

ALASKA LEGISLATIVE COMMITTEE FILED 1999 2000 00/2

9880 HOUSE JUDICIARY

**SB**

**24**

1-LS0274P  
Bannister  
1/26/00

HOUSE CS FOR CS FOR SENATE BILL NO. 24( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Offered:  
Referred:

Sponsor(s): SENATORS DONLEY, Taylor

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to regulations; and providing for an effective date."

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

3 \* Section 1. The uncodified law of the State of Alaska is amended by adding a new  
4 section to read:

5 SHORT TITLE. This Act may be known as the Alaska Regulations Reform Act.

6 \* Sec. 2. AS 44.62.030 is amended to read:

7 Sec. 44.62.030. Consistency and relationship between regulation and  
8 statute. Except as to a regulation, regulation amendment, or order of repeal of  
9 a regulation that is made by a state agency to which AS 44.62.213 applies, if [IF],  
10 by express or implied terms of a statute, a state agency has authority to adopt  
11 regulations to implement, interpret, make specific, or otherwise carry out the provisions  
12 of the statute, a regulation adopted is not valid or effective unless consistent with the  
13 statute and reasonably necessary to carry out the purpose of the statute.

14 \* Sec. 3. AS 44.62.030 is amended by adding a new subsection to read:

15 (b) If, by express or implied terms of a statute, a state agency to which

1 AS 44.62.213 applies has authority to adopt regulations to implement, interpret, make  
2 specific, or otherwise carry out the provisions of the statute,

3 (1) a regulation, an order of repeal, or an amendment adopted by the  
4 state agency is not valid or effective, notwithstanding any other provision of law, if

5 (A) the regulation, order of repeal, or amendment thwarts,  
6 circumvents, conflicts with, or is contrary to the intent of the statute being  
7 implemented, interpreted, made specific, or otherwise carried out; or

8 (B) the regulation, order of repeal, or amendment imposes any  
9 material capital or operating costs on industrial, commercial, or other  
10 development activity without yielding significant public benefits; and

11 (2) when a regulation is challenged

12 (A) under (1)(A) of this subsection, the burden of proof is on  
13 the person challenging the regulation to prove by clear and convincing evidence  
14 that the regulation is invalid under (1)(A) of this subsection;

15 (B) under (1)(B) of this subsection, the burden of proof is on  
16 the person challenging the regulation to prove by a preponderance of the  
17 evidence that the regulation is invalid under (1)(B) of this subsection.

18 \* Sec. 4. AS 44.62 is amended by adding a new section to read:

19 **Sec. 44.62.213. Additional procedural requirements for certain state**  
20 **agencies.** (a) The provisions of this section apply to regulations of the Department  
21 of Environmental Conservation, but do not apply to regulations of

22 (1) a board or commission located in the Department of Environmental  
23 Conservation; or

24 (2) any other organizational entity located in the Department of  
25 Environmental Conservation if the organizational entity is governed by a board whose  
26 members are subject to confirmation by the legislature.

27 (b) In addition to complying with the notice requirements of AS 44.62.190, a  
28 state agency to which this section applies shall

29 \* (1) mail notice to persons who have provided comment to the state  
30 agency on the proposed adoption, amendment, or repeal of the regulation; and

31 (2) publish the notice on the Internet.

1 (c) In addition to meeting the requirements of AS 44.62.200(a) relating to  
2 contents of a notice, a state agency to which this section applies shall include with the  
3 notice an explanation of why the regulation of the agency is not invalid under  
4 AS 44.62.030(b)(1).

5 (d) Notwithstanding the variance in content authorized by AS 44.62.200(b),  
6 a regulation that is adopted, amended, or repealed by a state agency to which this  
7 section applies may vary in content from the summary specified in AS 44.62.200(a)(3)  
8 if the subject matter of the regulation remains the same and the notice was written so  
9 as to assure that members of the public are reasonably notified of the proposed subject  
10 of agency action in order for them to determine whether their interests could be  
11 affected by agency action on that subject.

12 (e) If a state agency to which this section applies rewrites a proposed  
13 regulation, an amendment of a regulation, or an order of repeal after it has complied  
14 with AS 44.62.190, 44.62.200, and 44.62.210, and if the rewriting substantially  
15 changes the substance of the regulation, amendment, or order but the state agency  
16 would not normally consider the change to be significant enough to require additional  
17 notice and opportunity for comment under AS 44.62.190, 44.62.200, and 44.62.210,  
18 before adoption, the state agency shall provide notice and opportunity for public  
19 comment under AS 44.62.190(a)(2) - (8), 44.62.200, 44.62.210, and (b) of this section  
20 for the rewritten regulation, amendment, or order of repeal.

21 (f) If the state agency does not provide the notice and opportunity for public  
22 comment under (e) of this section for a rewritten proposed regulation, amendment, or  
23 order of repeal because it believes the rewriting did not substantially change the  
24 substance,

25 (1) the state agency shall prepare a written explanation of the reasons  
26 why the requirement of (e) of this section does not apply; and

27 (2) when the adopted regulation, amendment, or order of repeal is  
28 published in the Alaska Administrative Journal, the lieutenant governor shall include  
29 the state agency's explanation provided under (1) of this subsection with the text or a  
30 summary of the text of the regulation, amendment, or order of repeal.

31 (g) The provisions of (e) and (f) of this section do not apply to regulations

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(1) adopted under AS 44.62.260 to make emergency regulations permanent;

(2) that are necessary to meet federal requirements, to obtain an exemption for a person, program, or situation in the state from federal requirements, or to revise, in a manner that reduces any burden imposed by a federal requirement, how the federal requirement will apply to a person, program, or situation in the state; or

(3) that would reduce the regulatory burden on the public.

(h) If, as to a state agency to which this section applies, a newly enacted statute does not expressly require the state agency to adopt regulations, the state agency shall, within 90 days after the date of enactment, publish notice in the manner required under AS 44.62.190(a)(1) that the state agency will or will not propose and adopt regulations to implement, interpret, or make specific the statute that it administers or to govern applicable procedures.

(i) A state agency to which this section applies may not take more than two years to adopt regulations that the state agency determines are needed unless the state agency complies with (j) of this section. The two-year period begins on the effective date of the statute or section of the statute under which the regulations are being adopted. However, the requirement of this subsection is not intended to prohibit the state agency from amending a regulation after the regulation has been adopted.

(j) When 17 months of the two-year time limit established under (i) of this section for the adoption of regulations have elapsed without adoption of the regulations, the state agency shall determine whether the adoption of the regulations will take longer than the two-year time limit. If the state agency determines that adoption of the regulations will not be completed within the two-year time limit, the state agency shall prepare a written report containing the reasons for the failure and submit the report before 18 months of the two-year time limit have elapsed to the president of the senate, the speaker of the house of representatives, and the Administrative Regulation Review Committee established under AS 24.20.400. Notwithstanding AS 44.62.300, a court may not hold a regulation invalid for failure to comply with this subsection.

- 1 (k) The provisions of (i) and (j) of this section do not apply if  
2 (1) the regulations are necessary  
3 (A) to meet federal requirements;  
4 (B) to obtain an exemption for a person, program, or situation  
5 in the state from federal requirements; or  
6 (C) to revise, in a manner that reduces any burden imposed by  
7 a federal requirement, how the federal requirement will apply to a person,  
8 program, or situation in the state; and  
9 (2) the agency has made a good faith effort to adopt the regulations  
10 within the two-year period set out in (i) of this section.

11 \* Sec. 5. The uncodified law of the State of Alaska is amended by adding a new section  
12 to read:

13 APPLICABILITY. (a) AS 44.62.213(h) - (k), added by sec. 4 of this Act, apply to  
14 the adoption of regulations if the effective date of the Act enacting the statutory authority  
15 relating to the adoption is the same as or after the effective date of this Act.

16 (b) Except as provided by (a) of this section, this Act applies to the adoption,  
17 amendment, or repeal of a regulation if the original notice under AS 44.62.190 of the  
18 adoption, amendment, or repeal is given on or after the effective date of this Act.

19 \* Sec. 6. This Act takes effect July 1, 2000.

order CSC (JUD)  
amend # 1 delete section  
# 2 & # 5

1-LS0274L  
Bannister  
4/7/00

HOUSE CS FOR CS FOR SENATE BILL NO. 24( )  
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2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 \* Section 1. The uncodified law of the State of Alaska is amended by adding a new  
4 section to read:

5 SHORT TITLE. This Act may be known as the Alaska Regulations Reform Act.

6 \* Sec. 2. AS 44.19 is amended by adding a new section to read:

7 ~~Sec. 44.19.021. Powers of the lieutenant governor. (a) To promote public~~  
8 ~~awareness and in the best interests of the state, the lieutenant governor, under the~~  
9 ~~provisions of AS 36.30, may provide for the availability of consolidated space in~~  
10 ~~newspapers of general circulation and in trade and industry publications for the~~  
11 ~~publication of notices regarding state agency regulations as required by AS 44.52.010 -~~  
12 ~~44.62.290. The lieutenant governor may require state agencies to participate in the use~~  
13 ~~of consolidated space provided under this section and may waive the requirement if~~  
14 ~~nonparticipation is in the best interests of the state.~~

(b) In this section, "state agency" means a department, board, commission,

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Newspaper  
Opposition

1 division, authority, public corporation, or other administrative unit of the executive  
2 branch of state government.

3 \* Sec. 3. AS 44.62.190(a) is amended to read:

4 (a) At least 30 days before the adoption, amendment, or repeal of a regulation,  
5 notice of the proposed action shall be

6 (1) published in the newspaper of general circulation or trade or  
7 industry publication that the state agency prescribes and in the Alaska Administrative  
8 Journal; in the discretion of the state agency giving the notice, the requirement of  
9 publication in a newspaper or trade or industry publication may be satisfied by using  
10 a combination of publication and broadcasting; [WHEN BROADCASTING THE  
11 NOTICE, AN AGENCY MAY USE AN ABBREVIATED FORM OF THE NOTICE  
12 IF THE BROADCAST PROVIDES THE NAME AND DATE OF THE NEWSPAPER  
13 OR TRADE OR INDUSTRY JOURNAL WHERE THE FULL TEXT OF THE  
14 NOTICE CAN BE FOUND;]

15 (2) furnished [MAILED] to every person who has filed a request for  
16 notice of proposed action with the state agency;

17 (3) if the agency is within a department, furnished [MAILED OR  
18 DELIVERED ] to the commissioner of the department;

19 (4) when appropriate in the judgment of the agency,

20 (A) furnished [MAILED] to a person or group of persons who  
21 [WHOM] the agency believes is interested in the proposed action; and

22 (B) provided [PUBLISHED] in the additional form and manner  
23 the state agency prescribes;

24 (5) furnished to the Department of Law together with a copy of the  
25 proposed regulation, amendment, or order of repeal for the department's use in  
26 preparing the opinion required after adoption and before filing by AS 44.62.060;

27 (6) furnished to all incumbent State of Alaska legislators and the  
28 Legislative Affairs Agency;

29 (7) furnished to the standing committee of each house of the legislature  
30 having legislative jurisdiction over the subject matter treated by the regulation under  
31 the Uniform Rules of the Alaska State Legislature, together with a copy of the

1 proposed regulation, amendment, or order of repeal for the committee's use in  
2 conducting the review authorized by AS 24.05.182;

3 (8) furnished to the staff of the Administrative Regulation Review  
4 Committee, together with a copy of the proposed regulation, amendment, or order of  
5 repeal and, if preparation of an appropriation increase estimate is required by  
6 AS 44.62.195, a copy of the estimate.

7 \* Sec. 4. AS 44.62.190(c) is amended to read:

8 (c) The failure to furnish [MAIL] notice to a person as provided in this  
9 section does not invalidate an action taken by an agency under AS 44.62.180 -  
10 44.62.290.

11 \* Sec. 5. AS 44.62.200(a) is amended to read:

12 (a) The notice of proposed adoption, amendment, or repeal of a regulation that  
13 is published under AS 44.62.195 in the Alaska Administrative Journal or is  
14 provided under AS 44.62.190(a)(2) - (8) must include the information described in  
15 (1) - (7) of this subsection. The notice that is published in a newspaper of general  
16 circulation or trade or industry publication or that is broadcast must include the  
17 information described in (1), (4), and (6) of this subsection. The information that  
18 must be provided according to requirements set out in this subsection is

19 (1) a statement of the time, place, and nature of proceedings for  
20 adoption, amendment, or repeal of the regulation;

21 (2) reference to the authority under which the regulation is proposed  
22 and a reference to the particular code section or other provisions of law that are being  
23 implemented, interpreted, or made specific;

24 (3) an informative summary of the proposed subject of agency action;

25 (4) other matters prescribed by a statute applicable to the specific  
26 agency or to the specific regulation or class of regulations;

27 (5) a summary of the fiscal information required to be prepared under  
28 AS 44.62.195;

29 (6) a brief general description of the proposed subject of agency  
30 action, how more detailed information may be obtained, and the name of the  
31 agency contact person;

*See  
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~~(7) the reason for the proposed action, the initial cost to the state agency of implementation, the estimated annual costs to the state agency of implementation, the name of the contact person for the state agency, and the origin of the proposed action.~~

\* Sec. 6. AS 44.62 is amended by adding a new section to read:

Sec. 44.62.213. Additional procedural requirements for certain state agencies. (a) The provisions of this section apply to regulations of the Department of Environmental Conservation, but do not apply to regulations of

(1) a board or commission located in the Department of Environmental Conservation; or

(2) any other organizational entity located in the Department of Environmental Conservation if the organizational entity is governed by a board whose members are subject to confirmation by the legislature.

(b) In addition to complying with the notice requirements of AS 44.62.190, a state agency to which this section applies shall

(1) furnish notice to persons who have provided comment to the state agency under AS 44.62.210 on earlier versions of the proposed adoption, amendment, or repeal of the regulation; and

(2) publish the notice on the Internet.

(c) Notwithstanding the variance in content authorized by AS 44.62.200(b), and except as provided in (d) of this section, a regulation that is adopted, amended, or repealed by a state agency to which this section applies may vary in content from the summary specified in AS 44.62.200(a)(3) if the subject matter of the regulation remains the same and the notice was written so as to assure that members of the public are reasonably notified of the proposed subject of agency action in order for them to determine whether their interests could be affected by agency action on that subject.

(d) If a state agency to which this section applies rewrites a proposed regulation, an amendment of a regulation, or an order of repeal after it has complied with AS 44.62.190, 44.62.200, and 44.62.210, and if the rewriting substantially changes the substance of the regulation, amendment, or order, the state agency shall, before adoption, provide notice and opportunity for public comment under

1 AS 44.62.190(a)(2) - (8), 44.62.200, 44.62.210, and (b) of this section for the  
2 rewritten regulation, amendment, or order of repeal.

3 (e) If the state agency does not provide the notice and opportunity for public  
4 comment under (d) of this section for a rewritten proposed regulation, amendment, or  
5 order of repeal because it believes the rewriting did not substantially change the  
6 substance,

7 (1) the state agency shall prepare a written explanation of the reasons  
8 why the requirement of (d) of this section does not apply; and

9 (2) when the adopted regulation, amendment, or order of repeal is  
10 published in the Alaska Administrative Journal, the lieutenant governor shall include  
11 the state agency's explanation provided under (1) of this subsection with the text or a  
12 summary of the text of the regulation, amendment, or order of repeal.

13 (f) The provisions of (d) and (e) of this section do not apply to regulations

14 (1) adopted under AS 44.62.260 to make emergency regulations  
15 permanent; or

16 (2) that are necessary to meet federal requirements, to obtain an  
17 exemption for a person, program, or situation in the state from federal requirements,  
18 or to revise, in a manner that reduces any burden imposed by a federal requirement,  
19 how the federal requirement will apply to a person, program, or situation in the state.

20 (g) If a statute is enacted or amended relating to a state agency to which this  
21 section applies, the state agency shall, within 90 days after the effective date of the  
22 statute or amendment, publish notice in the manner required under AS 44.62.190(a)(1)  
23 that the commissioner of the agency does or does not find regulations presently  
24 necessary to implement, interpret, or make specific the statute or amendment or to  
25 govern applicable procedures.

26 (h) If a state agency to which this section applies publishes notice under (g)  
27 of this section that the commissioner does not find regulations presently necessary, and  
28 the commissioner subsequently finds that regulations are necessary to implement,  
29 interpret, or make specific the statute or amendment or to govern applicable  
30 procedures, the agency shall, within 90 days after the commissioner's revised finding,  
31 publish notice of the revised finding in the manner required under AS 44.62.190(a)(1).

1 (i) A state agency to which this section applies may not take more than two  
2 years to adopt regulations that the commissioner of the agency finds are necessary  
3 under (g) or (h) of this section unless the agency complies with (j) of this section. The  
4 two-year period begins on the date of the commissioner's finding that regulations are  
5 necessary under (g) or (h) of this section. However, the requirement of this subsection  
6 is not intended to prohibit the agency from amending a regulation after the regulation  
7 has been adopted.

8 (j) If 21 months of the two-year time limit established under (i) of this section  
9 for the adoption of regulations elapse without the agency adopting the regulations, and  
10 if the agency determines that adopting the regulations will occur later than the two-  
11 year time limit, the agency shall prepare a written report containing the reasons for the  
12 failure and submit the report before expiration of the two-year time limit to the  
13 governor, the president of the senate, the speaker of the house, and the chair of the  
14 Administrative Regulation Review Committee established under AS 24.20.400.

15 (k) Notwithstanding AS 44.62.300, a court may not hold a regulation invalid  
16 for failure to comply with (g) - (j) of this section.

17 \* Sec. 7. AS 44.62.190(d) is repealed.

18 \* Sec. 8. AS 44.62.213, enacted by sec. 6 of this Act, is repealed.

19 \* Sec. 9. Sections 1, 10, and 11 of this Act are repealed.

20 \* Sec. 10. The uncodified law of the State of Alaska is amended by adding a new section  
21 to read:

22 APPLICABILITY OF AS 44.62.213(g) - (k). AS 44.62.213(g) - (k), added by sec. 6  
23 of this Act, apply to the adoption of regulations under a statute or amendment if the effective  
24 date of the Act enacting the statute or amendment is the same as or after the effective date  
25 of sec. 6 of this Act.

26 \* Sec. 11. The uncodified law of the State of Alaska is amended by adding a new section  
27 to read:

28 APPLICABILITY OF OTHER NEW PROVISIONS. Except as provided by sec. 10,  
29 secs. 1 - 7 of this Act apply to the adoption, amendment, or repeal of a regulation if the  
30 original notice under AS 44.62.190 of the adoption, amendment, or repeal is given on or after  
31 the effective date of secs. 1 - 7 of this Act.

- 1 \* **Sec. 12.** Sections 1 - 7, 10, and 11 of this Act take effect July 1, 2000.
- 2 \* **Sec. 13.** Sections 8 and 9 of this Act take effect July 1, 2005.

# STATE OF ALASKA

**DEPARTMENT OF LAW**  
*OFFICE OF THE ATTORNEY GENERAL*

*TONY KNOWLES, GOVERNOR*

*1031 WEST 4<sup>TH</sup> AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907)269-5274  
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March 22, 2000

The Honorable Pete Kott  
Chair, House Judiciary Committee  
Alaska State House  
State Capitol  
Juneau, Alaska 99801

Re: House CS for CS for Senate Bill No. 24 (Work Draft R, February 15, 2000)

Dear Representative Kott:

On February 7, 2000, at your invitation, I submitted a letter reviewing Work Draft P of Senate Bill 24. Subsequently, the Committee moved to Work Draft E. Yesterday I received Work Draft R, which deletes one set of provisions from the versions previously under discussion and rearranges the others. Because it will be difficult to correlate the comments on Work Draft P with the rearranged sections of Work Draft R, I am submitting this letter to specifically address Work Draft R. In substance, however, all of the comments made in this letter are comments I have made before.

The first six sections of Work Draft R apply to all agencies and relate to the procedure for giving notice of regulations. My comments do not address that portion of the bill.

Section 7 of Work Draft R would enact provisions aimed at regulations proposed by the Department of Environmental Conservation (DEC). The first part of Section 7 is a marked expansion of the public notice process for DEC regulations, including amendments and repealers. It increases both the volume of material to be published and the amount of time required to complete the process. The second part of Section 7 attempts to ensure that regulations are adopted soon after the effective date of the authorizing statute. Both parts of Section 7 are problematic as currently drafted.

As you know, Senate Bill 24 was first conceived as a broad regulatory reform bill governing several agencies. As a partial response to industry and Administration concerns raised about that earlier version, Section 7 of the bill has been narrowed to cover only DEC. Special administrative procedures applicable to only a single department should appear in the statutory title for that agency (Title 46 in the case of the Department of Environmental Conservation). Currently, the statutes already contain some special departures from the Administrative

The Honorable Pete Kott

March 22, 2000  
Page 2

Procedure Act for DEC, and those are codified in Title 46. An example is AS 46.35.090. To avoid confusing the public, the new statutory section proposed in Section 7 should be revised to appear in Title 46 rather than Title 44.

I now turn to the particular subsections of the new AS 44.62.213, which Section 7 would create.

Subsection (b) presents two technical issues that need correction. First, the thrust of subpart (1) apparently is to require the agency to provide continuing notice to commenters as the multiple rounds of public notice called for in subpart (d) go forward. In other words, if someone comments on the first draft regulation put out to public comment, that person should receive notice of any revised draft following the first round of comment. If this is the intent, the subpart should be clarified by deleting the words "on the" from line 25 of page 4 and replacing them with the phrase: "under AS 44.62.210 upon a substantially similar". Otherwise, the language could require notice to people who have commented informally, outside of the Administrative Procedure Act context and not on the record.

Second, subsection (b), as simply an addition to the list of requirements in AS 44.62.190, should be tied to the limitation in AS 44.62.190(c) that applies to the other items on the list.

Subsection (d) requires a new round of public notice and comment each time the agency responds to previous comments by "substantially chang[ing] the substance" of the proposed regulation, provided the agency "would not normally consider the change to be significant enough to require additional notice." The quoted language creates an uncertain standard. As a practical matter, the agency will feel it must go back out to comment if it makes any change other than a change to form in response to public comments. The process will then be longer and more expensive.

Frequently, it is industry that is most anxious to get new regulations in place. An illustration of how this requirement might operate in practice is found in the recent process of adopting a site-specific water quality criteria regulation for Point Woronzof. The Municipality of Anchorage, which operates a water treatment plant at the location, desired an immediate state regulatory change to protect itself from potential liability for federal penalties. DEC took the new criteria from public notice through adoption in four months. However, the adopted version of the regulation contained a substantive change from the proposed version, because a criterion had been proposed for total chromium whereas it became apparent that the limit should apply to only one type of chromium. Had SB 24 been law, the agency would have had to put the regulation out to a second round of comment. This would have lengthened the process from four months to at least seven, and made it impossible to meet the municipality's target date for putting the new regulation in place.

The Honorable Pete Kott

March 22, 2000

Page 3

Subsection (e) requires the agency to explain a negative, that is, to publish an explanation of why subsection (d) does not apply to a particular situation. The benefit of this added effort and expense, in terms of informing the public, is questionable.

Subsection (f) attempts to create certain exceptions to the multiple notice rounds envisioned by subsection (d). Exception (2) is vague, and it would be risky to rely on it. It speaks of reducing "any burden imposed by a federal requirement" in connection with a "situation in the state." Whether a particular requirement imposes or relieves burdens often depends on one's point of view, and to avoid this uncertainty and the attendant risk of litigation the agency is likely to choose to re-notice. Note that the Point Woronzof regulation would not have qualified with any degree of confidence for either of the listed exceptions.

Subsections (g) through (j) appear to be aimed at requiring DEC to announce its intention to adopt, or not to adopt, regulations as soon as the authorizing statute is passed, and to complete the process of proposing regulations within two years. The premise of these subsections is unreliable: they are based on the assumption that each regulation draws on a single authorizing statute and that the statute is static. Instead, most regulations draw on multiple statutes, all enacted at different times and all amended from time to time. Applying the time limits imposed by subsections (g)-(j) would frequently entail guesswork.

Adding to the confusion is Section 12 of Work Draft R, the applicability provision for Section 7. That section makes the time limit provisions applicable only to regulations for which "the" statutory authority comes from an act with an effective date on or after July 1, 2000. Again, the multiple bases of authority for most regulations, and the tendency of statutes to be amended from time to time, makes this provision difficult to put into practice.

The difficulty of applying these subsections would be a serious problem indeed if regulations could be invalidated because some later litigant was able to convince a court that a deadline had been missed. Lines 19-20 of page 6 appear to be aimed at preventing that from occurring. However, to be fully effective in this regard, line 20 must be changed to "to comply with subsections (g) through (i) of this section."

\* \* \*

The Honorable Pete Kott

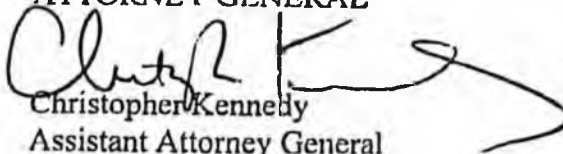
March 22, 2000  
Page 4

Thank you for the opportunity to comment on Work Draft R of Senate Bill 24.  
Should the committee require further information, please do not hesitate to ask.

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:

  
Christopher Kennedy  
Assistant Attorney General

cc: The Honorable Dave Donley (by fax and hand delivery)  
Committee Members, House Judiciary  
Commissioner Michele Brown  
Pat Pourchot  
Shari Kochman  
Janice Adair  
Chrystal Smith  
Deborah Behr



**SENATOR DAVE DONLEY**  
ALASKA STATE LEGISLATURE

**SECTIONAL ANALYSIS**  
**HOUSE CS FOR CS FOR SENATE BILL 24 ( )**  
1-LSO274\R (2/15/00)

**Section 1** – Provides that this act shall be called the *Alaska Regulations Reform Act*.

**Section 2** – Allows the lieutenant governor to require state agencies to use abbreviated public notices in newspapers of general circulation and in trade and industry publications.

**Section 3** – Amends Article 2 of the Administrative Procedure Act allowing the lieutenant governor to provide internet notice of regulations outside the scope of AS 44.62.040. This change is consistent with the sections of the bill dedicated to creating more efficiency in the Administrative Procedure Act by allowing for abbreviated, printed notices which direct interested parties to more detailed internet notices.

**Section 4** – Amends 44.62.190(a) by recognizing the advances in technology away from broadcast medium and print to online services. It deletes reference to a broadcast notice providing the name and the date of the publication where the full text of a public notice can be found. If left in the law, this section would defeat the purpose of abbreviating public notices and allowing for the increasing use of internet capabilities. This section broadens the opportunities for the public to receive notice beyond mail or publication.

**Section 5** – Substitutes the word “furnish” for “mail” in order to conform Article 4 of the Administrative Procedure Act – dealing with the procedure for adopting regulations.

**Section 6** – Amends the contents of public notices, to allow for abbreviated notices in print. AS 44.62.200(a)(7) replaces AS 44.62.190(d). Abbreviated notices will include:

1. A statement of the time, place and nature of proceedings for adoption, amendment, or repeal of the regulation; (*current law*)

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[www.akrepublicans.org/Donley.htm](http://www.akrepublicans.org/Donley.htm) • [www.legis.state.ak.us/senate/donley.htm](http://www.legis.state.ak.us/senate/donley.htm)

2. Other matters prescribed by a statute applicable to the specific agency or to the specific regulation or class of regulations; (*current law*)
3. A brief general description of the proposed subject of agency action, how more detailed information may be obtained, and the name of the agency contact person. (*new language*)

**Section 7** - AS 44.62 is amended by adding a new section—AS 44.62.213 *Additional procedural requirements for certain state agencies*. This section is the corpus of the pilot program created in this legislation. This section sets out additional procedural requirements for the DEC, but not for regulations produced by any DEC board, commission or any other organization within the DEC whose members are confirmed by the legislature (as set out in **subsection (a)**).

**Subsection (b)**--In addition to the notice requirements currently in statute under AS 44.62.190 (*Notice of proposed action*), SB 24 adds several more requirements:

- Furnish notice to persons who have provided comment to the state agency on the proposed adoption, amendment or repeal of a regulation;
- Publish the notice on the internet;

**Subsection (c)**— This subsection's language mirrors the language currently in statute under AS 44.62.200(b) with the exception of the word "*original*" which is deleted from between the words "*the*" & "*notice*" on page 4, line 30. By deleting the word "*original*" this section's requirements apply to all subsequent notices, as well as the original.

**Subsection (d)**— If an agency to which this section applies rewrites a proposed regulation, an amendment of a regulation, or an order of repeal after complying with AS 44.62.190, 44.62.200 & 44.62.210, and if the rewriting substantially changes the content of the original regulation, but the agency would not normally consider the change to be significant enough to require additional notice under the aforementioned statutes, before adoption, the state agency shall provide notice and opportunity for public comment under AS 44.62.190(a)(2)–(8) (excluding republishing in the newspaper), 44.62.200, 44.62.210 and (b) of this section.

**Subsection (e)** – If an agency to which this section applies fails to meet the requirements of (d) of this section because they feel that the change is not substantial, the agency must:

- Prepare a written explanation of the reasons why the requirement of (d) of this section does not apply; and

- The lieutenant governor shall publish the state agency's explanation in the Alaska Administrative Journal with the text or a summary of the text of the regulation, amendment, or order of repeal.

**Subsection (f)**— This subsection exempts emergency regulations, regulations necessary to meet federal requirements, or regulations that reduce the regulatory burden of the public from the provisions of (d) & (e) of this section.

**Subsection (g)**— This subsection requires a state agency to which this section applies to publish a notice, as dictated in AS 44.62.190(a)(1), within 90 days after the date of enactment that the agency will or will not propose and adopt regulations to implement the statute, if it is not expressly required to prepare regulations within said statute.

**Subsection (h)**— Creates a two year time limit for the adoption of regulations for state agencies to which this section applies (the DEC).

**Subsection (i)** – If the agency (DEC) determines that the adoption of the regulations will not be completed within the two year time limit of (i), the state agency shall prepare a written report containing the reasons for the failure and will submit the report before 18 months of the two year time limit have elapsed to the president of the senate, speaker of the house, and the Administrative Regulation Review Committee.

**Subsection (j)**— This subsection sets out criteria that allows the agency to disregard the provisions of (h) & (i) of this section.

**Section 8** – Repeals AS 44.62.190(d) which was replaced by AS 44.62.200(a)(7)— in section 6 of this legislation.

**Sections 9–13 & 15** – These sections of the bill set the sunset clause for sections 1 & 7 at five years –section 7 creates the pilot program for the promulgation of regulations.

**Section 14** – Sets the effective date of this Act at July 1, 2000.

## RESPONSES TO THE TESTIMONY OF CHRIS KENNEDY (DOL)

1. SB 24 applies only to the DEC, but SB 24 is written so that the law would be placed in AS 44, rather than title 46 (the DEC title).

*During the evolution of SB 24 there have been many changes to the bill. Most notably, is the reduction in the number of agencies to which it applies. This is why it was originally written into title 44. However, it remains in title 44 because of the future possibility that the program could be expanded to other agencies. SB 24 is written in such a way that allows this to happen quite easily, whereas if it was placed in title 46 a substantial rewrite would be needed in order to add another agency.*

2. The new standards in SB 24 (Sec. 3 (1)(A)) are novel. The courts will have a difficult time deciphering their meaning.

*Perhaps. The novel approach has been taken in order to hold an agency more accountable and to require it to follow these strict standards before it promulgates regulations. The administration seems to believe that the status quo is working; yet from everything we hear it is not. Many citizens are unhappy with how regulations are promulgated and the first standard of this section was created to respond to some of those concerns. The test provided in (1)(A) is more stringent in order to ensure that the administration does not ignore the intent of the statute when promulgating regulations. Although the old test has been in place since 1959 and has been tested, it is clearly not working to the satisfaction of many citizens, industry groups and legislators. However, it should also be noted that after considering the comments of the administration and various groups it became apparent that if a stricter test is created for the agency, then the burden on the person challenging the regulation needed to be more stringent, thus the language clear and convincing evidence was used. This was done to allay the fears expressed by the administration and industry groups that the more stringent test would create more opportunities for the regulation to be challenged*

3. The test in part B of section 3 is untested and troubling because it inserts courts into the public process of determining whether a benefit is truly public or not.

*The language used in this standard was actually borrowed from the Alaska Forest Practices Act and though it is not the exact same language, it would not be accurate to say that this standard is a completely novel approach either.*

4. Amending regulations is problematic due to the way Sec 5 reads on the applicability of this statute. When a regulation is amended after the enactment of the new test, but only in part, is the entire regulation subject to the new test or is only the new language?

*Checking with legal.*

5. Section 5(a) makes some provisions of the bill apply only to regulations if the statute giving authority for those regulations has an effective date of July 1, 2000 or later. This may become problematic when a regulation derives authority from a combination of statutes with various effective dates.

*Checking with legal.*

6. The language in Section 4 seems vague and should be clarified to require DEC to mail (now furnish) notices only to those who have formally commented on an earlier draft of the regulation.

*Checking with legal.*

7. The word "mail" in Section 4 seems too narrow and should be changed to "furnish" to allow for electronic mailing.

*The word "mail" has been changed to "furnish" in the in the CS.*

8. Subsection (c) of Section 4, requiring a written explanation by DEC is an invitation for lawyers to simply produce boilerplate explanations and is unlikely to produce any material that is genuinely informative.

*This requirement appears to be a reasonable way to encourage agencies to inform the public and help the public understand the intent of the Department. This argument does not appear to have much merit and the public will likely find these explanations valuable.*

9. Subsection (e) requiring a new round of public comments whenever the Department has substantially changed the substance of a proposed regulation would be too costly, would slow the process and would not be effective.

*This section is really the heart of the bill. It is a policy call as to how much accountability one believes that the Department should have with the public.*

10. Exceptions to (e) are too vague (except number 1) to be of any real use.

*Subsection (2) on Page 4: represents an effort to acknowledge previous department testimony that federal requirements need to be considered. Subsection (3) has been removed from the new CS, since Rep. Murkowski pointed out that it could be used by the Department to get around having to provide another public notice.*

11. Subsections (J) should be expanded to include (H)-(J) so that it would give DEC more flexibility to meet the two-year requirement to enact regulations.

*Again, this represents a policy decision. There are no technical or legal problems with this expansion, but it would take the heart out of the requirement the Department promptly enact regulations to carry out the will of the Legislature.*



**SENATOR DAVE DONLEY**  
ALASKA STATE LEGISLATURE

**CHANGES MADE IN CS TO SB 24 (1-LS0274\P)**

Working from work draft SB 24 (1-LS0274\P) the changes are:

1. P. 2, Line 29: Delete "mail" and insert "furnish" in its place.
2. P. 4, Line 8: Delete subsection (3)—entire line.
3. P. 5, Lines 9-10: Language was added to require the department to provide a report explaining their "good faith effort" if they chose to utilize this clause to circumvent the requirements of (i) and (j).
4. A five year sunset clause was added for the material in version 'P'.
5. Senator Leman's amendment was incorporated into the new CS. Senator Leman's amendment is not covered by the sunset clause.

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*TESTIMONY OF RICHARD HARRIS  
SENIOR VICE PRESIDENT, NATURAL RESOURCES  
SEALASKA CORPORATION  
IN SUPPORT OF HCS CS SB(24) (VERSION P)  
BEFORE THE HOUSE JUDICIARY COMMITTEE  
FEBRUARY 2, 2000*

SEALASKA CORPORATION IS THE ANCSA REGIONAL CORPORATION FOR SOUTHEAST ALASKA. ON BEHALF OF OUR 16,000 SHAREHOLDERS, SEALASKA IS ACTIVELY ENGAGED IN AN ARRAY OF REGULATED ECONOMIC ACTIVITY, INCLUDING MINING AND COMMERCIAL FORESTRY.

SEALASKA IS PLEASED TO SUPPORT THE PROPOSED COMMITTEE SUBSTITUTE FOR SB 24, AND WE HAVE ALSO BEEN ASKED TO CONVEY THE SUPPORT OF THE ALASKA FOREST ASSOCIATION, OF WHICH SEALASKA IS A MEMBER. THE VERSION OF SB 24 THAT IS BEFORE YOU IS THE RESULT OF CONSIDERABLE EFFORT ON THE PART OF SENATOR DONLEY TO ACHIEVE TANGIBLE AND SIGNIFICANT REGULATORY REFORM WITHOUT RUNNING THE RISK OF FURTHER INVOLVING THE COURTS IN THE MAKING OF STATE NATURAL RESOURCE POLICY.

EARLIER VERSIONS OF THIS BILL WOULD HAVE REQUIRED ADEC TO PERFORM A COST/BENEFIT ANALYSIS OF CERTAIN

NEW REGULATIONS. WHILE THE BENEFITS OF THAT REQUIREMENT ARE OBVIOUS, MANY WERE CONCERNED THAT THE REQUIREMENT MIGHT INVITE LITIGATION OVER WHETHER PARTICULAR COSTS OR BENEFITS--AND PARTICULARLY DIFFICULT-TO-QUANTIFY ENVIRONMENTAL COSTS--WERE GIVEN ADEQUATE WEIGHT IN THE BALANCING PROCESS.

TO FIND A STANDARD THAT MET THE LEGISLATION'S ORIGINAL GOAL, BUT DID NOT RAISE THE RISK OF INCREASED LITIGATION, THIS BILL NOW BORROWS FROM ALASKA'S FOREST PRACTICES ACT--A PIECE OF LEGISLATION WITH WHICH SEALASKA IS UNIQUELY FAMILIAR.

THAT LEGISLATION, AS YOU KNOW, IS THE PRODUCT OF A CONSENSUS REACHED BY ALASKA'S RESOURCE AGENCIES, ENVIRONMENTAL GROUPS AND THE REGULATED INDUSTRY IN 1990. THAT LEGISLATION SERVES AS A MODEL FOR COOPERATIVE, SCIENTIFICALLY-BASED RESOURCE REGULATION, AND ITS 10-YEAR HISTORY PROVES THAT LITIGATION DOES NOT HAVE TO BE A PART OF MODERN ENVIRONMENTAL MANAGEMENT.

ONE OF THE PROVISIONS THAT ALL THE PARTIES AGREED TO IN THEIR UNANIMOUS ENDORSEMENT OF THE FOREST PRACTICES ACT WAS SECTION 080(D), WHICH PROVIDES THAT DNR CANNOT ADOPT REGULATIONS THAT IMPOSE COSTS ON THE INDUSTRY UNLESS THOSE REGULATIONS WILL PRODUCE "SIGNIFICANT BENEFITS TO PUBLIC RESOURCES."

I CAN TELL YOU, FROM EXPERIENCE, THAT THIS SIMPLE, STRAIGHTFORWARD STANDARD HAS HAD A SIGNIFICANT IMPACT IN ENSURING THAT THE RULES IMPOSED ON OUR INDUSTRY HAVE A CLEAR PUBLIC JUSTIFICATION. IT IS A STANDARD THAT MAKES THE AGENCY JUSTIFY WHAT IT IS DOING, AND IT MAKES THE AGENCY THINK EVERY TIME IT PROPOSES A NEW RULE THAT INCREASES PRIVATE-SECTOR COSTS.

BUT IT IS EQUALLY IMPORTANT IN WHAT IT DOES NOT DO. IT DOES NOT FORCE THE AGENCY INTO AN ESOTERIC WEIGHING OF COSTS AND BENEFITS. AND PARTLY FOR THAT REASON, IN ITS 10-YEAR HISTORY IT HAS PROVOKED NO LITIGATION OF WHICH WE ARE AWARE.

ON PAGE 2, LINES 8-10, OF DRAFT "P" OF SB 24, YOU WILL FIND AN ADAPTATION OF THAT FOREST PRACTICES STANDARD WHICH, IF THIS BILL IS ENACTED, WOULD APPLY TO A RANGE OF ADEC PROGRAMS. WE BELIEVE, IN THE LONG RUN, THAT ENVIRONMENTAL REGULATION IN ALASKA SHOULD BORROW EVEN MORE HEAVILY FROM THE SUCCESSFUL EXPERIENCE OF THE FOREST PRACTICES ACT. BUT WE COMMEND SENATOR DONLEY FOR TAKING THE FIRST STEP IN THAT REGARD, AND WE ENTHUSIASTICALLY SUPPORT THIS LEGISLATION.

# STATE OF ALASKA

DEPARTMENT OF LAW  
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February 7, 2000

The Honorable Pete Kott  
Chair, House Judiciary Committee  
Alaska State House  
State Capitol  
Juneau, Alaska 99801

Re: House CS for CS for Senate Bill No. 24 (Work Draft P, January 26, 2000)

Dear Representative Kott:

This letter reviews the work draft of Senate Bill 24 discussed in the House Judiciary Committee on February 2, 2000. I write at your invitation to detail the concerns I raised in oral testimony to the Committee on that date. I am grateful for the opportunity to submit these comments.

Work Draft P of Senate Bill 24 has three main features, all of them special provisions aimed at regulations proposed by the Department of Environmental Conservation (DEC). The first feature, found in Section 3 of the bill, is a change in the standard of review for DEC regulations. The second feature is a marked expansion of the public notice process, both in volume of material to be published and in the amount of time required to complete the process. Finally, the bill attempts to ensure that regulations are adopted soon after the effective date of the authorizing statute.

As you know, Senate Bill 24 was first conceived as a broad regulatory reform bill governing several agencies. As a partial response to industry and Administration concerns raised about that earlier version, the bill has been narrowed to cover only DEC. Special administrative procedures applicable to only a single department should appear in the statutory title for that agency (Title 46 in the case of the Department of Environmental Conservation). Currently, the statutes already contain some special departures from the Administrative Procedure Act for

The Honorable Pete Kott

February 7, 2000  
Page 2

DEC, and those are codified in Title 46; an example is AS 46.35.090. To avoid confusing the public, the substantive provisions of SB 24 should be revised to appear in Title 46 rather than Title 44.

I now turn to the specific provisions of the bill, taken in order. References to page and line numbers are to Work Draft P.

Section 2 of the bill removes DEC from the current standard under which regulations are tested in the courts. The present standard has been in effect since 1959, and its meaning is no longer subject to uncertainty in litigation.

Section 3 lays out a replacement standard for DEC regulations. It is a wholly novel standard made up of words entirely new to the statutes, such as "thwarts" and "circumvents." Courts would attempt to give each of these words meaning, and would assume that the overall meaning must be different from the 1959 language or the Alaska State Legislature would not have gone to the trouble to change it. Beyond that, the outcome of litigation under this standard would be uncertain. This uncertainty makes the replacement standard undesirable, because it reduces the ability of both stakeholders and state officials to predict whether a court would uphold a regulation. Uncertainty interferes with business and government planning and adds to legal expenses.

It has been suggested that the new standard is modeled on the Forest Practices Act language found at AS 41.17.080(d). That provision reads: "The commissioner shall adopt only those regulations necessary to accomplish the purposes of this chapter and shall avoid regulations that increase operating costs without yielding significant benefits to public resources." The language found at lines 3-17 of page 2 of the work draft of SB 24 has been greatly altered from this model. More fundamentally, AS 41.17.080(d) is merely an overlay to the 1959 standard. There is no parallel in the Forest Practices Act to Section 2 of SB 24, and forestry regulations have *not* been exempted from the coverage of AS 44.62.030. Were SB 24 to parallel the Forest Practices Act, Section 2 of SB 24 would be eliminated and Section 3 would simply add the language of AS 41.17.080(d) to AS 46.03.020(10), or would use that language to replace the current text of AS 46.03.024. As DEC has pointed out, AS 46.03.024 is a counterpart to the Forest Practices Act language that already applies to DEC.

Appearing as it does as a freestanding standard of review, the cost-benefit comparison in lines 8-10 of page 2 of the work draft is especially problematic. A court cannot uphold a regulation without finding that it yields "significant" and "public" benefits to counterbalance any "material" costs imposed on any industry or other development activity. This enlists the Alaska Superior Courts in weighing what is a benefit, what is a significant benefit, and what is a public benefit. It is a role that, as the Alaska Supreme Court has sometimes recognized, is inappropriate for the judicial branch.

The Honorable Pete Kott

February 7, 2000

Page 3

The following example illustrates the kind of weighing that would be involved. DEC issues special regulations, set out at 18 AAC 70.230-236, to provide particular industrial facilities with locally relaxed water quality standards allowing those facilities to discharge more waste into the water than federal and state law would otherwise permit. Though these site specific regulations typically do not impose a cost on the industry that requests and receives them, they may impose costs on another "industry" that shares the same resource. For example, I recently worked on a case where the state was adverse to certain plaintiffs seeking to block oil development of the Alpine field. Some plaintiffs claimed standing to sue by asserting that they were in the business of taking paying clients on ecotourism trips in the Colville River delta. Under SB 24, such a group--as a member of the tourist industry--might claim the special water criterion affected its operation. It would then be in a position to invalidate the regulation unless the regulation created a *significant* and *public* benefit. While the state would argue otherwise, some judges might view the benefit conferred by a water quality standard adjustment extended to a single company as neither significant nor public, but rather a private benefit. By introducing such uncertainty into the process, SB 24 would make it hard for industry or government to know which regulations may be relied on and which may later be invalidated.

Further difficulties emerge when Section 3 is viewed in conjunction with Section 5 on applicability. SB 24 applies only to new regulatory actions begun after July 1 of this year. The problem arises because most DEC regulatory actions are amendments to existing regulations, in order to make them clearer, to respond to problems pointed out by the regulatory community, or to respond to changing conditions or amendments to statutes. An amendment may only change, for example, the last three words of a sentence. Later, if that regulation were challenged, the court would have to review three words of the sentence under one standard and the other words under another standard. Within a few years, the DEC regulations would be a Byzantine tangle of fragments covered by the old standard and fragments covered by the new test.

It is no answer to this problem to make SB 24 apply retroactively. That solution would reopen all existing regulations, even those that have already been upheld in court, to new challenges based on the changed standard of review, renewing opportunities for gadfly litigants to press agendas that have previously failed.

A technical problem with Section 3 is its use of "burdens of proof" in connection with the standard of review for regulations. Whether or not a regulation meets the standard of review is traditionally a question of law, not a question of fact. The court must reach the same conclusion about the validity of a regulation regardless of who is testing it and regardless of what "evidence" is brought before the court; after all, a regulation cannot be valid law for one person and invalid law for another, or serious equal protection issues would ensue. For this reason courts test regulations using the public record of legislative context and intent. While parties may help to illuminate this record to the court through briefing, in the end the court is to examine the issue objectively and to consult all relevant legislative sources on its own. The concept of "burden of proof" is largely foreign to the process of deciding questions of law. Its inclusion in

The Honorable Pete Kott

February 7, 2000

Page 4

Senate Bill 24 would lead to confusion and uncertainty. Should the court accept the notion that testing regulations against a standard of review should be approached as a triable factual issue, the consequence would be that challenges to regulations could rarely be decided on summary judgment. The principal beneficiaries of such a development would be litigants whose objective is to obstruct projects by means of delay.

I turn next to Section 4 of the work draft, which creates a new section 213 of the Administrative Procedure Act. I will address each lettered subsection in turn.

Subsection (a) appears to be an artifact of the earlier version of SB 24 that applied to multiple agencies, some of which encompassed boards or commissions. It is probably unnecessary to a bill that applies only to DEC, unless the sunset of the Board of Storage Tank Assistance, scheduled under AS 44.66.010(a)(18) for the day before the effective date of SB 24, is extended.

Subsection (b) presents three technical issues that needs correction. In subpart (1), the word "mail" on line 29 should be changed "furnish," to avoid restricting the agency to the use of U.S. Postal Service mail. The flexibility is needed because members of the public who comment by e-mail generally prefer to receive subsequent notices by e-mail.

Secondly, the thrust of subpart (1) appears to be to require the agency to provide continuing notice to commenters as the multiple rounds of public notice called for in subpart (e) go forward. In other words, if someone comments on the first draft regulation put out to public comment, that person should receive notice of any revised draft following the first round of comment. If this is the intent, the subpart should be clarified by deleting the words "on the" from line 30 and replacing them with the phrase: "under AS 44.62.210 upon a substantially similar". Otherwise, the language could require notice to people who have commented informally, outside to Administrative Procedure Act context and not on the record.

Thirdly, subsection (b), as simply an addition to the list of requirements in AS 44.62.190, should be tied to the limitation in AS 44.62.190(c) that applies to the other items on the list.

Subsection (c) is related to the standard of review change, requiring the agency to publish an explanation of its legal position on the validity of the proposed regulation. Such an explanation could be lengthy, and writing and publishing it would be expensive. Long public notices can actually decrease the likelihood of successfully informing the public, in that the information of real interest to the public becomes lost in the volume of material. If a stakeholder is genuinely concerned that the agency has given inadequate consideration to the legal standard for adopting the regulations, it can raise the issue by comment and receive an explanation in the responsiveness summary that many DEC divisions prepare when issuing regulations.

The Honorable Pete Kott

February 7, 2000

Page 5

Subsection (e) requires a new round of public notice and comment each time the agency responds to previous comments by "substantially chang[ing] the substance" of the proposed regulation, provided the agency "would not normally consider the change to be significant enough to require additional notice." The quoted language creates an uncertain standard. As a practical matter, the agency will feel it must go back out to comment if it makes any change other than a change to form in response to public comments. The process will then be longer and more expensive.

Frequently, it is industry that is most anxious to get new regulations in place. An illustration of how this requirement might operate in practice is found in the recent process of adopting a site-specific water quality criteria regulation for Point Woronzof. The Municipality of Anchorage, which operates a water treatment plant at the location, desired an immediate state regulatory change to protect itself from potential liability for federal penalties. DEC took the new criteria from public notice through adoption in four months. However, the adopted version of the regulation contained a substantive change from the proposed version, because a criterion had been proposed for total chromium whereas it became apparent that the limit should apply to only one type of chromium. Had SB 24 been law, the agency would have had to put the regulation out to a second round of comment. This would have lengthened the process from four months to at least seven, and made it impossible to meet the municipality's target date for putting the new regulation in place.

Subsection (f) is similar to subsection (e), requiring the agency to explain a negative, that is, to publish an explanation of why subsection (e) does not apply to a particular situation. The benefit of this added effort and expense, in terms of informing the public, is questionable.

Subsection (g) attempts to create certain exceptions to the multiple notice rounds envisioned by subsection (e). Exceptions (2) and (3) are vague, and it would be risky to rely on them. Exception (2), for example, speaks of reducing "any burden imposed by a federal requirement" in connection with a "situation in the state." Whether a particular requirement imposes or relieves burdens often depends on one's point of view, and to avoid this uncertainty and the attendant risk of litigation the agency is likely to choose to re-notice. Note that the Point Woronzof regulation would not have qualified with any degree of confidence for any of the listed exceptions.

Subsections (h) through (k) appear to be aimed at requiring DEC to announce its intention to adopt, or not to adopt, regulations as soon as the authorizing statute is passed, and to complete the process of proposing regulations within two years. The premise of these sections is flawed: they are based on the assumption that each regulation draws on a single authorizing statute and that the statute is static. Instead, most regulations draw on multiple statutes, all enacted at different times and all amended from time to time. Applying the time limits imposed by subsections (h)-(k) would be an exercise in guesswork.

The Honorable Pete Kott

February 7, 2000

Page 6

Adding to the confusion is subsection (a) of the applicability provision of SB 24. That section makes the time limit provisions applicable only to regulations for which "the" statutory authority comes from an act with an effective date on or after July 1, 2000. Again, the multiple bases of authority for most regulations, and the tendency of statutes to be amended from time to time, makes this provision difficult to put into practice.

The difficulty of applying these subsections would be a serious problem indeed if regulations could be invalidated because some later litigant was able to convince a court that a deadline had been missed. Lines 30-31 of page 4 appear to be aimed at preventing that from occurring. However, to be fully effective in this regard, line 31 must be changed to "to comply with subsections (h) through (j) of this section."

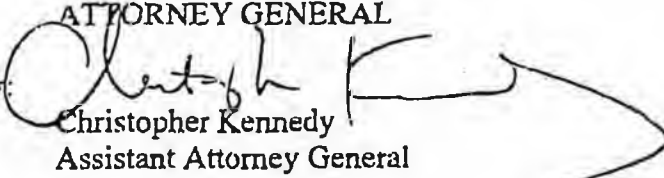
\* \* \*

Thank you for the opportunity to comment on Work Draft P of Senate Bill 24. Should the committee require further information, please do not hesitate to ask.

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:

  
Christopher Kennedy  
Assistant Attorney General

cc: The Honorable Dave Donley  
Committee Members, House Judiciary  
Commissioner Michele Brown  
Pat Pourchot  
Shari Kochman  
Janice Adair  
Chrystal Smith  
Deborah Behr

Testimony from Chris Kennedy on SB 24:

Number 0149

CHRIS KENNEDY, Assistant Attorney General, Civil Division, Environmental Section, Department of Law, came forward to testify on SB 24. He indicated Janice Adair, Director, Division of Environmental Health, Department of Environmental Conservation (DEC), was unable to testify at today's committee meeting. He asked, on her behalf, that she be given the opportunity to comment later. He referred to the committee substitute for SB 24 and stated,

While the bill has improved over previous versions, we continue to have a number of concerns. First of all, a housekeeping point. As, I think, Senator Donley covered, SB 24, as it's revised applies special procedures only to DEC. Now, special administrative procedures applicable only to a single department are normally in place in the statutory title for that agency. And, currently, we already have on the books some special departures from the Administrative Procedures Act that apply only to DEC and those are in Title 46. The main example is AS 46.35.090. Now that it has been narrowed to relate only DEC, the main provisions of this bill in Sections 3 and 4 should be revised to go into Title 46, rather than Title 44. I heard the discussion of this being a pilot program that might last 5 years or so. Of course, if it were a successful pilot program and someone wanted to expand in 5 years from now, one could recodify again, but 5 years is a long time to have a DEC statute stuck off in another title where people might miss it.

Number 0239

MR. KENNEDY continued,

Now I'll turn to the substance of the bill. I'd like to look first at the standard of review which has just been discussed. It can be found in Section 3 of the bill. It completely replaces the current standard under which an agency's regulations are tested, and the current standards in [AS]44.62.030 is quite a firm standard. It says that regulations have to be consistent with the statutes and that they have to be reasonably necessary to carry out the purposes of the

authorizing statute. This standard has been in place since 1959. It stood the test of time. The courts have decided dozens of changes based on it and the legal community of both industry and government knows what it means. The new standard in SB 24 is entirely novel. It uses words like "thwarts" and "circumvents" that are new to the Alaska statutes and not found in many other states statutes either. No one can predict how a court would interpret them. The SB 24 standard also inserts "courts" into a process of weighing costs and benefits. And here I'm talking about part (B) of the new standard of review which is at lines 8 through 10 on page 2. Under SB 24 a court cannot uphold a regulation without finding that it yields "significant public benefits" to counter balance any "material costs imposed on development activities". This gets the superior courts into laying what is a benefit, what is a significant benefit, and what is a public benefit. Increasingly, unfortunately, courts in Alaska are coming to the realization that they're not equipped for that kind of role. The Alaska Supreme Court said in the recent Casio(ph) case that it doesn't want to (indisc.-coughing) get mired in questions of public policy as to regulations because that is beyond our authority and expertise.

Concern  
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Number 0331

MR. KENNEDY further stated,

I'll give you an example of the kind of weighing that would be involved. DEC issues special regulations to provide particular industrial facilities with mixing zones that, as a practical matter, allow the industry to discharge more waste into the water than federal or state law would otherwise permit. And a user of the water body, such as an eco-tourism company, might challenge a regulation like that, alleging that it imposed cost on them because they have to travel farther to find a pristine tourist destination. Against that cost, the court would have to weigh the benefits of letting the industrial facility use the mixing zone. Then you would have the question of whether that is a public benefit or just a private benefit to the company that owns the facility. And some judges might even question whether it's a benefit at all. No one knows how a court would rule given

The test  
may work  
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industry

this kind of language and it introduces an uncertainty into the whole process and makes it hard for industry or anyone to know which regulations they can rely on and which are going to be snatched out from under them in some later litigation. There's another very troubling aspect in introducing a whole new standard for reviewing regulations. And to appreciate it, you have to look at Section 3 in conjunction with Section 5 on applicability. As it must, to avoid a host of other problems, this bill has been (indisc.) not to be retroactive. It applies to new regulatory action begun after July 1 of this year. The trouble comes because most of what DEC does with regulations is amend existing regulations in order to make them clearer or to respond to problems pointed out by the regulated community or to respond to changing conditions or amendments to statutes. An amendment may only change, for example, the last three words of a sentence under one sentence of a regulation. Later, if that regulation is challenged, then you would, you would be testing those three words under one standard of review and the other words of the regulation under another standard of review. And within a few years, the DEC regulations would be a hopeless patchwork of bits covered by, some covered by the old standard and some covered by the new test. It would be very hard to predict how a court would unravel that.

Number 0458

MR. KENNEDY continued,

While I'm on the subject of applicability in Section 5, I want to just talk for a moment about subsection (a) of the applicability provision. That section makes some provisions of the bill only apply to regulations if the statute giving authority for those regulations has an effective date after July 1 of 2000. The problem there is that many regulations draw authority from a combination statute that all have different effective dates. Also, do you go by the effective date of the first version of the statute, or do you go by the effective date of the most recent amendment of the statute, or do you engage in some sort of court inquiry as to how significant the latest statutory amendment was? I think both the agency and

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the court and industry would have a very difficult time knowing how to interpret this applicability provision. Let me just turn back, if I may, to Section 4. The other substantive provision of the draft. The first part of that relates to the public notice process for adopting regulations. I think that the rest of this is perhaps to make sure that the agency has a genuine dialogue with the public. The idea may be that if the draft set of regulations is out to the public then it significantly revises the draft. It'd have to take a new round of public comment. I should make a couple of technical points.

In subsection (b)(1) of the new section [AS 44.62.]213 the bill would require DEC to mail notice to person had provided comment to DEC on the proposed adoption, amendment, or repeal of a regulation. I think the intent here is probably to refer to those who have commented formally on a previously noticed draft of those regulations. But the language of the bill doesn't quite say that and this requirement could be interpreted to invalidate a regulation just because the agency did not notify someone who had commented in some informal context at some time in the past. Also, and this is a minor concern, that the phrase "mail notice" should be changed to "furnish notice". As we move more and more to electronic commenting, the agency receives comments by e-mail and would want to respond and providing notice by e-mail to people who prefer. That mechanism and the use mail is usually going to be interpreted just as strictly U.S. mail.

Number 0576

MR. KENNEDY stated,

Moving onto subsection (c). This is a requirement that the agency developed in explanation of why its proposed regulation is not invalid under the new standard of review that I mentioned before. This is an invitation for lawyers to compose boiler plates. It's unlikely to produce any material genuinely informative to the general public and whatever it does produce will have to be published, potentially at great cost, in the Alaska Administrative Journal. Next, I'd like to comment on the core subsection here, subsection (e), which requires a new round of public notice whenever the agency, in response to comments,

has "substantially changed the substance of the draft regulation". The first concern is that this imposes an uncertain standard. Secondly, it slows down the process considerably. Whereas industry and the public, in general, are often impatient for regulations to become final. Third, it's costly and fourth, it may not be an effective way to accomplish what seems to be the goal of this provision. If the goal is to make sure the agency has a meaningful dialogue with commenters the best solution might be to require the agency to compare and furnish to commenters a response in the summary explaining why it accepted or rejected each comment. I understand some DEC divisions do this already and it's a procedure that's been well received when it's been tried. I'd like to touch briefly on the exceptions to subsection (e). The exceptions are in subparts of subsection (g) which travels pages 3 and 4 of the draft. The point to made here is that these exceptions, other than number 1 are too vague to be of any real use to the agency. They talk about reducing burden. One person's burden is another person's benefit and it will generally be difficult to tell if a regulation reduces burdens on society as a whole.

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Finally, I would like to; I should comment briefly on subsections (h) through (k) which attempt to ensure that regulations are adopted probably after the underlying statute has passed. These provisions suffer from similar concerns. They are vague and even more of a problem is that the underlying assumption is that regulations will be based on a single statute that has a single effective date. These, which as I mentioned previously, is frequently not the case, or most commonly is not the case. These provisions will be extremely hard to apply where regulations have multiple statutes behind them. All with different effective dates and with multiple statutory amendments that often have different effective dates.. Finally, while a delay in issuing regulations can be frustrating, these provisions are perhaps a little too blunt to address that. Often the need for regulations doesn't become apparent...to anyone until there's been years of experience in attempting to implement the underlying statute; and it would be unfortunate to have a blanket two-year cut-off for regulations in those situations. Last of all, what I think is a

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technical fix; the last line of subsection (j) which was lines 30, 31 on page 4, state that the court may not hold a regulation invalid for failure to comply with "this subsection which is part, but not all of the two-year limit mechanism. If this line were changed to "failure to comply with subsection (h) through (j)" then the two-year limit would be something for DEC to strive for, and perhaps to be embarrassed if it failed to meet the code because we'd have to report to the Legislature. But it would not be set in stone and wouldn't hold out the threat of having regulatory reforms become impossible if it later became apparent that...they were needed after the two-year period had gone by.

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# SENATOR DAVE DONLEY

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ALASKA STATE LEGISLATURE

## SPONSOR STATEMENT HOUSE C<sub>2</sub> FOR CS FOR SENATE BILL 24 ( ) "THE ALASKA REGULATION REFORM ACT"

Senate Bill 24 reforms how administrative regulations are adopted by the state of Alaska and places reasonable new limits on the power of state bureaucracy to impose new regulations on Alaskans.

SB 24 increases opportunities for public notice and comment regarding adoption of regulations. SB 24 requires that new regulations pass a "needs" test and be drafted in a way to minimize their impact on personal liberties and property rights. Senate Bill 24 pertains only to the Department of Environmental Conservation. Its scope has been reduced dramatically in an effort to single out a department where the measures required in SB 24 could serve as a pilot program. However, SB 24 is written in such a way so as to make it easy to broaden its applicability to other departments in the future.

Regulations adopted by state agencies have the effect of law similar to statutes adopted by the legislature. The regulation adoption process however has very few of the safeguards and opportunities for public input that the legislative process has. Unlike statutes which require a series of public hearings in the state House and Senate, regulations can be adopted with a single notice and hearing which may or may not even reflect the actual content of the final version of the regulation.

Once adopted, state regulations can only be amended by the agency that adopted them or by the adoption of a statute that somehow directly conflicts with the regulation. This makes state regulations in Alaska very hard to amend or appeal once in place. Entrenched state bureaucrats, with little incentive to be responsive to the public, often have more real control over public policy through regulations than elected state officials.

Senate Bill 24 makes state regulators more accountable to the public and to elected officials. SB 24 places reasonable and needed restraints on the ever increasing number of state regulations Alaskans live with.

DD/hrn  
1/31/00

Vice-Chair, Senate Finance Committee • Chair, Capital Budget Subcommittee • Co-Chair, Anchorage Caucus  
Member: Senate Judiciary Committee • Senate Labor & Commerce Committee • Legislative Council

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January-May: STATE CAPITOL • JUNEAU, AK • 99801-1182 • (907) 465-3892 • FAX: (907) 465-6595  
June-December: 716 W. 4TH AVE. • STE. 430 • ANCHORAGE, AK • 99501 • (907) 269-0234 • FAX: (907) 269-0238



**SENATOR DAVE DONLEY**  
ALASKA STATE LEGISLATURE

**SECTIONAL ANALYSIS**  
**HOUSE CS FOR CS FOR SENATE BILL 24 ( )**  
1-LS02741P (1/26/00)

**Section 1** – Provides that this act shall be called the *Alaska Regulations Reform Act*

**Section 2** – Amends AS 44.62.030—*Consistency between regulation and statute.*—by referencing AS 44.62.213 (Sec. 4 of this Act) as an exception to the standards provided in this section.

**Section 3** – Amends AS 44.62.030 by adding a new subsection that sets new regulation validity standards for state agencies to which AS 44.62.213 is applicable (the DEC).

Under this section, a regulation, an order of repeal, or an amendment adopted by the state agency is **not valid or effective**, notwithstanding any other provision of law, if:

- A. It thwarts, circumvents, conflicts with, or is contrary to the intent of the statute being implemented.
- When a regulation is challenged under this standard, the burden of proof is on the person challenging the regulation to prove by clear and convincing evidence that the regulation is invalid.

Or

- B. It imposes any material capital or operating costs on industrial, commercial, or other development activity without yielding significant public benefits.
- When a regulation is challenged under this standard, the burden of proof is on the person challenging the regulation to prove by a preponderance of evidence that the regulation is invalid.

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Vice-Chair, Senate Finance Committee • Chair, Capital Budget Subcommittee • Co-Chair, Anchorage Caucus  
Member: Senate Judiciary Committee • Senate Labor & Commerce Committee • Legislative Council

January-May: STATE CAPITOL • JUNEAU, AK • 99801-1182 • (907) 465-3892 • FAX: (907) 465-6595  
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**Section 4** – AS 44.62 is amended by adding a new section—AS 44.62.213 *Additional procedural requirements for certain state agencies*. This section sets out additional procedural requirements for the DEC, but not for regulations produced by any DEC board, commission or any other organization within the DEC whose members are confirmed by the legislature (as set out in **subsection (a)**).

**Subsection (b)**--In addition to the notice requirements currently in statute under AS 44.62.190 (*Notice of proposed action*), SB 24 adds several more requirements:

- Mail notice to persons who have provided comment to the state agency on the proposed adoption, amendment or repeal of a regulation;
- Publish the notice on the internet;

**Subsection (c)**—In addition to the requirements of AS 44.62.200(a) (*Contents of Notice*), SB 24 adds a requirement that the agencies to which this section applies include with the notice an explanation of why the regulation of the agency is not invalid under AS 44.62.030(b)(1)—standard # 1 of section three of this bill (how the regulation does not thwart, circumvent, conflict with...etc. the intent of the statute).

**Subsection (d)**—This subsection's language mirrors the language currently in statute under AS 44.62.200(b) with the exception of the word "*original*" which is deleted from between the words "*the*" & "*notice*" on page 3, line 8. By deleting the word "*original*" this section's requirements apply to all subsequent notices, as well as the original.

**Subsection (e)** – If an agency to which this section applies rewrites a proposed regulation, an amendment of a regulation, or an order of repeal after complying with AS 44.62.190, 44.62.200 & 44.62.210, and if the rewriting substantially changes the content of the original regulation, but the agency would not normally consider the change to be significant enough to require additional notice under the aforementioned statutes, before adoption, the state agency shall provide notice and opportunity for public comment under AS 44.62.190(a)(2)–(8) (excludes republishing in the newspaper), 44.62.200, 44.62.210 and (b) of this section.

**Subsection (f)**—If an agency to which this section applies fails to meet the requirements of (e) of this section because they feel that the change is not substantial, the agency must:

- Prepare a written explanation of the reasons why the requirement of (e) of this section does not apply; and
- The lieutenant governor shall publish the state agency's explanation in the Alaska Administrative Journal with the text or a summary of the text of the regulation, amendment, or order of repeal.

**Subsection (g)**—This subsection exempts emergency regulations, regulations necessary to meet federal requirements, or regulations that reduce the regulatory burden of the public from the provisions of (e) & (f) of this section.

**Subsection (h)**—This subsection requires a state agency to which this section applies to publish a notice, as dictated in AS 44.62.190(a)(1), within 90 days after the date of enactment that the agency will or will not propose and adopt regulations to implement the statute, if it is not expressly required to prepare regulations within said statute.

**Subsection (i)** – Creates a two year time limit for the adoption of regulations for state agencies to which this section applies (the DEC).

**Subsection (j)**—If the agency (DEC) determines that the adoption of the regulations will not be completed within the two year time limit of (i), the state agency shall prepare a written report containing the reasons for the failure and will submit the report before 18 months of the two year time limit have elapsed to the president of the senate, speaker of the house, and the Administrative Regulation Review Committee.

**Subsection (k)**—This subsection sets out criteria that allows the agency to disregard the provisions of (i) & (j) of this section.

**Section 5** – Sets out the applicability of this Act.

**Section 6** – Sets the effective date of this Act at July 1, 2000.

**SB**

**26**

During Session, January - May:  
State Capitol, Room 115  
Juneau, Alaska 99801  
(907) 465-2095  
465-3810 FAX



During Interim, June - December:  
716 W 4th Ave, Suite 520  
Anchorage, Alaska 99501  
(907) 269-0240  
269-0242 FAX

Senator Loren Leman

**M E M O R A N D U M**

**TO: REPRESENTATIVE PETE KOTT  
CHAIRMAN, HOUSE JUDICIARY COMMITTEE**

**FROM: SENATOR LOREN LEMAN  
SPONSOR** *Loren Lemman*

**DATE: APRIL 14, 2000**

**RE: REQUEST FOR HEARING, SB 26**

Please schedule SB 26 for a hearing in House Judiciary Committee at your earliest convenience.

SB 26 broadens existing statutes prohibiting the use of deception and false information to hinder the criminal justice system.

I have attached a copy of the legislation, along with a sponsor statement. Please contact my staff aide Mike Pauley at 465-3841 if you require additional information.

During Session, January - May:  
State Capitol, Room 115  
Juneau, Alaska 99801  
(907) 465-2095  
465-3810 FAX



During Interim, June - December:  
716 W 4th Ave, Suite 520  
Anchorage, Alaska 99501  
(907) 269-0240  
269-0242 FAX

Senator Loren Leman

## Sponsor Statement – CS for SB 26 (FIN)

### **“An Act relating to hindering prosecution and to providing false information or reports to a peace officer.”**

SB 26 broadens existing statutes that prohibit the use of deception and false information to hinder the criminal justice system.

In the criminal justice context, people employ deception in two ways: they lie to protect another person who has committed a crime, or they lie to protect themselves. SB 26 addresses both situations.

Existing law (AS 11.56.770 & 11.56.780) makes it a crime to hinder prosecution by rendering assistance to another person who has committed a crime, with the intention of hindering the apprehension, prosecution, conviction, or punishment of the other person. The definition of “rendering assistance to another” includes using deception to prevent or obstruct the discovery or apprehension of that person. Accordingly, it is a crime if a person lies to a police officer in an effort to obstruct the apprehension of another person who has committed a crime.

However, the “hindering prosecution” statute applies only if a person lies to prevent apprehension of a person who has committed a crime that is punishable by imprisonment of greater than 90 days. This means that Class B misdemeanors are not covered under existing law. Class B misdemeanors include such offenses as disorderly conduct, harassment, misconduct involving weapons in the fifth degree, and criminal mischief in the fourth degree. Although these crimes are not the most serious offenses on the books, they do consume a significant amount of time and resources of both law enforcement agencies and the court system. It is not appropriate for the statute to sanction deception under these circumstances. SB 26 amends the existing law so that it applies to all crimes, including Class B misdemeanors.

SB 26 also amends existing law concerning false reports to a peace officer (AS 11.56.800). Currently it is a crime to give false information to a police officer with the intent of implicating another in a crime. SB 26 amends this to state that it is also a crime to give false identity information to a peace officer while the person is under arrest, detention, or investigation for a crime, or while the person is being served with an arrest warrant or being issued a citation. According to law enforcement personnel, false identity information can be a significant impediment to successful investigations and prosecutions. The law should not sanction this behavior.

SB 26 is supported by the Alaska Association of Chiefs of Police, the Alaska Peace Officers Association, and Victims for Justice.

Prepared by Mike Pauley, Staff Aide to Senator Loren Leman (907-465-3841)  
Last updated: April 14, 2000

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## NOTES TO DECISIONS

**Legislative intent.** — In enacting the hindering prosecution statutes, the legislature unequivocally expressed the intent to dispense with any requirement of awareness as to the legal classification of the crime committed by the assisted person. *Noblit v. State*, 808 P.2d 280 (Alaska Ct. App. 1991).

**Culpable mental state.** — Where it is found that the defendant rendered assistance to another with

knowledge of the other person's wrongdoing and with the specific intent to hinder his prosecution, this culpable mental state affords adequate protection against the possibility of a conviction based on innocent conduct; no additional culpable mental state is necessary for due process purposes. *Noblit v. State*, 808 P.2d 280 (Alaska Ct. App. 1991).

**Sec. 11.56.790. Compounding.** (a) A person commits the crime of compounding if, unless authorized by AS 12.45.120 or 12.45.130, the person

(1) confers, offers to confer, or agrees to confer a benefit on another in consideration of that other person's concealing an offense, refraining from initiating or aiding in the prosecution of an offense, or withholding evidence of an offense; or

(2) accepts or agrees to accept a benefit in consideration of concealing an offense, refraining from initiating or aiding in the prosecution of an offense, or withholding evidence of an offense.

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

**Sec. 11.56.800. Making a false report.** (a) A person commits the crime of making a false report if the person knowingly

(1) gives false information to a peace officer with the intent of implicating another in a crime;

(2) makes a false report to a peace officer that a crime has occurred or is about to occur;

(3) makes a false report or gives a false alarm that a fire or other incident dangerous to life or property calling for an emergency response has occurred or is about to occur; or  
(4) makes a false report to the Department of Natural Resources under AS 46.17 concerning the condition of a dam or reservoir.

(b) Making a false report is a class A misdemeanor. (§ 6 ch 166 SLA 1978; am § 1 ch 30 SLA 1987)

**Effect of amendments.** — The 1987 amendment added paragraph (a)(4).

## NOTES TO DECISIONS

**Statements prohibited.** — Defendant's statements concerning his oral accusation that a police officer had taken \$250 from the glove compartment of his truck, which the police officer authorized to be towed without operating lights or current registra-

tion, were prohibited by former AS 11.30.215, which made it a misdemeanor to give a false report of a crime to a peace officer. *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978).

**Sec. 11.56.805. False accusation.** (a) A person commits the crime of false accusation if the person knowingly or intentionally initiates a false complaint with the Select Committee on Legislative Ethics established in AS 24.60.

(b) False accusation is a class A misdemeanor. (§ 2 ch 36 SLA 1984; am § 1 ch 113 SLA 1986)

**Effect of amendments.** — The 1986 amendment in subsection (b) substituted "class A misdemeanor" for "class C felony."

**Sec. 11.56.810. Terroristic threatening.** (a) A person commits the crime of terroristic threatening if the person knowingly makes a false report that a circumstance dangerous to human life exists or is about to exist and

(1) places a person in fear of physical injury to any person;

- (3) provides or aids in providing the other person with money, transportation, a dangerous instrument, a disguise, or other means of avoiding discovery or apprehension;
  - (4) prevents or obstructs, by means of force, threat, or deception, anyone from performing an act which might aid in the discovery or apprehension of the other person;
  - (5) suppresses by an act of concealment, alteration, or destruction physical evidence which might aid in the discovery or apprehension of the other person; or
  - (6) aids the other person in securing or protecting the proceeds of the crime.
- (c) Hindering prosecution in the first degree is a class C felony. (§ 6 ch 166 SLA 1978)

**Opinions of attorney general.** — Where an operator of a motor vehicle which was involved in an accident, fails to render assistance to an injured person, an act which is punishable as a felony under AS 28.35.060(c); the Alaska state troopers investigate the incident and during the course of the investigation an attorney contacts the troopers, stating that a client has informed him that the client has committed the

act and wishes to make restitution to the victim for medical expenses; and the attorney requests the troopers' assistance in making the payment, but refuses to disclose to the troopers the name of his client, such refusal to divulge the client's identity is neither illegal nor unethical. November 27, 1979, Op. Att'y Gen.

NOTES TO DECISIONS

**Legislative intent.** — In enacting the hindering prosecution statutes, the legislature unequivocally expressed the intent to dispense with any requirement of awareness as to the legal classification of the crime committed by the assisted person. *Noblit v. State*, 808 P.2d 280 (Alaska Ct. App. 1991).

**Culpable mental state.** — Where it is found that the defendant rendered assistance to another with knowledge of the other person's wrongdoing and with the specific intent to hinder his prosecution, this culpable mental state affords adequate protection against the possibility of a conviction based on innocent conduct; no additional culpable mental state is necessary for due process purposes. *Noblit v. State*, 808 P.2d 280 (Alaska Ct. App. 1991).

**Concealment of evidence by defense attorney.** — While statutes which address the concealing of evidence are generally construed to require an affirmative act of concealment in addition to the failure to disclose information to the authorities, a defense attorney's taking possession of evidence from a

nonclient third party and holding the evidence in a place not accessible to investigating authorities would seem to fall within predecessor section's ambit. *Morrell v. State*, 575 P.2d 1200 (Alaska 1978).

**Not lesser included offense of robbery.** — While, under the circumstances of the case, robbery and hindering prosecution may have been related offenses, the latter offense was not necessarily included in the former. Consequently, in a prosecution for robbery, the trial court did not err in refusing to give a lesser included offense instruction on hindering prosecution. *Thiel v. State*, 762 P.2d 478 (Alaska Ct. App. 1988).

**Applied in State v. Williams**, 653 P.2d 1067 (Alaska Ct. App. 1982).

**Quoted in Borja v. State**, 886 P.2d 1311 (Alaska Ct. App. 1994).

**Cited in Gilbreath v. State**, 668 P.2d 1354 (Alaska Ct. App. 1983); **Stumpf v. State**, 749 P.2d 880 (Alaska Ct. App. 1988).

**Sec. 11.56.780. Hindering prosecution in the second degree.** (a) A person commits the crime of hindering prosecution in the second degree if the person renders assistance to another who has committed a crime punishable by imprisonment for more than 90 days, with intent to

(1) hinder the apprehension, prosecution, conviction, or punishment of the other person; or

(2) assist the other person in profiting or benefiting from the commission of the crime.

(b) For purposes of this section, a person "renders assistance" to another if the person does any act described in AS 11.56.770(b).

(c) Hindering prosecution in the second degree is a class B misdemeanor. (§ 6 ch 166 SLA 1978)

**Opinions of attorney general.** — Where an operator of a motor vehicle which was involved in an accident, fails to render assistance to an injured person, an act which is punishable as a felony under AS 28.35.060(c); the Alaska state troopers investigate the incident and during the course of the investigation an attorney contacts the troopers, stating that a client has informed him that the client has committed the

act and wishes to make restitution to the victim for medical expenses; and the attorney requests the troopers' assistance in making the payment, but refuses to disclose to the troopers the name of his client, such refusal to divulge the client's identity is neither illegal nor unethical. November 27, 1979, Op. Att'y Gen.

**Legislative intent.** — prosecution was expressed the intent of awareness crime committed State, 808 P.2d Culpable mental state of the defendant

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**Effective dates.** — Section 24, ch. 86, SLA 1998 makes this section effective June 13, 1998, in accordance with AS 01.10.070(c).

**Sec. 11.56.755. Unlawful contact in the second degree.** (a) A person commits the crime of unlawful contact in the second degree if

(1) the person is arrested for a crime against a person under AS 11.41 or a crime involving domestic violence; and

(2) before the person's initial appearance before a judge or magistrate or before dismissal of the charge for which the person was arrested, whichever occurs first, the person initiates communication or attempts to initiate communication with the alleged victim of the crime that was the basis for the person's arrest.

(b) Unlawful contact in the second degree is

(1) a class B misdemeanor if the person was arrested for an offense that is a class A misdemeanor or a felony offense;

(2) a violation if the person was arrested for an offense that is a class B misdemeanor.

(§ 2 ch 86 SLA 1998)

**Effective dates.** — Section 24, ch. 86, SLA 1998 makes this section effective June 13, 1998, in accordance with AS 01.10.070(c).

**Sec. 11.56.756. Definitions.** In AS 11.56.750 and 11.56.755,

(1) "victim" has the meaning given in AS 12.55.185; and

(2) "witness" has the meaning given in AS 12.61.900. (§ 3 ch 86 SLA 1998)

**Effective dates.** — Section 24, ch. 86, SLA 1998 makes this section effective June 13, 1998, in accordance with AS 01.10.070(c).

**Sec. 11.56.760. Violating an order to submit to DNA testing.** (a) A person commits the crime of violating an order to submit to DNA testing if, when requested by a health care professional acting on behalf of the state to provide a blood sample, oral sample, or both, the person refuses to provide the sample or samples and the person has been

(1) ordered to submit to DNA testing as part of a sentence imposed under AS 12.55.015; or

(2) convicted of an offense that requires DNA testing under the provisions of AS 44.41.035.

(b) In this section, "DNA testing" means the collection of a blood sample, oral sample, or both, for the deoxyribonucleic acid identification registration system under AS 44.41.035.

(c) Violating an order to submit to DNA testing is a class A misdemeanor. (§ 4 ch 95 SLA 1998)

**Effective dates.** — Section 4, ch. 95, SLA 1998, which enacted this section, took effect on September 10, 1998.

**Sec. 11.56.770. Hindering prosecution in the first degree.** (a) A person commits the crime of hindering prosecution in the first degree if the person renders assistance to a person who has committed a crime punishable as a felony with intent to

(1) hinder the apprehension, prosecution, conviction, or punishment of that person; or

(2) assist that person in profiting or benefiting from the commission of the crime.

(b) For purposes of this section, a person "renders assistance" to another if the person

(1) harbors or conceals the other person;

(2) warns the other person of impending discovery or apprehension;

# Alaska Association of Chiefs of Police



MAR 02 1999

February 23, 1999

Senator Loran Leman  
State Capitol  
Juneau, AK 99801

Dear Senator Leman:

This letter is written in support of SB 26, an Act relating to providing false information or reports to a peace officer.

The use of false information to escape arrest or prosecution has become a way of life for many criminals. Beyond implicating another in a crime, a substantial number of persons continue to use the names and personal information of others again and again in order to "escape" the justice system. We also believe the penalty should equal the seriousness of the crime, since there is currently no greater penalty for providing false information in a felony case than in a misdemeanor case.

We endorse this effort to discourage both misdemeanor and felony suspects from attempting to escape justice by deception.

Sincerely,

A handwritten signature in cursive script, reading "Duane S. Udland".

Duane S. Udland, President  
Alaska Association of Chiefs of Police

STATE OFFICE  
**ALASKA PEACE OFFICERS ASSOCIATION**

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355



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Senator Leman  
Alaska State Legislature  
State Capital  
Juneau, Alaska 99801-1182

February 19, 1999

Dear Senator Leman,

At a recent meeting of the APOA Board of Directors, we unanimously agreed to endorse SB 26.

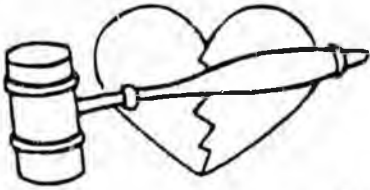
Please contact us if there is anything we can do to assist you with this bill as it proceeds through the legislative process. You may contact us at the APOA office in Anchorage at 277-0515.

Thank you for sponsoring this legislation.

Sincerely,

John Charbonneau  
State President  
Alaska Peace Officers Association

## VICTIMS



**for Justice** 619 East Fifth Avenue • Anchorage, AK 99501  
(907) 278-0977 • Fax: (907) 258-0740

MAR 02 1999  
MAR 02 1999

February 24, 1999

Loren Leman  
State Capitol Suite 520  
Juneau, Ak 99801

Dear Senator Leman:

Victims for Justice is writing in support of SB 26, which is an act relating to providing false information or reports to a peace officer. It is important that a person is held accountable for lying to a police officer. When it is necessary for an officer to make an arrest or to use a statement from a witness concerning a crime, a simple lie can prevent that person from providing necessary information. Lying needs to be discouraged. I have seen juvenile offenders not be prosecuted because of lying to an officer. It is difficult for the justice system when a simple lie can prevent arrest or a person from being involved in an investigation. This legislation would be a good tool for police, prosecutors and crime prevention. Thank you Senator Leman for working for the safety of our communities.

Sincerely,

A handwritten signature in cursive script that reads "Janice Lienhart".

Janice Lienhart

# FISCAL NOTE

STATE OF ALASKA  
2000 LEGISLATIVE SESSION

BILL NO. CSSB 26 (FIN)

Revision Date/Time (Note if correction) \_\_\_\_\_ Dept. Affected Law  
 Title "An Act relating to hindering prosecution and to BRU Criminal Division  
providing false information or reports to a peace officer." Component 1st-4th Judicial Districts; Criminal  
 Sponsor Senator Leman Appeals/Special Litigation  
 Requester Senate Finance Committee Component Serial No. 2198-99;2201,03,61,79

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2000) cost: \_\_\_\_\_

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

CSSB 26 (FIN) applies hindering prosecution in the second degree to conduct where a person helps another who has committed any misdemeanor. The committee substitute also makes lying to a police officer regarding one's identity under certain defined circumstances a class A misdemeanor.

The Department of Law does not anticipate a fiscal impact from passage of this bill.

Prepared by: Joan M. Kasson  
 Division: Attorney General's Office  
 Approved by Commissioner: Grace M. Boleyn, Attorney General  
 Agency: Department of Law

Phone 465-5370  
 Date/Time 4/6/00, 4:49 PM  
 Date 4/6/00

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# FISCAL NOTE

**STATE OF ALASKA**  
**2000 LEGISLATIVE SESSION**

**BILL NO. CSSB 26 ( FIN)**

Revision Date/Time (Note if correction) 4/11/00 11:50 a.m. Dept. Affected Department of Corrections  
 Title An Act relating to hindering prosecution and to BRU Administration and Operations  
providing false information or reports to a peace officer. Component All  
 Sponsor Senator Leman  
 Requester Senate Finance Committee Component No. #0694

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>	<b>***</b>

Estimate of any current year (FY2000) cost: 0.0

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

If passed, this legislation would provide an additional category to the crime of providing false information to a peace officer. It would become a Class A misdemeanor for an individual to provide a false identity to a peace officer while under investigation, arrest or detention or while being served with an arrest warrant or being issued a citation.

A class A misdemeanor is punishable by up to one year in prison. It would be very difficult to determine the fiscal impact of this bill because we do not have any way of determining how many times this occurs or what kind of sentencing might result. It could be used as a negotiating tool and result in no additional time as well. Therefore, the Department of Corrections is submitting an indeterminate fiscal note.

Prepared by: Candy Brower, Legislative Liaison Phone 465-3307  
 Division Commissioner's Office Date/Time 4/11/00 4:18 PM  
 Approved by Commissioner Margaret M. Pugh Date 4-11-00  
 Agency Dept. of Corrections

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# FISCAL NOTE

# DRAFT

**STATE OF ALASKA**  
**2000 LEGISLATIVE SESSION**

**BILL NO. CSSB 26 Version K**  
**Work Draft**

Revision Date/Time (Note if correction) <u>10-Apr-00</u>	Dept. Affected <u>Administration</u>
Title <u>"An Act relating to hindering prosecution and to providing false information or reports to a peace officer"</u>	BRU <u>Legal and Advocacy Services</u>
Sponsor <u>Senator Leman</u>	Component <u>Public Defender Agency</u>
Requester <u>(S) FIN</u>	Component No. <u>1631</u>

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services	26.8	26.8	26.8	26.8	26.8	26.8
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>26.8</b>	<b>26.8</b>	<b>26.8</b>	<b>26.8</b>	<b>26.8</b>	<b>26.8</b>

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	26.8	26.8	26.8	26.8	26.8	26.8
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>26.8</b>	<b>26.8</b>	<b>26.8</b>	<b>26.8</b>	<b>26.8</b>	<b>26.8</b>

Estimate of any current year (FY2000) cost: \_\_\_\_\_

**POSITIONS**

Full-time						
Part-time	1	1	1	1	1	1
Temporary						

**ANALYSIS:** *(Attach a separate page if necessary)*

See attached.

# DRAFT

Prepared by: <u>Barbara Brink, Director</u>	Phone <u>264-4414</u>
Division <u>Public Defender Agency</u>	Date/Time _____
Approved by <u>Commissioner - Robert Poe, Jr.</u>	Date <u>4/10/00</u>
Agency <u>Department of Administration</u>	

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FISCAL NOTE

**DRAFT**

STATE OF ALASKA  
2000 LEGISLATIVE SESSION

BILL NO. CSSB 26

ANALYSIS: (continued)

This bill would change the current statute on Making a False Report, AS 11.56.800 by adding a provision making it illegal for a person to provide false information concerning his or her identity if the person is being detained or cited by the police. The bill also broadens the hindering prosecution bill to include rendering assistance to people who have committed any misdemeanor. (Under current law, hindering prosecution does not apply to class B misdemeanors.)

This bill will have some fiscal impact on the Public Defender Agency. Although it is difficult to determine the exact impact, the Agency does know that, in a significant percentage of arrests, defendants give false information concerning their identities. We conservatively estimate that defendants give false identity information in 2% of our cases.

We are currently appointed to represent defendants in about 3,200 new felonies and 8,500 new misdemeanors a year. If 2% of the defendants give false identity information, we would have 234 new misdemeanor charges. 234 new misdemeanors would be about a half-time caseload for a misdemeanor attorney, an Attorney II.

However, we have to take into account that other charges would be brought in many of these cases and that part of our existing caseload includes charges brought under the current Making a False Report statute. Because of these factors we are estimating that a part-time associate attorney could be hired to deal with the increased caseload. We are not requesting funding for any additional equipment, supplies, travel, or contractual services.

Therefore, we are requesting funding for a part-time Associate Attorney I to be stationed in Anchorage.

**DRAFT**

**SB**

**27**



# SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Suite 520, Anchorage, AK 99501 (907) 258-8189  
Web Site: <http://www.akrepublicans.org/Leman.htm>

Session: State Capitol, Juneau, AK 99801 (907) 465-2125  
Email: [Senator\\_Loren\\_Leman@legis.state.ak.us](mailto:Senator_Loren_Leman@legis.state.ak.us)

## Sponsor Statement - CS for SB 27 (FIN)

### "An Act relating to school records and driver license records of certain children."

Senate Bill 27 ensures parents will have access to important records about their minor children, and also requires school districts to share information with other districts about potentially dangerous transfer students.

The Division of Motor Vehicles will not allow a parent or legal guardian to review a minor's driving record. AS 28.15.151(f) declares that "information and records under this section are... confidential and private." An exception in the law allows DMV to provide a certified abstract of an individual's driving record to a municipal, state, or federal administrative or judicial agency. However, no exception exists to allow parental access.

Denying parents this information is unfair and nonsensical given that state law requires a parent or legal guardian to sign a minor's application for a driver's license. Furthermore, state law holds the parent or guardian who signed the application liable for any damage caused by negligence or wilful misconduct of the minor while operating a motor vehicle [AS 28.15.071(b)].

A driving record includes information that could help parents determine whether their child is driving safely: accident reports; convictions of vehicle, driver, and traffic offenses; and any actions taken upon the driver's license, such as suspension.

SB 27 also requires school districts to make copies of a minor child's school record available to parents. Although most districts in Alaska voluntarily make school records available, parents have no explicit right under state law to review this information. However, it is the federal government's policy to deny funding to any educational agency or institution that denies parental access to school records. SB 27 adds clarity to Alaska law by clearly stating that parents have this right.

Finally, SB 27 requires school districts to transfer certain information about a child who moves from one school district to another. If a student has committed an offense that is punishable as a felony, or if the student has committed any offense involving the use of a deadly weapon, this information must be included in the student record information that follows the child from one district to another. This provision will help school districts protect their students from potentially dangerous young offenders.

Public officials are often heard imploring parents to become more involved in the lives of their children. However, rather than helping parents do their job, government sometimes creates obstacles. By removing a few of these legal impediments, SB 27 takes a small step toward helping parents meet their responsibilities.

Prepared by Mike Pauley, Staff Aide to Senator Loren Lemman (465-3841)  
Last updated: March 25, 1999

March 22, 1999

Representative Norman Rokeberg  
State Capitol  
Juneau, AK 99801

Dear Mr. Rokeberg,

I would like to offer this letter as a means of support and to say thank you for listening and taking action on behalf of a citizen and voter from your district.

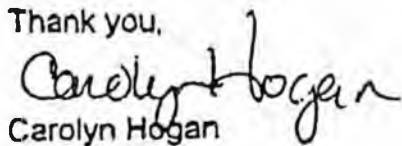
Sometime last fall (1998) I received a notice from the Municipality of Anchorage advising me of a \$300.00 fine my minor daughter received while driving. It was her second citation in as many years and I felt quite concerned and pressed to check into her driving record. She had not informed me or her father of these citations, we heard about them through the mail.

I called the DMV in Anchorage and was told that in order to get a copy of my minor daughters' driving record that I would have to get her written permission. Needless to say, I was outraged. Parents are held accountable to the strictest standards when it comes to their childrens' actions, but on the other hand minor children have little to no accountability to their parents.

This law needs to be changed. It is unreasonable and sadly outdated. Please support House Bill entitled

"An Act relating to driver license records of certain children."

Thank you,

  
Carolyn Hogan  
PO Box 221544  
Anchorage, AK 99522-1544

(907) 349-4881

payment of the required fee, obtain a duplicate license. A person who recovers an original license for which a duplicate has been issued shall immediately surrender the duplicate to the department. (§ 19 ch 178 SLA 1978)

*Sec. 28.15.150. Records. [Repealed, § 19 ch 178 SLA 1978.]*

**Sec. 28.15.151. Records to be kept by the department.** (a) The department may maintain a file of

(1) every driver's license application, license or permit and duplicate driver's license issued by it;

(2) every license that has been suspended, revoked, canceled, limited, restricted, or denied, and the reasons for those actions; and

(3) all accident reports required to be forwarded to the department under this title.

(b) The department may also maintain a file of all accident reports, abstracts of court records of convictions of vehicle, driver, and traffic offenses, and other information which the department considers necessary to carry out the purposes of this chapter.

(c) The department shall, upon request, subject to the applicable provisions of AS 12.62 and (f) of this section and without charging a fee, furnish a municipal, state, or federal administrative or judicial agency with a certified abstract of the driving record of a driver. The abstract must include a listing of accidents in which the driver has been determined by the department or a court of competent jurisdiction to have been liable, convictions of vehicle, driver, and traffic offenses, any actions taken upon the driver's license, and information relating to financial responsibility.

(d) The department shall, upon request and payment of a fee determined by the commissioner, furnish a driver or a person designated by the driver with an abstract or the original copy of the computer printed record of the driver's record as provided in (c) of this section.

(e) *[Repealed, § 2 ch 144 SLA 1980.]*

(f) Except as provided otherwise in this section, information and records under this section are declared confidential and private. (§ 19 ch 178 SLA 1978; am §§ 1, 2 ch 144 SLA 1980)

**Opinions of attorney general.** — Most, but not all, information pertaining to motor vehicle accidents contained in Department of Transportation and Public Facilities files or the computer data base is public information and should be released upon request. However, certain information regarding particular

accidents, including individual names and specific driver's license information, must remain confidential by operation of statute. March 30, 1983, Op. Att'y Gen.

**Collateral references.** — Inspection of motor vehicle records, right as to, 84 ALR2d 1261.

*Sec. 28.15.160. Court reports. [Repealed, § 19 ch 178 SLA 1978.]*

## Article 2. Cancellation, Suspension, Revocation or Limitation of Drivers' Licenses.

### Section

- 161. Cancellation of driver's license
- 165. Administrative revocations and disqualifications resulting from chemical sobriety tests and refusals to submit to tests
- 166. Administrative review of revocation
- 171. Suspending privileges of a person licensed in another jurisdiction; reporting convictions, suspensions, disqualifications, and revocations
- 181. Court suspensions, revocations, and limitations
- 183. Administrative revocation of license to drive
- 184. Administrative review of revocation of a minor's license

### Section

- 185. Court revocation of a minor's license to drive
- 187. Administrative revocation of a license to drive for use of false identification.
- 189. Administrative review of revocation of license for use of false identification
- 191. Court reports to department
- 201. Limitation of driver's license
- 211. Periods of limitation, suspension or revocation; opportunity for hearing and surrender of license
- 219. Definitions

**Sec. 28.15.161**

a driver's license

(1) the licensee license, or has be

(2) there is an

(3) the licensee application; or

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**Collateral referen** biles and Highway T. 60 C.J.S., Motor Ve Denial, suspensio cense because of phy: 452.

Necessity of notice suspension of motor v 361.

Sufficiency of notic

**Sec. 28.15.161**

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28.33.030(a)(2);

28.33.031(a) or f

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the department

Gifts Act) or a living will under AS 18.12 (Living Wills and Do Not Resuscitate Orders) by displaying posters in the offices in which applications are taken, by providing a brochure or other written information to each person who applies in person or by mail, and, if requested, by providing oral advice.

(e) *[Repealed, § 17 ch 70 SLA 1984.]*

(f) At the time of application for a driver's license or an instruction permit, or renewal of a driver's license or an instruction permit, the department shall provide the applicant written information explaining the state's financial responsibility and mandatory motor vehicle insurance laws and potential penalties for failure to comply with those laws.

(g) Upon request, the department shall provide a social security number provided under this section to the child support enforcement agency created in AS 25.27.010, or the child support agency of another state, for child support purposes authorized by law. (§ 19 ch 178 SLA 1978; am §§ 5, 17 ch 70 SLA 1984; am § 9 ch 43 SLA 1988; am § 22 ch 108 SLA 1989; am § 20 ch 80 SLA 1997; am §§ 51, 52 ch 132 SLA 1998)

**Delayed amendment.** — Under § 54(b), ch. 132, SLA 1998, effective July 1, 2001, subsection (g) is repealed and subsection (b) is amended to delete "social security number," from paragraph (b)(1).

**Cross references.** — For purpose, findings, and nonseverability provisions related to the 1998 amendments affecting this section, see §§ 1 and 56, ch. 132, SLA 1998 in the 1998 Temporary and Special Acts.

**Effect of amendments.** — The 1997 amendment, effective September 11, 1997, in subsection (d), added

"or a living will" at the end of the first sentence and inserted "or a living will under AS 18.12 (Living Wills and Do Not Resuscitate Orders)" in the second sentence.

The 1998 amendment, effective June 26, 1998, inserted "social security number," in paragraph (b)(1) and added subsection (g).

**Collateral references.** — 7A Am. Jur. 2d, Automobiles and Highway Traffic, § 99.  
60 C.J.S., Motor Vehicles, § 156.

*Sec. 28.15.070. Examination. [Repealed, § 19 ch 178 SLA 1978.]*

**Sec. 28.15.071. Application of minors.** (a) The application of a person under the age of 18 years for an instruction permit or driver's license must be signed by the father, mother, guardian, or spouse who is 18 years of age or older, or if there is no parent, guardian, or spouse, then by another responsible adult who is willing to assume the obligation imposed under this section upon a person signing the application. The application must be signed and verified before a person authorized to administer oaths, or be signed in the presence of an authorized representative of the department.

(b) Any negligence or wilful misconduct of a person under the age of 18 years when driving a motor vehicle in this state is imputed to the person who signed the application of the person for a permit or license, and that person is jointly and severally liable for damage caused by the negligence or wilful misconduct of the person under the age of 18 years, except as provided in (c) of this section.

(c) If a minor deposits, or there is deposited on behalf of the minor, proof of financial responsibility for the minor's driving of a motor vehicle, in the form and amount required in AS 28.20, then the department may accept the application of the minor signed as required under (a) of this section, and, while proof of financial responsibility is maintained, the parent, guardian, spouse, or other responsible adult is not subject to the liability imposed under (b) of this section.

(d) A person who signs the application of a minor for a driver's license may file with the department a verified written request that the license of the minor be canceled. When the license is canceled, the person who signed the application is relieved from liability under (b) of this section.

(e) This section does not apply to a person under 18 years of age who is legally emancipated under AS 09.55.590 or a similar law in another jurisdiction. (§ 19 ch 178 SLA 1978; am §§ 11, 12 ch 60 SLA 1986; am § 2 ch 119 SLA 1990)

**Effect of amendments.** — The 1990 amendment, effective January 1, 1991, added subsection (e).

Quoted in *Siemionka* 1992).

Collateral reference of statutes which minor person signing minor

*Sec. 28.15.080*

**Sec. 28.15.081.** every applicant applicant's (1) ey (3) knowledge of on drivers and knowledge of the responsibility an traffic laws and of ability to exer the type and gen applicant who t jurisdiction shal department reas type and genera

(b) The comm 44.62 necessary and consult with purpose of mak 28.15.091 or 28. concurrent reso. becoming effecti satisfied by pres the applicant's v commissioner sh social services i

(c) A require: applicant is the issued under fec the Department

(d) The depa: ities, or qualifie this chapter. (§ am § 24 ch 108

Collateral refer biles and Highway

*Sec. 28.15.086*

**Sec. 28.15.087.** good cause to b be licensed, it licensee to sub

with respect to the child's and there were no factually hearing would flesh out, a Nelson v. Jones, 944 P.2d

ange in circumstances. — te move of a considerable ited by the need to arrange ce with a visitation order, circumstances sufficient to aring on modification of the 956 P.2d 455 (Alaska 1998). t. — Inability of parents to able visitation arrangement original agreement represents circumstances requiring reexaminal custody arrangement. 956 P.2d 447 (Alaska 1998). ng change in procedure rt-ordered two-year adjustparent would have primary would have liberal visitation hare custody equally on an fter two years, was not autotody not based on statutorily ange in custody. Deininger v. Alaska 1992).

in circumstances suffier of custody. — Substanthe mother's circumstances, tody from the father to the s evidence in the record reration, her changed marital loyment, and her sustained inking problem. Nichols v. (Alaska 1990).

oved to a distant locale, a ytical custody arrangement e the basis that it disrupted year-old child's life and was terests. West v. Lawson, 951

ances insufficient to supdy order. — Trial court's cumstances which referred to ntered into a lesbian relation-finding as to how such relate the child, were insufficient istody order. S.N.E. v. R.L.B., 85).

dy hearing based on alleged . it is impermissible to rely on ial stigma attaching to moth-S.N.E. v. R.L.B., 699 P.2d 875

ion. — Superior court did not etermining that remaining in l moving with him to Califordren's best interests. House v. Alaska 1989).

on was remanded and the urther findings on the effect of , where the primary changed the father relied on appeal, n to leave the state, was never

found by the trial court to negatively affect the child's best interests or to merit a change in custody. Lee v. Cox, 790 P.2d 1359 (Alaska 1990).

**Error in denying father evidentiary hearing.** — Superior court abused its discretion by denying the father an evidentiary hearing, where he made a prima facie showing that circumstances had changed in the years following orders which had terminated his visitation rights and restrained him from contacts with his child. Carter v. Brodrick, 816 P.2d 202 (Alaska 1991).

**Modification of visitation order.** — The change

in circumstances required for modification of visitation rights need not rise to the level sufficient to warrant a change of custody. Hermsillo v. Hermsillo, 797 P.2d 1206 (Alaska 1990).

Actions by a custodial parent which substantially interfere with the noncustodial parent's visitation rights are sufficient to constitute a change in circumstances which may justify and require a modification of the visitation order, if such modification is in the best interest of the child. Hermsillo v. Hermsillo, 797 P.2d 1206 (Alaska 1990).

**Collateral references.** — Putative father's right to visit illegitimate child, 15 ALR3d 887.

Right of jailed or imprisoned parent to visit from minor child, 15 ALR4th 1234.

Withholding visitation rights for failure to make alimony or support payments, 65 ALR4th 1155.

Post adoption visitation by natural parent, 78 ALR4th 218.

**Sec. 25.20.115. Attorney fee awards in custody and visitation matters.** In an action to modify, vacate, or enforce that part of an order providing for custody of a child or visitation with a child, the court may, upon request of a party, award attorney fees and costs of the action. In awarding attorney fees and costs under this section, the court shall consider the relative financial resources of the parties and whether the parties have acted in good faith. (§ 3 ch 130 SLA 1990)

NOTES TO DECISIONS

**Applicability.** — This section applied in a custody proceeding brought by a nonbiological parent in an attempt to modify a custody order made prior to the determination that he was not the biological father. B.J. v. J.D., 950 P.2d 113 (Alaska 1997).

**Explicit findings required.** — In making an award of attorney's fees and costs under this section, a court must make explicit findings as to the parties'

relative financial resources and whether the parties acted in good faith. S.L. v. J.H., 883 P.2d 984 (Alaska 1994).

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**Collateral references.** — Right to attorney's fees in proceeding, after absolute divorce, for modification of child custody or support order, 57 ALR4th 710.

Excessiveness or adequacy of attorneys' fees in domestic relations cases, 17 ALR5th 366.

**Sec. 25.20.120. Closure of custody proceedings and records.** At any stage of a proceeding involving custody of a child the court may, if it is in the best interests of the child, close the proceeding to the public or order the court records closed to the public temporarily or permanently. The court may modify or vacate an order under this section at any time. (§ 6 ch 88 SLA 1982)

NOTES TO DECISIONS

**Broad gag order must be justified by compelling circumstances.** — In a child custody hearing, a gag order which goes beyond assuring confidentiality of the file and anonymity of the parties must be

justified by compelling circumstances and drawn as narrowly as possible to protect against particular evils. S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985).

**Sec. 25.20.130. Access to records of the child.** A parent who is not granted custody under AS 25.20.060 — 25.20.130 has the same access to the medical, dental, school, and other records of the child as the custodial parent. (§ 6 ch 88 SLA 1982)

**Sec. 25.20.140. Action for failure to permit visitation with minor child.** (a) When a court order is specific as to when a custodian of a minor child must permit

request regarding flagged records, including any knowledge as to the whereabouts of the child. Upon notification by the Department of Public Safety that the person who was listed as a missing child has been found, the school or school district shall remove the flag from the person's record. (§ 1 ch 202 SLA 1990)

**Sec. 14.30.710. Required records upon transfer.** Within 14 days after enrolling a child as a transfer student from this or another state in an elementary or secondary school, the school or school district shall request directly from the child's previous school a certified copy of the child's record. An elementary or secondary school or a school district in this state requested to forward a copy of a transferring child's record to another school shall comply with the request within 10 days after receiving the request unless the record has been flagged under AS 14.30.700. Upon receipt of a request for a record that has been flagged, the school or school district shall immediately notify the Department of Public Safety. Unless directed to do so by the Department of Public Safety, a school or a school district may not forward a copy of a flagged record. (§ 1 ch 202 SLA 1990)

**Sec. 14.30.720. Definitions.** In AS 14.30.700 — 14.30.720,  
(1) "child" means a person under 18 years of age;  
(2) "school district" means a municipal school district or a regional educational attendance area. (§ 1 ch 202 SLA 1990)

*Sec. 14.30.750. Alaska school counseling program grant fund. [Repealed, § 12 ch 42 SLA 1997.]*

### Chapter 33. School Safety Patrols.

**Section**  
10. Requirements for school safety patrols  
20. Organization of a patrol  
30. Duties of a patrol

**Section**  
40. Guidance for patrols  
50. Cooperation with law-enforcement authorities  
60. Immunity from liability

**Collateral references.** — 68 Am. Jur. 2d Schools, §§ 252-254.  
78A C.J.S. Schools and School Districts, §§ 725, 781, 793.  
Coverage and exceptions under student accident policy. 74 ALR2d 1253.  
Tort liability of public schools and institutions of higher learning for accident occurring during school

athletic events. 35 ALR3d 725.  
Tort liability of public schools and institutions of higher learning for injuries caused by acts of fellow students. 36 ALR3d 330.  
Permitting child to walk to school unattended as contributory negligence of parents in action for injury or death of child. 62 ALR3d 541.

**Sec. 14.33.010. Requirements for school safety patrols.** The school borough or city school district or regional educational attendance area, or a denominational school may require that school safety patrols be established pupils to cross streets and highways adjacent to schools in safety. (§ 1 ch 68 S am § 53 ch 98 SLA 1966; am § 25 ch 46 SLA 1970; am § 27 ch 124 SLA 1975

**Sec. 14.33.020. Organization of a patrol.** (a) If a school board, or a denominational school determines that a safety patrol should be established for the principal of the school shall appoint pupils in the school to serve as member patrol.

(b) A pupil may not be appointed a patrol member unless the pupil's parent guardian give written consent to the pupil's membership in the patrol.

(c) The principal shall designate a teacher or teachers in the school to supervise the operation of the patrol.

FISCAL NOTE

STATE OF ALASKA  
1999 LEGISLATIVE SESSION

No. 1  
Bill Version: SB 27  
(S) Publish Date: 2-25-99

Revision Date: \_\_\_\_\_  
Title: An Act relating to school records and driver license records of certain children  
Sponsor: Senator Leman  
Requestor: (S) HES

Department Affected: Administration  
BRU: Motor Vehicles  
Component: \_\_\_\_\_

COMPONENT SERIAL NO. 2348

Expenditures/Revenues: (Thousands of Dollars)  
Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2000	FY 2001	FY2002	FY 2003	FY 2004	FY 2005
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY 99) cost: \$ \_\_\_\_\_

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

This bill allows parents who are financially responsible for the actions of a minor driver to obtain the driving record of that minor.  
This bill has no fiscal impact on DMV.

Prepared by: Charles R. Hosack  
Division: Motor Vehicles

Phone: 269-5559  
Date: \_\_\_\_\_

Approved by Commissioner: Robert Poe Jr.  
Agency: Department of Administration

Date: 2/19/99

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**r ISCAL NOTE** No. 2

STATE OF ALASKA  
1999 LEGISLATIVE SESSION

Bill Version: SB 27  
(S) Publish Date: 2-25-99

Revision Date/Time (Note if correction) \_\_\_\_\_ Dept. Affected Education  
 Title School Records and Driver BRU Teaching and Learning Support  
 License Records of Certain Children \_\_\_\_\_ Component \_\_\_\_\_  
 Sponsor Senator Leman \_\_\_\_\_  
 Requester \_\_\_\_\_ Component Serial No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous	*	*	*	*	*	*
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY99) cost: 0.0

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

Section 1 of this bill directs districts to provide a copy of a child's record, upon the request of a parent or guardian of a child under 18 years of age currently, or previously, enrolled in a school district.

\* It is impossible to determine what the cost to the school districts will be.

Prepared by Barbara Thompson Phone 465-8727  
 Division Teaching and Learning Support Date/Time 2/12/99 1:43 PM  
 Approved by Commissioner: Shirley J. Holloway, Ph.D. Date 2/19/99  
 Agency Department of Education

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payment of the required fee, obtain a duplicate license. A person who recovers an original license for which a duplicate has been issued shall immediately surrender the duplicate to the department. (§ 19 ch 178 SLA 1978)

*Sec. 28.15.150. Records. [Repealed, § 19 ch 178 SLA 1978.]*

**Sec. 28.15.151. Records to be kept by the department.** (a) The department may maintain a file of

(1) every driver's license application, license or permit and duplicate driver's license issued by it;

(2) every license that has been suspended, revoked, canceled, limited, restricted, or denied, and the reasons for those actions; and

(3) all accident reports required to be forwarded to the department under this title.

(b) The department may also maintain a file of all accident reports, abstracts of court records of convictions of vehicle, driver, and traffic offenses, and other information which the department considers necessary to carry out the purposes of this chapter.

(c) The department shall, upon request, subject to the applicable provisions of AS 12.62 and (f) of this section and without charging a fee, furnish a municipal, state, or federal administrative or judicial agency with a certified abstract of the driving record of a driver. The abstract must include a listing of accidents in which the driver has been determined by the department or a court of competent jurisdiction to have been liable, convictions of vehicle, driver, and traffic offenses, any actions taken upon the driver's license, and information relating to financial responsibility.

(d) The department shall, upon request and payment of a fee determined by the commissioner, furnish a driver or a person designated by the driver with an abstract or the original copy of the computer printed record of the driver's record as provided in (c) of this section.

(e) *[Repealed, § 2 ch 144 SLA 1980.]*

(f) Except as provided otherwise in this section, information and records under this section are declared confidential and private. (§ 19 ch 178 SLA 1978; am §§ 1, 2 ch 144 SLA 1980)

**Opinions of attorney general.** — Most, but not all, information pertaining to motor vehicle accidents contained in Department of Transportation and Public Facilities files or the computer data base is public information and should be released upon request. However, certain information regarding particular

accidents, including individual names and specific driver's license information, must remain confidential by operation of statute. March 30, 1988, Op. Att'y Gen.

**Collateral references.** — Inspection of motor vehicle records, right as to, 84 ALR2d 1261.

*Sec. 28.15.160. Court reports. [Repealed, § 19 ch 178 SLA 1978.]*

## Article 2. Cancellation, Suspension, Revocation or Limitation of Drivers' Licenses.

### Section

- 161. Cancellation of driver's license
- 165. Administrative revocations and disqualifications resulting from chemical sobriety tests and refusals to submit to tests
- 166. Administrative review of revocation
- 171. Suspending privileges of a person licensed in another jurisdiction; reporting convictions, suspensions, disqualifications, and revocations
- 181. Court suspensions, revocations, and limitations
- 183. Administrative revocation of license to drive
- 184. Administrative review of revocation of a minor's license

### Section

- 185. Court revocation of a minor's license to drive
- 187. Administrative revocation of a license to drive for use of false identification.
- 189. Administrative review of revocation of license for use of false identification
- 191. Court reports to department
- 201. Limitation of driver's license
- 211. Periods of limitation, suspension or revocation; opportunity for hearing and surrender of license
- 219. Definitions

**Sec. 28.15.161.**

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application; or

(4) the license w

(b) The licensee

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**Intent of act.** — The intent that all revocators' licenses be the act Safety. Knudsen v. City (Alaska 1960), overrule; State, 458 P.2d 340 (Al

**Collateral references.** Bikes and Highway Tra 60 C.J.S., Motor Vehi Denial, suspension, c ense because of physic 452.

Necessity of notice an suspension of motor veh 361.

Sufficiency of notice

**Sec. 28.15.165.**

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28.33.030(a)(2); or

28.33.031(a) or AS

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person, takes effect

within seven days,

(b) After reading

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the department w



found by the trial court to negatively affect the child's best interests or to merit a change in custody. *Lee v. Cox*, 790 P.2d 1359 (Alaska 1990).

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**Section**

- 10. Requirements for school safety patrols
- 20. Organization of a patrol
- 30. Duties of a patrol

**Section**

- 40. Guidance for patrols
- 50. Cooperation with law-enforcement authorities
- 60. Immunity from liability

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78A C.J.S. Schools and School Districts, §§ 725, 781, 793.

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Tort liability of public schools and institutions of higher learning for injuries caused by acts of fellow students. 36 ALR3d 330.

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**Sec. 14.33.020. Organization of a patrol.** (a) If a school board, or a denominational school determines that a safety patrol should be established for the principal of the school shall appoint pupils in the school to serve as member patrol.

(b) A pupil may not be appointed a patrol member unless the pupil's parent or guardian give written consent to the pupil's membership in the patrol.

(c) The principal shall designate a teacher or teachers in the school to supervise the operation of the patrol.

March 22, 1999

Representative Norman Rokeberg  
State Capitol  
Juneau, AK 99801

Dear Mr. Rokeberg,

I would like to offer this letter as a means of support and to say thank you for listening and taking action on behalf of a citizen and voter from your district.

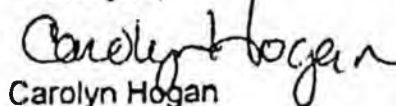
Sometime last fall (1998) I received a notice from the Municipality of Anchorage advising me of a \$300.00 fine my minor daughter received while driving. It was her second citation in as many years and I felt quite concerned and pressed to check into her driving record. She had not informed me or her father of these citations, we heard about them through the mail.

I called the DMV in Anchorage and was told that in order to get a copy of my minor daughters' driving record that I would have to get her written permission. Needless to say, I was outraged. Parents are held accountable to the strictest standards when it comes to their childrens' actions, but on the other hand minor children have little to no accountability to their parents.

This law needs to be changed. It is unreasonable and sadly outdated. Please support House Bill entitled

"An Act relating to driver license records of certain children."

Thank you,



Carolyn Hogan  
PO Box 221544  
Anchorage, AK 99522-1544

(907) 349-4881

**Subject:** Re: SB 27

**Date:** Sun, 11 Apr 1999 20:40:19 -0800

**From:** Senator Loren Leman <Senator\_Loren\_Leman@legis.state.ak.us>

**Organization:** Alaska Legislature

**To:** prudy brown <prudy@gci.net>

Thanks for your support. I certainly agree with you about parental rights.

Loren Leman

prudy brown wrote:

> As a voter, I strongly support the passage of SB 27 giving parents the right  
> to inspect a child's driving record and the right to review their children's  
> school records. I appreciate your article in the Eastside Pulse. Parents'  
> rights in Alaska seem to be eroding more all the time.

>

> Prudence J. Brown

> 2754 E. 20th Avenue

> Anchorage, AK 99508

EDUCATION

§ 507, 93 transferred secretary of

L. 95-561, 20 USCS respect to

965, P. L. April 28, years as 20 ion relates apply to the all not be or take any

965, P. L. April 28, years as 20 section re- ot apply to all not be or take any

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General of the , shall have ac-

FEDERAL STATUTE... GENERAL PROVISIONS

20 USCS § 1232g

cess, for the purpose of audit examination, to any records maintained by a recipient that may be related, or pertinent to, grants, subgrants, cooperative agreements, loans, or other arrangements to which reference is made in subsection (a), or which may relate to the compliance of the recipient with any requirement of an applicable program.

(Jan. 2, 1968, P. L. 90-247, Title IV, Part C, Subpart 4, § 443 [437], as added Nov. 1, 1978, P. L. 95-561, Title XII, Part C, § 1231(c), 92 Stat. 2346; Oct. 20, 1994, P. L. 103-382, Title II, Part A, § 212(b)(1), Part D, § 248, 108 Stat. 3913, 3924.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

A prior 20 USCS § 1232f was redesignated § 406A of Act Jan. 2, 1968, P. L. 90-247, by Act Nov. 1, 1978, P. L. 95-561, Title XII, Part C, § 1231(c), 92 Stat. 2346, and has been reclassified as 20 USCS § 1221e-1a, prior to repeal by Act Oct. 20, 1994.

Amendments:

1994. Act Oct. 20, 1994 (effective on enactment, as provided by § 3(a)(2) of such Act, which appears as 20 USCS § 1221 note), in subsec. (a), substituted "grant, subgrant, cooperative agreement, loan, or other arrangement" for "grant, subgrant, contract, subcontract, loan, or other arrangement (other than procurement contracts awarded by an administrative head of an educational agency)", substituted "three" for "five", and inserted "financial or programmatic"; and, in subsec. (b), substituted "to any records maintained by a recipient that may be related, or pertinent to, grants, subgrants, cooperative agreements, loans, or other arrangements" for "to any records of a recipient which may be related, or pertinent to, the grants, subgrants, contracts, subcontracts, loans, or other arrangements".

Redesignation:

This section, enacted as § 437 of Act Jan. 2, 1968, P. L. 90-247, Title IV, Part C, Subpart 4, was redesignated § 443 of such Act by Act Oct. 20, 1994, P. L. 103-382, Title II, Part A, § 212(b)(1), 108 Stat. 3913 (effective on enactment as provided by § 3(a)(2) of such Act, which appears as 20 USCS § 1221 note).

Other provisions:

Effective date and application of section. Act Nov. 1, 1978, P. L. 95-561, Title XII, Part E, § 1261, 92 Stat. 2356, which appears as 20 USCS § 1232c note, provided that this section shall take effect with respect to appropriations for fiscal year 1980 and subsequent fiscal years.

CROSS REFERENCES

This section is referred to in 20 USCS §§ 1232d, 1232e.

§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information

to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions. (1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically

GENERAL PROVISIONS

20 USCS § 1232g

intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of Federally-supported education programs; recordkeeping. (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, or (iii) State educational authorities, under the conditions set forth in paragraph (3) of this subsection;

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

GENERAL PROVISIONS

20 USCS § 1232g

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[:]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1986 [26 USCS § 152];

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any

educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

## GENERAL PROVISIONS

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18, United States Code), the results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime with respect to such crime.

(c) **Surveys or data-gathering activities; regulations.** Not later than 240 days after the date of enactment of the Improving America's Schools Act of 1994 [enacted Oct. 20, 1994], the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) **Students' rather than parents' permission or consent.** For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) **Informing parents or students of rights under this section.** No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) **Enforcement; termination of assistance.** The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) **Office and review board; creation; functions.** The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations

of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) **Certain disciplinary action information allowable.** Nothing in this section shall prohibit an educational agency or institution from—

- (1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or
- (2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(Jan. 2, 1968, P. L. 90-247, Title IV, Part C, Subpart 4, § 444 [438], as added Aug. 21, 1974, P. L. 93-380, Title V, § 513(a), 88 Stat. 571; Dec. 31, 1974, P. L. 93-568, § 2(a), 88 Stat. 1858; Aug. 6, 1979, P. L. 96-46, § 4(c), 93 Stat. 342; Nov. 8, 1990, P. L. 101-542, Title II, § 203, 104 Stat. 2385; July 23, 1992, P. L. 102-325, Title XV, Part H, § 1555(a), 106 Stat. 840; Oct. 20, 1994, P. L. 103-382, Title II, Part A, § 212(b)(1), Part D, § 249, Part E, § 261(h), 108 Stat. 3913, 3924, 3928.)

#### HISTORY; ANCILLARY LAWS AND DIRECTIVES

##### References in text:

The "Improving America's Schools Act of 1994", referred to subsec. (c), is Act Oct. 20, 1994, P. L. 103-382, 108 Stat. 3518. For full classification of this Act, consult USCS Tables volumes.

"This Act", referred to in this section, is Act Jan. 2, 1968, P. L. 90-247, 81 Stat. 783, popularly known as the Elementary and Secondary Education Amendments of 1967, Title IV of which is popularly known as the General Education Provisions Act and appears generally as 20 USCS §§ 1221 et seq. For full classification of such Act, consult USCS Tables volumes.

##### Explanatory notes:

The bracketed semicolon was inserted in subsec. (b)(1)(E)(ii)(II) to indicate the probable intent of Congress to retain that punctuation in the 1994 amendment. See 1994 Amendment note.

##### Effective date of section:

This section took effect ninety days after enactment, pursuant to Act Aug. 21, 1974, P. L. 93-380, Title V, § 513(b)(1)(i), 88 Stat. 574.

##### Amendments:

1974. Act Dec. 31, 1974, in subsec. (a), para. (1), designated existing provisions as subpara. (A), in subpara. (A) as so designated, substituted "educational agency or institution" for "State and local educational agency, any institution of higher education, any community college, any school agency offering a preschool program, or any other educational institution", substituted "who are or have been in attendance at a school of such agency or at such institution, as the case may be" for "attending