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insolvency of transferor who was related to transferee); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D.Ark.1963) (although threat or pendency of litigation said to be an indicator of fraud, transfer was held not to be fraudulent when adequate consideration and good faith were shown).

(e) Whether the transfer was of substantially all the debtor's assets: Walbrun v. Babbitt, 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a single transaction held to be fraudulent); Cole v. Mercantile Trust Co., 133 N.Y. 164, 30 N.E. 847 (1892) (transfer of all property before plaintiff could obtain a judgment held to be fraudulent); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (although transfer of all assets said to indicate fraud, transfer held not to be fraudulent because full consideration was paid and transferor surrendered possession).

(f) Whether the debtor had absconded: *In re* Thomas, 199 F. 214 (N.D.N.Y.1912) (when debtor collected all of his money and property with the intent to abscond, fraudulent intent was held to be shown).

(g) Whether the debtor had removed or concealed assets: Bentley v. Young, 210 F. 202 (S.D.N.Y.1914), aff'd, 223 F. 536 (2d Cir.1915) (debtor's removal of goods from store to conceal their whereabouts and to sell them held to render sale fraudulent); Cioli v. Kenourgios, 59 Cal.App. 690, 211 P. 838 (1922) (debtor's sale of all assets and shipment of proceeds out of the country held to be fraudulent notwithstanding adequacy of consideration).

(h) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred: Toomay v. Graham, 151 S.W.2d 119 (Mo.App.1941) (although mere inadequacy of consideration said not to be a badge of fraud, transfer held to be fraudulent when accompanied by badges of fraud); Texas Sand Co. v. Shield, 381 S.W.2d 48 (Tex.1964) (inadequate consideration said to be an indicator of fraud, and transfer held to be fraudulent because of inadequate consideration, pendency of suit, family relationship of transferee, and fact that all non-exempt property was transferred); Weigel v. Wood, 355 Mo. 11, 194 S.W.2d 40 (1946) (although inadequate consideration said to be a badge of fraud, transfer held not to be fraudulent when inadequacy not gross and not accompanied by any other badge fact that transfer was from father to son held not sufficient to establish fraud).

(i) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (insolvency of transferor said to be a badge of fraud and transfer held fraudulent when accompanied by other badges of fraud); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D.Ark.1963)

(although the insolvency of the debtor said to be a badge of fraud, transfer held not fraudulent when debtor was shown to be solvent, adequate consideration was paid, and good faith was shown, despite the pendency of suit); Wareheim v. Bayliss, 149 Md. 103, 131 A. 27 (1925) (although insolvency of debtor acknowledged to be an indicator of fraud, transfer held not to be fraudulent when adequate consideration was paid and whether debtor was insolvent in fact was doubtful).

(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred: Commerce Bank of Lebanon v. Hallsdale A Corp., 618 S.W.2d 288, 292 (Mo.App.1981) (when transferors incurred substantial debts near in time to the transfer, transfer was held to be fraudulent due to inadequate consideration, close family relationship, the debtor's retention of possession, and the fact that almost all the debtors' property was transferred).

(7) The effect of the two transfers described in paragraph (b)(11), if not avoided, may be to permit a debtor and a lienor to deprive the debtor's unsecured creditors of access to the debtor's assets for the purpose of collecting their claims while the debtor, the debtor's affiliate or insider, and the lienor arrange for the beneficial use or disposition of the assets in accordance with their interests. The kind of disposition sought to be reached here is exemplified by that found in Northern Pacific Co. v. Boyd, 228 U.S. 482 (1913), the leading case in establishing the absolute priority doctrine in reorganization law. There the court held that a reorganization whereby the secured creditors and the management-owners retained their economic interests in a railroad through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a fraudulent disposition (*id.* at 502-05). See Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization, 19 Va.L.Rev. 541, 693 (1933). For cases in which an analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see Jackson v. Star Sprinkler Corp. of Florida, 575 F.2d 1223, 1231-34 (8th Cir. 1978); Heath v. Helmick, 173 F.2d 157, 161-62 (9th Cir.1949); Toner v. Nuss, 234 F.S. 457, 461-62 (E.D.Pa.1964); and see *In re* Spotless Tavern Co., Inc., 4 F.Supp. 752, 753, 755 (D.Md.1933).

(8) Nothing in subsection (b) is intended to affect the application of AS 45.02.402(b), AS 45.09.205, or 45.09.301, or former AS 45.06.105 (Uniform Commercial Code). AS 45.02.402(b) recognizes the generally prevailing rule that retention of possession of goods by a seller may be fraudulent, but limits the application of the rule by negating any imputation of fraud from "retention of possession in good faith and current course of trade by a merchant seller for a commercially reasonable time after a sale or identification." AS 45.09.205 explicitly negates any imputation of fraud from the grant of liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property collateral or to account for its proceeds. The section recognizes that it does not relax prevailing requirements

for delivery of possession by a pledgor. Moreover, the section does not mitigate the general requirement of AS 45.09.301(a)(2) that a nonpossessory security interest in personal property must be perfected to be effective against a levying creditor. Finally, like the 1918 Act, this Act does not pre-empt the statutes governing bulk transfers, such as former AS 45.06 of the Uniform Commercial Code. Compliance with the cited sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value would be voidable under this Act notwithstanding compliance with the Uniform Commercial Code.

Sec. 34.41.040. This section describes the transfers that are fraudulent as to creditors whose claims arose before the transfer was made or obligation was incurred by the debtor.

OFFICIAL COMMENTARY

(1) Subsection (a) is derived from § 4 of the 1918 Act. It adheres to the limitation of the protection of that section to a creditor who extended credit before the transfer or obligation described. As pointed out in comment (2) accompanying Sec. 34.41.030, this Act substitutes "reasonably equivalent value" for "fair consideration."

(2) Subsection (b) renders a preferential transfer -- *i.e.*, a transfer by an insolvent debtor for or on account of an antecedent debt -- to an insider vulnerable as a fraudulent transfer when the insider had reasonable cause to believe that the debtor was insolvent. This subsection adopts for general application the rule of such cases as Jackson Sound Studios, Inc. v. Travis, 473 F.2d 503 (5th Cir. 1973) (security transfer of corporation's equipment to corporate principal's mother perfected on eve of bankruptcy of corporation held to be fraudulent); *In re* Lamie Chemical Co., 296 F. 24 (4th Cir 1924)(corporate preference to corporate officers and directors held voidable by receiver when corporation was insolvent or nearly so and directors had already voted for liquidation); Stuart v. Larson, 298 F. 223 (8th Cir 1924), noted 38 Harv.L.Rev. 521 (1925) (corporate preference to director held voidable). See generally 2 G. Glenn, Fraudulent Conveyances and Preferences 386 (Rev. ed 1940). Subsection (b) overrules such cases as Epstein v. Goldstein, 107 F.2d 755, 757 (2d Cir. 1939) (transfer by insolvent husband to wife to secure his debt to her sustained against attack by husband's trustee); Hartford Accident & Indemnity Co. v. Jirasek, 254 Mich. 131, 139, 235 N.W. 836, 839 (1931) (mortgage given by debtor to his brother to secure an antecedent debt owed the brother sustained as not fraudulent).

(3) Subsection (b) does not extend as far as § 8(a) of the 1918 Act and § 548(b) of the Bankruptcy Code in rendering voidable a transfer or obligation incurred by an insolvent partnership to a partner, who is an insider of the partnership. The transfer to the partner is not vulnerable to avoidance under subsection (b) unless the

transfer was for an antecedent debt and the partner had reasonable cause to believe that the partnership was insolvent. The cited provisions of the 1918 Act and the Bankruptcy Act make any transfer by an insolvent partnership to a partner voidable. Avoidance of the partnership transfer without reference to the partner's state of mind and the nature of the consideration exchanged would be unduly harsh treatment of the creditors of the partner and unduly favorable to the creditors of the partnership.

Sec. 34.41.050. This section defines the moments in time at which when a claim for relief or cause of action to avoid a transfer or obligation arises.

OFFICIAL COMMENTARY

(1) One of the uncertainties in the law governing the avoidance of fraudulent transfers and obligations is the difficulty of determining when the claim for relief or cause of action arises. This section clarifies this point in time. For transfers of real estate, paragraph (1) fixes the time as the date of perfection against a good faith purchaser from the transferor. For transfers of fixtures and assets constituting personalty, the time is fixed under paragraph (1) as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection typically is effected by notice-filing, recordation, or delivery of unequivocal possession. See AS 45.09.302, 45.09.304, and 45.09.305 (security interest in personal property perfected by notice-filing or delivery of possession to transferee); 4 American Law of Property §§ 17.10-17.12 (1952) (recordation of transfer or delivery of possession to grantee required for perfection against bona fide purchaser from grantor). The provision for postponing the time a transfer is made until its perfection is an adaptation of § 548(d)(1) of the Bankruptcy Code. When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers -- *e.g.*, an assignment of a bank account, creation of a security interest in money, or execution of a marital or premarital agreement for the disposition of property owned by the parties to the agreement -- may not be amenable to perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not perfectible as provided in paragraph (1), the transfer occurs for the purpose of this Act when the transferor effectively parts with an interest in the asset as provided in AS 45.41.110(12), *infra*.

(2) Paragraph (4) requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice-filing or recordation of a document evidencing an interest in an asset to be acquired in the future. *Cf.* Bankruptcy Code § 547(e); AS 45.09.203(a)(3).

(3) Paragraph (5) is new. It is intended to resolve uncertainty arising from Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 989-91, 997 (2d Cir.1981), insofar as that case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guaranty are made rather than when the guaranty first became effective between the parties. Compare Rosenberg, Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware, 125 U.Pa.L.Rev. 235, 256-57 (1976).

An obligation may be avoided as fraudulent under this Act if it is incurred under the circumstances specified in AS 34.41.030(a) or 34.41.040(a). The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. See Rubin v. Manufacturers Hanover Trust Co., 661 F.2d at 991-92; Williams v. Twin City Co., 251 F.2d 678, 681 (9th Cir. 1958); Rosenberg, *supra* at 243-46.

Sec. 34.41.060. This section sets out the remedies available to creditors. The listing is not exclusive.

OFFICIAL COMMENTARY

(1) This section is derived from §§ 9 and 10 of the 1918 Act. Section 9 of that Act specified the remedies of creditors whose claims have matured, and § 10 enumerated the remedies available to creditors whose claims have not matured. A creditor holding an unmatured claim may be denied the right to receive payment for the proceeds of a sale on execution until the claim has matured, but the proceeds may be deposited in court or in an interest-bearing account pending the maturity of the creditor's claim. The remedies specified in this section are not exclusiv

(2) The availability of an attachment or other provisional remedy has been restricted by amendments of statutes and rules of procedure to reflect views of the United States Supreme Court expressed in Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969), and its progeny. This judicial development and the procedural changes that followed in its wake do not preclude resort to attachment by a creditor in seeking avoidance of a fraudulent transfer or obligation. See, *e.g.*, Britton v. Howard Sav. Bank, 727 F.2d 315, 317-20 (3d Cir.1984); Computer Sciences Corp. v. Sci-Tek Inc., 367 A.2d 658, 661 (Del. Super. 1976); Great Lakes Carbon Corp. v. Fontana, 54 A.D.2d 548, 387 N.Y.S.2d 115 (1st Dep't 1976). Paragraph (a)(2) continues the authorization for the use of attachment contained in § 9(b) of the 1918 Act, or of a similar provisional remedy, when the state's procedure provides therefor, subject to the constraints imposed by the due process clauses of the United States and state constitutions.

(3) Subsections (a) and (b) of § 10 of the 1918 Act authorized the court, in an action on a fraudulent transfer or obligation, to restrain the defendant from

disposing of the defendant's property, to appoint a receiver to take charge of the property, or to make any order the circumstances may require. Section 10, however, applied only to a creditor whose claim was unmatured. There is no reason to restrict the availability of these remedies to such a creditor, and the courts have not so restricted them. See, *e.g.*, Lipskey v. Voloshen, 155 Md. 139, 143-45, 141 Atl. 402, 404-05(1928) (judgment creditor granted injunction against disposition of property by transferee, but appointment of receiver denied for lack of sufficient showing of need for such relief); Matthews v. Schusheim, 36 Misc.2d 918, 922-23, 235 N.Y.S.2d 973, 976-77, 991-92 (Sup.Ct. 1962) (injunction and appointment of receiver granted to holder of claims for fraud, breach of contract, and alimony arrearages, whether creditor's claim was mature said to be immaterial); Oliphant v. Moore, 155 Tenn. 359, 362-63, 293 S.W. 541, 542 (1927) (tort creditor granted injunction restraining alleged tort feasor's disposition of property).

(4) As under the 1918 Act, a creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed under subsection (a). See Sec. 34.41.110(3) & (4), *infra*; American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, Fraudulent Conveyances and Preferences 129 (Rev.ed. 1940).

(5) The provision in subsection (b) for a creditor to levy execution on a fraudulently transferred asset continues the availability of a remedy provided in § 9(b) of the 1918 Act. See *e.g.*, Doland v. Burns Lbr. Co., 156 Minn. 238, 194 N.W. 636 (1923); Montana Ass'n of Credit Management v. Hergert, 181 Mont. 442, 449, 453, 593 P.2d 1059, 1063, 1065 (1979); Corbett v. Hunter, 292 Pa.Super. 123, 128, 436 A.2d 1036, 1038 (1981); see also American Surety Co. v. Conner, 251 N.Y. 1, 6, 166 N.E. 783, 784, 65 A.L.R. 244, 247 (1929) ("In such circumstances he [the creditor] might find it necessary to indemnify the sheriff and, when the seizure was erroneous, assumed the risk of error"); McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L. Rev. 404, 441-42 (1933).

(6) The remedies specified in this section, like those enumerated in §§ 9 and 10 of the 1918 Act, are cumulative. Lind v. O. N. Johnson Co., 204 Minn. 30, 40, 282 N.W 661, 667, 119 A.L.R. 940 (1939) (Uniform Fraudulent Conveyance Act held not to impair or limit availability of the "old practice" of obtaining judgment and execution returned unsatisfied before proceeding in equity to set aside a transfer); Conemaugh Iron Works Co. v. Delano Coal Co., Inc., 298 Pa. 182, 186, 148 A. 94, 95 (1929) (Uniform Fraudulent Conveyance Act held to give an "additional optional remedy" and not to "deprive a creditor of the right, as formerly, to work out his remedy at law"); 1 G. Glenn, Fraudulent Conveyances and Preferences 120, 130, 150 (Rev.ed. 1940).

Sec. 34.41.070. This section sets out the defenses available to, the potential liability of, and protections available for, a transferee.

OFFICIAL COMMENTARY

(1) Subsection (a) states the rule that applies when the transferee establishes a complete defense to the action for avoidance based on Sec. 34.41.030(a)(1). The subsection is an adaptation of the exception stated in § 9 of the 1918 Act. The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. Chorost v. Grand Rapids Factory Showrooms, Inc., 77 F.Supp. 276, 280 (D.N.J. 1948), affd 172 F.2d 327, 329 (3d Cir. 1949).

(2) Subsection (b) is derived from § 550(a) of the Bankruptcy Code. The value of the asset transferred is limited to the value of the leviable interest of the transferor, exclusive of any interest encumbered by a valid lien. See Sec. 34.41.-110(2), *infra*.

The requirement of § 550(b)(1) of the Bankruptcy Code that a transferee be "without knowledge of the voidability of the transfer" in order to be protected has been omitted as inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee. Knowledge of the voidability of a transfer would seem to involve a legal conclusion. Determination of the voidability of the transfer ought not to require the court to inquire into the legal sophistication of the transferee.

(3) Subsection (c) is new. The measure of the recovery of a defrauded creditor against a fraudulent transferee is usually limited to the value of the asset transferred at the time of the transfer. See, *e.g.*, United States v. Fetnon, 640 F.2d 609, 611 (5th Cir. 1981); Hamilton Nat'l Bank of Boston v. Halstead, 134 N.Y. 520, 31 N.E. 900 (1892); *cf.* Buffum v. Peter Barceloux Co., 289 U.S. 227 (1932) (transferee's objection to trial court's award of highest value of asset between the date of the transfer and the date of the decree of avoidance rejected because an award measured by value as of time of the transfer plus interest from that date would have been larger). The premise of subsection (c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery. Circumstances may require a departure from that measure of the recovery, however, as the cases decided under the 1918 Act and other laws derived from the Statute of 13 Elizabeth illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby. See Bankruptcy Code § 550(d); Janson v. Schier, 375 A.2d 1159,1160 (N.H. 1977), Anno. 8 A.L.R. 527 (1920). If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction. See Damazo v. Wahby, 269 Md. 252, 257, 305 A.2d 138, 142 (1973). If the transferee

has collected rents, harvested crops, or derived other income from the use or occupancy of the asset after the transfer, the liability of the transferee should be limited in any event to the net income after deduction of the expense incurred in earning the income. Anno., 60 A.L.R.2d 593 (1958). On the other hand, adjustment for the equities does not warrant an award to the creditor of consequential damages alleged to accrue from mismanagement of the asset after the transfer.

(4) Subsection (d) is an adaption of § 548(c) of the Bankruptcy Code. An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred.

(5) Paragraph (e)(1) rejects the rule adopted in Darby v. Atkinson (*In re* Farris), 415 F.Supp. 33, 39-41 (W.D.Okla. 1976) that termination of a lease on default in accordance with its terms and applicable law may constitute a fraudulent transfer. Paragraph (e)(2) protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the provisions of Part 5 of Article 9 of the Uniform Commercial Code (AS 45.09.501 - 45.09.507). *Cf.* Calaiaro v. Pittsburgh Nat'l Bank (*In re* Ewing), 33 B.R. 288, 9 C.B.C.2d 526, CCH B.L.R. ¶ 69,460 (Bk.W.D.Pa. 1983) (sale of pledged stock held subject to avoidance as fraudulent transfer in 548 of the Bankruptcy Code), rev'd, 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed). Although a secured creditor may enforce rights in collateral without a sale under AS 45.09.502 or 45.09.505, the creditor must proceed in good faith (AS 45.09.103) and in a "commercially reasonable" manner. The "commercially reasonable" constraint is explicit in AS 45.09.502(b) and is implicit in AS 45.09.505. See 2 G. Gilmore, Security Interests in Personal Property 1224-27 (1965).

(6) Subsection (f) provides additional defenses against the avoidance of a preferential transfer to an insider under Sec. 34.41.040(b).

Paragraph (f)(1) is adapted from § 547(c)(4) of the Bankruptcy Code, which permits a preferred creditor to set off the amount of new value subsequently advanced against the recovery of a voidable preference by a trustee in bankruptcy to the debtor without security. The new value may consist not only of money, goods, or services delivered on unsecured credit but also of the release of a valid lien. See *e.g.*, *In re* Ira Haupt & Co., 424 F.2d 722, 124 (2d Cir. 1970); Baranow v. Gibraltor Factors Corp. (*In re* Hygrade Envelope Co.), 393 F.2d 60, 65-67 (2d Cir.), cert. denied, 393 U.S. 837 (1968); *In re* John Morrow & Co., 134 F. 686, 688 (S.D.Ohio 1901). It does not include an obligation substituted for a prior obligation. If the insider receiving the preference thereafter extends new credit to the debtor but also

takes security from the debtor, the injury to the other creditors resulting from the preference remains undiminished by the new credit. On the other hand, if a lien taken to secure the new credit is itself voidable by a judicial lien creditor of the debtor, the new value received by the debtor may appropriately be treated as unsecured and applied to reduce the liability of the insider for the preferential transfer.

Paragraph (f)(2) is derived from § 547(c)(2) of the Bankruptcy Code, which excepts certain payments made in the ordinary course of business or financial affairs from avoidance by the trustee in bankruptcy as preferential transfers. Whether a transfer was in the "ordinary course" requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged under Sec. 34.41.040(b). See Tait & Williams, Bankruptcy Preference Laws: The Scope of Section 547(c)(2), 99 Banking L.J. 55, 63-66 (1982). The defense provided by paragraph (f)(2) is available, irrespective of whether the debtor or the insider or both are engaged in business, but the prior conduct or practice of both the debtor and the insider-transferee is relevant.

Paragraph (f)(3) is new and reflects a policy judgment that an insider who has previously extended credit to a debtor should not be deterred from extending further credit to the debtor in a good faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A similar rationale has sustained the taking of security from an insolvent debtor for an advance to enable the debtor to stave off bankruptcy and extricate itself from financial stringency. Blackman v. Bechtel, 80 F.2d 505, 508-09 (8th Cir. 1935); Olive v. Tyler (*In re* Chelan Land Co.), 257 F. 497, 5 A.L.R. 561 (9th Cir. 1919); *In re* Robin Bros. Bakeries, Inc., 22 F.S. 662, 663-64 (N.D.Ill. 1937); see Dean v. Davis, 242 U.S. 438, 444 (1917). The amount of the present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative effort are relevant considerations in determining whether the transfer was in good faith.

Sec. 34.41.080. This section makes it clear that failure to take action within the statutory time limits bars the right of action.

OFFICIAL COMMENTARY

(1) This section is new. Its purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. See Restatement of Conflict of Laws 2d § 143 Comments (b) & (c) (1971). The section rejects the rule applied in United States v. Gleneagles Inv. Co., 565 F.S. 556, 583 (M.D.Pa. 1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act).

(2) Statutes of limitations applicable to the avoidance of fraudulent transfers and obligations vary widely from state to state and are frequently subject to

uncertainties in their application. See Hesson, The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations, 32 Cornell L.Q. 222 (1946); Annos., 76 A.L.R. 864 (1932), 128 A.L.R. 1289 (1940), 133 A.L.R. 1311 (1941), 14 A.L.R.2d 598 (1950), and 100 A.L.R.2d 1094 (1965). Together with Sec. 34.41.050, this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations of actions to fraudulent transfers and obligations. The periods prescribed apply, whether the action under this Act is brought by the creditor defrauded or by a purchaser at a sale on execution levied pursuant to Sec. 34.41.060(b) and whether the action is brought against the original transferee or subsequent transferee. The prescription of statutory periods of limitation does not preclude the barring of an avoidance action for laches. See Sec. 34.41.090 and the accompanying comment, *infra*.

Sec. 34.41.090. This section provides that other applicable principles of law supplement the provisions of this chapter.

OFFICIAL COMMENTARY

This section is derived from § 11 of the 1918 Act and § 1-103 of the Uniform Commercial Code (AS 45.01.103). The section adds a reference to "laches" in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a fraudulent transfer. See Louis Dreyfus Corp. v. Butler, 496 F.2d 806, 808 (6th Cir. 1974) (action to avoid transfers to debtor's wife when debtor was engaged in speculative business held to be barred by laches or applicable statutes of limitations); Cooch v. Grier, 30 Del.Ch. 255, 265-66, 59 A.2d 282, 287-88 (1948) (action under the Uniform Fraudulent Conveyance Act held barred by laches when the creditor was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

Sec. 34.41.100. This section is the standard statement of the purpose of a uniform law and serves as a guide to courts that may be interpreting the law.

Sec. 34.41.110. This section sets out the definitions for the chapter.

OFFICIAL COMMENTARY

(1) The definition of "affiliate" is derived from § 101(2) of the Bankruptcy Code.

(2) The definition of "asset" is substantially to the same effect as the definition of "assets" in § 1 of the 1918 Act. The definition in this Act, unlike that in the earlier Act, does not, however, require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal

injury or a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under Sec. 34.41.010, although applicable law may not allow such an asset to be levied on and sold by a creditor. *Cf.* Manufacturers & Traders Trust Co. v. Goldman *(In re* Ollag Construction Equipment Corp.), 578 F.2d 904, 907-09 (2d Cir.1978).

Subparagraphs (2)(A) - (C) provide clarification by excluding from the term not only generally exempt property but also [illegible] interest in a tenancy by the entirety in many states and an interest that is generally beyond reach by unsecured creditors because subject to a valid lien. This Act, like its predecessor and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims. The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting leviability of interest in entireties property are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.

A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by process against the tenant's interest, and in some states a creditor of a tenant by the entirety may likewise collect a judgment by process against the tenant's interest. See 2 American Law of Property 10, 22, 28-32 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 98 Am.Bankr. L.J. 255, 258-59 (1974). The leviable interest of such a tenant is included as an asset under this Act.

The definition of "assets" in the 1918 Act excluded property that is exempt from liability for debts. The definition did not, however, exclude all property that can not be reached by a creditor through judicial proceedings to collect a debt. Thus, it included the interest of a tenant by the entirety although in nearly half the states such an interest can not be subjected to liability for a debt unless it is an obligation owned jointly by the debtor with the debtor's cotenant by the entirety. See 2 American Law of Property 29 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 48 Am.Bankr.L.J. 255, 258 (1974). The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.

The reference to "generally exempt" property in subparagraph (2)(B) recognizes that all exemptions are subject to exceptions. Creditors having special rights against generally exempt property typically include claimants for alimony, taxes, wages, the purchase price of the property, and labor or materials that improve the property. See Uniform Exemptions Act § 10 and the accompanying Comment. The fact that a particular creditor may reach generally exempt property by resorting to

differs from the definition in the Bankruptcy Code in omitting the reference in 11 U.S.C. 101(28)(D) to an elected official or relative of such an official as an insider of a municipality. As in the Bankruptcy Code (see 11 U.S.C. 102 (3)), the word "includes" is not limiting, however. See also AS 01.10.040(b). Thus, a court may find a person living with an individual for an extended time in the same household or as a permanent companion to have the kind of close relationship intended to be covered by the term "insider." Likewise, a trust may be found to be an insider of a beneficiary.

(8) The definition of "lien" is derived from paragraphs (30), (31), (43), and (45) of § 101 of the Bankruptcy Code, which define "judicial lien," "lien," "security interest," and "statutory lien" respectively.

(9) The definition of "person" is adapted from paragraphs (28) and (30) of § 1-201 of the Uniform Commercial Code (AS 45.01.201(29) and (31) in the Alaska Statutes), defining "organization" and "person" respectively, and has been modified to incorporate by reference those items already provided for in AS 01.10.060.

(10) The definition of "property" is derived from § 1-201(33) of the Uniform Probate Code (AS 13.06.050(33) in the Alaska Statutes). Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

(11) The definition of "relative" is derived from § 101(37) of the Bankruptcy Code but is explicit in its references to the spouse of a debtor in view of uncertainty as to whether the common law determines degrees of relationship by affinity.

(12) The definition of "transfer" is derived principally from § 101(48) of the Bankruptcy Code. The definition of "conveyance" in § 1 of the 1918 Act was similarly comprehensive and the references in this Act to "payment of money, release, lease, and the creation of a lien or incumbrance" are derived from the 1918 Act. While the definition in the 1918 Act did not explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent with an interpretation that covered such a transfer. See, *e.g.* Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and foreclosure sales); Lefkowitz v. Finkelstein Trading Corp., 14 F.Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); Langan v. First Trust & Deposit Co., 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th Dept. 1950), aff'd 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); Catabene v. Wallner, 16 N.J.Super. 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure).

(13) The definition of "valid lien" is new. A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor. See, *e.g.*, Pearlman v. Reliance Insurance Co., 371 U.S. 132, 136 (1962) (upholding a surety's equitable lien in respect to a fund owing a bankrupt contractor).

Sec. 34.41.120. The short title by which the chapter may be cited.

Sec. 2. Repeals the existing Alaska law on fraudulent conveyances generally (AS 34.40).

If I may be of further assistance, please advise.

DRD:pl
94-052.plm

HB

442

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL

Bill Version: HB 442
(H) Publish Date: 2/4/94

Revision Date:
Title: Criminal Justice Information

Dept. Affected: Health and Social Services
BRU: Family & Youth Services
Component: Central Office, SCRO,NRO, SERO

Sponsor: Rules Committee by request of Governor
Requestor:

COMPONENT SERIAL NO. 0254,0255,0258,0259

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGES IN REVENUES						

FUND SOURCE						
(Thousands of Dollars)						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0
POSITIONS:						
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: 0.0

ANALYSIS: (Attach a separate page if necessary)

This bill pertains to criminal justice information sharing and procedural requirements affecting adult criminals and juveniles waived to adult status. This fiscal note is based on the assumption that mandatory fingerprinting pertains only to adults and those juveniles waived to adult status. Additionally, DFYS assumes the standards for fingerprinting contained in the bill will not apply to the juvenile justice system.

Prepared by: Deborah R. Wing, Director — Phone: 465-3191
Division: Division of Family & Youth Services — Date: 02/02/94

Approved by Commissioner: Margaret R. Lowe, M.Ed., Ed.S. — Date: 2-2-94
Agency: Department of Health & Social Services

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STATE OF ALASKA
1994 LEGISLATIVE SESSION

FISCAL NOTE

No. 2
Bill Version: HB 442
(H) Publish Date: 2/4/94

Revision Date: January 7, 1994
Title: "...relating to criminal justice information... obtaining certain criminal justice information..."
Sponsor: Rules Committee/Request of the Governor
Requestor: Governor's Office/OMB

Department Affected: Department of Law
BRU: Prosecution
Component: Criminal Justice Litigation
COMPONENT SERIAL NO. 0089

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING:

1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: January 7, 1994

Richard I. Pegues /FOR/

Approved by Commissioner: Bruce M. Botelho, Acting Attorney General
Agency: Department of Law
Date: January 7, 1994

PREPARER TO PROVI[illegible] [illegible]GISLATIVE OFFICE
For further [illegible] [illegible]ve Office

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. _____

ANALYSIS CONTINUATION:

This bill would completely revise state law regarding the collection, safekeeping and dissemination of criminal justice information in the state's automated criminal justice data systems. The bill would also establish an oversight committee to be known as the Criminal Justice Information Advisory Board. Among other members, the bill would make the attorney general or the attorney general's designee a member of the advisory board. These new duties would entail two meetings per year. Consequently, the department does not anticipate a fiscal impact.

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BII Bill Version: HB 442
(H) Publish Date: 2/4/94

Revision Date: _____ Dept. Affected: Public Safety

Title: "An Act relating to criminal justice inform- ation; providing procedural requirements for..." BRU: STATEWIDE

Component: Records and Identification

Sponsor: Rules

Requestor: Governor COMPONENT SERIAL NO. 1190

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY 93) impact: $ 0

ANALYSIS: (Attach a separate page if necessary.)
See Attached

Prepared By: Ken Bischoff Phone: 465-4336

Division: Administrative Services Date: 01/05/94

Approved by Commissioner: [signature] Date: 01/06/94

Agency: Richard L. Burton, Department of Public Safety

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PUBLIC SAFETY FISCAL NOTE

The Department of Public Safety submits a zero fiscal note with the following comments:

1. The legislation establishes a statutory framework that should permit a better allocation of existing resources. To a significant degree, this legislation formalizes the procedures that exist currently. To this extent, the bill should help improve the efficiency of criminal record processing. Efficiency improvements cannot reliably be quantified but would assist the department and contributing agencies in reducing criminal record backlogs;

2. Mandatory provisions have been minimized, sections generally do not take effect until regulations are adopted.

3. To the extent this legislation may increase public access, provision for the adoption of fees to provide services has been made. The Department currently charges fees for a number of services that will continue to be provided, we do not see an immediate need to increase fees. If such a need arises, regulations would be developed subject to public notice prior to adoption.

4. This bill will provide a framework to guide discussion on how to improve the collection of fingerprints and related criminal history record information. That discussion will include all agencies represented by the Criminal Justice Working Group. To implement the full scope of this legislation will require a series of discussions in order to reach implementation agreement. This will take time to negotiate. Accordingly, no immediate fiscal impact is anticipated.

   DPS's primary goal is to provide a framework necessary to maintain an accurate and complete and timely criminal history file. DPS depends on all criminal justice agencies to contribute to the database. This bill provides such a framework

   DPS cannot autonomously implement this legislation across the board. DPS will use the Criminal Justice Work Group and its subcommittees as a forum to confirm the need for specific data in the criminal history record and proceed only after concurrence is obtained.

Summary

This legislation is required to establish this State's statutory framework for criminal history record information, something which exists in virtually every other state. Criminal history records consist of timely, accurate, and complete files used to make decisions related to investigations, release, sentencing and employment. Defendants are not going to volunteer their previous criminal history. If accurate and complete criminal records are not available on line, criminal justice agencies have no choice but to make ongoing decisions without reliable criminal history record information. This will result in lighter sentencing, improper employment decisions, and less efficient police investigations.

The Criminal Justice Work Group has endorsed the need for this type of legislation and has submitted a written recommendation to the Governor's Office.

No. 4
Bill Version: HB 442
(H) Publish Date: 2/4/94

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BL

Revision Date: 1/28/94
Title: Criminal Justice Information System
Sponsor:
Requestor: Governor

Dept. Affected: Corrections
BRU: All
Component: Commissioner, Correctione
Academy, Institutions, D&W Processing
COMPONENT SERIAL NO. 694, 703, 698, 708-7

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	120,674	124,294	128,023	131,864	135,820	139,894
TRAVEL	21,200	21,200	21,200	21,200	21,200	21,200
CONTRACTUAL	40,000	0	0	0	0	0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	181,874	145,494	149,223	153,064	157,020	161,094
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004-GF	181,874	145,494	149,223	153,064	157,020	161,094
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	181,874	145,494	149,223	153,064	157,020	161,094

Estimate of any current year (FY94) cost: $

POSITIONS

FULL-TIME	1	1	1	1	1	1
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Please see the attached fiscal analysis.

Prepared by: Diane Schenker, Special Assistant
Division: Corrections
Phone: 786-2147/465-4643
Date: 1/28/94

Approved by Commissioner: J
Agency: C
Date: 1/28/94

CORRECTIONS FISCAL NOTE

LEGISLATIVE OFFICE

The bill establishes a Criminal Justice Information Advisory Board, one member of which will be the Commissioner of Corrections (or designee.) The Board will advise the Commissioner of Public Safety regarding criminal justice information issues. The Commissioner of Public Safety will adopt regulations concerning the collection, reporting, and analysis of criminal justice information. It is difficult to predict the fiscal impact of this bill since it is not currently known what requirements may be imposed through future regulations. The bill mandates fingerprinting in all criminal cases, "in the manner and on forms approved by the department" [of Public Safety.] The bill requires that criminal justice information be accurate and complete, and sets up auditing requirements. The bill also clarifies which criminal justice information can be released, to whom, and by whom, and authorizes agencies to collect fees, through regulations, for processing records requests.

Assumptions

1. It is assumed that the Board will meet at least twice per year, and that the Commissioner or designee will be required to travel to Juneau on two occasions. Travel and per diem is estimated at approximately $500 per trip at current rates.

2. It is assumed that this department will not be required to perform any additional data management, research, data entry, booking procedures, or other information reporting services than are currently being performed, unless specifically informed of the new requirements during the budget process of the year preceding the effective date of the new requirement, in order to be able to request the necessary resources/ funds. It is further assumed that if, at the end of the legislative session, funds were not appropriated to perform the anticipated new requirements, that the Department of Public Safety will not require the new/additional tasks of the Department of Corrections. Therefore, no fiscal impact is estimated for the implementation of any new tasks beyond those explicity required in the bill.

3. It is assumed that the Department of Public Safety will not require the Department of Corrections to fingerprint criminal cases in any different manner or on any different forms than currently used. (The Department currently fingerprints all felons and misdemeanants upon booking into a state correctional facility.) If this assumption is incorrect, the fiscal note will be amended to reflect any training, machinery, forms, or other staff resources needed to meet the new requirements. It is assumed that the efforts currently made by the Department of Corrections to obtain more legible sets of fingerprints, when notified of an unsatisfactory identification, are considered "reasonable" and that no additional staff resources will be needed to comply with this requirement.

4. It is assumed that the department's current criminal justice information is not accurate, nor is it complete. It is further assumed that our procedures to protect information are inadequate, that our ability to screen, supervise, and discipline agency personnel in order to avoid security violations is inadequate, that our training resources for employees working with criminal justice information are grossly inadequate, and that we do not have adequate resources to keep records required for audit purposes in this bill. The department has an auditor position which can be assigned to set up a system for auditing. Additional resources will be necessary to bring the department into compliance with this requirement of the bill.

5. It is assumed that additional training will be necessary for all institutional and probation/parole staff, as well as for central records staff, concerning the new rules as to what information can be given to the public and to other criminal justice agencies. It is assumed that the majority of requests for information involving the Department of Corrections will not be likely to be subject to fee collection, since most involve brief questions and answers directed to institutions by phone, around the clock each day and night. Although a review will be done to determine if there are any requests which can be used to generate revenue, at this point no fees are anticipated.

6. The bill will require significant rewriting of regulations and policies governing department operating procedures. Revisions to address information dissemination will be a major need, as will revisions to clarify instructions during the booking process to improve accuracy and completeness of information. The department will contract for these one-time revisions, and anticipates a full-year contract to accomplish the changes.

Operating Expenses

1. Travel:

Two trips per year at $600 = $1200 for the Office of the Commissioner. In order to train institutional booking personnel in data entry procedures, to insure accuracy and completeness of criminal justice information, a trainer and the auditor will have to travel to each institution and field probation office at least once per year. Each visit will require a minimum of two days to reach all shift rotations. It is roughly estimated that two individuals traveling to 15 sites will cost $20,000 in airfare and per diem. This travel is assigned to the Office of the Commissioner, where the Training Academy and auditor positions are located. Total travel expenses for the Office of the Commissioner would be $21,200 in FY95 and each subsequent year. This does not include an inflation factor.

2. Personal Services:

A new position will be required to provide training on new policies and procedures to improve the accuracy and completeness of criminal justice information, and to help institute a plan to improve security of the system. This individual would travel to all institutions and field offices at least once per year to provide intensive training to data entry staff on all shifts in all locations across the state. This individual would be responsible for training on-site personnel to become trainers, and to coordinate statewide training on criminal justice information issues among all sites. The individual would need to be familiar with booking procedures as well as data entry and data management systems, and would have to be skilled in training, including training on-site trainers for follow-up. This will require an Analyst Programmer IV located in Anchorage area. Total position cost in FY95 would be **$63,842.** (See attached Position Information Sheet.)

Training line staff in institutions requires overtime coverage for the positions assigned to attend training. To train eight staff per institution for two days requires 128 hours of overtime pay, at approximately $37 per hour, at each of 12 institutions.

128 hours X $37 per hour X 12 institutions = **$56,832** in personal services expenses in FY95.

TOTAL: $63,842 + $56,832 = $120,674 personal services expense in FY95.

A 3% inflation factor has been used to calculate personal services increases in succeeding years.

3. Contractual:

Contract funds will be necessary to revise and update policies, procedures, and regulations, and to disseminate them in coordination with the field training referenced above. Much of the FY95 contract year will be spent developing clear instructions regarding information dissemination according to the new guidelines. A full-year contract to coordinate policy development related to criminal justice information is estimated at $40,000, assigned to the Office of the Commissioner, where Policy and Procedure functions rest.

POSITION INFORMATION HAS BEEN UPDATED AND FUNDING HAS BEEN UPDATED.

01/28/94 Position Information Inquiry/Update 09:58:19

Position: 20-20#066 Project: 0____ Salary Costs: 44,976.00
Component: 20-94-01-01-05-00 Benefits Costs: 18,866.39
Scenario: 3 FY: 95 COLA %= 0.00 Total Costs: 63,842.39

Actuals not available (Status: UNKNOWN) Retirement Code: A

	Step: A for 12.0 months & Step: B for _0.0 months (total: 12.00)
00/00/00	Merit Date; use merit defaults? N (0.0 @ & 0.0 @)
0	Class/Sched Prefix: 2 Schedule: 2A (actual:)
	Bargaining Unit: GG Range: 19 (actual:)
	Location Code: EBA Place: ANCHORAGE
	Job Class Code: P1624 Title: ANALYST/PROGRAMMER IV________
	Seasonal Indic.: F Type: -

Optional Override Salary Rates:
Monthly Rate: 0.00____ for _0.0 months & rate of 0.00____ for _0.0 months
Hourly Rate: 0.00____ for _0.0 months Frozen at this rate? (Y/N): N

Press ENTER to update record; enter # or use PF key to go to another screen:
1=Premium pay info 2=Funding info 4=Code Translations 6=Calculations
7=MISC NEW POS DATA 8=Detail Report 12=Exit w/o update Selection: 0_

STATE OF ALASKA

DEPARTMENT OF PUBLIC SAFETY

DIVISION OF ADMINISTRATIVE SERVICES

WALTER J. HICKEL, GOVERNOR

Richard L. Burton
Commissioner

P.O. BOX N
JUNEAU, ALASKA 99811-1200
PHONE: 465-4322

February 4, 1994

The Honorable Brian Porter
Chair, Senate Judiciary
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Representative Porter:

This is to request your assistance in scheduling a Judiciary hearing on HB 442, "An Act relating to criminal justice information; providing procedural requirements for obtaining certain criminal justice information; and providing for an effective date".

This bill to update Alaska's laws regarding the administration of certain criminal justice information is the culmination of a four year effort sponsored by the Department of Public Safety, assisted by SEARCH, the National Consortium for Criminal Justice Information and Statistics, and the Department of Law.

The broad based goal of this bill is to establish the statutory framework necessary to provide police, prosecutors, courts, corrections and employers, essential criminal history information via the Alaska Public Safety Information Network (APSIN)

Legislation is required to ensure the taking of fingerprints and the capturing of arrest and related information to ensure that Alaska's criminal justice decision makers are supplied with complete, accurate and timely criminal history information. Alaska's APSIN criminal history database is dependent upon cooperation with police agencies to provide arrest information, Corrections for fingerprints and prisoner information, Department of Law for decline to prosecute information and the Courts for judgement information. This legislation will provide the statutory framework necessary to facilitate the reporting of criminal history information to the Department of Public Safety. The Criminal Justice Working Group has endorsed the need for this type of legislation.

Without accurate, complete and timely criminal history records, police investigations will be impaired, persons who should be arrested or otherwise held during routine police contact will not be, repeat offenders will receive lighter sentencing or be

inappropriately released from custody, unsuitable persons will be permitted employment in criminal justice or sensitive civilian capacities, ineligible persons will be allowed to purchase and carry firearms.

APSIN houses Alaska's criminal history database and provides access to national criminal history and fingerprint networks. APSIN is accessed statewide by all police and criminal justice agencies comprising 2,000 users and 900 computer terminals. Information contained in this database and its companion fingerprint system is used by police to investigate crimes and identify persons and property. Prosecutors depend upon APSIN to determine previous criminal history. Courts, through Corrections presentence reports, use APSIN information in making sentencing, release, probation and parole decisions.

APSIN criminal history information is provided to employers and regulatory authorities to make informed employment and licensing decisions. Certain background checks, such as those for criminal justice employment and school teachers, are provided for by law. Others, such as background checks on foster parents, are voluntary but critical to the public welfare. Further, APSIN is a partner with our sister states and the federal government in developing national systems initiatives to form national criminal justice information networks.

The importance of complete, accurate and timely access to criminal history information continues to increase due to recently enacted federal legislation involving gun control (Brady-National Instant Check System) and protection of children (National Child Protection Act). Other federal initiatives are pending involving the registration of offenders who are convicted of crimes against children (Jacob Wetterling Crimes Against Children Registration Act) and requiring states to establish programs to screen, license and train security officers (Private Security Officers Quality Assurance Act). In addition, the Alaska legislature is considering concealed weapons permit legislation (HB 351), registration of sexual offenders (HB 69), and the Governor's Anti-Crime Package (Three Strikes You're Out). All of these initiatives are dependent upon the availability of criminal history information in order to implement the provisions of these enacted and pending laws.

Sincerely,

Ken Bischoff for

Richard L. Burton
Commissioner

CC: Senator Halford
Senator Jacko
Senator Donley
Senator Little

WALTER J. HICKEL
GOVERNOR

P.O. Box 110001
Juneau, Alaska 99811-0001
(907) 465-3500

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 4, 1994

The Honorable Ramona L. Barnes
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Speaker Barnes:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to criminal justice information.

The need for new Alaska legislation on the subject of criminal justice information and computer information systems has been recognized for a number of years. If accurate and complete, these information systems provide a measure of protection for law enforcement officers on the front line of the battle against crime and provide needed information for all parts of the criminal justice system and the public. At the same time, provisions are needed for the security and privacy of the information contained in these systems. Under the bill, "criminal justice information" does not include records relating to juvenile offenders.

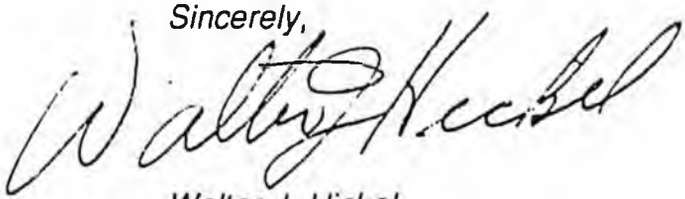
The federal Anti-Drug Abuse Act of 1988 required the United States Department of Justice to develop a system for more immediate and accurate identification of offenders, which resulted in voluntary national standards being developed. The Department of Justice recommended that all states (1) implement mandatory reporting of all criminal justice information, (2) monitor case dispositions and adopt unique case-tracking numbers to improve data accuracy, (3) ensure timely submission of fingerprint records, (4) provide standardized data entry, and (5) provide audits, training, and data security. This bill is a necessary step toward that goal, and it will provide a framework under which the state can comply with appropriate national standards for the collection and use of criminal justice information, to the extent they are practical as applied to Alaska.

This bill also adopts a trend seen in some other states, to give the press and public greater access to criminal history records and to make those records more "open."

For example, under this bill, anyone would be permitted to receive information about a person in the custody or under the supervision of the state, including the location of incarceration of inmates, and the conditions under which such inmates are released into the community on bail, probation, or parole. Currently, much of this information is available only to victims of crimes. AS 33.16.120(f). The public would also be permitted to receive information about past convictions if less than 10 years has elapsed from the date the offender was released from all state supervision. Current law gives past conviction records only to employers of persons who work with children, and only for specified crimes. AS 12.62.035. These provisions in this legislation would give the public a great deal of information about current or past criminal offenders that is either not available under current law, or is only available by expending great effort to search paper or microfilm records in the possession of the court system.

A detailed section-by-section description that describes the need for and the intent behind each provision in the bill is available from the Department of Public Safety.

Sincerely,



Walter J. Hickel
Governor

GOVERNOR HICKEL'S CRIMINAL HISTORY RECORDS INFORMATION LEGISLATION

(SB 276 & HB 442)

Governor Hickel has introduced legislation which will provide police, prosecutors, courts, corrections, and employers with essential criminal history information via the Alaska Public Safety Information Network (APSIN).

APSIN houses Alaska's criminal history database and provides access to national criminal history and fingerprint networks. APSIN is accessed statewide by all police and criminal justice agencies comprising 2,000 users and 900 computer terminals. Information contained in this database and its companion fingerprint system is used by police to investigate crimes and identify persons and property. Prosecutors depend upon APSIN to determine previous criminal history. Courts, through Corrections presentence reports, use APSIN information in making sentencing, release, probation and parole decisions.

Without accurate, complete and timely criminal history records, police investigations will be impaired. Persons who should be arrested or otherwise held during routine police contact will not be. Repeat offenders will receive lighter sentencing or be inappropriately released from custody. Unsuitable persons will be permitted employment in criminal justice or sensitive civilian capacities. Ineligible persons will be allowed to purchase and carry firearms.

APSIN criminal history information is provided to employers and regulatory authorities to make informed employment and licensing decisions. Certain background checks, such as those for criminal justice employment and school teachers, are provided for by law. Others, such as background checks on foster parents, are voluntary but critical to the public welfare. Further, APSIN is a partner with our sister states and the federal government in developing national systems initiatives to form national criminal justice information networks.

The importance of complete, accurate and timely access to criminal history information continues to increase due to recently enacted federal legislation involving gun control (Brady-National Instant Check System) and protection of children (National Child Protection Act). Other federal initiatives are pending involving the registration of offenders who are convicted of crimes against children (Jacob Wetterling Crimes Against Children Registration Act) and requiring states to establish programs to screen, license and train security officers (Private Security Officers Quality Assurance Act). In addition, the Alaska legislature is considering concealed weapons permit legislation (HB 351), registration of sexual offenders (HB 69), and the Governor's Anti-Crime Package. All of these initiatives are dependent upon the availability of criminal history information in order to implement the provisions of these enacted and pending laws.

February 3, 1994

"An Act Relating to criminal justice information;
providing procedural requirements for obtaining certain criminal justice information; and
providing for an effective date."
Commentary and section-by-section description

The need for new Alaska laws for criminal justice information systems has been recognized for a number of years. It has been recommended, for example, that state statutes "should be revised to reflect a decision as to oversight and monitoring responsibility and to clearly set policy . . . .". *A Special Report on the Oversight of Criminal Justice Information Systems in Alaska and the Alaska Public Safety Information Network*, Division of Legislative Audit, 1986. See also, Trostle, *Alaska Criminal History Record Information Program, A White Paper*, Justice Center, University of Alaska (1991) ("Legislative intervention in this area is warranted and required."). The Ombudsman has also recommended new legislation. *Investigative Report, Complaint J91-0810* (December 10, 1992).

In 1972, the statutes in AS 12.62, the regulations in 6 AAC 60, and the constitutional right of privacy in Art. I, sec. 22, of the state constitution, were adopted as a direct result of fears generated by the 1971 implementation of the Alaska Justice Information System computer (known as "AJIS").[1] With the exception of AS 12.62.035 (access to conviction records for sex offenders), the statutes have not changed in over 20 years. The last decade has seen enormous changes in the use of, and attitude towards, computer systems, and statutory changes are needed to reflect these changes.[2]

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[1] Newspaper reports at the time contained statements by the sponsors and supporters of the constitutional amendment that the AJIS system was the primary motivation for the right-to-privacy provision. *See*, articles appearing in Alaska newspapers in 1972: Anchorage Daily News, March 21 at 8; March 22 at 5; March 31 at 1-2; April 1 at 4; April 6 at 2; Anchorage Times, March 20 at 8; March 27 at 2; March 27 at 2; March 31 at 1-2; Fairbanks Daily News-Miner, March 20 at 2; Southeast Alaska Empire, March 17 at 2; March 20 at 1; March 21 at 1 and 8; May 18 at 4.

[2] The regulations in 6 AAC 60 were amended in 1982 during the last meeting of the Governor's Commission on the Administration of Justice, but in reality there has been no systematic oversight of criminal justice information systems since the 1970's. The federal regulations in 28 CFR, Part 20, apply only to information systems funded in whole or in part by the Law Enforcement Assistance Administration, which provided federal grant funds since the 1970s. In 1986 the Department of Law issued an opinion concluding that changes in the funding of the Department of Public Safety criminal records system meant that the statutes and regulations no longer applied to that system. *See, Applicability of AS 12.62 to Alaska Public Safety Information Network*, Inf. Op. Atty. Gen. 663-86-0479, December 10, 1986. Both the division of legislative audit and the division of legislative legal services concur in that conclusion. *See, A Special Report On The Oversight Of Criminal Justice Systems In Alaska And The Alaska Public Safety Information Network*, at 8 (March 19, 1986; Audit Control Number 12-4247-86-5) and *A Report to the Fifteenth State Legislature, Examinining Court Decisions and Opinions of the Attorney General Construing Alaska Statutes*, at 29 (November, 1987).

There has also been a growing recognition that national standards for criminal justice data collection should be established, and the Anti-Drug Abuse Act of 1988 required the Department of Justice to develop a system for more immediate and accurate identification of offenders. The Justice Department recommended that states (1) implement mandatory reporting of all criminal justice information, (2) monitor case dispositions and adopt unique case-tracking numbers to improve data accuracy, (3) ensure timely submission of fingerprint records, (4) provide standardized data entry, and (5) provide audits, training, and data security.

In addition, federal handgun control efforts, such as the "Brady bill" in 1993, depend to a large extent on the accuracy, completeness and availability of criminal history records. Alaska has recently received a federal grant to improve its data collection, and this bill is a necessary step toward that goal. This legislation provides a framework under which the state can comply with appropriate national standards, to the extent they are practical in Alaska.

Major portions of this legislation are patterned after the laws in other states, the federal regulations in 28 CFR, Part 20, and the recommendations made by SEARCH, Inc., in *Standards for the Security and Privacy of Criminal History Record Information, Third Edition*, published in July, 1988.[3] This publication resulted from a three-year effort by the SEARCH Law and Policy Project Advisory Committee, with assistance provided by experts within and outside of the criminal justice community. While the SEARCH publication was not intended as a model statute that would fit the particular needs of every state, it does set out a comprehensive approach to criminal justice information policy based upon articulated standards that reflect the knowledge and experience of a large, nationwide group of criminal justice information experts.

This bill is organized as follows:

AS 12.62.100	Criminal justice information advisory board.
AS 12.62.110	Duties of the commissioner regarding information systems.
AS 12.62.120	Mandatory fingerprinting in criminal cases.
AS 12.62.130	Reporting of criminal justice information.
AS 12.62.140	Reporting of uniform crime information.
AS 12.62.150	Reporting of information regarding wanted persons and stolen property.
AS 12.62.160	Completeness, accuracy and security of criminal justice information.
AS 12.62.170	Release and use of criminal justice information; fees.
AS 12.62.180	Correction of criminal justice information.
AS 12.62.190	Sealing of criminal justice information.
AS 12.62.200	Purging of criminal justice information.
AS 12.62.210	Civil action and defense.
AS 12.62.900	Definitions.

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[3] That SEARCH publication is known across the country as *Technical Report No. 13 (Revised)*.

AS 12.62.100

Subsection (a) establishes the Criminal Justice Information Board, located for administrative and budgetary purposes within the Department of Public Safety. Although the board's role is advisory, provisions requiring twice yearly meetings and annual reports to the Governor and Legislature should encourage it to be active in its advisory role.

There are boards of this type in about half of the states. *Compendium of State Privacy and Security Legislation*, United States Department of Justice, 1989 Overview (hereafter "Dept. of Justice Overview") at page 21. Experience in other states has shown that an advisory board of this type can be effective and can exert a strong influence on the development of policies.

In order to keep the board to a manageable size, the board's membership is limited to commissioners from the five state departments most directly involved in criminal justice matters, the chief justice, a municipal police chief, as well as a member of the public appointed by the Governor to represent broader public interests.

AS 12.62.110

This section sets out the powers and duties of the Commissioner of Public Safety, based on similar provisions in numerous state laws, and requires the commissioner to develop a central state repository for criminal history records and other criminal justice information. At the present time, the Alaska Public Safety Information Network (APSIN) serves as the central repository, and it is anticipated that it will continue in that role. The commissioner must consult with the Criminal Justice Information Board, and cooperate with other state and federal law enforcement agencies.

This section also specifically requires the commissioner to promulgate regulations governing the central repository. Based upon Alaska's past experience with the long-inactive Governor's Commission on the Administration of Justice, it is more efficient and workable to vest rule-making authority in the official, i.e., the commissioner, who is responsible for the day-to-day operation of the system.

There is regulatory authority in this area in nearly every state in the country. Dept. of Justice Overview at page 20. This bill limits the commissioner's rule-making authority to the development and operation of the central repository and enforcement of the statutory requirements concerning the reporting of information to the central repository. The commissioner also is authorized to issue regulations necessary to insure that criminal justice agencies maintain records sufficient to facilitate the audit responsibilities imposed by the statute,

although regulations would not be strictly necessary to prescribe the forms on which information is to be reported. In other respects, criminal justice agencies in the state are free to establish their own agency rules and procedures to comply with the substantive requirements of the chapter. The section specifically authorizes the commissioner to cooperate with NLETS, NCIC, the Interstate Identification Index (III) system and other interstate, national or international identification and record systems.

This section also provides that any regulations adopted by the commissioner will not affect agencies or officials of the judicial branch. This avoids legal questions concerning the separation of powers. It is anticipated that rules affecting operation of the court will be adopted by the supreme court, and it is the intent of this legislation that the court cooperate with executive branch agencies in providing workable criminal justice information systems. As a member of the Criminal Justice Information Board, the chief justice will be familiar with the issues involved in criminal justice data collection, and participation on the board will provide a basis for cooperation with other agencies concerning such issues as court disposition reporting, taking of fingerprints and use of tracking numbers. According to SEARCH, such an approach has worked well in other states.

AS 12.62.120 -- 150: Applicability

Based on preliminary comments from a number of criminal justice agencies, an applicability section at the end of the bill will apply the fingerprinting and reporting requirements of AS 12.62.120 -- 150 only to persons arrested for felony offenses. It was felt that meeting the fingerprinting and reporting requirements for the many thousands of misdemeanor cases proceedings through the courts every year in Alaska would be burdensome to state and municipal agencies. In order to hold down the initial costs of this legislation, and to enable justice agencies to streamline procedures, these sections will not apply to misdemeanor offenses until July 1, 1996.

AS 12.62.120

This section imposes a mandatory fingerprinting requirement for all offenses that will be included in the central criminal history record system. Since fingerprints provide positive identification, thereby ensuring the integrity of the records, it is important that fingerprints be uniformly obtained and forwarded to the central repository. National standards adopted by the Justice Department call for increased collection of fingerprint data.

It has been suggested that routine taking of fingerprints in all criminal cases may violate an offender's right of privacy. Given the minimal intrusiveness of fingerprinting, however, and its common acceptance as a standard police practice, it is doubtful a person under

arrest or charged with a crime would have a subjective expectation of privacy with respect to fingerprints, nor is it likely society would be willing to recognize any such expectation as reasonable. It is therefore unlikely a court would conclude that the right of privacy is implicated.

Subsection (a), requiring arresting officers to take fingerprints, and requiring a court to order a person charged with a crime to submit to fingerprinting if not arrested, is modeled after a provision in New York's law (N.Y. Crim. Proc. Law § 160.10). See, also 18 Pa. Cons. Stat. Ann. § 9112 (Purdon). Subsection (b) ensures that fingerprints are obtained at the time of conviction in cases in which, for whatever reason, fingerprints were not obtained earlier.

Subsection (c) is modeled after provisions in many state laws requiring correctional institutions to obtain fingerprints of persons committed to such institutions. E.g., Ga. Code Ann. § 35-3-36(f) (1981); Del. Code Ann. tit. 11, § 8509-8510. In addition, most other states follow this practice, though it is not expressly required by law.

Subsection (d) sets a time limit for the forwarding of fingerprints to the central repository. Fingerprints are required to be forwarded within five days. The most common time frame in use (by law or practice) in other states is seventy-two hours, although fingerprint reporting requirements vary from twenty-four hours to a week or more. Five days is a reasonable standard that criminal justice agencies in Alaska can meet in practice. This subsection also deals with poor quality fingerprints by requiring the originating agency to attempt to obtain better prints.

Subsection (e) is modeled after a provision in New York's law specifically requiring the central repository to use reasonable efforts to confirm the identity of the person being fingerprinted. N.Y. Crim. Proc. Law, § 160.30. If the central repository discovers that the person has an alias, the original agency must be notified. It is anticipated that in the vast majority of cases the sole effort to confirm identity would be through the department's automated fingerprint system. This will be sufficient to meet the requirement of "reasonable" efforts.

Subsection (f) permits the commissioner to adopt regulations to exempt certain classes of offenders from the fingerprinting requirement. For example, the commissioner may determine that it is not necessary for purposes of prison security or data accuracy to take repeated sets of fingerprints of prisoners transferred between institutions or of persons rearrested for violations of bail conditions, as would be required by subsection (c).

AS 12.62.130

This section establishes a framework for requiring that every significant event in the criminal justice process be reported to the Department of Public Safety. The current record system is ordinarily based only on the first event (usually an arrest) and the last event (usually a court judgment). Because of delays in the court process, records may show no disposition of the charges for long periods of time unless the department is notified of intervening events, such as dismissals of or amendments to criminal charges.

Reporting requirements set out in this section are modeled after the approach followed in Maryland. Md. Ann. Code art. 27, § 747 (1957). This section identifies all decisions or actions that occur in the course of the processing of criminal offenders and anticipates that the agency responsible for each "reportable event" will forward relevant information to the central repository. This section, however, leaves it to the commissioner to specify by regulation which agency is responsible for reporting each event.

At the present time this level of information is not uniformly reported to the department, and the APSIN system currently in operation is not capable of collecting all of this information. It is anticipated that the ability to collect and report this information will be developed over a period of time, and this section requires the commissioner to consult with the Criminal Justice Information Board and with affected agencies such as municipal police departments, prosecutors, courts, probation and parole officers, and others. Although this section will not be implemented immediately, the basic framework should be set forth in statute.

The form, content, and timing of the reports may be specified by the department without regulation. It is anticipated that different events will be required to be reported under different deadlines, depending on the importance of the information. For example, it may be reasonable to require that information about arrests and arrest warrants be reported within 48 hours, whereas information about other events could be reported within 30-60 days. A 30-day requirement is consistent with California's statutes for court disposition reporting (Cal. Penal Code § 13151) and with laws and policies of several other states. The national average, however, is about 60 days. See, e.g., Maryland Ann. Code art. 27, § 747 (1957) (60 days), 18 Pennsylvania Cons. Stat. Ann. § 9113(a) (Purdon) (90 days); Delaware Code Ann. tit. 11, § 8509 (90 days). Given the wide variation in personnel, equipment and telecommunication capabilities in Alaska, the specific requirements are best left to the commissioner, after consulation with local criminal justice agencies.

Subsection (b) is a relatively complete list of reportable events, but a catch-all category is included authorizing the commissioner to specify other events or actions to be reported.

AS 12.62.140 and AS 12.62.150

These two provisions are not strictly necessary to deal with the most immediate issues concerning criminal justice information systems, but they are useful and appropriate recommendations made by the SEARCH group in order to establish a statutory framework for a workable central criminal justice reporting system.

Proposed AS 12.62.140 imposes a legal requirement on criminal justice agencies to submit information to the Department of Public Safety for uniform crime reports and to cooperate with the central repository in efforts to ensure compliance with national and state uniform crime reporting requirements. It is modeled after provisions in Georgia. Ga. Code Ann. of 1981, § 35-3-36 (i), (k) (1981).

Proposed AS 12.62.150 is modeled after provisions in the laws of other states, requiring the reporting of information relating to wanted persons, stolen vehicles and identifiable stolen property.

AS 12.62.160

This section sets out data quality requirements applicable to the central records repository and to other criminal justice information systems in the state.

All criminal justice systems are subject to the general requirement in subsection (a) that procedures be adopted to ensure that criminal history record information is complete, accurate and secure. Such steps may include the use of manual procedures such as standard data collection forms and reporting procedures to detect inaccurate or missing information, or automated procedures to edit and verify required data fields and to perform a wide variety of checks on the accuracy and consistency of information entered into the systems.

The security provisions set out in (a) are taken from the federal regulations but in somewhat abbreviated form. They set out basic requirements for physical, personnel and computer security. Subsection (a) also requires that when a criminal justice agency utilizes a shared automated information system operated by a non-criminal justice agency, such as a municipal or regional data processing center, the criminal justice agency must insure that the system utilizes security procedures that are adequate to comply with the statutory security requirements.

Subsection (b) requires that procedures be developed for linking of charges and dispositions. Such a procedure might include use of a unique tracking number. The few extensive audits of state repositories that have been undertaken (including recent audits in Texas and Maryland) have demonstrated that tracking systems utilizing unique case numbers can solve

most problems encountered in linking reported disposition data to the right rap sheet and to the correct charges. In this way all charges can be accounted for and the criminal history record can accurately and clearly reflect the outcome of the case.

The requirement that the department adopt "reasonable" procedures recognizes that there is a large amount of information already maintained in APSIN, which was not collected using a uniform arrest tracking number or which was received from another jurisdiction, and missing information within this data cannot reasonably be linked to dispositions of the charges. This limitation on existing data is well known within the criminal justice system and this bill does not require modification of that data.

Subsection (c) requires the department to perform audits every two years, and to obtain an independent audit every four years, of the central repository and of a sample of other agencies to verify compliance with legal requirements. It should be noted that the sample need not be a random sample or a representative sample. This will permit the central repository to audit problem agencies or large agencies in a particular year, if appropriate or necessary. The independent audit could be performed by a private contractor or by an agency such as the Division of Legislative Audit. Subsection (a) also requires criminal justice agencies to maintain source documents and other records necessary to facilitate the performance of the audits.

AS 12.62.170

Even in criminal justice information systems that are federally-funded, a detailed state law will govern dissemination – rather than federal regulations. "When a State enacts comprehensive legislation in this area, such legislation will govern dissemination by local jurisdictions within the State." Commentary to 28 CFR 20.21(b) (7-1-91 Edition).

Unfortunately, current Alaska law does not directly address the confidentiality of criminal history records on state computers.[4] This section makes criminal justice information confidential and prohibits its release, except as provided in this chapter. The rules for dissemination in this section are taken in general form from recommendations by the SEARCH group.

Criminal justice information is made confidential in subsection (a), and may not be disseminated except pursuant to subsection (b) or AS 12.62.190(d). Information may be

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[4] The United States Supreme Court, however, has held that public disclosure of such information would constitute an "unwarranted invasion of personal privacy" as that term is used in the federal Freedom of Information Act, and dissemination of such information at the federal level is limited. *United States v. Reporters Committee For Freedom of the Press*, 489 U.S. 749, 103 L.Ed.2d 774, 109 S.Ct. 1468 (1989).

released only by the agency than maintains it. The information cannot be provided unless it is up-to-date and accompanied by proper identification, and once provided, the information must be used only for the purpose for which it was released. Subsection (c). The department of public safety is permitted to establish fees for certain services in providing information under this section. Subsection (d).

Subsection (b) specifies several categories of criminal justice information that may be disseminated by criminal justice agencies. Even if the information may be disseminated under subsection (b), it is recognized that some other provision of law or court rule may prohibit its release. The types of information that may be provided by criminal justice agencies under subsection (b) are:

- An assessment or summary of criminal justice information can be provided to anyone if necessary to avoid imminent danger to life or extensive damage to property. Subsection (b)(1).

- Criminal justice information may be provided pursuant to court rule or court order. Subsection (b)(2).

- Agencies would be permitted to publicly release information about recent police activity, such as posters, announcements, notices, press releases, bulletins, police blotters, including data derived from a criminal justice information system. Subsection (b)(3). This is a common and traditional practice, recognized in current 6 AAC 60.070(g) and in most other states and the federal regulations.

- Criminal justice information would be provided to criminal justice agencies for criminal justice purposes. Subsection (b)(4). This includes making full criminal histories available to federal and out-of-state criminal justice agencies, such as the FBI and to central repositories in other states by means of the Interstate Identification Index (III) system. By exchanging information in this way, the state is permitted to participate in the III system.

- Criminal justice information would also be provided to non-criminal justice governmental agencies for official purposes (that is, those related to an agency's statutory duties), to other persons authorized by law to receive the information. Subsections (b)(5) and (b)(6).

Under (b)(5) the Public Defender Agency or the Office of Public Advocacy would be able to directly obtain information necessary for representation of indigent defendants, to the same extent as is available currently. Private defense attorneys would be able to obtain the same

information through the court or court rules under subsection (b)(2), or as a member of the public under (b)(10) or (b)(11).[5]

Government agencies would also be able to obtain information for purposes of licensing, security clearances, and other official purposes, as is available currently through written agreements with the Department of Public Safety. It is not anticipated, however, that employment of non-criminal justice personnel will be "necessary" for the enforcement of a law, and therefore full criminal justice information will not be made available for general government employment purposes unless there is specific statutory authorization in another law. Government employers would, however, be able to obtain more limited records to the same extent as other employers under subsections (b)(10), (b)(11) and (b)(12).

- The governor, lieutenant governor and state legislators would also be entitled to receive criminal justice information under (b)(7) and (b)(8) for security purposes and for purposes of appointment of exempt or partially-exempt state officials.

- Information for research purposes may be disseminated under (b)(9), subject to written conditions to safeguard security and privacy.

- Any person would be permitted to receive "current offender information". Subsection (b)(10). The definition of "current offender information" includes many pieces of information about a person currently charged with a crime or in the custody or under the supervision of the state, including the location of incarceration of inmates, and the conditions under which such inmates are released. Much of this information is presently provided only to victims of crimes under AS 33.16.120(f).

- Anyone would also be permitted to receive "past conviction information", if less than 10 years has elapsed from the date the offender was released from all state supervision. Subsection (b)(11). The 10-year limitation on past records is designed to assure that very old conviction records are not freely disseminated.

Although current law does not explicitly make criminal justice information confidential, the United States Supreme Court has held that such information is exempt from the federal "freedom of information" statutes that formed the basis for current state public records laws in AS 09.25.120(6). *United States Dept. of Justice v. Reporters Committee for Freedom of the Press, et al.*, 489 U.S. 749, 103 L.Ed.2d 774, 109 S.Ct. 1468 (1989) (criminal conviction

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[5] Current regulations in 6 AAC 60 (which no longer apply to APSIN; see footnote 2) adopt a procedure that would permit private defense attorneys to get criminal justice information directly from the Public Defender Agency. It was felt that this procedure is not workable because if it became a routine practice it would greatly add to the workload of the Public Defender Agency and because the normal safeguards applied to agency access would be missing.

records on computers are not subject to disclosure under federal law). In addition, current AS 12.62.035 could be construed as a legislative expression that conviction records be provided to the public only if the person requesting the information is an employer of persons who work with children, and only for specified crimes. For these, and other reasons, the Department of Public Safety does not currently disseminate criminal justice information to the public.

Taken together, however, subsections (b)(10) and (b)(11) provide the public with a great deal of information that is either not available under current law, or is only available by expending great effort to search manual or microfilm files in the possession of the court system. These provisions reflects a strong public policy interest in permitting criminal justice agencies to respond to press or public inquiries about ongoing criminal cases and about offenders currently or recently under state supervision.

Florida, Oklahoma and Wisconsin currently have "open" record policies and several other states permit criminal history records to be made available for a wide range of non-criminal justice purposes. Based on a study in Florida by SEARCH, the main recipients of this information are businesses and agencies that use the information for employment screening purposes. Only a small percentage of the requests for such information are for "curiosity". "Availability of Criminal History Records: The Effect of an Open Records Policy", SEARCH Group, Inc. 1990.

- The current provisions in AS 12.62.035 are retained in subsection (b)(12). This current statute permits dissemination of certain conviction records, regardless of the passage ot time, in order to evaluate someone for a position involving supervision of children or dependent adults.

- Finally, a person can have access to his or her own criminal justice information. Subsection (b)(13).

Subsection (c)(3) provides that criminal justice information may not be released unless the subject's identity is confirmed by fingerprint comparison or some other approved means of identification. There are other instances, however, when the requirement of fingerprint identification or other positive identification is not feasible or necessary, and this subsection permits the commissioner to exempt certain requesters (such as criminal justice agencies, for example) from the strict identification requirements.[6]

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[6] For the public and the press it is not feasible to obtain fingerprint identification for current offenders. Because most such inquiries will likely be made of local criminal justice agencies by persons within the community where the crime was committed, fingerprints are probably not required to obtain information about the correct person. Moreover, newly developed name search techniques used in Florida are regarded as extremely accurate. "Availability of Criminal History Records: The Effect of

(continued...)

Subsection (c)(4) requires that criminal justice agencies maintain logs of persons to whom criminal history record information is provided. This facilitates audits of the system, and permits notification in case of errors or corrections. Here, too, there are instances when the requirement of maintaining logs is not warranted, and this subsection permits the commissioner to exempt agencies from maintaining logs for certain classes of recipients, such as criminal justice agencies.

AS 12.62.180

The provisions in the bill authorizing persons to request corrections to their own records are similar to existing law in AS 12.62.030 (c), (e) and (f). Under this bill, however, if a court undertakes a review of an agency's refusal to modify records, the burden is placed on the person to prove that the information is inaccurate or incomplete, rather than on the criminal justice agency. It is appropriate to place the burden on the person challenging the information, because that person is usually in the best position to have access to relevant evidence to support the challenge. Although less than half of the states provide for judicial review (Dept. of Justice Overview at 25), it was felt that this provision in Alaska law should be continued.

AS 12.62.190

This section permits criminal justice agencies to "seal" past or current conviction records if the records resulted, beyond a reasonable doubt, from mistaken identity or false accusation. It is anticipated that, upon request, the central repository or other agency will voluntarily seal records in appropriate circumstances.

Like the provisions for revising information in proposed AS 12.62.180, an administrative appeal of the agency's decision may be made to the court, but the appellant bears the burden on appeal of showing that the agency's decision was clearly mistaken. This heavy burden reflects the intent that proceedings to seal records should be rare. As noted by the court of appeals, "no court has seriously questioned the legitimacy or importance of the government's interest in obtaining and retaining records dealing with individuals who pass through our criminal justice system . . ." *Journey v. State*, 850 P.2d 663, 666 (Alaska App. 1993).

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[6](...continued)
an Open Records Policy", SEARCH Group, Inc. 1990, at page 7. It is also not required that the person requesting current offender information present positive identification.

If the state or a municipal prosecutor pursues a criminal case in good faith, it is unlikely a defendant could muster the necessary level of proof beyond a reasonable doubt, much less that the department's decision to retain the records was clearly mistaken. Thus sealing will not become a common practice following dismissal or acquittal of criminal charges. Moreover, a proceeding to seal information should not be used as another avenue of collateral attack on court judgments, or on other actions taken by prison, probation or parole authorities. Unless the person is successful in an appeal or post-conviction relief action, a court judgment or prison administrative decision will be conclusive evidence that the record should not be sealed.

Under current Alaska law, it is not clear that persons have a right to have their records sealed. *Journey v. State*. This section thus establishes a procedure for persons to use to seal their records and, to the extent that subsection (d) permits a person to deny the existence of a sealed record, this statute provides a broader remedy than would be available under a the "inherent" power of the courts.

Subsection (d) authorizes a person whose record has been sealed to deny the existence of the record and any related arrest or other action. This provision reflects the view in half the states (Dept. of Justice Overview at 31) that if a person can be required to reveal the existence of a sealed record, in answer to a question on an employment application, for example, the sealing remedy is ineffective. Records that have been sealed may only be disseminated for specific limited purposes under this section.

AS 12.62.200

This section permits criminal justice agencies to "purge" (i.e., destroy) criminal justice information for a variety of administrative reasons, if the information is devoid of any usefulness to a criminal justice agency.

AS 12.62.210

Given the many thousands of arrests made each year, and the remoteness of many locations in Alaska, it is likely that in many instances fingerprints will not be taken or will not be submitted to the department, that backlogs in reporting of events or in data entry may cause delays in processing and compiling data in an information system, or that other errors may occur. Therefore, subsection (a) provides immunity from civil liability if the requirements of the chapter or regulations (including requirements for accurate and complete data), are not strictly followed, but such conduct can be used as a basis for employee discipline or administrative action to restrict agency access to the system. Public officials could, however, be subject to criminal sanctions in extreme cases in which confidential information is misused.

This civil immunity provision is generally based on AS 13.50.014(a) and 016(a), providing immunity from liability for failure of hospital or law enforcement personnel to search for information relating to anatomical gifts. It is also based on similar immunity provisions relating to reporting or not reporting cases of abuse of the elderly (AS 47.24.010(f) and (g)) and reporting abuse of children. AS 47.17.050. This provision is, however, also specifically intended to reverse the decision in *Zerbe v. State*, 578 P.2d 597 (Alaska 1978), and to make clear that there is no cause of action for errors made in recordkeeping.

A legal remedy for damages is provided, however, if criminal justice information is released or used in knowing violation of this chapter. The civil remedy and defense set out in this section is based on current AS 12.62.060. This section does not create a separate criminal offense because current AS 11.56.860 already makes misuse of confidential information by a "public servant" a class A misdemeanor. The definition of "public servant" is broad, and includes contractors and consultants to government agencies. Although current law does not provide a criminal penalty for misuse by other persons, such as members of the public and the press, the civil damage remedies are likely to be an adequate deterrent.

AS 12.62.900

The definitions are generally consistent with, although more detailed than, those found in the federal regulations (28 CFR Part 20, § 20.3). They are also consistent with recommendations made by the SEARCH Group.

The definition section contains many important provisions that specify the applicability of this legislation. For example, the word "information" is defined to mean, unless the context clearly indicates otherwise, data compiled within a "criminal justice information system". That latter term, in turn, is defined to mean an "automatic data processing" system (i.e., a computer) linked to another computer in another department, branch of government, or in another jurisdiction, in such a way that access to the information in the system can occur directly, without action by the agency maintaining the information. This concept of a direct connection between agency computers is contained in current 6 AAC 60.900(1), and reflects the desire to limit interference with internal agency files that cannot be electronically accessed by another agency.

Because of these definitions, this chapter does not apply to the paper records in the possession of criminal justice agencies (which continue to be covered by the general public records statutes) nor to records contained in computers commonly referred to as "stand-alone" computers that are used solely within one department or agency (in this bill a multi-jurisdictional task force is considered a single "agency"). It was not the intent of this bill to regulate the paper files, notebooks, binders, microfilm or other internal records maintained by dozens of state, municipal or judicial branch agencies, if that information is not susceptible to being directly

accessed from outside of that agency by way of a computer system. This definition is also not intended to regulate the exchange of photographs or original documents, whether by facsimile transmission or otherwise.

The criminal justice process produces many different types of information, and therefore a large number of definitions are required.

The broad definition of "criminal justice information" includes all types of data generally collected by criminal justice and public safety agencies, with the exception of court records, drivers license records and records relating to juveniles within the juvenile justice system. It includes criminal history record information, nonconviction information, correctional treatment information, as well as data about wanted or missing persons and stolen property. These various types of information are defined in terms of "identifiable persons". This limitation means that statistical information that does not identify a person is not "criminal justice information".

This legislation leaves to the supreme court the task of regulating court record systems. This legislation also recognizes that the confidentiality and dissemination of drivers license records are already covered by AS 28.15.181.

Each type of information has different uses, and each may be subject to differing rules, depending on the sensitivity of the information and the need for its easy accessibility by the public, the press, and other agencies.

The most sensitive is correctional treatment information. This includes data from confidential sources such as prison medical and psychological files, and presentence reports. Another type of information subject to limited dissemination is "nonconviction" information, which includes data about old arrests or other old charges without dispositions. Oftentimes criminal history records show arrests or charges, but no dispositions of those charges. If the arrest is recent (less than a year old) or prosecution is ongoing, this data is treated, consistently with federal regulations, as "current offender information", which has greater accessibility to the public. However, once a year has passed with no indication that prosecution is ongoing, an arrest record without a disposition is treated as "nonconviction information". Under this bill, information in these categories is not available to the general public or the press, and is only provided for official agency activities.

The definition of "criminal history record information" is functionally equivalent to the one found in the federal regulations and in general use in the laws in other states. Within that broad term there are three categories: (A) past conviction information; (B) current offender information; and (C) criminal identification information.

"Past conviction information" relates only to old convictions where the sentence has already been served and the person has been unconditionally discharged. Such information can include not only the fact of conviction but any specific data related to that conviction, such as dates of proceedings. Convictions that have been set aside under AS 12.55.085 following a suspended imposition of sentence, or that have been vacated or reversed, are included. Under this bill, "past conviction data" less than 10 years old is available to the public when accompanied by adequate identification of both the subject of the records and the person who is requesting the information.

"Current offender information" includes all data of public interest about current or recent cases, or those in which the offender is still under the custody or supervision of the state. Included are conditions of bail or probation and the location of incarceration or community supervision.

"Criminal justice activity" is defined as broadly inclusive of all official activities of criminal justice agencies, including the traditional law enforcement activities of police agencies and activities involved in the processing of criminal cases from arrest through correctional supervision. Also included is criminal justice employment activities. Criminal defense is not an included activity; however, the Public Defender Agency and the Office of Public Advocate will continue to have access to discoverable information under Alaska Rules of Criminal Procedure 16, as well as proposed AS 12.62.170(b)(5).

Section 2 of the bill.

Section 2 of the bill amends AS 44.99.310(f) to exempt criminal justice information from the provisions in that statute governing challenges to accuracy and completeness of "personal information". The provisions of this bill address such issues more comprehensively and directly.

Section 3: Repealer.

All of current AS 12.62, much of it over 20 years old, is repealed, as are AS 18.65.060 and AS 44.41.040, which relate to subjects covered comprehensively in the bill.

Section 4: Transition.

This transition section permits agencies to adopt regulations under this Act at any time, but the regulations do not become effective until the Act takes effect. This allows agencies to avoid delays in adopting regulations. This section has an immediate effective date.

Section 5: Applicability.

Based on preliminary comments from a number of criminal justice agencies, an applicability section at the end of the bill will apply the fingerprinting and reporting requirements of AS 12.62.120 -- 150 only to persons arrested for felony offenses. It was felt that it would be burdensome to state and municipal agencies to immediately begin meeting the fingerprinting and reporting requirements for the many thousands of misdemeanor cases proceeding through the courts every year in Alaska. In order to hold down the initial costs of this legislation, and to enable justice agencies to streamline procedures, these sections will not apply to misdemeanor offenses until July 1, 1996.

Sections 6 and 7: Effective dates.

alaska judicial council

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501-1917 (907) 279-2526 FAX (907) 276-5046

November 2, 1993

Honorable Walter Hickel
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

RE: Criminal Justice Working Group Recommendation concerning Criminal History Legislation

Dear Governor Hickel:

I am writing on behalf of the Criminal Justice Working Group which you recently established to, among other reasons, recommend to you policies which would benefit the criminal justice system in Alaska as a whole. The CJWG recently reviewed legislation prepared by the Departments of Public Safety and Law which comprehensively addresses the collection, oversight and dissemination of criminal history information. While the CJWG did not consider all of the specifics in the legislation, and undoubtedly members will have differences of opinion on individual items, the CJWG was unanimous in endorsing the general direction of the legislation. The Group strongly urges you to introduce it and work for its passage next session.

Accurate and complete criminal history information is a necessity for all parts of the criminal justice system. The ability of the police and troopers to apprehend criminals and protect the public depends in many cases on accurate fingerprint identification. Innocent citizens often can be absolved by accurate records while inaccurate information can put them at risk. Sentencing decisions under our laws are dependent on accurately determining prior convictions. Further, accurate and complete information is vital to a wide range of decisions in our society, for example, hiring a day care worker who has not been convicted of sexual abuse of a minor. Current statutes governing criminal records collection, use and dissemination are inadequate. Because of these inadequacies, protection of the public and individuals can be at risk.

The CJWG endorses the following general objectives of the proposed legislation:

BACK-UP

1. Establish an advisory group to oversee the collection and use of criminal history information;
2. Establish regulatory authority with Department of Public Safety;
3. Provide for mandatory fingerprinting;
4. Establish mandatory reporting of events in the criminal justice system;
5. Provide for correcting or sealing information;
6. Make recommendations for dissemination of information.

The CJWG did not review individual sections of the legislation. In particular, some members had reservations about the dissemination provisions, although all felt that dissemination of criminal history information is an important topic which must be addressed.

The CJWG believes a need for new, comprehensive legislation governing the collection and use of criminal history information is an important issue. As a whole, the group feels that complete and accurate criminal history records are an integral part of a good criminal justice system and request the Governor endorse and introduce this legislation during the next session.

Very truly yours,

William T. Cotton
Executive Director

WTC:pjs

cc: Criminal Justice Working Group Members

Commissioner Richard L. Burton, Department of Public Safety
Attorney General Charles E. Cole
Commissioner Theodore A. Mala, Department of Health & Social Services
Brant McGee, Director, Office of Public Advocacy
Chief Justice Daniel A. Moore, Jr.
Ron Otte, President, Police Chiefs
Representative Brian Porter, Alaska State Legislature
Commissioner J. Frank Prewitt, Department of Corrections
John Salemi, Public Defender
Arthur H. Snowden, Administrative Director, Alaska Court System
Shelby Stastny, Director, Office of Management & Budget
Senator Robin Taylor, Alaska State Legislature
Duane Udland, Chief Deputy, Anchorage Police Department
Commissioner Nancy Bear Usera, Department of Administration

IMPACT UPON LOCAL POLICE

IN GENERAL: This legislation establishes a statutory framework which formalizes existing criminal justice information processing procedures. Mandatory provisions have been minimized and sections generally do not take effect until regulations are adopted. To implement the full scope of this legislation, a series of implementation discussions with local law enforcement are required. Full implementation will be achieved through negotiation and concurrence. The bill provides for an effective date of July 1, 1994 but the substantive sections of the bill do not apply to misdemeanants until July 1, 1995. This delay is intended to hold down the initial costs of this legislation and to enable justice agencies to streamline procedures.

The information depicted below addresses those provisions that may increase the work load of local police. Other provisions of the bill, not mentioned here, are either already performed by local police or the performance requirement is placed on other organizations in the criminal justice community. The accompanying materials fully explain the provisions of the legislation.

PROVISION	EXPECTED IMPACT	EXPECTED BENEFIT
Criminal Justice Information Board (12.62.100)	A municipal police chief serves as a Board member	Direct local police representation on policy and implementation issues. Travel and per diem expenses are paid by the State.
Mandatory fingerprinting (12.62.120) Current practice is to obtain fingerprints for all felonies and serious misdemeanors.	All accused misdemeanants and felons must be fingerprinted. If the arresting agency normally books prisoners at a Correctional facility, there is no impact. If the local police department operates a jail, there will likely be an increase in the number of people it fingerprints.	Fingerprints are the only acceptable, cost effective way to guarantee the identity of the individual and the accuracy of the criminal history record. Additionally, these fingerprints are included in AAFIS and the FBI system for latent matching and national retrieval of criminal records.
Time limit for forwarding fingerprints to the central repository (12.62.120)	Fingerprint cards must be forwarded to AAFIS within five working days. Local police may have to mail cards to the central repository more frequently.	A more timely delivery to AAFIS will result in quicker positive identification of criminals and a more timely updating of APSIN in "merge person" situations.
Reporting of criminal justice information (12.62.130) - An Arrest, issuance or withdrawal of an arrest warrant - all currently done. Release of a person after arrest without filing of a charge - not currently done	Reporting requirements have been extended to every significant event in the criminal justice process. If the local police department operates a jail, there will likely be some increase in data entry. Law's commentary clearly states that the form, content and timing of reports may be specified without regulation. The intent is to work with local criminal justice agencies in adopting policies that are efficient, workable and cost effective.	A significant increase in the content, integrity, timeliness, completeness, and usability of APSIN information.
Reporting of Uniform Crime Information (12.62.140) Approximately 25 police agencies currently submit UCR based information to Public Safety comprising approximately 85% of statewide crime statistics.	A requirement placed on criminal justice agencies to submit uniform crime reporting information to DPS continues. The intent is to work with local police agencies prior to adopting changes from current practice. This legislation does not mandate NIBRS nor UCR reporting formats - law enforcement will be consulted prior to change in current practices.	Availability of true statewide crime statistics and crime trending. Accurate information is useful to law enforcement in operations planning, budget submissions, grant applications

CRIMINAL HISTORY DATABASE

The importance of complete and accurate criminal history records cannot be over-emphasized at this time. Within the criminal justice system, criminal history records are needed for decisions relating to pretrial release, offense charging, prosecution priorities, sentencing and correctional assignments. Similarly , such data are increasingly necessary for noncriminal justice purposes to meet requirements relating to licensing, security clearances and employment of individuals in sensitive positions. A Bureau of Justice Statistics (BJS) survey found that, as of October 1990, almost all states had enacted some legislation which required that criminal history record information be considered in connection with criminal justice decisions. (Source: Report of the National Task force on Criminal History Record disposition Reporting)

ALASKA'S CRIMINAL HISTORY REPOSITORY

Alaska's criminal history database contains approximately 500,000 criminal record entries representing approximately 300,000 persons;

Alaska's fingerprint database contains approximately 170,000 sets of ten print records;

Alaska's fingerprint database contains approximately 2,500 latent fingerprints from crime scenes;

Alaska's criminal history database is updated or queried approximately 50,000 times per month by courts, police, corrections, prosecutors and on behalf of employers;

Alaska's criminal history database is accessed through 900 terminals and 2,000 users in state and nationally via the Law Enforcement Telecommunications System (NLETS);

Preliminary results of a sample of 300 FY 91 arrests disclosed that approximately one third were supported by fingerprints and one third had dispositions reported. Currently, State Correctional facilities are fingerprinting approximately 40% of people accused of committing crimes; Contract Jails fingerprint approximately 50% and smaller facilities approximately 30%.

PROPOSED CRIMINAL HISTORY RECORD CONTENTS

Source: December 1989 Search Report, September 26, 1991 University of Alaska White Pap

(1) ISSUANCE OR WITHDRAWAL OF AN ARREST WARRANT

(2) AN ARREST

(3) RELEASE OF A PERSON AFTER ARREST WITHOUT FILING OF A CHARGE

(4) DECISION BY A PROSECUTOR NOT TO COMMENCE CRIMINAL PROCEEDINGS OR TO DEFER OR INDEFINITELY POSTPONE PROSECUTION

(5) PRESENTMENT OF AN INDICTMENT OR THE FILING OF A CRIMINAL INFORMATION OR OTHER STATEMENT OF CHARGES AFTER ARREST

(6) A RELEASE PENDING TRIAL OR APPEAL

(7) COMMITMENT TO OR RELEASE FROM A PLACE OF PRETRIAL CONFINEMENT

(8) THE DISMISSAL OF AN INDICTMENT OR CRIMINAL INFORMATION OR ANY OF THE CHARGES SET OUT IN SUCH INDICTMENT OR CRIMINAL INFORMATION

(9) AN ACQUITTAL, CONVICTION OR OTHER DISPOSITION AT OR FOLLOWING TRIAL

(10) IMPOSITION OF A SENTENCE

(11) COMMITMENT TO OR RELEASE FROM A CORRECTIONAL FACILITY, WHETHER STATE OR LOCALLY OPERATED, INCLUDING COMMITMENT TO OR RELEASE FROM A PAROLE OR PROBATION AGENCY

(12) COMMITMENT TO OR RELEASE FROM THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES AS INCOMPETENT TO STAND TRIAL OR AS NOT CRIMINALLY RESPONSIBLE

(13) AN ESCAPE FROM DETENTION OR CONFINEMENT

(14) ENTRY OF AN APPEAL TO AN APPELLATE COURT

(15) JUDGMENT OF AN APPELLATE COURT

(16) A PARDON, REPRIEVE, COMMUTATION OF SENTENCE OR OTHER CHANGE IN SENTENCE LENGTH, INCLUDING A CHANGE ORDERED BY A COURT

(17) REVOCATION OF PROBATION OR CHANGE IN PAROLE STATUS

(18) ANY OTHER EVENT ARISING OUT OF OR OCCURRING DURING THE COURSE OF CRIMINAL JUSTICE PROCEEDINGS DECLARED TO BE REPORTABLE BY REGULATIONS ISSUED BY THE DPS COMMISSIONER

ENTS / Issue Paper	CONTRIBUTOR SYSTEM/AGENCY	CURRENTLY PROVIDED	CONDITIONS/RECOMMENDED ACTION
	APSIN - POLICE PROMIS - AG DOL	YES	Passage of legislation addressing the management of criminal justice information is needed. The current proposal includes the following sections and are briefly discussed: 1. 12.62.100 - Discontinues the Governor's Commission on Criminal Justice and establishes a criminal justice advisory group to the Commissioner Department of Public Safety; 2. 12.62.110 - Defines the responsibilities of the Commissioner, Department of Public Safety with respect to criminal justice information systems; 3. 12.62.120 - Prescribes mandatory fingerprinting for all serious offenses in order to authenticate entries to a person's criminal history record and to facilitate future person identification; 4. 12.62.130 - Authorizes the reporting of criminal justice information; 5. 12.62.140 - Authorizes the reporting of Uniform Crime Information; 6. 12.62.150 - Authorizes the reporting of wanted persons and stolen property; 7. 12.62.160 - Addresses issues of completeness, accuracy and security of criminal justice information; 8. 12.62.170 - Defines criteria for dissemination of criminal justice information; 9. 12.62.180 - Prescribes the process for correction of criminal history record information; 10. 12.62.190 - Makes provision for sealing of criminal history record information; 11. 12.62.200 - Makes provision for purging of criminal history record information; 12. 12.62.210 - Provides for recourse through civil action and defense; 13. 12.62.900 - Provides definitions of terms used in this legislation.
	APSIN - POLICE	YES, BUT NOT TIMELY	
	APSIN-POLICE	NO	
IAL	PROMIS-AG DOL	YES	
RGES	PROMIS-AG DOL	YES, BUT NOT ENTERED	
	COURTS	NO	
	OBSCIS-CORRECTIONS	NO	
AL	OBSCIS-CORRECTIONS	NO	
	CONTRACT JAIL-DPS	NO	
ZA- IENT	COURTS	YES	
OR	COURTS	YES	
	COURTS	YES	
	OBSCIS-CORRECTIONS	NO	
	CONTRACT JAIL-DPS	NO	
OLE			
OF AND	H&SS	NO	
	OBSCIS-CORRECTIONS	NO	
	CONTRACT JAIL-DPS	NO	
	COURTS	NO	
	PROMIS-AG DOL	NO	
	COURTS	NO	
	COURTS	NO	
	GOVERNOR	NO	
ATUS	OBSCIS-CORRECTIONS	NO	
ING RED	APSIN, OBSCIS PROMIS, H&SS	N/A, CURRENTLY	

HB
445

GOVERNOR HICKEL'S
DWI LAWS
(SB 279 & HB 445)

Governor Hickel has introduced legislation to remove the impaired driver from the Alaska's highways. The main objective of this legislation is to provide "implied consent" for, and administration of, chemical tests to detect the presence of drugs in drivers of motor vehicles or commercial motor vehicles involved in accidents that cause death or serious physical injury.

Impaired driving, and crashes related to it account for more than half of all traffic deaths in Alaska and is among the nation's leading problems. Despite a rising tide of public indignation, the wide variety of drugs, their use in combination with alcohol or other drugs, and their availability combine to produce a major public safety problem to Alaska's highways.

The Governor's legislation amends the implied consent statutes to specify that a person who operates a motor vehicle or commercial motor vehicle in this state is considered to have given consent to submit to a chemical test or tests of the person's blood and urine for the purpose of determining the presence of both alcohol and drugs if the person is involved in an accident that causes death or serious physical injury to another person, even if the person is not under arrest. The tests may be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating a motor vehicle or commercial vehicle that was involved in an accident that caused death or serious physical injury to another person.

The penalty for refusal to submit to a chemical test under the provision of the legislation is a Class A misdemeanor and will result in revocation of the driver's license, privilege to drive, or privilege to obtain a license, in addition to other criminal penalties. If a person has been notified of the penalties that will result from refusal to submit to a chemical test, and the person refuses to submit, the chemical test may not be given unless the person has been arrested and the arrest resulted from an accident that causes death or serious physical injury to another person.

Driving is a privilege granted by the state that can be conditioned upon consent to reasonable terms. This legislation will provide law enforcement and prosecutors with the tools they need to combat the significant highway safety problems presented by those drivers who use drugs and then cause fatal or serious injury accidents.

SPONSOR STATEMENT

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BII

Bill Version: HB 445
(H) Publish Date: 2/4/94

Revision Date: _____ Dept. Affected: Public Safety

Title: Mandatory Drug / Alcohol Testing BRU: DPS Statewide Support

_____ Component: Laboratory Services

Sponsor: Rules

Requestor: Governor COMPONENT SERIAL NO. 527

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	49.6	49.6	49.6	49.6	49.6	49.6
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	49.6	49.6	49.6	49.6	49.6	49.6
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other Interagency Rcpts.	49.6	49.6	49.6	49.6	49.6	49.6
TOTAL	49.6	49.6	49.6	49.6	49.6	49.6

Estimate of current year (FY 94) impact: $ 0

POSITIONS:

FULL-TIME	1	1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

See attached analysis.

Prepared By: Francis C. Allan Phone: (907) 269-5691

Division: Administrative Services Date: 01/10/94

Approved by Commissioner: _____ Date: 01/10/94

Agency: Richard L. Burton, Dept. of Public Safety

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[redacted] Legislative Office

STATE OF ALASKA
1994 LEGISLATIVE SESSION

Bill Version: HB 445
(H) Publish Date: 2/4/94

Revision Date: _____
Title: "An Act relating to dirving a motor vehicle ..."
Sponsor: Rules/By Request of the Governor
Requestor: Governor's Office

Department Affected: Department of Law
BRU: Prosecution
Component: All
COMPONENT SERIAL NO. 0085 through 0090

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
POSITIONS:						
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: January 25, 1994

Richard I. Pegues, for

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: January 25, 1994

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STATE OF ALASKA

FISCAL NOTE

NO. 2

Bill Version: HB 445

(H) Publish Date: 2/4/94

BILL NO.

1994 LEGISLATIVE SESSION

Revision Date:

Title: Relating to operating a motor vehicle

Sponsor: Rules Committee

Requestor: Governor

Department Affected: Administration

BRU: Public Defender Agency

Component: Public Defender Agency

COMPONENT SERIAL NO. 3540

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUNDING SOURCE: (Thousands of Dollars)

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY 94) cost: $

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: John B. Salemi, Public Defender

Phone: 264-4400

Division: Public Defender Agency

Date:

Approved by Commissioner: Nancy Bear Usera, Commissioner

Agency: Department of Administration

Date:

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STATE OF ALASKA
1994 LEGISLATIVE SESSION

FISCAL NOTE

NO. 1
Bill Version: HB 445
(H) Publish Date: 2/4/94

Revision Date:
Title: Relating to operating a motor vehicle
Sponsor: Rules Committee
Requestor: Governor

Department Affected: Administration
BRU: Office of Public Advocacy
Component: Office of Public Advocacy
COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUNDING SOURCE: (Thousands of Dollars)

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 94) cost: $ 0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Brant McGee, Director
Division: Office of Public Advocacy
Phone: 274-1684
Date:

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date:

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Rev 10/93
S legfn4-361 KP1

It is anticipated that federal highway funds through the Highway Safety Planning Agency will be available to fund the initial three years of this position. Contingent upon the success of the program and review by the regional administrator, federal highway funds may be available to continue this position beyond the initial three year period.

PERSONAL SERVICES		
Salary - Criminalist I Range 15, Step A	$34,260	
Benefits	15,321	
Total Personal Services		$49,581

WALTER J. HICKEL
GOVERNOR

P. O. Box 110001
Juneau, Alaska 99811-0001
(907) 465-3500

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 4, 1994

The Honorable Ramona L. Barnes
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Speaker Barnes:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to operating or driving a motor vehicle, commercial motor vehicle, aircraft, or watercraft.

Sections 5, 7, 12, and 13 of the bill contain the main objective of the bill. Those sections contain provisions relating to implied consent for, and administration of, chemical tests to detect the presence of drugs in drivers of motor vehicles or commercial vehicles that are involved in accidents that cause death or serious physical injury to another person.

The use of drugs by motor vehicle drivers, both alone and in combination with alcohol, is a major traffic safety concern. The apprehension and successful prosecution of the drug-impaired driver has been and remains a major concern of law enforcement.

The state's implied consent law is contained in existing AS 28.35.031 and, for commercial motor vehicle drivers, in AS 28.33.031. These sections provide that a vehicle driver who is under arrest for driving while intoxicated is considered to have given "consent" to a chemical breath test to determine the amount of alcohol in the person's blood or breath. Existing AS 28.35.032 authorizes law enforcement officers to request that an arrested driver submit to that chemical breath testing.

Sections 5 and 7 of the bill amend the implied consent statutes (AS 28.33.031 and AS 28.35.031) to specify that a person who operates a motor vehicle or commercial

SECTIONAL ANALYSIS

motor vehicle in this state is considered to have given consent to submit to a chemical test to determine the presence of both alcohol and drugs if the person is involved in an accident that causes death or serious physical injury to another person, even if the person is not under arrest. A specific definition for "serious physical injury" is provided in sec. 16 of the bill. Driving is a privilege granted by the state that can be conditioned upon consent to reasonable terms, such as consent to the chemical tests enumerated in AS 28.33.031 and AS 28.35.031 as amended by the bill.

Under existing AS 28.35.032(a), a person can refuse to submit to a chemical breath test; existing AS 28.35.032(f) makes the refusal a misdemeanor offense. Section 8 of the bill amends AS 28.35.032(a) to add references to the chemical tests provided for in secs. 5 and 7 of the bill; sec. 10 of the bill amends AS 28.35.032(f) in the same way. Several "housekeeping" amendments to AS 28.35.032(a) are also made by sec. 8 of the bill.

Under AS 28.35.032(a) and 28.35.035, if a person has been notified of the penalties that will result from refusal to submit to a chemical breath test, and the person then refuses to submit, the test may not be given unless the person has been arrested and the arrest resulted from an accident that causes death or physical injury to another person. This bill does not change those provisions other than to add references to the additional chemical tests provided for in secs. 5 and 7 of the bill. See secs. 8, 12, and 13 of the bill.

Sections 1 - 4, 9, 11, and 14 of the bill make additional conforming amendments to statutes in AS 28 to refer to the chemical tests provided for in secs. 5 and 7 of the bill. The amendment to AS 28.33.190 in sec. 6 of the bill is generally to provide a definition for "controlled substance" in AS 28.33. That term is used in AS 28.33.031(a) as that statute is amended by sec. 5 of the bill. Additionally, the amendment to AS 28.33.190 will provide other needed definitions for AS 28.33.010 - 28.33.031. The existing language of AS 28.33.190 unnecessarily excludes those sections.

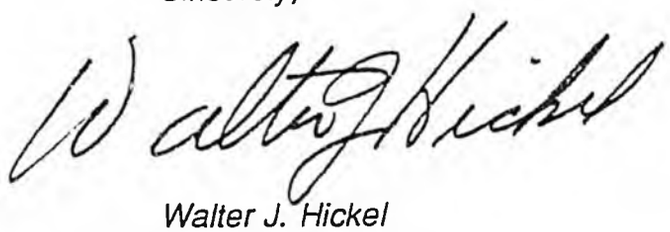
The amendments made by secs. 15 and 17 of the bill are to provide a definition of "controlled substance" for AS 28.35.029 - 28.35.039. The existing definition, which is specific to only AS 28.35.030, is repealed and is replaced by the same definition located in a general definition section for AS 28.35.029 - 28.35.039.

In my State of the State address on January 12, 1993, I identified "alcoholism, along with the abuse of other drugs," as "Alaska's number one health problem." I reiterated my commitment to dealing with this issue in my State of the State address this year, as well. This proposed legislation gives police and prosecutors the tools they need to

combat the significant highway safety problem presented by those drivers who use drugs and then cause fatal or serious injury accidents.

I urge your favorable action on this bill.

Sincerely,



Walter J. Hickel
Governor

WALTER J. HICKEL, GOVERNOR

Richard L. Burton
Commissioner
P.O. BOX 111200
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DEPARTMENT OF PUBLIC SAFETY

OFFICE OF THE COMMISSIONER

Mandatory Drug/Alcohol Testing Discussion Paper

"A bill to provide for implied consent for, and administration of, chemical test to detect the presence of drugs in drivers of motor vehicles or commercial vehicles that are involved in accidents that cause death or serious physical injury to another person".

This proposed legislation gives law enforcement officers additional tools they need to combat the significant highway safety challenge presented by those drivers who use drugs and then cause fatal or serious injury accidents.

Discussion:

Much deserved attention has been focused on drunk driving, while the related dangers presented by individuals driving under the influence of drugs other than alcohol or taken in conjunction with alcohol or other drugs have had little attention. One of the reasons for the lack of attention has been a lack of legislation allowing for the taking of blood and urine samples in those cases where drug use may be suspected.

The impact of intentional or unintentional drug abuse on motor vehicle operation in our highly mobile society is enormous as there currently are obtainable over 20,000 prescription drugs; 100,000 over-the-counter drugs; 500 illicit drugs; and 200 herbal drugs.

Drug use has become prevalent in our society. An estimated twenty-three million people are marijuana users, at least five million people use cocaine, and even a greater number use psychoactive prescription and over-the-counter medication.

There are unique subcategories of drivers whose apparent drug use patterns differ from those of the general driving population. For example, commercial truck drivers exhibit a substantially lower alcohol-involvement crash rate than do passenger vehicle drivers. In 1985, five percent of the drivers of heavy trucks involved in fatal crashes had been drinking whereas thirty-four percent of the drivers of passenger vehicles involved in fatal crashes had consumed alcohol. However, truck drivers were found to have been more apt to use stimulants.

The National Transportation Safety Board (NTSB) released a study in October 1988 revealing that at least 26 accidents of 189 heavy truck accidents from 1985 to 1987 conclusively involved drug or alcohol abuse. In one case, the driver of a heavy truck struck the rear of a queue of four other heavy trucks; the driver had not slept in the previous forty-four hours and had consumed alcohol, amphetamines, and cocaine in an attempt to stay awake.

Another unique subgroup appears to be young male drivers. An often-cited study (Compton, A Report to Congress 1988) of drug incidence among fatally injured young male drivers in California found higher rates of drug use in general and marijuana and cocaine use in particular than among the general population. One or more drugs were detected in 81 percent of 440 male drivers aged 15 to 34 killed in vehicle crashes, whereas two or more drugs were detected in 43 percent. In addition, drugs other than alcohol rarely were detected alone; the drugs usually were found in combination with alcohol and generally the BAC levels were 0.10 percent or higher. The use of drugs among young drivers is thought to present a greater risk than among the general population since youths are beginning to experiment with drugs and are inexperienced at driving.

The wide variety of drugs, their use in combination with alcohol or other drugs, and their availability combine to produce a major public safety problem to the nation's highways.

It is the consensus of the Highway Safety Planning Agency that passage of this legislation will provide law enforcement with an additional tool in which to remove the impaired driver from the state's highways.

Lorn M. Campbell

Lorn M. Campbell
Executive Director
Alaska Highway Safety Planning Agency

02/08/94
Date

STATE OF ALASKA

DEPARTMENT OF PUBLIC SAFETY

OFFICE OF THE COMMISSIONER

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February 16, 1994

DRUGS IN SERIOUS INJURY AND F. TAL ACCIDENTS

FACT SHEET

1. Very few studies have been conducted of drug use by drivers involved in crashes. What limited data is available has focused on limited geographic areas and special driver populations such as young males.

2. In 1988, the National Highway Transportation Administration synthesized existing research in a report to Congress and found that drugs were present in 10-22 percent of crash involved drivers.

3. Los Angeles Police Department personnel estimate that 20 percent of persons arrested for impaired driving were under he influence of drugs. In addition, when drugs were found in either crash involved or arrested drivers, they were found most often in combination with alcohol.

4. Urine is generally the best specimen to screen for the presence of a drug, but blood is necessary if you wish to know the degree of influence of the drug as well as possible dose and time of administration.

5. If you want to know if a suspect was under the influence of a drug at the time of committing an offense, a blood and urine sample should be collected as close to the time of the offense as possible.

6. In one study blood specimens were obtained from nearly 2,000 fatally injured drivers from seven states. Drugs other then alcohol were present in approximately 18 percent of these drivers.

7. A second recentstudy which was a far more comprehensive which focused on fatally injured drivers who died within four hours of the crash. Blood specimens were collected from a sample of 1,882 fatally injured drivers from 13 sampling sites, encompassing three entire states (Massachusetts, North Carolina, and Wisconsin), and selected counties in California, Nevada, Texas and Virginia. The results of the tests are as follows:

    a. Alcohol was found in 52 percent of fatalities.

b. Drugs other than alcohol were found in 18 percent of fatalities.

c. 64 percent of drug cases also had alcohol.

d. A drug was detected without alcohol in 6.3 percent of fatalities.

e. Abuse drugs (e.g., marijuana, cocaine) were found most frequently in the 25-54 age group.

f. Marijuana and cocaine were found more frequently in urban crashes than in rural ones.

g. Prescription drugs were found most frequently in the over 55 age group.

h. Drugs were found mostly in males.

i. Regional difference: Amphetamines were found nearly exclusively in California; Marijuana/cocaine were unusually prevalent in Dallas, TX; and Wisconsin had the lowest abuse drug involvement.

8. With a urine sample, the lab is able to screen for a wide range of all types of controlled substances in detail very cheaply. Then the lab is able to go back after identifying the controlled substance in the urine and quantify the amount through the blood test. If blood alone is submitted it is a very cumbersome, slow expensive process to attempt to identify multiple substances or in essence screen the blood.

9. The following substances are usually checked during a routine urine screen.

A. Stimulants
   1. Amphetimines
   2. methamphetamine
   3. "MDA"
   4. Dexedrine

B. Depressants
   1. Barbiturates
   2. Seconal
   3. Nembutal

C. Tranquilizers
   1. Valium
   2. Librium

D. Opiates
   1. Morphine
   2. Percodan
   3. Heroin
   4. Dilaudid

E. Antidepressants
   1. Elavil

F. Marijuana

G. Cocaine

H. LSD

Lorn M. Campbell

Lorn M. Campbell (Name of Submitter)

HSPA (Agency)

465-4374 (Phone Number)

DRUG IMPAIRED DRIVING

RESOLUTION 93–14 (new)

WHEREAS, people who operate motor vehicles while under the influence of alcohol have long been known to cause thousands of crashes, injuries and deaths each year, but only recently has the magnitude of the problems caused by drug (other than alcohol) impaired drivers come to light; and

WHEREAS, a NHTSA report to Congress disclosed a frequency of drug use by fatally injured drivers is between 10-15 percent; and

WHEREAS, many studies have documented this finding, pointing to a national prevalence of drug impaired driving; and

WHEREAS, NHTSA has developed a standardized curriculum for training police officers as Drug Recognition Experts (DRE);

NOW THEREFORE BE IT RESOLVED, that NAGHSR encourages states to adopt legislation which makes it illegal to operate a motor vehicle while impaired by drugs other than alcohol or in combination with alcohol; and

BE IT FURTHER RESOLVED, that states allow the chemical test sample to be analyzed to determine the presence and/or concentration of drugs other than alcohol.

Submitted by: Impaired Driving Committee

NATIONAL SAFETY COUNCIL

POLICY STATEMENT

COMMITTEE ON ALCOHOL AND OTHER DRUGS

ENFORCEMENT OF LAWS AIMED AT ALCOHOL-IMPAIRED DRIVING

There is strong scientific consensus suggesting that the public's perception of effective enforcement appears to be a strong deterrent to alcohol impaired driving. In order to enhance the effectiveness of enforcement activities in preventing impaired driving, the National Safety Council recommends that jurisdictions:

Implement new enforcement programs requiring chemical tests of body substance samples for all drivers involved in nighttime crashes.

Consider the use of new technologies such as passive alcohol sensors and motor vehicle ignition interlocks.

Develop and use highly visible and widely publicized enforcement approaches that increase the public's perception of the risk of apprehension.

Passed by the Committee on Alcohol and Other Drugs, November 4, 1992.

GENERAL ASSEMBLY OF MARYLAND
REPORT OF THE
TASK FORCE ON DRUNK
AND
DRUGGED DRIVING

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December 1, 1988

The Honorable Thomas V. Mike Miller, Jr., Co-Chairman
The Honorable R. Clayton Mitchell, Co-Chairman
Members of the Legislative Policy Committee

Ladies and Gentlemen:

On behalf of the Task Force on Drunk and Drugged Driving, we are pleased to submit our report to you.

Since its appointment, the Task Force has met regularly. We wish to acknowledge the support of the individuals who attended and testified at the meetings and provided the Task Force with the benefit of their research, opinions, and suggestions.

The responsibility of the Task Force is serious and we hope the Task Force will continue to function in the 1989 Interim.

Respectfully submitted,

Laurence Levitan
Co-Chairman

William S. Horne
Co-Chairman

/slb

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INTRODUCTION

In recent years, the problems associated with drunk and drugged drivers have increasingly become the focus of attention from both concerned citizens and government officials. The reason for this attention can be found in the statistics that quantify the tragic waste of human life and public resources at the hands of drunk and drugged drivers. In Maryland alone, alcohol has been identified as a contributing factor in the highway deaths of 2,684 people since 1981 (See Appendix 1 - "Relevant Statistics", for information on highway fatalities in which alcohol was a contributing factor and other pertinent statistics).

Beginning in 1981, the General Assembly of Maryland dramatically increased efforts to curb the drinking driver. During the period of 1981 through 1988, the General Assembly enacted over 30 laws to counteract the problems associated with individuals who drink and drive. These legislative measures include increased criminal and administrative penalties, prohibitions of specific behavior associated with drunk driving, enhanced driver education and rehabilitation programs, provision of additional enforcement tools to law enforcement and judicial personnel, and improved enforcement and treatment of juvenile offenders.

The statistics show that these efforts have met with considerable success. For example, there has generally been an increase since 1981 in the number of alcohol-related driving arrests and convictions. Even more

importantly, the percentage of highway fatalities in which alcohol was a contributing factor markedly decreased in the past few years. In 1981, alcohol was a contributing factor in 500 fatalities, 63% of the total highway fatalities. In 1987, these figures dropped to 309 fatalities, 37% of the total. Preliminary figures for 1988 are comparable with the 1987 figures (See Appendix 1).

In 1988, recognizing that the goal of removing the impaired driver from the highways had not been fully realized, the General Assembly passed House Joint Resolution 53* establishing a Task Force on Drunk and Drugged Driving. The Task Force is composed of legislators, judges, law enforcement officials, a State's Attorney, the Administrator of the Motor Vehicle Administration ("MVA"), and other knowledgeable and concerned representatives of the public and private sectors.

The Task Force met regularly during the 1988 Interim and considered a wide range of issues including the establishment of new offenses and harsher penalties, testing for alcohol and drugs, treatment of juvenile offenders, and other impaired driver issues.

What follows is the Task Force's Report on Drunk and Drugged Driving including recommendations to the General Assembly.

* Signed and designated Joint Resolution No. 15 by Governor William Donald Schaefer, May 27, 1988.

Shock Trauma Study

One of the major problems investigated by the Task Force was the issue of drugged driving. To assist the Task Force in its investigation, Dr. Carl Soderstrom, a surgical staff member of the Maryland Shock Trauma Center of the Maryland Institute for Emergency Medical Services Systems briefed the Task Force on the results of a recent study of 1,023 patients, victims of both vehicular and nonvehicular trauma.

Dr. Soderstrom stated that that the radioimmune serum test (i.e., a type of blood test) used in the study reliably indicates use of marijuana and other cannabinoids ("THC") w thin a period of 3 to 4 hours before the test is performed. On the other hand, Dr. Soderstrom stated that a urine test is not useful for determining the specific time period of drug use.

According to Dr. Soderstrom the results of the study indicated for all drivers:

1) 15% tested positive for THC alone;
2) 19% tested positive for alcohol alone; and
3) 17% tested positive for both THC and alcohol.

Dr. Soderstrom indicated that, although various drugs were detected in patients, prescription drugs and over-the-counter drugs were not revealed as a major problem. In addition to marijuana and other cannabinoids, Dr.

Soderstrom found that 7% of drivers tested positive for PCP, cocaine, methaqualone, or methadone alone or in combination with another drug.

Enforcement

Section 21-902(c) of the Transportation Article prohibits an individual from driving or attempting to drive while so far under the influence of any drug, any combination drugs, or a combination of one or more drugs and alcohol that the individual cannot drive a vehicle safely. Section 21-902(d) prohibits an individual from driving or attempting to drive "while under the influence of any controlled dangerous substance...if the person is not entitled to use the controlled dangerous substance under the laws of this State." Based on the prevalence of both legal and illegal drug use in our society, it is clear that arrests for these charges are underrepresented. Table A below shows the number of citations received in the District Court on these drug-related driving offenses and the guilty dispositions for drug-related driving offenses, and the total number of all §21-902 (a), (b), (c), and (d) drug-and alcohol-related driving arrests and guilty dispositions.

TABLE A
Drug-And Alcohol-Related Driving Offenses

	TA §21-902(c)	TA §21-902(d)	All TA §21-902 (does not reflect Circuit Ct. info.)
FY 1986			
Citations Received	352	414	33,302
Guilty Dispositions	77	45	10,843
FY 1987			
Citations Received	682	589	36,832
Guilty Dispositions	74	43	10,886
FY 1988			
Citations Received	739	620	42,367
Guilty Dispositions	103	68	11,217

The need for greater prosecution of the current laws against drugged driving resulted in study by the Task Force of additional enforcement techniques and tools.

Drug Evaluation and Classification Training

Mr. William E. Scott, Director, Office of Alcohol and State Programs, Traffic Safety Programs, NHTSA, testified before the Task Force on the topic of drug evaluation and classification training for police officers. Mr. Scott stated that very few police officers are trained to recognize the symptoms of impairment by drugs other than alcohol. Mr. Scott recommended to the Task Force a program, developed by the Los Angeles Police Department (LAPD), which enables a police officer to systematically administer a battery of physical and physiological tests to determine:

1) Whether a driver is impaired;

2) If so, whether the impairment is drug-related or medically-related (i.e., illness or injury); and

3) If drug-related, the broad category of drugs likely to have caused the impairment.

Sgt. William Tower of the Maryland State Police also briefed the Task Force on this topic. Sgt. Tower's extensive qualifications for discussing this subject include aiding the U.S. Department of Transportation in the development of a program to train police officers in drug testing and

participating in the program sponsored by the LAPD. According to Sgt. Tower, 20% of drivers who are charged and tested for blood alcohol content have symptoms more serious than the BAC test indicates. Sgt. Tower stated that an individual trained under the LAPD program has a 90% success rate in determining the type of drug an individual had used.

The LAPD program has two stages. The first stage trains the officer to conduct standardized field sobriety tests on an individual to determine whether the individual is under the influence of drugs. This first stage includes a 1 day course on how to recognize the basic signs of drug impairment. The second stage is an intensive 7 day course on how to identify the clinical signs of drug impairment followed by 2-3 weeks of hands-on experience with people under the influence of drugs.

According to Sgt. Tower, several hundred of Maryland's police officers have completed the field sobriety training. He stated that he would conduct the 1 day course to complete the first stage of the training in mid-December.

Drug Testing

A major law enforcement tool that the Task Force studied was medical testing of suspected drugged drivers. Current law authorizes breath or blood tests for alcohol. House Bill 822 of 1988, "Vehicle Laws - Tests for Alcohol Concentration and Drug Content", would have authorized drug tests

for driver but received unfavorable action during the 1988 Session of the General Assembly. However, the House Judiciary Committee requested that the issue be studied in detail by the Task Force.

Mr. Scott of NHTSA and other individuals who testified before the Task Force endorsed the concept of drug testing for a driver who has been detained by a police officer having reasonable grounds to believe that the driver is under the influence of a drug. Approximately 32 states allow testing of a driver to determine the presence of drugs. In essence, the drug testing proposal contained in House Bill 822 of 1988 would:

1) Expand the current implied consent statute to include consent to test for drugs other than alcohol; and

2) Allow testing of specimens of urine and "other bodily fluids".

In addition, House Bill 822 of 1988 would:

1) Change the definition of "qualified medical individual" (used to determine who is authorized to withdraw blood for testing) to include any individual authorized by an agency designated by the Secretary of Health and Mental Hygiene;

2) Increase the number of days (from 20 to 30) before trial that the State is required to notify the defendant or the defendant's attorney of the State's intention to introduce test results as

evidence without the presence or testimony of the technician who administered the test and to deliver a copy of the test results;

3) Increase the number of days (from 10 to 20) before trial that a defendant is required to notify the court and the State if the defendant desires the technician who performed the test to be present and testify;

4) Provide that, if the case is transferred to a circuit court from the District Court, the State is not required to file a second notice;

5) If the case is transferred to a circuit court from the District Court, require the defendant to notify the court and the State at least 20 days before trial that the defendant desires the technician to be present and testify at trial;

6) If a postponement is granted in the District Court or a circuit court, require the defendant to notify the court in writing at least 20 days before trial that the defendant desires the technician to be present and testify at trial;

7) Add manslaughter by automobile, motorboat, locomotive, etc., and any violation of an alcohol restriction on a driver's license to those offenses for which a test of alcohol or other drugs is admissible in evidence.

Dr. Yale Caplan, State Toxicologist, testified on some of the issues contained in House Bill 822 of 1988. Dr. Caplan suggested specifying what drugs should be the subject of testing. According to Dr. Caplan, testing should be concentrated on marijuana and other cannabinoids, cocaine, phencyclidine (PCP), opiates, and amphetamines. Dr. Caplan also stated that the implied consent law would need to be amended to allow testing for the presence of drugs and testing of specimens other than blood or breath (e.g., urine and other bodily fluids).

Dr. Caplan also stated that a drug testing entity, that does not currently exist, would be necessary to perform drug testing. Dr. Caplan stated that neither the Maryland State Police nor the Office of the Chief Medical Examiner within the Department of Health and Mental Hygiene has the resources of office space, personnel, and equipment to perform drug testing.

Dr. Caplan estimated that approximately 1,000 tests would be performed in the first year of testing, 2,000 to 3,000 in the second year, and multiple thousands in the third and subsequent years. Dr. Caplan also predicted that court appearances and testimony may be required of testing personnel in a large number of these cases. Dr. Caplan also estimated a fiscal impact of $1 to $2 million to establish the testing laboratory.

In response to questions on the drug testing issue, Dr. Caplan stated that there are no specific levels for drug content in the body that can be legislatively established as is currently done with blood alcohol content.

Dr. Caplan suggested that limiting testing to detect the presence of the illegal drugs to which he referred would obviate the need to establish specific levels of drug content in the body for a multitude of legal and illegal drugs. Dr. Caplan also viewed the use of the drug test result as confirmatory evidence, that would be introduced at trial in addition to drug evaluation and classification testimony by the arresting police officer, rather than establishing presumptive levels of intoxication or under the influence.

In response to questions regarding what type of test indicates recent use of a drug, Dr. Caplan stated that a blood test offers a greater interpretive value than a urine test in determining the time period of drug use. Dr. Caplan noted also that a blood test may be obtained only by qualified medical personnel. In responding to further questions regarding the greater expense of conducting blood tests, Dr. Caplan agreed that the current arrangement under which the State pays for the BAC tests for both the State and the counties may be the subject of a budgetary controversy as the number of tests and their costs increase.

Peter C. Cobb, Executive Assistant for Public Safety, Office of the Governor, and a member of the Task Force, indicated that the Governor will not budget funds for drug testing for drivers until at least fiscal year 1990 unless legislation authorizing drug testing is enacted first. Mr. Cobb also indicated a preference for allowing the executive branch to determine programatically by regulation the specific drugs for which testing would be conducted.