

SB

249

26-LS1014P
Wayne
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CS FOR SENATE BILL NO. 249()

**IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SIXTH LEGISLATURE - SECOND SESSION**

BY

**Offered:
Referred:**

Sponsor(s): SENATOR ELLIS

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to official action by electronic transmission, to records, and to public**
2 **records."**

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

4 *** Section 1.** AS 11.81.900(b)(53) is amended to read:

5 (53) "public record"

6 (A) means each of the following that is [A DOCUMENT,
7 PAPER, BOOK, LETTER, DRAWING, MAP, PLAT, PHOTO,
8 PHOTOGRAPHIC FILE, MOTION PICTURE, FILM, MICROFILM,
9 MICROPHOTOGRAPH, EXHIBIT, MAGNETIC OR PAPER TAPE,
10 PUNCHED CARD OR OTHER DOCUMENT OF ANY OTHER
11 MATERIAL, REGARDLESS OF PHYSICAL FORM OR
12 CHARACTERISTIC,] developed or received under law or in connection with
13 the transaction of official business and preserved or required by law to be
14 preserved [APPROPRIATE FOR PRESERVATION] by an [ANY] agency, a

1 municipality, or a [ANY] body subject to the open meeting provision of
2 AS 44.62.310 [,] as evidence of the organization, function, policies, decisions,
3 procedures, operations, or other activities of that agency, municipality, or
4 body [THE STATE OR MUNICIPALITY] or because of the informational
5 value in it:

6 (i) a document, paper, book, letter, drawing, map,
7 plat, photo, photographic file, motion picture, film, microfilm,
8 microphotograph, exhibit, magnetic or paper tape, punched card,
9 electronic record, or other document of any other material,
10 regardless of physical form or characteristic; and

11 (ii) [; IT ALSO INCLUDES] staff manuals and
12 instructions to staff that affect the public;

13 (B) does not include

14 (i) proprietary software programs;

15 (ii) library and museum material developed or
16 acquired and preserved solely for reference, historical, or
17 exhibition purposes;

18 (iii) extra copies of documents preserved solely for
19 convenience of reference;

20 (iv) stocks of publications and processed documents;

21 or

22 (v) material that is available for public inspection
23 during state business hours in an agency's office or in a public
24 library, unrestricted records in the custody of the state archivist or
25 the state recorder, records relating to a public agency's regularly
26 conducted activities, including adjudicatory activities, that are
27 recorded and open to the public, books in a public library, statutes,
28 published court opinions, published legal opinions, published
29 regulations, magazines, journals, state land plats, published
30 portions of case files maintained by the department of natural
31 resources, unrestricted motor vehicle records, and published

1 treatises;

2 * Sec. 2. AS 39.25 is amended by adding a new section to read:

3 **Sec. 39.25.165. Official action through private electronic transmission**
4 **systems prohibited.** (a) When sending or receiving a written electronic transmission
5 for the purpose of taking or withholding official action, a public officer shall use a
6 system that is operated and maintained by the state or under a contract with the state,
7 unless

8 (1) it is not feasible to use that system;

9 (2) there is a compelling reason for the transmission to occur without
10 delay; and

11 (3) the material transmitted is not confidential by law.

12 (b) An electronic transmission under (a) of this section is a public record
13 under AS 40.25.

14 (c) The prohibition under (a) of this section does not apply to a public officer
15 who is taking or withholding official action during a public safety emergency.

16 (d) In this section,

17 (1) "official action" means advice, participation, or assistance,
18 including for example, a recommendation, decision, approval, disapproval, vote, or
19 other similar action, including inaction, by a public officer;

20 (2) "public officer" means

21 (A) a permanent, probationary, seasonal, temporary,
22 provisional, or nonpermanent employee of an agency, whether in the classified,
23 partially exempt, or exempt service;

24 (B) a member of a board or commission; and

25 (C) a state officer designated by the governor to act as trustee
26 of the trust, or a person to whom the trustee has delegated trust duties; in this
27 paragraph, "trust" has the meaning given in AS 37.14.450.

28 * Sec. 3. AS 40.21.150(6) is amended to read:

29 (6) "record"

30 (A) means each of the following that is [ANY DOCUMENT,
31 PAPER, BOOK, LETTER, DRAWING, MAP, PLAT, PHOTO,

1 PHOTOGRAPHIC FILE, MOTION PICTURE FILM, MICROFILM,
2 MICROPHOTOGRAPH, EXHIBIT, MAGNETIC OR PAPER TAPE,
3 PUNCHED CARD, ELECTRONIC RECORD, OR OTHER DOCUMENT OF
4 ANY OTHER MATERIAL, REGARDLESS OF PHYSICAL FORM OR
5 CHARACTERISTIC,] developed or received under law or in connection with
6 the transaction of official business and preserved or required by law to be
7 preserved [APPROPRIATE FOR PRESERVATION] by an agency or a
8 political subdivision of the state [,] as evidence of the organization, function,
9 policies, decisions, procedures, operations, or other activities of the state or
10 political subdivision or because of the informational value in it:

11 (i) a document, paper, book, letter, drawing, map,
12 plat, photo, photographic file, motion picture, film, microfilm,
13 microphotograph, exhibit, magnetic or paper tape, punched card,
14 electronic record, or other document of any other material,
15 regardless of physical form or characteristic; and

16 (ii) staff manuals and instructions to staff that affect
17 the public;

18 (B) [THEM; THE TERM] does not include

19 (i) proprietary software programs;

20 (ii) library and museum material developed or acquired
21 and preserved solely for reference, historical, or exhibition purposes;

22 (iii) [,] extra copies of documents preserved solely for
23 convenience of reference;

24 (iv) [, OR] stocks of publications and processed
25 documents; or

26 (v) material that is available for public inspection
27 during state business hours in an agency's office or in a public
28 library, including unrestricted records in the custody of the state
29 archivist or the state recorder, records relating to a public agency's
30 regularly conducted activities, including adjudicatory activities,
31 that are recorded and open to the public, books in a public library,

1 statutes, published court opinions, published legal opinions,
2 published regulations, magazines, journals, state land plats,
3 published portions of case files maintained by the department of
4 natural resources, unrestricted motor vehicle records, and
5 published treatises;

6 * Sec. 4. AS 40.25.110(b) is amended to read:

7 (b) Except as otherwise provided in this section, the fee for copying public
8 records may not exceed the cost of materials and supplies used to duplicate the
9 records [STANDARD UNIT COST OF DUPLICATION] established by the public
10 agency and may not include the labor costs or overhead costs associated with the
11 duplication.

12 * Sec. 5. AS 40.25.110(c) is amended to read:

13 (c) If the production of records for one requester in a calendar month exceeds
14 five person-hours and the agency determines that the request is by a corporation
15 other than a news media corporation, is unduly burdensome, or is for a
16 commercial purpose, the public agency shall require the requester to pay the
17 personnel costs required during the month to complete the search and copying tasks.
18 The personnel costs may not exceed the actual salary and benefit costs for the
19 personnel time required to perform the search and copying tasks. The requester shall
20 pay the fee before the records are disclosed, and the public agency may require
21 payment in advance of the search. If the agency determines that the request is
22 unjustifiably burdensome, it shall suspend searching and copying for a period of
23 10 business days with notice to requestor, help the requestor revise the request,
24 and reconsider the agency's determination. If the agency determines after
25 reconsideration that the request is justifiable, the agency may not require the
26 requestor to pay personnel costs under this subsection.

27 * Sec. 6. AS 40.25.115(a) is amended to read:

28 (a) Notwithstanding AS 40.25.110(b) and (d) [AS 40.25.110(b) - (d)] to the
29 contrary, upon request and payment of a fee established under (b) of this section, a
30 public agency may provide electronic services and products involving public records
31 to members of the public. A public agency is encouraged to make information

1 available in usable electronic formats to the greatest extent feasible. The activities
2 authorized under this section may not take priority over the primary responsibilities of
3 a public agency.

4 * Sec. 7. AS 40.25.125 is repealed and reenacted to read:

5 **Sec. 40.25.125. Enforcement; crimes.** (a) Whether acting independently or in
6 concert with another, a person who unlawfully impairs or attempts to impair the verity,
7 legibility, or availability of a public record is subject to

8 (1) prosecution for a criminal offense under AS 11.56.815 and
9 11.56.820;

10 (2) injunction by order of the superior court.

11 (b) A person may seek injunctive relief under (a) of this section without
12 exhausting that person's remedies under AS 40.25.123 and 40.25.124.

13 * Sec. 8. AS 40.25.220(3) is amended to read:

14 (3) "public record" or "public records"

15 (A) means each of the following [BOOKS, PAPERS, FILES,
16 ACCOUNTS, WRITINGS, INCLUDING DRAFTS AND
17 MEMORIALIZATIONS OF CONVERSATIONS, AND OTHER ITEMS,
18 REGARDLESS OF FORMAT OR PHYSICAL CHARACTERISTICS,] that is
19 [ARE] developed or received under law or in connection with the
20 transaction of official business by a public agency [, OR BY A PRIVATE
21 CONTRACTOR FOR A PUBLIC AGENCY,] and [THAT ARE] preserved or
22 required by law to be preserved [FOR THEIR INFORMATIONAL VALUE
23 OR] as evidence of the organization, function, policies, decisions,
24 procedures, operations, or other activities [OR OPERATION] of the public
25 agency or because of the informational value in it:

26 (i) a document, paper, book, letter, drawing, map,
27 plat, photo, photographic file, motion picture, film, microfilm,
28 microphotograph, exhibit, magnetic or paper tape, punched card,
29 electronic record, or other document of any other material,
30 regardless of physical form or characteristic; and

31 (ii) staff manuals and instructions to staff that affect

1 the public;

2 (B) [; "PUBLIC RECORDS"] does not include

3 (i) proprietary software programs;

4 (ii) library and museum material developed or
5 acquired and preserved solely for reference, historical, or
6 exhibition purposes;

7 (iii) extra copies of documents preserved solely for
8 convenience of reference;

9 (iv) stocks of publications and processed documents;

10 or

11 (v) material that is available for public inspection
12 during state business hours in an agency's office or in a public
13 library, including unrestricted records in the custody of the state
14 archivist or the state recorder, records relating to a public agency's
15 regularly conducted activities, including adjudicatory activities,
16 that are recorded and open to the public, books in a public library,
17 statutes, published court opinions, published legal opinions,
18 published regulations, magazines, journals, state land plats,
19 published portions of case files maintained by the department of
20 natural resources, unrestricted motor vehicle records, and
21 published treatises;

STATE OF ALASKA

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April 2, 2010

Senator Hollis French
State Capital, Room 417
Juneau, Alaska 99801

Dear Senator French:

Senate Bill No. 249 ("SB 249") would amend laws regarding access to public records. The Department of Law supports the attempt in SB 249 to remove unnecessary inconsistencies in the definitions of "public record" and "record" and to partially codify the Email Retention Policy issued by the Department of Administration on August 7, 2009. The bill, however, raises some significant legal and policy issues.

We are concerned that sections 4 and 5 of SB 249 create substantial, unfunded monetary burdens for all Alaska public agencies in responding to Alaska Public Records Act requests. State and municipal agencies already absorb the cost of reviewing records for privileged and confidential information.¹ The personnel time required for these tasks is often vastly greater than that required to search for and copy the requested records. As discussed in section A, below, the bill seeks to add to public agencies' fiscal burden the labor and overhead costs of copying records. And, apparently, it would require them to cover the cost of providing electronic services and products when the time needed to do so does not exceed five-person hours in a calendar month: under current law, the requester pays this cost.

In addition, as explained below, we have several additional concerns. The definitions (in sections 1, 3, and 7) of "public record" and "record," including the definition of "electronic transmission" (which is also in section 2), are not clear or are overly broad or both. The intended scope of the proposed Alaska Executive Branch Ethics Act amendment (in section 2), which would prohibit certain electronic transmissions, is not clear and could substantially impede state business; also, the proposed amendment does not seem appropriate for inclusion in the Ethics Act. Finally, the proposed Public Records Act amendment (in section 6), which would add a provision

¹ The task of reviewing records for protected information includes redacting and logging that information.

making tampering with or otherwise affecting the availability of a public record an undefined criminal offense, is incomplete and also might impede state business.

A. The Proposed Amendments Would Fiscally Burden State and Municipal Agencies.

The Alaska Supreme Court has characterized public access to records as a fundamental right. But who should bear the cost of responding to record requests is not clear. For example, providing persons copies of their own medical records without charge seems reasonable, but should limited state and municipal revenues be used to cover the cost of responding to extremely broad requests of large corporations for records that are sought for commercial uses? And if public agencies are to bear more of the expense of responding to record requests, the legislature should consider what source of funds the agencies should use to cover the additional costs. Addressing these issues is especially important given the following: the exponential growth in public records because of the increase in the number of electronic records; the numerous locations where electronic and non-electronic records are stored; and the increased public awareness of the availability of, and interest in obtaining, government records. Also, if the cost to a requester of obtaining records decreases, requests for records will likely increase.

Accordingly, sections 4 and 5 of SB 249 raise significant concerns because they would amend the Public Records Act to shift more of the cost of responding to record requests from requesters to state and municipal agencies: *i.e.*, the amendments would require public agencies to use additional government revenues to respond to the requests of any requesters regardless of the commercial or non-commercial use of the records or the electronic services and products.²

Section 4 would shift costs to public agencies by amending AS 40.25.110(b) to limit the fees that are chargeable for copying records to the "cost of materials and supplies used to duplicate the records": "the labor costs or overhead costs associated with the duplication" would not be recoverable.³ Thus, section 4 would shift from requesters

² Under the Public Records Act, "public agency" means a political subdivision, department, institution, board, commission, division, authority, public corporation, council, committee, or other instrumentality of the state or a municipality; "public agency" includes the University of Alaska and the Alaska Railroad Corporation." AS 40.25.220(2).

³ Whether the terms "materials" and "supplies" are intended to cover different things is not clear.

to each public agency the personnel cost and the proportionate share of the overhead costs of operating copy machines and printers that are incurred when responding to public record requests. And section 4 would do so without regard to the breadth of a request, how many times a requester has made requests, and whether a request is likely to serve a commercial or personal interest, as opposed to a public interest. And if personnel and overhead costs are paid with government revenues, even less incentive will exist for requesters to narrow their requests and to choose to review records at the agencies, rather than request copies.

Also, excluding personnel costs from the costs that are recoverable when a public agency copies records would conflict with AS 40.25.110(c), which provides that, “[i]f the production of records for one requester in a calendar month exceeds five person-hours, the public agency shall require the requester to pay the personnel costs required during the month to complete the search and copying tasks;” personnel costs are defined as “the actual salary and benefit costs for the personnel time required to perform the search and copying tasks.”

Section 5 would amend AS 40.25.115(a) to delete the reference to AS 40.25.110(c) and therefore would shift costs of responding to requests for electronic services and products to public agencies: under current law, the requester pays those costs. AS 40.25.115(a) now provides that, “[n]otwithstanding AS 40.25.110(b) — (d) to the contrary, upon request and payment of a fee established under (b) of this subsection, a public agency may provide electronic services and products involving public records to members of the public.” By removing the reference to AS 40.25.110(c), section 5 seems to require agencies to absorb costs that are now recoverable when a public agency provides electronic services and products: *i.e.*, to make the costs of responding to an AS 40.25.115 request recoverable only “[i]f the production . . . for one requester in a calendar month exceeds five person-hours.” AS 40.25.110(c).

By shifting to each public agency the cost of providing electronic services and products when the time needed to respond to a request is five-person hours or less in a calendar month, section 5 could very substantially increase the cost to public agencies of complying with the Public Records Act. This is so because of the likelihood that public agencies will be asked to respond to a great number of AS 40.25.115 requests, and because the agencies cannot recover the cost to review records for information that is protected from disclosure by a common law privilege or a constitutional or statutory source of confidentiality.⁴ For example, when (in the next few months) the state

⁴ *Fuller v. City of Homer*, 113 P.3d 659, 662-66 (Alaska 2005). For example, in 2009, the Department of Law spent thousands of hours—totaling hundreds of thousands of dollars in personnel costs—working on matters relating to the Public

completes the conversion to the Symantec Enterprise Vault email archiving system, any or all of the contents of any state executive branch employee's email account will be producible in five person-hours. Under the law now, a requester will be required to pay almost \$300 for the work. If this fee is statutorily waived by the enactment of section 5, no reason will exist for members of the public not to seek all of the emails in the email account of any public agency employee; and each month, a requester could make such a request, or any number of requesters could make such requests.

While SB 249 would commit even more of the limited revenues of the state and municipalities to responding to Public Records Act requests, the legislature may wish to consider requiring requesters to pay the cost of reviewing records for protected information, especially where the requester is a corporation, other entity, or individual who is not a resident of, and otherwise has no substantial contacts with, Alaska; seeks records for a commercial purpose; is not seeking records concerning himself or herself (such as medical records); or has made an extremely broad request for records.⁵

B. The Definitions of "Public Record" and "Record" Raise Several Concerns.

Section 1 of SB 249 would amend the AS 11.81.900(b)(53) definition of "public record" that is used in the state's criminal statutes; section 3 would amend the AS 40.21.150(6) definition of "record" that is used in the state's records retention statute; and section 7 would amend the AS 40.25.220(3) definition of "public record" that is used in the Public Records Act. Significant problems exist with each of these proposed amendments.

Records Act. The vast majority of the work involved reviewing records for privileged and confidential information.

⁵ Depending on certain factors—such as the amount of search time, number of copies, and intended use of the records—the federal government and some states, including Michigan and Mississippi, require or permit public agencies to seek reimbursement for the cost of reviewing records for protected information. See 5 U.S.C. § 552(a)(4)(ii)(I) (providing that "fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use"); M.C.L. § 15.234; Miss. Code Ann. § 25-61-7.

1. The Definition of "Electronic Transmission" Is Vague and Overly Broad.

Sections 1, 3, and 7 of SB 249 would include "electronic transmissions" in the definitions of "public record" and "record."⁶ The definition of "electronic transmission" would cover electronic mail and "any other form of communication . . . that creates a record that can be retained, retrieved, and reviewed by a recipient of the communication and that can be reproduced in paper form through an automated process." This definition is so broad that it would require that telephone conversations be treated as "public records" and as "records" under the state's criminal, records retention, and access-to-records laws: telephone conversations on state landlines are digitized and, therefore, can be retained and reviewed and can be reproduced in paper form through the use of speech recognition software.

Also, the SB 249 definition of "electronic transmission" includes text and instant messages, but public agencies are unable to capture text messages and cannot efficiently capture instant messages. Third-party vendors provide these services. Text messages can be retrieved only from a cell phone's internal storage or the vendor's server or backup storage, and therefore retrieving text messages depends on the vendor and is subject to its charges. Also, the state is aware of no software for automatically retaining instant messages. To save instant messages, users must manually store them, which defeats the purpose of using this communication tool. And even if text and instant messages could reasonably be stored and retrieved, given the exponential increase in their use, the costs of storing, searching, reviewing, and producing such messages would be very substantial now and continue to grow. If the definitions of "public record" and "record" are amended to cover instant and text messages, public agencies might well be forced to ban the use of such forms of communication because of the costs of—and potential to violate the law by not—saving and producing them, regardless of the effects of such a ban on government efficiency.

⁶ The same definition of "electronic transmission" is in sections 1, 3, and 7. Section 2 of SB 249 also includes a definition of "electronic transmission"; this definition—unlike the one in sections 1, 3, and 7—includes the clause "whether the recipient is the state or any other person the sender intended to receive the electronic transmission"; regardless, the same problems with the definition of "electronic transmission" in sections 1, 3, and 7 apply to the definition of "electronic transmission" in section 2.

2. SB 249 Does Not Make the Definitions of "Public Record" and "Record" Consistent.

In several respects, SB 249 does not remove unnecessary inconsistencies in the definitions of "public record" and "record."

- a. Section 1 retains in the definition of "public record" "staff manuals and instructions to staff that affect the public." These records are not explicitly referenced in the AS 40.21.150(6) definition of "record" (section 3) or the AS 40.25.220(3) definition of "public record" (section 7). The need to expressly reference these records in AS 11.81.900(b)(53) and the reason for not doing so in AS 40.21.150(6) and AS 40.25.220(3) are not clear.
- b. Sections 3 and 7, but not section 1, would add "electronic record" to the AS 40.21.150(6) definition of "record" and the AS 40.25.220(3) definition of "public record." This term should be added to the AS 11.81.900(b)(53) definition of "public record."
- c. Section 3, but not sections 1 and 7, excludes from the definition of "record" "library and museum material developed or acquired and preserved solely for reference, historical, or exhibition purposes, extra copies of documents preserved solely for convenience of reference, or stocks of publications and process documents." This exclusion should be added to the AS 11.81.900(b)(53) and AS 40.25.220(3) definitions of "public record" and expanded to encompass all other "readily available" records, as that term is defined in 2 AAC 96.100(b); the definition of "readily available" should also include all records that are available on the Internet.
- d. Section 7, but not sections 1 and 3, excludes from the definition of "public record" "proprietary software programs." This exclusion should be added to the AS 11.81.900(b)(53) and AS 40.21.150(6) definitions of "public record" and "record."

3. The Phrase “Or Appropriate for Preservation” Is Unnecessary.

Sections 1, 3, and 7 would amend the definitions of “public record” and “record” to cover records “preserved, required by law to be preserved, or appropriate for preservation.” If a record is not subject to an approved (under AS 40.21) records retention schedule and a public agency is not otherwise legally required to retain it, it would not be “appropriate for preservation”: only records that are “preserved” (for their informational value or as evidence of the organization or operation of the agency) or that a public agency is legally required to retain should be “public records” in the context of the state’s criminal and access-to-records statutes and “records” in the context of the state’s records retention statute. Accordingly, the phrase “appropriate for preservation” should be deleted from the AS 11.81.900(b)(53) definition of “public record” and the AS 40.21.150(6) definition of “record.”

4. The Phrase “Under Law” Is Unnecessary

Section 7 would amend the Public Records Act definition of “public record” to include the phrase “under law”: “‘public record’ . . . means each of the following developed or received under law or in connection with the transaction of official business” The phrase would add nothing to the AS 40.25.220(3) definition of “public record”: records developed or received by a public agency “under law” are developed or received “in connection with the transaction of official business.” Accordingly, this phrase should be deleted from the AS 11.81.900(b)(53) definition of “public record” and the AS 40.21.150(6) definition of “record.”

5. A Means of Paying for Private Contractor’s Records Is Not Identified.

Section 7 would not change the following language in the definition of “public record” in the Public Records Act: “developed or received . . . by a private contractor for a public agency.” AS 40.25.220(3). The Act does not, however, expressly address the recovery of the costs contractors charge to respond to record requests: *i.e.*, to search for records, review records for protected information, and duplicate records. The Act should be amended to make clear whether—even in response to extraordinarily broad requests that serve only commercial interests—the public agencies or requesters must bear these costs.

C. The Proposed Ethics Act Amendment Might Impede State Business and Raises Other Concerns.

Section 2 of SB 249 would amend the Alaska Executive Branch Ethics Act, AS 39.52, to provide that, “[w]hen taking or withholding official action, a public officer may not send or cause another to send information by electronic transmission within a system for electronic delivery unless the system is operated and maintained by the state”; and the section would amend the Ethics Act to provide that a covered electronic transmission is “a public record under AS 40.25.” The intended scope of this prohibition—which includes no exceptions, even for covered communications regarding any law enforcement or emergency matters—is unclear, and the prohibition might substantially impede state business.

The amendment has been described as prohibiting certain state officers from using email systems other than the state email system to conduct state business. However, given the terms used, the amendment appears to have a much broader reach. It would not simply codify the part of the Department of Administration’s Email Retention Policy that requires executive branch employees to use (whenever feasible) their state email accounts to conduct state business. The phrase “electronic transmission within a system for electronic delivery” appears to encompass more than email.⁷ The term “public officer” includes all state employees, regardless of classification, and all members of boards and commissions subject to the Ethics Act.⁸ And the term “official action” is also broadly defined: it includes not only what would be considered a final state action, but also advice, participation, and assistance leading to the action.⁹ Accordingly, the prohibition in section 2 would arguably apply to participation by any public officer in a matter of

⁷ The definition of “electronic transmission” is vague and overly broad for the reasons explained above. The meaning and scope of the phrase “within a system for electronic delivery” is also vague: *e.g.*, does it include the computer and, therefore, prohibit a public officer from sending an “electronic transmission” from a home computer? And may the electronic delivery system be operated and maintained by a contractor of the state?

⁸ Testimony has suggested that this prohibition will not apply to every “public officer” as that term is defined in the Ethics Act at AS 39.52.960(21), but no restriction appears in the bill.

⁹ “[O]fficial action’ means advice, participation, or assistance, including, for example, a recommendation, decision, approval, disapproval, vote, or similar action, including inaction, by a public officer.” AS 39.52.960(14).

state business. Thus, the prohibition on sending an “electronic transmission within a system for electronic delivery” that is not “operated and maintained by the state” would result in consequences such as the following:

1. public officers would be prohibited from requesting that others—including state contractors and other non-state personnel—send information to other third-parties’ electronic mail addresses or facsimile machines;
2. public officers would be prohibited from sending facsimiles from any non-state equipment to any non-state equipment (*e.g.*, from a state contractor’s office to a federal government office), even if the facsimile were also sent to a state office;
3. public officers would be prohibited from leaving messages on social media, such as Twitter and Facebook, for state business;
4. public officers would be prohibited from leaving voicemail messages on any system not operated and maintained by the state;
5. public officers would be prohibited from engaging in telephone conversations with any non-state person with the capacity to record and transcribe (through an automated process) such conversations; and
6. the state would need to provide state email accounts to all volunteer members of state boards and commissions.

The prospect of inadvertently committing a violation of the Ethics Act or a provision of the criminal code would likely cause state officers to avoid the use of accepted and efficient means of modern communication.

Also, if section 7 is enacted, no need exists for proposed subsection AS 39.52.135(b), which provides that an “electronic transmission” under the proposed subsection AS 39.52.135(a) is “a public record under AS 40.25.” Section 7 includes “electronic transmissions” in the AS 40.25.220(3) definition of “public records.”

Finally, section 2 does not seem to fit within the Ethics Act. Generally, the Ethics Act seeks to preserve the integrity of state action by prohibiting conduct or the misuse of state resources that results in personal gain (*e.g.*, benefits a personal or financial interest of a public officer), provides an unwarranted benefit to another, or otherwise suggests an intention to improperly influence state action. The prohibition in section 2—*i.e.*, on sending “information by electronic transmission within a system for electronic delivery” that is not “operated and maintained by the state”—does not appear to be based on the same premise. Also, in the Ethics Act, the legislature mandates a focus on substantial and material conflicts and misconduct and recognizes that minor conflicts are unavoidable. The Ethics Act standards in AS 39.52.110(b) for making the relevant determination would not apply to the conduct prohibited by section 2 because the use of

“a system for electronic delivery” that is not “operated and maintained by the state” does not arise from a public officer’s outside interests and would likely always have an insignificant effect on a matter of state business. Thus, section 2 seems inappropriate for inclusion in the Ethics Act.¹⁰

D. The Proposed Criminal Provision Is Critically Vague and Might Well Substantially Impede State Business.

Section 6 is critically vague. It would amend AS 40.25.125 to subject a person who tampers with or otherwise affects the availability of a public record to “prosecution for a criminal offense, including an offense under AS 11.56.815 and AS 11.56.820.” Other than AS 11.56.815 and AS 11.56.820, however, section 6 does not identify what crime and what degree of the crime that person would be guilty of.¹¹

Also, section 6 would likely substantially impede state business. First, given that “public records” include records “that are developed or received . . . by a private contractor for a public agency,” the section could make retaining contractors substantially more difficult and expensive. AS 40.25.220(3). Second, the section would make public agency employees extremely reluctant to discard records in compliance with record retention schedules, resulting in extraordinary records management problems. Third, it would make public agency employees extremely reluctant to participate in efforts to respond to public record requests because of a concern that their involvement would lead to charges that they somehow unlawfully attempted to affect the availability of a public record when, for example, their search for a record was unsuccessful; they withheld a record on the grounds that it is privileged or confidential; they misunderstood the request; or they accidentally overlooked a record.

¹⁰ The prohibition would seem to be more consistent with AS 39.25.160, which is part of the State Personnel Act.

¹¹ A provision—if any—making a violation of the Public Records Act a criminal offense should apply only to actions intended to prevent the state from substantially complying with its statutory obligations and, accordingly, should be limited to the period between when a sufficiently clear request is received (triggering the duty to preserve and produce or identify records) and all opportunities to appeal have expired or been exhausted. Also, it should not apply in connection with any record that is identified as privileged or confidential: a public officer should not fear prosecution for protecting privileged or confidential information.

April 2, 2010
Page 11

We are available to answer any questions you have regarding our comments on SB 249 and to work with the Judiciary Committee and Senator Ellis to address our concerns.

Sincerely,

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: 

Alan Birnbaum
Assistant Attorney General

cc: Senator Johnny Ellis

ALASKA STATE LEGISLATURE

Senate Finance Committee

Health & Social Services Committee

Legislative Council

Committee on Committees



While in Session
State Capitol, Rm. 103
Juneau, AK 99801
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Fax: (907) 465-2529

While in Anchorage
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Anchorage, AK 99501
(907) 269-0169
Fax: (907) 269-0172

SENATOR JOHNNY ELLIS
SENATE MAJORITY LEADER

MEMORANDUM

To: Senator Hollis French
Chair, Senate Judiciary Committee

From: Senator Johnny Ellis

A handwritten signature in black ink, appearing to be "JE", written over the name "Senator Johnny Ellis".

Date: March 23, 2010

Subject: Scheduling Request for SB249 – Public Records/Electronic Transmissions

I am requesting that you schedule Senate Bill 249, "An Act relating to official action by electronic transmission, to records, and to public records" for a hearing in the Senate State Affairs Committee at your earliest convenience.

SB249 would clarify and strengthen our public records laws by imposing consistent definitions and requirements on what makes up a public record, who the laws apply to, what the public has access to, and how that access is governed.

Thank you for your consideration, and my staff and I are available for any questions.

ALASKA STATE LEGISLATURE

Rules Committee
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Finance Committee
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Health & Social Services Committee
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Committee on Committees



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SENATE MAJORITY LEADER
JOHNNY ELLIS

SPONSOR STATEMENT – SENATE BILL 249

SB 249 – An Act relating to official action by electronic transmission, to records, and to public records.

SB 249 clarifies and strengthens current law regarding the preservation of and access to public records. Our public records statutes are made up of three chapters, relating to the preservation and maintenance of records, and a criminal statute to set out potential punishments. Inconsistencies and variations between the three have led to confusion and controversy on the part of the public in its attempts to access records they are entitled to, and the agencies in their efforts to preserve and maintain records while balancing open government with personal privacy and legal limits.

As technology advances and government and society are forced to adapt, it becomes essential for our Public Records statutes to keep up with current practices in order to fulfill their original purpose. Alaska's original public records law was adopted as a part of the Organic Act of 1913. Over the years, it has been revised and expanded to keep up with changes in government practice and technological advances. However, the original statute provides a powerful statement of intent: *"Every person has a right to inspect any public writing or record . . . and every public officer having the custody thereof is bound to permit such inspection. . ."*

The bill makes the following changes:

- Applies a consistent definition to the term 'public record' throughout the Alaska statutes.
- Clarifies that electronic transmissions, including text messages, instant messages, email, or other forms of electronic communication are included within that definition.
- Clarifies the duty of state agencies to preserve records, and the ability of the public to access records which are required by law to be preserved.
- Amends the Executive Branch Ethics Act to codify in statute Commissioner Kreitzer's policy which requires state employees to use state electronic systems in order to take official actions so that emails about state business can be included in the public records systems.
- Limits the fees that may be charged to members of the public who wish to access public records to the actual costs of materials and supplies needed to provide the records.
- Explains that impeding either the preservation of or access to public records is a violation of existing criminal law.

SB 249 preserves the ability of Alaskans to keep their government open and accountable. I urge you to join me in support of ethical and transparent government.

STATE OF ALASKA

SEAN PARNELL, GOVERNOR

DEPARTMENT OF ADMINISTRATION

ANNETTE KREITZER
CHIEF INFORMATION OFFICER

P.O. BOX 110200
JUNEAU, ALASKA 99811-0200

PHONE: (907) 465-2200
FAX: (907) 465-2135

Focus: State of Alaska Executive Branch Employees	State of Alaska Department of Administration Office of the Commissioner Chief Information Officer
Topic: Email Retention Policy	Effective Date: August 7, 2009
Authority: AS 44.21	

POLICY

Emails, including attachments, are subject to the same records retention requirements that apply to any other electronic or non-electronic records. Like paper records, if an email is subject to multiple records retention requirements, it must be archived for the longest applicable period. The applicable records retention requirements are the State of Alaska executive branch records retention schedules imposed pursuant to AS 40.21 and any implementing regulations, and the requirements imposed pursuant to a notification of a legal hold in connection with judicial or administrative litigation, or imposed because of a request under the Alaska Public Records Act, AS 40.25.100 - 40.25.220.

Accordingly, all executive branch employees are responsible for archiving into the designated executive branch email archiving system their sent and received emails (including any attachments) in accordance with the policy identified here.!!)

ALL EXECUTIVE BRANCH EMPLOYEES

When executive branch employees conduct state business through email they must, whenever feasible, use the state's electronic mail system. In some circumstances, employees may need to use, or may inadvertently use, private email accounts to conduct state business. In those

[1] **Guidelines for determining what types of emails must be archived** can be found in the document entitled "Email: FAQ and Rules," linked on the Division of Archives home page and found at http://www.archives.state.ak.us/pdfs/records_management/le_mail.pdf

instances, employees must send copies of those messages to their state email accounts.

Under no circumstance may State of Alaska personally identifiable information (PII) be sent to or from an executive branch employee's private email account. PII is defined in AS 45.48.590(4).^[2]

Employees are required to follow the executive branch email policy. Failure to do so may result in discipline up to and including dismissal.

EXECUTIVE EMPLOYEES

Any email sent or received by an executive employee^[3] may be deleted within 90 days unless the email is subject to a records retention requirement, public records request or legal hold. If within that 90-day period a sent or received email becomes subject to a records retention requirement, public records request or legal hold then it cannot be deleted unless the requirement, request, or hold is lifted before the end of the period. All email not deleted within 90 days will be automatically archived.

NON-EXECUTIVE EMPLOYEES

[2] Definition of Personally Identifiable Information:

AS 45.48.590(4): "personal information" means (A) an individual's passport number, driver's license number, state identification number, bank account number, credit card number, debit card number, other payment card number, financial account information, or information from a financial application; or (B) a combination of an individual's (i) name; and (ii) medical information, insurance policy number, employment information, or employment history"

[3] Definition of Executive Employee:

The following persons are executive employees: (1) the Executive Branch employees defined as "public officials" in AS 39.50.200(a)(9); and (2) the persons employed in the following job classifications:

Assistant Commissioner
Executive Director
Assistant Director
Labor Relations Manager
State Accountant
State Leasing and Facilities Manager
Department of Public Safety Liaison
Chief, Worker's Compensation Adjudication
Veterans Affairs Administrator
Administrator, Violent Crimes Compensation Board
Administrator, Highway Safety Planning Agency
Marine Highway Transportation Services Manager

Positions placed in the partially exempt service under AS 39.25.130(a)(1) or (2) will be added to this list.

August 7, 2009

If a records retention requirement applies to a sent or received email of a non-executive employee, then within 90 days after the email was sent or received, it must be archived into the state's designated email archiving system in accordance with the records retention requirement. If an email is subject to multiple records retention requirements, it must be archived for the longest applicable period. Any email not archived within 90 days after it was sent or received will be automatically deleted.

EDUCATION

All employees with an email account must be educated on the executive branch email policy. Any new employee with an assigned email account must be educated on the policy before the account is activated. The education portion of this policy does not take effect until the state implements the email archiving system.



Annette Kreitzer, Commissioner
Department of Administration
Chief Information Officer

8-7-09
Date

adn.com

Anchorage Daily News

[Print Page](#) | [Close Window](#)**Our view: Private e-mails**
Court says loophole is OK; legislators, governor should act*(08/14/09 21:17:14)*

Judge Jack Smith says there is no state law requiring state employees to do their state business on the state e-mail system. With the ruling, employees may still potentially hide messages from public scrutiny by using private e-mail accounts, as Gov. Sarah Palin and her staff did. OK, then, it's time to pass a state law.

State Rep. Mike Doogan offered one such bill last year, HB195. It went nowhere, though. Doogan is stuck in the House minority, with relatively little power.

In any event, it will be months before the Legislature can close this gap in the state public records law. Lawmakers don't convene again until January.

In the meantime, Gov. Sean Parnell can help immensely by taking a more forceful approach to this question.

His spokeswoman Sharon Leighow said last week that Gov. Parnell stands by a previous directive from Gov. Palin's chief of staff, who said any private e-mails concerning state business must be copied into the state's e-mail system.

However, that directive was issued only to the governor's office staff, rather than to all state government employees. Leighow said in an e-mail Thursday that a new state policy is due out soon and will deal with this issue.

Gov. Parnell needs to issue a clear, unambiguous order to all state employees and ensure that all e-mails about state business appear in the state e-mail system. That way, the e-mails can be properly archived for possible public access until the Legislature has time to write this requirement into state law.

BOTTOM LINE: E-mails about state business need to be in the state e-mail system.

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11.81.900 (b)

(53) "Public record" means:

(A) each of the following that is developed or received under law or in connection with the transaction of official business and preserved or appropriate for preservation by any agency, municipality, or any body subject to the open meeting provision of AS 44.62.310, as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the state or municipality or because of the informational value in it:

(i) a document, paper, book, letter, drawing, map, plat, photo, photographic file, motion picture, film, microfilm, microphotograph, exhibit, magnetic or paper tape, punched card or other document of any other material, regardless of physical form or characteristic; and

(ii) an electronic transmission, including a text message, an instant message, electronic mail, or any other form of communication not directly involving the physical transmission of paper that creates a record that can be retained, retrieved, and reviewed by a recipient of the communication and that can be reproduced in paper form through an automated process;

(B) staff manuals and instructions to staff that affect the public;

40.21.150

(6) "record"

(A) means each of the following that is developed or received under law or in connection with the transaction of official business and preserved, required by law to be preserved, or appropriate for preservation by an agency or a political subdivision as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the state or municipality or because of the informational value in it:

(i) a document, paper, book, letter, drawing, map, plat, photo, photographic file, motion picture, film, microfilm, microphotograph, exhibit, magnetic or paper tape, punched card or other document of any other material, regardless of physical form or characteristic; and

(ii) an electronic transmission, including a text message, an instant message, electronic mail, or any other form of communication not directly involving the physical transmission of paper that creates a record that can be retained, retrieved, and reviewed by a recipient of the communication and that can be reproduced in paper form through an automated process;

(B) does not include library and museum material developed or acquired and preserved solely for reference, historical, or exhibition purposes, extra copies of documents preserved solely for convenience of reference, or stocks of publications and processed documents;

40.25.220

(3) "public record" or "public records"

(A) means the following that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved, required by law to be preserved, or appropriate for preservation as information or as evidence of the organization or operation of the public agency:

(i) books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics; and

(ii) an electronic transmission, including a text message, an instant message, electronic mail, or any other form of communication not directly involving the physical transmission of paper that creates a record that can be retained, retrieved, and reviewed by a recipient of the communication and that can be reproduced in paper form through an automated process;

(B) does not include proprietary software programs;

ALASKA STATE LEGISLATURE

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SENATOR JOHNNY ELLIS
SENATE MAJORITY LEADER

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Chair, Senate Judiciary Committee

From: Senator Johnny Ellis 

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