

Public Safety Employees Association, Inc.
"Representing Alaska's Finest"
A.F.S.C.M.E. Local 803

September 3, 2008

Ms. Judy B. Bockmon
Assistant Attorney General
Attorney Generals Office
Opinions, Appeals & Ethics Section
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501-1994

Dear Ms. Bockmon:

The Public Safety Employees Association (PSEA) has reviewed the Alaska Statutes and Administrative Code provisions that govern the confidentiality of Alaska state employee personnel records, to determine when a state official unlawfully discloses an employee's confidential personnel records. As you know, a state employee's personnel records are made confidential by statute, and protected against unauthorized disclosure. The Executive Branch Ethics Act provides for substantial penalties against state officials who unlawfully disclose an employee's personnel records. Criminal penalties may also apply.

A review of the transcript of the conversation between Frank Bailey, Director of Boards and Commissions, Office of the Governor, and AST Lieutenant Rodney Dial indicates that the Governor and her office may have had unauthorized access to Alaska State Trooper Wooten's personnel records, and improperly disclosed some information from those records to Lieutenant Dial, as well access to Trooper Wooten's confidential Workers Compensation medical records. PSEA brings this complaint for an ethics violation under AS 39.52.120 - Misuse of Official Position, AS 39.52.140 - Improper Use or Disclosure of Information, and AS 39.25.080, for the improper release of personnel records. PSEA requests an investigation into these matters.

1. AS 39.25.080: The Alaska Personnel Act, Personnel Records.

The Alaska Personnel Act, AS 39.25.080, provides that: "[s]tate personnel records, including employment applications and examination materials, are confidential and are not open to public inspection, except as provided in this section." AS 39.25.080(a). State personnel records are exempted from the Public Records Act, AS 09.25.220(3). See also Personnel Rules, 2 AAC 07.910(c) ("All other records [not listed in 910(b) as open for public inspection] of applicants for employment and employees in the classified and partially exempt service, including applications and resumes, are confidential and will be released only under following conditions").

The Alaska Supreme Court has emphasized that the protected personnel records were of a type similar to the examples in the statute, "employment applications" and "examination materials," which "contain details about the employee's or applicant's personal life." *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 979-80 (Alaska 1997). The exceptions to the confidentiality requirement delineated in AS 39.25.080(b), including position title and "compensation authorized," "tell ... little about the individual's personal life, but instead simply describe ... employment status." *Id.* at 980. In *Jones v. Jennings*, 788 P.2d 732, 738-39 (Alaska 1990), as excessive force tort case, the Court indicated that police officers had a legitimate expectation of privacy in their personnel records, which contain their names, addresses, and personal financial information, noting that personnel files "contain the most intimate details of an employee's work history."

Moreover, medical or rehabilitation records in an employee's file maintained by the Workers Compensation Division or held by the Board "are not public records subject to public inspection and copying under AS 40.25." AS 23.30.107. The Alaska Workers' Compensation Act prescribes a specific process for the release of medical and rehabilitation information relative to the employee's injury. *See* AS 23.30.107(a), (b)(1) & (2).

2. AS 39.52.140: The Executive Branch Ethics Act.

The Executive Branch Ethics Act, AS 39.52.140(b), provides that a current or former public officer "may not disclose or use, without appropriate authorization, information acquired in the course of official duties that is confidential by law." AS 39.52.190 further provides that it is a violation of the Act "for a public officer to knowingly aid another public officer in a violation of this chapter." Thus, a state official who deliberately discloses a confidential personnel record in violation of the State Personnel Act, AS 39.25.080, or who aids another officer in disclosing a confidential personnel record, also violates the Executive Branch Ethics Act, AS 39.52.140(b).

The Executive Branch Ethics Act was generally designed to address instances in which public officers are acting upon personal or financial interests that conflict with their responsibilities as public officers. The Act proscribes, as a violation of the public trust, any actions that benefit a personal or financial interest through official action. *See* AS 39.52.110(a), and 39.52.120. AS 39.52.140(b) and AS 39.52.190 are the only sections that do not speak to a personal interest. AS 39.52.140(b) is aimed at preserving the public trust that confidential materials will be protected by all public officers during and after employment with the state. AS 39.52.190 addresses the prohibition against knowingly aiding another public officer in violation of the Act.

With respect to each violation of the Ethics Act, the offending public servant may suffer a civil penalty of up to \$5,000, AS 39.52.440, and be subject to disciplinary action, AS 39.52.410(a), 2 AAC 07.416(b). To the extent that violations under AS 39.52 are punishable in a criminal proceeding, criminal penalties are in addition to the civil remedies available.

3. AS 11.56.850(a)(1) and (b): Official Misconduct.

A public servant commits the crime of official misconduct "if, with intent to obtain a benefit or to injure or deprive another person of a benefit," the public servant "performs an act relating to the public servant's office but constituting an unauthorized exercise of the public servant's official functions, knowing that that act is unauthorized." AS 11.56.850(a)(1). Official misconduct is a class A misdemeanor. AS 11.56.850(b). The disclosure of a state employee's confidential personnel records, in violation of the State Personnel Act and the Executive Branch Ethics Act, in an effort to advocate the discharge of that employee, should constitute official misconduct.

In *Larson v. State*, 564 P.2d 365 (Alaska 1977), the Alaska Supreme Court construed former AS 11.30.250 [replaced by AS 11.56.820], which prohibited the theft or destruction of public records by an "officer" having custody of the records. Upon upholding the conviction of a former state employee who stole traffic tickets while employed with the Alaska District Court as a deputy clerk, the Supreme Court broadly defined "officer" to include practically any public employee whose misconduct is at all related to his/her official duties, found the defendant to be an "officer" at common law, and declared his crime to be a form of official misconduct: "the breach of a duty of public concern by one who ... is ... entrusted with the public welfare." 564 P.2d at 370 (quoting *State v. Begyn*, 167 A.2d 161, 165 (N.J. 1961)). AS 11.30.250 had as its underlying purpose the punishment of those in a position of trust who interfered with, tampered with or misappropriated public documents. *Id.* at 371.

4. The Bailey Telephone Conversation with Dial Reflects Unauthorized Disclosure of Personnel Records.

The following passages from the transcript¹ indicate that Mr. Bailey possessed information that could only have been obtained from AST Wooten's personnel and Workers' Compensation claim records, and then freely shared that information with Lieutenant Dial:

Pages 8-9:

Bailey: But there are some very clear facts out there that -- and this is -- these things actually happened, that he tasered his 11-year-old kid. He drove drunk in a patrol car. He shot a cow moose out of season.

¹ See attached Transcript

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Dial: Wooten did?

Bailey: Yes. ... And yet he is -- you know, and then there was some really funny business about a Worker's Comp claim, I think, that came up. And you know, I was talking to Brad Thompson a little bit about that and his whole goal was to just get Wooten back working. But you know, he lied on his application when he applied. He -- he said that he didn't have any physical impairments and come to find out, he was rated in the military and that was discovered after he retired.

Pages 14-15:

Bailey: But especially the fact about him lying on his application. ...

Dial: And -- and where did -- and, Frank, where did you get that information from? I used to be a recruiter, so I'm just -- and I know how that ... that information a lot of times is extremely confidential. So I'm just -- I'm trying to find out how it was determined by anybody that -- that he had indicated something on his application that look -- later found was not to be true.

Bailey: Well, I'm a little bit reluctant to say, but in -- over in Admin is where, you know, we've -- we hold Workers' Comp right in there. And the situation where he declared Workers' Comp, but then was caught on an eight-mile snow machining trip days -- days after, you know, that -- that started coming up there. So we collected statements that we forwarded on to Workers' Comp there. And so we started seeing the

Dial: Oh, okay. I got it.

Bailey: ... the application from that point.

Dial: And that's while -- while he was a trooper?

Bailey: Correct.

Dial: Really? Okay.

Pages 21-22:

Dial: ... [J]ust so that I've got it straight, let's see here, I've got some of the following concerns that you have expressed. One that -- that he lied on his initial application.

Bailey: Correct.

Dial: And that was mainly regarding a pre-existing injury?

Bailey: Correct.

Dial: Okay. And then issues concerning may have illegally shot a moose?

Bailey: Right

Dial: Okay. And Workers' -- Workers' Comp issue?

Bailey: Uh-huh. The Workers' Comp issue is pretty much -- I believe he's back on full duty now. ... That was pretty much dealt with. And then the tasing of his kid, I don't know if that was ever verified or what. I think there was some kind of investigation on that at one point, but it's just horrible. We can't -- you know, can't understand why he would do that.

Dial: And then we've got use of patrol car off duty, ...

5. Request for Wooten's Workers Compensation Records and Return of the Official Records

The Governor's Office had previously requested Trooper Wooten's Workers' Compensation files be sent to the Anchorage Worker's Compensation office and copied for the Governor's Office staff. In Mr. Bailey's taped phone conversation with Lt. Dial, it was clear that the Governor's office acquired this information.² Following the press coverage about this confidential information being shared with the Governor's office staff, the file was then returned to the Juneau office for storage. The request to have these files returned was made by Mike Monagle, Administrator for the Fisherman's Fund Advisory & Appeals Council and the Second Injury Fund sections of the Division of Workers Compensation on August 21, 2008.³ No explanation was given for requesting that the files be returned to the Juneau office. Mr. Monagle would have no business reason to be requesting these files. Such records are confidential and cannot be disclosed without the consent of the employee. In this case, the employee, Trooper Wooten was not contacted to give his consent and no consent has been given. Trooper Wooten has filed Petitions for Protective Orders to stop the Governor from obtaining these files.

² See Pages 8-9 and 14-15 of the Transcript

³ See attached Routing Slip and memo from a worker at Workers Compensation in Anchorage.

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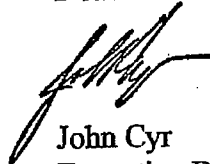
It is also noted that on Pages 8-9 of the Transcript of the phone conversation with Lieutenant Dial, Frank Bailey also discloses that he has been in discussion with Brad Thompson, Division Director, Department of Administration, Division of Risk Management, concerning Trooper Wooten's Workers Compensation Records. In his capacity as the Director of Risk Management, this information should not have been released to the Governor's office.

Therefore, PSEA requests that you and the Personnel Board open an investigation and inquiry in this matter and make a determination if Frank Bailey, Brad Thompson, Mike Monagle, and/or the Governor, engaged any ethics violations under AS 39.52.120 - Misuse of Official Position and AS 39.52.140 - Improper Use or Disclosure of Information, and/or improperly disclosed Trooper Wooten's personnel records, under AS 39.25.080.

Thank you for your attention to this matter. If there are any questions, or if more information is needed, please contact me.

Sincerely,

PUBLIC SAFETY EMPLOYEES ASSOCIATION



John Cyr
Executive Director

cc: Stephen F. Sorensen, General Counsel
Trooper Wooten