Mr. Powers is a close social friend of at least some of the people who live in the area, it has been suggested to us that perhaps some personal concerns may have outweighed the state's interest, or the interest of justice, involving a potential Rule 11 issue.

Third, in several off-the-record comments to me and to my associate, Robert Breckberg, Mr. Powers has made various intemperate statements; e.g., he indicated that regardless of what happens in the law suit, the state would eventually take the land in question from the Millers; and he has accused them and their former attorney, G. Kent Edwards, of "fraud", in their dealings with the Municipality, on the land involved in this case.

Fourth, representatives of the state have repeatedly misstated facts in various pleadings or arguments. The most troubling instance involves the Aldrich matter discussed in some detail below. Another example was presented by certain printed outlines displayed by Mr. Powers during oral argument on the cross-motions for summary judgment, asserting numerous facts favorable to the state to be "undisputed". These claims of undisputed issues were inaccurate and had to be known as such to Mr. Powers. Yet another instance is the claim made in pleadings filed, that the state's protest to the Bureau of Land Management (BLM) to an Indian allotment involving land down the valley towards Anchorage from the Miller land was not disallowed on the merits, but was merely dismissed as untimely, thus avoiding the effect of such adjudication on the issues in this case. In reality, the protest was summarily dismissed as substantially unfounded; and a subsequent appeal was thereafter dismissed as untimely. There is a substantial difference between these two sets of procedural steps, which is significant, considering the issue in the BLM protest involved the same alleged "road" here in question, as well as the lands adjacent to the Millers (collateral estoppel). These last two items appear to be in violation of DR 7-102 (a)(5).

Fifth, a certain questionnaire and cover letter circulated widely by the state in June do not appear to be appropriate to us. We have requested all replies which may be received to these circulars, copies of which were attached to Jo Ann Miller's July 7, 1989 letter to you. Mr. Powers has been unwilling to take a position on whether or not he will provide them or even use them.

I am advised that this questionnaire and cover letter circulated to the public are biased and misleading. They imply that force was used throughout the summer by the Millers. The state claims to represent the "public", yet the state repeatedly has restricted motorized access to that same public, and in its later pleadings in the summary judgment proceedings, is also now raising an alternative access issue, i.e., access for state employees alone, not for the public. The letter and questionnaire also are based on the assumption that "public access" is a given fact, while in reality, this is what the lawsuit is all about. The questionnaire also falsely claims (#9) that the Millers somehow blocked the "trailhead" which is over ½ mile down the valley towards Anchorage. I have also been informed that while the Millers were on-site, that numerous people who were out walking were carrying firearms. Since there is no way to tell the identity of the Millers or their caretakers from the state's documents, any answers the state receives may well rely on erroneous assumptions. Copies of the questionnaire and cover letter are once again attached, for your convenience.

Sixth, the Aldrich matter referred to above raises considerable concern on our part. An affidavit was prepared by the attorney general's office for one Harold Aldrich to sign, claiming that there had never been any gates or closures at the then Beroldo (now Millers) property line. This affidavit, duly executed by the witness, was filed by the State as an exhibit (Exhibit 37), in support of one of the state's motions for partial summary judgment, and in opposition to the Millers motion for partial summary judgment. Yet, in 1963, at a hearing on his homestead application in Rabbit Creek Valley (which was denied, along with his trade and manufacturing site application, due in part to lack of faith by the examiner in the veracity of Mr. Aldrich's various claims) Mr. Aldrich specifically complained (in a statement under oath), of the gates above him (i.e., at Beroldo's property line) being closed and causing him problems. We know that an investigator for the attorney general's office had reviewed that file in late 1988 and it is believed that copies of the files were made for that investigator, since parts of the BLM files show up as state exhibits. Therefore, the Assistant Attorney General who authorized the filing of what appears to be a perjured affidavit by Aldrich, knew or should have known of these direct contradictions.

When the BLM files were reviewed by the Millers, the discrepancy in the sworn testimony in 1963 (when anyone could have gone up and looked at the gates), and the Aldrich affidavit

prepared and filed by the state became apparent. Thereafter, a deposition of Mr. Aldrich was scheduled. At that deposition he retracted his claim of "no gates" and admitted that his affidavit was in error, and that he had indeed discussed that fact with Mr. Powers. Prior to our confronting Mr. Aldrich with the discrepancy of his sworn testimony during the deposition, Mr. Powers made no attempt to correct the inaccurate information, on which the state's motion for partial summary judgment and its opposition to the Millers' motion for partial summary judgment relies in part. Nor has he done anything yet to either admit it or otherwise bring it to the Court's attention, or in any manner attempt to justify his actions and the misleading document filed with the Court.

It is significant to note that photographs taken by Mr. Aldrich (at the time in question) showing the gate at the Beroldo property line, were provided to the state and through the state to the Millers after Mr. Aldrich's deposition. No attempt has been made by Mr. Powers to correct the court records to reflect the errors that seriously taint the affidavit of Mr. Aldrich, even though he was invited to do so through the written comments in the Millers Reply and Opposition and by verbal statements by me at the oral argument on the various pending summary judgment motions on October 13, 1989. A single oblique acknowledgment of any problem with the false Aldrich affidavit is contained in footnote 2 of the state's Reply to Defendants' Opposition to State's Motion for Partial Summary Judgment, which states in part: "Although the Millers have stooped to great depths" (<u>sic</u>) to attack on (<u>sic</u>) Mr. Aldrich's credibility, Reply and Opp. at 7-9, the court cannot resolve issues of credibility on summary judgment." In this regard, allow me to observe in passing, if anyone "stooped to great depth", it was whoever attempted to perpetuate this attempted clumsy deception of the court and counsel. If we, as private attorneys had dared to pull a stunt like that, the disciplinary machinery of the State Bar would, by now, be in full swing, I'm sure. You may want to review the question of how Mr. Power's conduct is to be regarded in light of the provisions of DR 7-102(A)(4), (6) and (8) and (B)(2).

This case has been troubling to me and Mr. Breckberg ever since we became involved. Mr. Powers has indicated repeatedly that the suit, in effect, is primarily a negotiating tool. In fact, after several years, the negotiations between the Millers and the state for acquisition of the property broke down due to the state raising, (for the first time in July 1988), the prescriptive easement issue, which we believe to be specious.

If the suit was indeed brought as a negotiation ploy, or in response to notice given to the state by the Millers that they had a prospective buyer, then the action, from its inception, may be in violation of DR 7-102(A)(1). We have come to the reluctant conclusion, based on the peculiar circumstances outlined above, that this entire suit was ill thought out before it was initiated, did not have the adequate inquiry required by Civil Rule 11 before it was filed, and was not instituted or maintained in good faith, notwithstanding any contrary self-serving assertion on the part of Mr. Powers or some of the folks in the Division of Parks.

Since you were thoughtful enough to express your concerns on this, we have taken the liberty to respond fully to your inquiry. We appreciate in advance, your time and trouble and giving this your attention.

If you have any further questions, or if I can be of any assistance to you in this matter, please feel free to contact me.

Respectfully yours,

BOYKO, BREEZE & FLANSBURG

By: Edgar Paul Boyko

EPB/spd
Enclosures
cc: Kenneth Powers, Esq.
Robert & Jo Ann Miller

P.S. We are enclosing a courtesy copy for the use of Mr. Powers, but presume that it is better protocol to forward it through you.