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IN THE SUPREME COURT OF THE STATE OF ALASKA

KALEB LEE BASEY,)	Supreme Court Case No. S-17099
)	
Appellant,)	Superior Court Case No. 4FA - 16 - 02509CI
)	
vs.)	
)	APPEAL FROM THE SUPERIOR COURT,
STATE OF ALASKA,)	FOURTH JUDICIAL DISTRICT AT
)	FAIRBANKS, THE HONORABLE DOUGLAS
Department of Public Safety,)	L. BLANKENSHIP PRESIDING
)	
Division of State Troopers,)	
)	
Bureau of Investigations,)	
)	
Appellee.)	

APPELLANT KALEB LEE BASEY'S OPENING BRIEF

KALEB LEE BASEY (688665)
Anchorage Jail East
1400 East 14th Avenue
Anchorage, AK 99501
Appellant in Pro Se

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CONSTITUTION

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Alaska Const. art. I, Section 22:

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

AS 39.25.080:

> Personnel Records Confidential; Exceptions.
> (a) State personnel records, including employment applications and examination and other assessment materials, are confidential and are not open to public inspection except as provided in this section.
> (b) The following information is available for public inspection, subject to reasonable regulations on the time and manner of inspection:
> (1) the names and position titles of all state employees;
> (2) the position held by a state employee;
> (3) prior positions held by a state employee;
> (4) whether a state employee is in the classified, partially exempt, or exempt service;
> (5) the dates of appointment and separation of a state employee;

(6) the compensation authorized for a state employee; and
(7) whether a state employee has been dismissed or disciplined for a violation of AS 39.25.160 (l) (interference or failure to cooperate with the Legislative Budget and Audit Committee).
(c) A state employee has the right to examine the employee's own personnel files and may authorize others to examine those files.
(d) An applicant for state employment who appeals an examination score may review written examination questions relating to the examination unless the questions are to be used in future examinations.
(e) In addition to any access to state personnel records authorized under (b) of this section, state personnel records shall promptly be made available to the child support services agency created in AS 25.27.010 or the child support enforcement agency of another state. If the record is prepared or maintained in an electronic database, it may be supplied by providing the requesting agency with access to the database or a copy of the information in the database and a statement certifying its contents. The agency receiving information under this subsection may use the information only for child support purposes authorized under law.

AS 40.25.110(a):

Public Records Open to Inspection and Copying; Fees.
(a) Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of the fee established under this section or AS 40.25.115 a certified copy of the public record.

AS 40.25.124:

Appeals.
A person may appeal to the superior court the final administrative order made by a public agency under AS 40.25.110 - 40.25.140.

2 AAC 96.330(a):

Deletion of nondisclosable information
(a) If a record contains both disclosable and nondisclosable information, the nondisclosable information must be segregated and withheld and the

> disclosable information must be disclosed. If the disclosable portions of a record cannot reasonably be segregated from the nondisclosable portions in a manner that allows information meaningful to the requestor to be disclosed, the public agency may not disclose the record.

JURISDICTIONAL STATEMENT

This is a timely appeal from a partial final judgment issued on May 3, 2018, by Superior Court for the Fourth Judicial District at Fairbanks, the Honorable Douglas L. Blankenship presiding. The Superior Court's jurisdiction was first invoked on October 19, 2016 when Appellant Kaleb Lee Basey filed a complaint pursuant to AS 40.25.124[1] for disclosure of public records. [Exc. 1-21] (Basey's Complaint). The Superior Court's May 3, 2018, order orally denied part of Appellant Basey's September 1, 2016, records request with respect to disciplinary records for Alaska State Troopers Kirsten Hansen and Albert Maurice Bell.[2] This partial denial constituted a "final decision" because in a public records case a final decision is "'an order by the [Superior] Court requiring release of documents by the Government to the plaintiff, *or an order denying the plaintiff's right to such release.*'" ACLU of N. Cal. v. U.S. DOJ, 880 F.3d 473, 480 n.3

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[1] AS 40.25.124 provides: "A person may appeal to the Superior Court the final administrative order made by a public agency under AS 40.25.110-40.25.140."

[2] [CD (4FA-16-2509CI), at Time 04:03:28] (Superior Court Judge's partial denial of Basey's Sept. 1, 2016, records request); [Exc. 12] at Par. 5 (Basey's September 1, 2016, public records request seeking Trooper discipling records for Kirsten Hansen and Albert Bell).

(9th Cir. 2018) (quoting In re Steele, 799 F.2d 461, 464 (9th Cir. 1986)) (emphasis added).

Since the Superior Court's order denied Basey his right to release of Trooper disciplinary records, this constituted a final decision within the meaning of Alaska Rule of Appellate Procedure 202(a), thereby giving the Supreme Court jurisdiction over this appeal.[3]

ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court err in concluding that the State's invocation of the personnel records exception had not been waived or foreclosed by the law of the case doctrine?
2. Did the Superior Court err in concluding that the personnel records exception is applicable to police officer disciplinary records?

STATEMENT OF THE CASE

On September 1, 2016, Basey sent a public records request to the Alaska State Troopers seeking *inter alia*, disciplinary records for Trooper's Kirsten Hansen and Albert ("Al") Maurice Bell.[4] What ensued become the subject of a previous appeal to

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[3] Alaska R. App. Proc. 202(a) ("An appeal may be taken to the Supreme Court from a final judgment entered by the superior court, in the circumstances specified in AS 22.05.010…"). A denial of release of public records constitutes "[a] decision of the superior court on an appeal from an administrative agency decision," within the meaning of As 22.05.010(c).

[4] [Exc. 11-12] at Par. 5 (Basey's Sept. 1, 2016, records request).

this Court in Basey v. State, 408 P.3d 1173 (Alaska 2017). The State initially denied the entirety of Basey's requests on the basis of two exceptions: (1) AS 40.25.120(a)(6)(A) the law-enforcement-interference exception and (2) AS 40.25.122 the State agency litigation exception. The Superior Court summarily dismissed the case on the basis of these two exceptions. Basey appealed to the Alaska Supreme Court.

This Court reversed the Superior Court's dismissal order finding that neither exception was properly invoked. The case was remanded back to the Superior Court for further proceedings. Upon remand, Basey filed a motion to compel production of the information he sought.[5] The State filed a response arguing, *inter alia*, that the personnel Records exception (AS 39.25.080) prevented disclosure of disciplinary records for Troopers Hansen and Bell.[6] Specifically, the State contended that Basey must carry the initial burden to justify disclosure of the Trooper disciplinary records in accordance with decisional law pertaining to criminal proceedings.[7] Basey then filed a reply arguing, *inter alia*, that the State had (1) waived invocation of further exceptions by not raising them initially and (2) overlooked controlling precedent from public records cases which placed the burden on the State to justify non disclosure of records.[8]

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[5] [Exc. 22-23] (Basey's Motion to Compel Production).
[6] [Exc. 24-33] (State's Response to Motion to Compel).
[7] Id. at 26-27 (citing Booth v. State, 251 P.3d 369 (Alaska App. 2011).
[8] [Exc. 38-42] (Basey's Reply).

On May 3, 2018, a hearing was held to address the outstanding motions. The Superior Court Judge denied Basey's motion to compel with respect to the Trooper disciplinary records.[9] Basey retorted by asking how exactly the Troopers maintained an expectation of privacy in their disciplinary records.[10] The Superior Court responded that the personnel records exemption itself creates the expectation of privacy.[11] Basey then filed a timely notice of appeal on May 14, 2018, challenging the Superior Court's decision to deny release of the Trooper disciplinary records.

STANDARDS OF REVIEW

This case presents questions of statutory interpretation which this Court analyzes "'using [its] independent judgment,'"[12] considering "the statute's 'text, legislative history, and purpose.'"[13] Similarly, this Court "appl[ies] independent judgment to constitutional issues, adopting 'a reasonable and practical interpretation in accordance

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[9] [CD (4FA-16-2509CI), at Time 04:03:28] (audio recording of Superior Court Judge Blankenship's denial of disciplinary records).

[10] [CD (4FA-16-2509CI), at Time 04:00:51] (Basey stated "...It appears that I haven't really gotten a clear answer as to why these officers would have a reasonable expectation to privacy in those disciplinary records.").

[11] [CD (4FA-16-2509CI), at Time 04:01:04] (Judge Blankenship stated:"...AS39.25.080,I believe the FOIA act incorporates with some blanket language...and the state is limited to disclosing...I don't see where I can issue an order those be disclosed. As far as the policies are concerned there needs to a more thorough response.").

[12] Basey, 408 P.3d at 1176 (quoting Bernard v. Alaska Airlines, Inc., 367 P.3d 1156, 1160 (Alaska 2016)).

[13] Id. (quoting Lingley v. Alaska Airlines, Inc., 373 P.3d 506, 512 (Alaska 2016)).

with common sense' based upon 'the plain meaning and purpose of the provision and the intent of the framers.'"[14] In interpreting exceptions to the Alaska Public Records Act, exceptions are to be "'narrowly construe[d]' in order to further the legislative policy of the broad access, and the state generally bears the burden of showing that a record is not subject to disclosure."[15] When interpreting the Public Records Act, this Court, like other state courts, may construe its public records law in *pari materia* with the federal Freedom of Information Act (FOIA) and its caselaw.[16]

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[14] Alaska Wildlife Alliance v. Rue, 948 P.2d 976, 979 (Alaska 1997) (quoting Arco Alaska, Inc. v. State, 824 P.2d 708, 710 (Alaska 1992)).

[15] Basey, 408 P.3d at 1176 (quoting Anchorage School District v. Anchorage Daily News, 779 P.2d 1191, 1193 (Alaska 1989)).

[16] See Underwater Construction v. Shirley, 884 P.2d 150, 155 (Alaska 1994) ("We construe state statutes *in pari materia* with federal statutes when the statutes deal with the same subject matter, and the state's scheme relies upon the federal scheme."); see also Farley v. Worley, 599 S.E 2d 835, 843 (W. Va. 2004) ("Previously we have looked to federal FOIA cases for guidance in interpreting the West Virginia Freedom of Information Act."); Evening News Association v. City of Troy, 339 N.W. 2d 421, 428 (Mich. 1983) ("'[T]he similarity between the [Michigan public records act] and the federal act invites analogy when deciphering the various sections and 'attendant judicial interpretations.'") (quoting Kestenbaum v. Michigan State University, 327 N.W.2d 783 (Michigan 1982)); Fioretti v. Maryland State Board of Dental Examiners, 716 A.2d 258, 263 (Maryland App. 1998) ("Where the purpose and language of a federal statute are substantially the same as that of a later state statute, interpretations of the federal statute are ordinarily persuasive.").

ARGUMENT

I. The Superior Court erred in concluding the State's invocation of the personnel records exception had not been waived or foreclosed by the law of the case doctrine

The State invoked the AS 39.25.080 personnel records exception for the first time on remand in its response to Basey's Motion to Compel.[17] Basey's reply argued, *inter alia*, that the invocation of that exception at this stage of the case was untimely and should amount to a waiver.[18] At the May 3, 2018, hearing the Superior Court judge agreed with the State that the personnel records exception applied and that there had been no waiver of this defense.[19] However, the Superior Court was clearly erroneous as controlling precedent of this Court and persuasive authority of other courts demands that the State waives exceptions that are not claimed in the original lower court proceedings. This Court should find that a waiver of further exceptions did occur and formally adopt a timeliness rule for exception invocation in public records cases.

A. Efficient administration of the Public Records Act requires the State to claim all potential exceptions in the original proceedings in the lower court

"*When* records are available for public inspection and copying is often important as *what* records are available," for the simple reason that "'information is often useful

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[17] [Exc. 25-31].
[18] [Exc. 38-39].
[19] [CD (4FA-16-2509CI), at Time 03:51:36 - 03:52:00] (audio recording of Judge Blankenship rejecting waiver theory).

only if it is timely [.]'"[20] The worthy goal of *timely* information about one's government is completely frustrated when the state raises exceptions one-at-a-time instead of providing the requester "a full and concentrated opportunity to challenge and test comprehensively the agency's evidence regarding all claimed exemptions."[21]

Neither the Alaska Legislature nor this Court has established a timeliness rule specific to the invocation of exceptions at the litigation level in public records cases. However, analogous proceedings in federal FOIA cases have judicially established such a rule in the absence of a statutory rule requiring that the agency "must assert all exemptions at the same time, in the original district court proceedings."[22] The logic behind this rule is that "the delay caused by permitting the government to raise its FOIA exemption claims one at a time interferes both with the statutory goals of 'efficient, prompt, and full disclosure of information'...and with 'interests of judicial finality and economy.'"[23] Moreover, "'[t]he timeliness rule is concerned not just with efficiency in a

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[20] State ex rel. Wadd v. City of Cleveland, 689 N.E.2d 25, 27 (Ohio 1998)(quoting 1 O'Reilly, Federal Information Disclosure (2d Ed. 1995) 7-20, section 7.06).

[21] Senate of Puerto Rico v. U.S. DOJ, 823 F.2d 574, 580 (D.C. Cir. 1987) (citing Jordan v. U.S. DOJ, 591 F.2d 753, 779-80 (D.C. Cir. 1978) (en banc)).

[22] Maydak v. U.S. DOJ, 218 F.3d 760, 764-65 (D.C. Cir. 2000) (citing Wash. Post Co. v. U.S. Dept. of Health and Human Servs., 795 F.2d 205, 208 (D.C. Cir. 1986)); see also Basey v. Dept. of the Army, 2017 U.S. Dist. LEXIS 219848 (D. Ak. Sept. 5, 2017) (agency was not allowed to "bifurcate" its exemptions).

[23] Maydak, 218 F.3d at 765 (quoting Senate of Puerto Rico, 823 F.2d at 574).

given case, but also with efficiency in the long run, and it disserves this broader goal to permit untimely defenses, even after they have been argued, to prevail.'"[24]

Here, if the AS 39.25.080 personnel records exception had been invoked at the outset of this case with the other claimed exceptions, the propriety of all the exceptions could have been resolved on the first appeal to this Court. A robust timeliness rule for the invocation of exceptions would encourage the State to present all its arguments the first time around saving everyone involved time and resources. Here, Basey has been burdened with the costs and effort of having to brief yet another appeal to address the merits of the State's newly-claimed exception. Had Basey been allowed to advert to a timeliness or waiver rule, then these additional costs and efforts could have been avoided. These considerations support the establishment of a robust timeliness rule that would well serve the Alaska Public Record Act's goal of efficient process.[25]

There may, of course, be "'unusual situations, largely beyond the government's control'...in which other considerations override those motivating the timeliness rule..."[26] However, such circumstances are not at issue in this case. Also, the application of this timeliness rule should not "require a finding of bad faith or intentional gamesmanship," id., on the State's behalf.

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[24] CREW v. U.S. DOJ, 854 F.3d 675, 680 (D.C. Cir. 2017) (quoting Wash. Post Co., 795 F.2d at 209).
[25] CREW, 854 F.3d at 680.
[26] Id.

In sum this Court should order the state to produce the requested Trooper disciplinary records on public policy grounds and that the State has effectively waived this exception. This Court should further declare and mandate that in public records cases the State shall claim all applicable exceptions at the same time in the lower court.[27]

B. Controlling precedent demands that the State's invocation of the personnel records exception is foreclosed by the law of the case doctrine at this point in the case

The law of the case doctrine prevents repeated attempts to litigate the same issue in a case, i.e., the invocation of exceptions in public records cases. "The law of the case doctrine is 'a doctrine of economy and of obedience to the judicial hierarchy.'"[28] The strong policy reasons behind this doctrine include: "(1) avoidance of indefinite litigation; (2) consistency of results in [the] same litigation; (3) essential fairness between the parties; and (4) judicial efficiency."[29] "Judicial economy and the parties' interests in the finality of judgment are in no way furthered" when the State is allowed to raise new exceptions after an appeal.[30]

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[27] Such a mandate could be promulgated into the rules and regulations of various public agencies pursuant to AS 40.25.123.

[28] Beal v. Beal, 209 P.3d 1012, 1017 (Alaska 2009) (quoting Dierihger v. Martin, 187 P.3d 468, 473-74 (Alaska 2008)).

[29] Petrolane Inc. v. Robles, 154 P.3d 1014, 1026 (Alaska 2007).

[30] State v. Carlson, 65 P.3d 851, 874 (Alaska 2003).

Even if this Court were to decline the formal establishment of a timeliness rule advocated for above, the well-established law regarding the law of the case doctrine would require, essentially, the same result. The State offends the basic fairness of the proceedings by only invoking the personnel records exception at this late hour on remand after its first defenses failed. Instead of raising this exception over a year ago, it now raises its defenses in seriatim fashion which is (1) indefinitely extending this case; (2) creating extra burdens for Basey; (3) slowing the records release process; and (4) is wreaking havoc on judicial resources. Since the issue of exceptions has already been previously litigated and this Court firmly rejected those invocations, the State cannot again relitigate the issue of exceptions. This is especially so given that it is an entirely new exception that the State is trying to forward. Therefore, the law of the case doctrine already established by precedent demands that the State's belated invocation of the personnel records exception be denied, the Superior Court's order reversed, and the Trooper disciplinary records ordered to be disclosed.

However, even if this Court were to affirm the Superior Court's rejection of this waiver theory, the disciplinary records would still, nevertheless, remain disclosable as explained below.

II. The Superior Court erred in concluding that the personnel records exception is applicable to police officer disciplinary

The State's contentions in its reply to Basey's Motion to Compel were that the Trooper disciplinary records "are personnel file materials and thereby [] beyond the scope of allowable public record requests."[31] The State further advocated a procedure whereby the requester would have to bear the burden to justify disclosure of the disciplinary records, citing several cases that dealt with discovery issues in criminal matters.[32] Basey's reply objected to the State's proposed burden-shifting approach, calling it "an exercise in poor sophistry" and contending that the Troopers enjoyed no legitimate expectation of privacy in their disciplinary records.[33] Despite Basey's objections, the Superior Court agreed with the State and denied Basey's request to compel production of the disciplinary records.[34]

The Superior Court, however, was clearly erroneous as police disciplinary records are not personnel records within the meaning of AS 39.25.080 nor are they private materials otherwise deserving of protection.

A. The Trooper disciplinary records qualify as public records

The Alaska Public Records Act provides for the disclosure to the public of state agency records, subject to limited exceptions.[35] The Act "defines 'public records,' in

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[31] [Exc. 25].
[32] [Exc. 27] ("In order to meet this burden, the [requester] must support a motion for disclosure 'with more than conclusory statements or unsupported assertions.'") (quoting Booth v. State, 251 P.3d 369, 376 (Alaska App. 2011)).
[33] [Exc. 40-41].
[34] [CD (4FA-16-2509CI), at Time 04:03:28 - 04:04:011].
[35] AS 40.25.110(a) provides: "Unless specifically provided otherwise, the public records of all public agencies are open

relevant part, as those 'preserved for their informational value or as evidence of the organization or operation of the public agency.'"[36] The Trooper disciplinary records requested by Basey unquestionably fall under this definition of public records.

B. The Trooper disciplinary records do not qualify as exempt personnel records within the meaning of AS 39.25.080

Alaska Statute 39.25.080 exempts state employee personnel records from the Public Records Act. It provides in part:

> (a) State personnel records, including employment applications and examination and other assessment materials, are confidential and are not open to public inspection except as provided in this section.
>
> (b) The following information is available for public inspection, subject to reasonable regulations on the time and manner of inspection:
>
> (1) the names and position titles of all state employees;
> (2) the position held by a state employee;
> (3) prior positions held by a state employee;
> (4) whether a state employee is in the classified, partially exempt, or exempt service;
> (5) the dates of appointment and separation of a state employee;
> (6) the compensation authorized for a state employee.

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to inspection by the public under reasonable rules during regular office hours."

[36] McLeod v. Parnell, 286 P.3d 509, 514 (Alaska 2012) (citing AS 40.25.220(3)).

No Alaska case has considered the question whether police officer disciplinary records are exempt "state personnel records" pursuant to AS 39.25.080.[37] However, as observed by this Court in Alaska Wildlife Alliance,

> examples of documents covered and exempted provided by the Public Records Act are revealing. Alaska Statute 39.25.080(a) lists as examples of personnel records "employment applications" and "examination materials." Both types of documents contain details about the employee's or applicant's ***personal life***. By contrast, exceptions to AS 39.25.080(a) include "position titles," "dates of appointment and separation," and "compensation authorized." AS 39.05.080(b)(1), (5), (6). Such information tells little about the individual's personal life, but instead simply describes employment status.

948 P.2d at 979-80 (bold and emphasis added). Thus, this Court has "defined the term 'personnel record' narrowly, to include only information which reveals the details of an individual's ***personal life***."[38] While disciplinary records are personnel files in the sense that they pertain to information about work history; Trooper disciplinary records do not deal with ***personal life***, rather, they involve one's ***public life*** as a paid government employee placed in an exceedingly high position of the public trust. In this respect, this Court has noted:

> One aspect of a private matter is that it is private, that is, it does not adversely affect persons beyond the actor, and hence is none of their

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[37] Courts in other states have found that police officer disciplinary records are disclosable under state public records laws reasoning that such records are not private facts of a personal nature contemplated by such laws. E.g., Peer News LLC v. City and County of Honolulu, 376 P.3d 1, 21-22 (Haw. 2016) (collecting cases).

[38] Int'l Ass'n of Fire Fighters v. Municipality of Anchorage, 973 P.2d 1132, 1135 (Alaska 1999) (citing Alaska Wildlife Alliance, 948 P.2d at 980) (bold and emphasis added).

> business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.[39]

When law enforcement officers act in such a manner as to be subject to disciplinary action, such conduct affects the public either directly or indirectly. Thus, records pertaining to officer misconduct are not "wholly private" dealing only with the officer's personal life.[40] Even when the officer is off duty, he or she may act in such a way that it would bring the officer's fitness to perform their public duty into question. If such off duty conduct were memorialized in a disciplinary record, the officer would lack a legitimate expectation of privacy in such a record as the public deserves to know about such things.[41] Indeed, even one of the cases relied on by the state recognizes that,

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[39] Id. at 1135-36 (quoting Luedtke v. Nabors Drilling Inc., 768 P.2d 1123, 1135 (Alaska 1989)).

[40] See State Org. of Police Officers v. Society of Professional Journalists Univ. of Hawaii, 927 P.2d 386 (Haw. 1996) ("Instances of misconduct of a police officer while on the job are not private, intimate, personal details of the officers life….They are matters with which the public has a right to concern itself.").

[41] Cowles Pub. Co. v. State Patrol, 748 P.2d 597, 605 (Wash. 1988) ("If the off duty acts of a police officer bear upon his or her fitness to perform public duty or if the activities reported in the records involve the performance of a public duty, then the interest of the individual in 'personal privacy' is to be given slight weight in the balancing test and the appropriate concern of the public as to the proper performance of public duty is to be given great weight."); Bozeman Daily Chronicle v. Bozeman Police Dept., 859 P.2d 435, 439 (Montana 1993) ("[L]aw enforcement officers occupy positions of great public trust…[and]...the public has a right to know when law enforcement officers act in such a manner as to be subject to disciplinary action."); see also Municipality

"[t]here is perhaps no more compelling justification for public access to documents regarding citizen complaints against police officers than preserving democratic values and fostering the public's trust in those charged with enforcing the law." Jones v. Jennings, 788 P.2d 732, 738 (Alaska 1990).

In sum, the Trooper disciplinary records are not exempt personnel records under AS 39.25.080 as they deal with the officer's *public life* and pertain to matters that affect the public at large. Thus, the disciplinary records of State Troopers do not resemble employment applications or examination materials that may contain private information about one's *personal life*, e.g., a residential address or a telephone number. That is not to say that all information within a disciplinary record may be disclosable. For example, if a currently-employed Trooper is disciplined for, say, hosting an underage drinking party at his house; in such a situation, the Trooper's address could be excised from the record to allow disclosure of the information.[42] Of course, though, the records requester would still maintain the right to challenge the adequacy of the State's duty to segregate all reasonably segregable portions of a given record.

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of Anchorage v. Anchorage Daily News, 794 P.2d 584, 591 (Alaska 1990) ("[P]ublic officials are properly subject to public scrutiny in the performance of their duties."); Int'l Ass'n of Fire Fighters, 973 P.2d 1136 n.6 (collecting cases where public official have diminished expectations of privacy in public records).

[42] See 2 AAC 96.330(a) ("If a record contains both disclosable and nondisclosable information, the nondisclosable information must be segregated and withheld and the disclosable information must be disclosed.").

Therefore, this Court should find that the personnel records exception is inapplicable to the requested Trooper disciplinary records, reverse the Superior Court's order denying Basey's motion to compel these records, and order the State to produce these records.

C. The Trooper disciplinary records are not private information protected by the constitutional right to privacy

The State vaguely referred to a potential constitutional right to privacy in the Trooper disciplinary records in a single citation in its response motion.[43] Basey was keen to point out at the May 3, 2018, hearing on the motion to compel that he had not been given a good answer as to how the Troopers maintained an expectation of privacy in their disciplinary records.[44] The Superior Court stated that the expectation of privacy was derived from the AS 39.25.080 personnel records exception itself.[45] It would appear that as a result of this circular logic, if this Court were to find the personnel records exception inapplicable, then the Superior Court Judge's theory as to a potential constitutional right to privacy would also go out the window. However, out of an

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[43] [Exc. 25] (citing Alaska Const. Art. I, § 22).
[44] [CD (4FA-16-2509CI), at Time 04:00:51] (Basey stated "...It appears that I haven't really gotten a clear answer as to why these officers would have a reasonable expectation to privacy in those disciplinary records.").
[45] [CD (4FA-16-2509CI), at Time 04:01:04] (Judge Blankenship stated:"...AS39.25.080,I believe the FOIA act incorporates with some blanket language...and the state is limited to disclosing...I don't see where I can issue an order those be disclosed.").

abundance of caution, Appellant will briefly address the issue of the lack of a constitutional privacy right in the disciplinary records.

2 Alaska Administrative Code (AAC) 96.335(a)(4) authorizes denial of records requested under the Public Records Act if "nondisclosure of the record is authorized by a federal law or regulation, or by state law." Article I, Section 22 of the Alaska Constitution provides that "the right of the people to privacy is recognized and shall not be infringed." This Court has previously recognized that "'under appropriate circumstances, a statute requiring the disclosure of a person's identity must yield to the constitutional right to privacy.'"[46] "This principle is equally applicable in the context of a Public Records Act request."[47] Thus, the State may not disclose Trooper disciplinary records, or segregable portions therein, if disclosure would violate a constitutional privacy right.

However, the State must "bear[] the burden of showing that a record is not subject to disclosure,"[48] based on a constitutional right to privacy. The State's proposed procedure set forth in its response relied on the case Booth v. State where the individual seeking discovery in a criminal case was made to carry the initial burden to justify

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[46] Int'l Ass'n of Fire Fighters, 973 P.2d at 1134 (quoting Alaska Wildlife Alliance, 948 P.2d at 980).
[47] Alaska Wildlife Alliance, 948 P.2d at 980.
[48] Basey, 408 P.3d at 1176 (citing Anchorage School District, 779 P.2d at 1193); Municipality of Anchorage, 794 P.2d at 591; Fuller v. City of Homer, 113 P.3d 659, 665 (Alaska 2005) ("There is a presumption in favor of disclosure of public documents.") ("Fuller II").

disclosure.[49] The State's proposed procedure is flawed as it shifts the burden improperly to the records requester. Instead, the proper procedure, as explained in Basey's reply motion, requires the State to carry the initial burden and involves a three-part test:

> (1) Does the party seeking to come within the protection of the right to [privacy] have a legitimate expectation that the materials will not be disclosed?
>
> (2) Is the disclosure nonetheless required to serve a compelling state interest?
>
> (3) If so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to privacy?[50]

Under this inquiry, the State "must first demonstrate the [Troopers] have a 'legitimate expectation that the materials or information will not be disclosed.'"[51] "Such an expectation is one that 'society is prepared to recognize as reasonable.'"[52] "The right to privacy is not absolute; it protects 'intimate' or 'sensitive personal information...which if disclosed even to a friend, could cause embarrassment or anxiety.'"[53]

The Superior Court appeared to believe that the personnel records exception itself created a reasonable expectation of privacy in the Trooper's disciplinary records. As explained above, that exception is inapplicable. For the sake of argument, the

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[49] [Exc. 26-31].
[50] Int'l Ass'n of Fire Fighters, 973 P.2d at 1134 (quoting Alaska Wildlife Alliance, 948 P.2d at 980 and Jones, 788 P,2d at 738).
[51] Id. at 1134.
[52] Id. (quoting Nathanson v. State, 554 P.2d 456, 458-59 (Alaska 1976)).
[53] Id. (quoting Doe v. Alaska Superior Court, Third Judicial District, 721 P.2d 617, 629 (Alaska 1986)).

Troopers do not have a reasonable expectation of privacy in their disciplinary records for any other reason. To conduct an inquiry into the Trooper's expectation of privacy in the disciplinary records necessarily requires that some reference be made to a source outside the phrase "expectation of privacy" or the word "privacy" itself. Such sources could include "concepts of real or personal property law [and]...understandings that are recognized and permitted by society." Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978).

A measure of privacy is derived from one's ability to exclude others from their personal information.[54] For instance, an individual generally has the right to exclude others from information in a personally owned electronic device and may sue those who interfere with the individual's right to exclude. Here, the Trooper's do not have a possessory interest in government records because it is the State who owns these documents. The State is, in essence, owned by the people at large. Therefore, the citizenry in general has a possessory interest in the Trooper's disciplinary records.

Another measure of privacy may be found by looking to the body of decisional law surrounding privacy torts. As observed by the Hawaii Supreme Court:

> Several jurisdictions employ a common law analysis of invasion of privacy to interpret the privacy exceptions in the jurisdictions' public records statutes....Therefore, it is appropriate, when determining whether disclosure of information implicates the constitutional right to privacy, to

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[54] See generally Mark Taticchi, *Redefining Possessory Interests: Perfect Copies of Information as Fourth Amendment Seizures*, 78 Geo. Wash. L. Rev. 476, 491-96 (2010) (discussing the right to exclude in terms of Fourth Amendment interests).

> consider whether the disclosure would result in tort liability for invasion of privacy. As set forth in *Restatement (Second) of Torts* [hereinafter, *Restatement*] § 652D, 383 (1977), "one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his [or her] privacy, if the matter publicized is a kind that (a) would be regarded as highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." The comment illustrates the nature of information protected by this right to privacy which parallels the "highly personal and intimate information" protected by [Hawaii's Constitution]...[55]

Applying this privacy tort standard, the Washington Supreme Court, in Cowles Publishing Co., held that names of law enforcement officers, against whom complaints had been sustained after internal investigations, were not exempt from disclosure under a provision of Washington's public disclosure act that exempts "personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their privacy." 748 P.2d at 601. Many other jurisdictions have reached similar conclusions by applying this privacy tort standard.[56]

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[55] State Org. of Police Officers, 927 P.2d at 406.

[56] E.g., White v. Fraternal Order of Police, 909 F.2d 512, 517 (D.C. Cir. 1990) (stating that drug use or administering of tests to detect drug use among police officers can never be regarded as mere "private facts"); Coughlin v. Westinghouse Broadcasting and Cable, Inc., 603 F. supp. 377 (E.D. Pa. 1985) (granting summary judgment against police officer who claimed, *inter alia*, that television broadcast portraying his alleged misconduct on the job invaded his privacy because "the broadcast dealt with the [officer's] public activity as a police officer. A police officer's on-the-job activities are matters of legitimate public interest, not private facts. A publication dealing with those activities thus cannot be the basis for an invasion of privacy action.") (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492-95 (1975) and *Restatement*, § 652 D); Rawlins v. Hutchinson Publishing Co., 543 P.2d 988 (Kan. 1975) (finding no invasion of privacy where

Regardless, though, the State did not carry its burden as to the first step of the three-part inquiry under International Association of Fire Fighters. However, assuming *arguendo* that the State could somehow demonstrate the Troopers have a legitimate expectation of privacy, there are overwhelming state interests that would, nevertheless, compel disclosure.

This Court has noted the compelling state interests involved in the release of public records, citing "[t]he legislative findings to the 1990 amendments to the public records act [which] explain that public access serves as an important 'check and balance' that allows citizens to maintain 'control of government.'"[57] And this Court's "decisions have characterized public access to records as a 'fundamental right.'"[58] In City of Kenai v. Kenai Peninsula Newspapers, Inc., this Court compared the policy

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newspapers published account of police officer's alleged misconduct in office because facts did not concern the "private life" of the officer and "a truthful account of misconduct in office cannot form the basis of an action for invasion of privacy."); Obiajulu v. City of Rochester, 625 N.Y.S. 2d 779, 780 (N.Y. App. Div. 1995) (explaining that "disciplinary files containing disciplinary charges, the agency determination of those changes, and the penalties imposed...are not exempt from disclosure…[because they are not] 'personal details of an employee's *personal life*.'") (emphasis added); Spokane Police v. Liquor Control Bd., 769 P.2d 283, 286-87 (Wash. 1989).

[57] Fuller v. City of Homer, 75 P.3d 1059, 1062 (Alaska 2003) ("Fuller I") (quoting Ch. 200, § 1, SLA 1990).

[58] Id. (quoting Gwich'in Steering Comm. v. State, Officer of the Governor, 10 P.3d 572, 578 (Alaska 2000); City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316, 1323 (Alaska 1982) (quoting MacEwan v. Holm, 359 P.2d 413, 421-22 (Ore. 1961)).

supporting the Public Records Act's right of public access to the principles underlying Alaska's open meetings act, which requires that all government agencies covered by the statute act "openly and that their deliberations be conducted openly."[59] Moreover, this Court has emphasized that broad public access to government records is important to the function of the State and is therefore a State and public interest:

> The cornerstone of a democracy is the ability of its people to question, investigate and monitor the government. Free access to public records is a central building block of our constitutional framework enabling citizen participation in monitoring the machinations of the republic. Conversely, the hallmark of totalitarianism is secrecy and the foundation of tyranny is ignorance.[60]

It is against this background that the disclosure of police officer disciplinary records would well serve the State's and public's interest in "question[ing], investigat[ing] the government." Id.

Finally, the State could avail itself of the use of redactions to segregate intimate information within any given record to allow for disclosure. This would satisfy the third step of the three-part test set forth in International Association of Fire Fighters.

In summary, Troopers Kirsten Hansen and Al Bell have no legitimate expectation of privacy in their disciplinary records and thus do not enjoy a constitutional right to privacy in those same records. Thus, the requested disciplinary records should be ordered to be released and the Superior Court's order must be reversed.

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[59] 642 P.2d at 1324 (quoting AS 44.62.312(a)).
[60] Jones, 788 P.2d at 735.

CONCLUSION

For the above stated reasons, the State has waived invocation of the personnel records exception by raising it for the first time on remand. Also, this Court should mandate that from now on the State will assert all of its exception claims at the same time in the original proceeding before the lower court to ensure fairness and efficiency. Thus, the Superior Court's order denying Basey's motion to compel production of the Trooper disciplinary records should be reversed and the State should be ordered to produce those records at once.

On separate grounds, this Court should also find that the AS 39.25.080 personnel records exception and the Alaska Constitution's right to privacy provision are both inapplicable in justifying nondisclosure of the Trooper disciplinary records. This Court should issue guidance to clarify this point and reverse the Superior Court's order denying Basey's motion to compel with respect to the Trooper disciplinary records and order those records be disclosed at once.

TYPEFACE CERTIFICATE

The undersigned certifies that this brief uses 13 point Times New Roman typeface and the footnotes in 12 point Courier New.

Respectfully submitted this 9th day of July 2018.

Kaleb Lee Basey

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