REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

IN THE SUPREME COURT FOR THE STATE OF ALASKA

KALEB LEE BASEY, Appellant, v. STATE OF ALASKA, DEPARTMENT OF PUBLIC SAFETY, DIVISION OF STATE TROOPERS BUREAU OF INVESTIGATIONS, Appellee.	) Supreme Court No. S-17099

Trial Court Case No.: 4FA-16-025091CI

CERTIFICATE OF TYPEFACE AND SERVICE

I certify, pursuant to App. R. 513.5, that the Brief of the ACLU of Alaska Foundation as Amicus Curiae was prepared in 13-point proportionately spaced Times New Roman typeface.

I certify that on this 31 day of May, 2019 a true and correct copy of the Brief of ACLU of Alaska Foundation as Amicus Curiae and this Certificate of Typeface and Service were served via U.S. mail upon the following:

Kimberly Rodgers
Office of the Attorney General
1031 W. 4th Ave., Suite 200
Anchorage, AK 99501

Brian Penner
APEA/AFT
3310 Arctic Blvd., Suite 200
Anchorage, AK 99503

Kaleb Basey # 17753006
FMC Lexington
FMC Cardinal Unit
PO Box 14500
Lexington, KY 40512

Khalial Withen
Kevin B. Daugherty
Alaska District Council of Laborers
2501 Commercial Drive
Anchorage, AK 99501

John McKay
Law Office of D. John McKay
117 E. Cook Avenue
Anchorage, AK 99501

Respectfully submitted, this 31 day of May, 2019.

Susan Orlansky, ABA 8106042

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ANCHORAGE, ALASKA 99501-1990
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APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE JUDGE DOUGLAS L. BLANKENSHIP

BRIEF OF AMICUS CURIAE
ACLU OF ALASKA FOUNDATION

Filed in the Supreme Court
for the State of Alaska on
this ____ of May, 2019

Meredith Montgomery, Clerk
Appellate Courts

By:_____
Deputy Clerk

Susan Orlansky [8106042]
ACLU Cooperating Attorney
REEVES AMODIO LLC.
500 L Street, Suite 300
Anchorage, AK 99501
(907) 222-7117
susano@reevesamodio.com

Stephen Koteff [9407070]
Joshua A. Decker [1201001]
ACLU of Alaska Foundation
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
Tel: 907-263-2007
skoteff@acluak.org
jdecker@acluak.org

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Sec. 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 employees 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 data base, it may be supplied by providing the requesting agency with access to the data base or a copy of the information in the data base 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.

Sec. 40.25.120 Public records; exceptions; certified copies.

(a) Every person has a right to inspect a public record in the state, including public records in recorders offices, except

(4) records required to be kept confidential by a federal law or regulation or by state law

STATEMENT OF INTEREST OF AMICUS CURIAE

By order dated January 28, 2019, this Court invited the ACLU of Alaska to submit an amicus brief addressing two specific questions. The ACLU of Alaska Foundation submits this brief in response to that invitation.

The ACLU of Alaska Foundation is an Alaska non-profit corporation dedicated to advancing civil liberties in Alaska. It has a long-time interest in both sets of competing rights at issue in this case: the rights of privacy and the rights of the public to be well informed about the operations of government. The ACLU of Alaska Foundation is an affiliate of the American Civil Liberties Union. Other affiliates across the country frequently have litigated cases involving access to police disciplinary records.

ARGUMENTS

Summary of Argument

This Court has posed two broad questions concerning the interpretation of AS 39.25.080(a) and the way to balance a state employee's interest in privacy with competing public interests in learning about the operations of state government. In this brief, Amicus answers these questions limited to the specific fact pattern at issue in this case. That is: How should the Court analyze when an individual may obtain access under the Public Records Act to information concerning the discipline record of a law enforcement officer?

Law enforcement officers occupy a very special position in society. They are entrusted with authority to restrain individuals' liberties, to seize their property, and to use force – even deadly force – against them. Given this awesome power, law enforcement officers' conduct must be more open to public scrutiny than that of other public employees. Numerous courts have held that police officers have no reasonable expectation of privacy in how complaints of their job-related misconduct are investigated and resolved; they must accept public oversight when they accept a job that carries the responsibilities of law enforcement. Different conclusions might be appropriate for different types of employees.

Amicus urges this Court to decide the questions presented in this case involving law enforcement officers' discipline records in favor of public access and transparency, leaving for another day questions about how, for other types of employees, AS 39.25.080(a) should be interpreted and how competing interests should be balanced.

No previous decision from this Court has definitively interpreted "personnel records," as used in AS 39.25.080(a), for purposes of determining whether personnel

records include records of police discipline. But prior cases strongly suggest that a narrow interpretation of "personnel records," focused on the core personal information that is typically maintained in such files, is appropriate. The narrow interpretation gives effect both to legitimate concerns for privacy and to the policies of open government expressed in Alaska's Public Records Act. Further, the standard principles of statutory construction – considering the plain language, the legislative history, and the purpose of the law – also favor a narrow construction and support the conclusion that the term "personnel records" in AS 39.25.080(a) does not include records compiled in the course of investigating a charge of misconduct against a law enforcement officer. Thus, such disciplinary records should not be considered categorically exempt from disclosure under AS 40.25.120(a)(4).

When records are not categorically exempt from disclosure, well-established case law guides the analysis of whether particular public records may be withheld from the public. That analysis begins with the policy behind the Public Record Act, which favors disclosure to promote transparency and accountability of public officials by allowing citizens to be informed about government operations. Past cases establish that public access to government records is a "fundamental" and "compelling" interest. These public interests are particularly strong when the documents at issue concern misconduct by law enforcement officers in the performance of their duties. Any government agency that seeks to bar disclosure must bear the burden of establishing a competing interest that outweighs the public interest in disclosure. To be accepted by a court, the interest in secrecy must be based on evidence, and may not be merely hypothetical. On request, the trial court must

review documents *in camera* to ensure that, even if some portions of some records may be withheld, redactions are minimized and the law is applied to favor maximum disclosure.

I. AS 39.25.080(a) SHOULD BE CONSTRUED SUCH THAT LAW ENFORCEMENT OFFICERS' DISCIPLINARY RECORDS ARE NOT CONSIDERED PART OF "PERSONNEL RECORDS."

This Court interprets a statute "according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose."[1] The Court also considers how the statute at issue fits with other related statutes.[2] When construing AS 39.25.080(a), the key related statute is the Alaska Public Records Act, which declares the policy that all public records are open to inspection unless specifically exempted.[3] One exemption is for records declared to be confidential by other statutes.[4] The State identified AS 39.25.080(a) as the statute that supposedly establishes confidentiality for the trooper disciplinary records at issue in this case.

As shown below, the relevant factors favor a narrow construction of "personnel records" as an exemption from the Public Records Act.

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1 *Warnke-Green v. Pro-West Contractors, LLC*, __ P.3d __, 2019 WL 1870683 at *3 (Alaska Apr. 26, 2019) (internal quotation marks omitted).

2 *See, e.g., Alaska Ass'n of Naturopathic Physicians v. State, Dep't of Commerce, Cmty. & Econ. Dev.*, 414 P.3d 630, 635-36 (Alaska 2018); *Bullock v. State, Dep't of Cmty. & Reg'l Affairs*, 19 P.3d 1209, 1214-15 (Alaska 2001).

3 *See* AS 40.25.120(a) ("Every person has a right to inspect a public record in the state, . . . except [as listed in the following sections]."), (b) ("Every public officer having the custody of records not included in the exceptions shall permit the inspection . . . .").

4 *See* AS 40.25.120(a)(4).

Past decisions: The State Personnel Act uses the term "personnel records" in the following sentence:

> 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.[5]

The term "personnel records" is not defined within the State Personnel Act or anywhere else within Alaska statutes.

This Court has addressed the meaning of "personnel records" only a few times, and each time has given the term a narrow meaning.

In *Alaska Wildlife Alliance v. Rue*,[6] this Court noted that the Personnel Act explicitly mentions as confidential "employment applications" and "examination materials," which are documents that "contain details about the employee's or applicant's personal life."[7] By contrast, this Court continued, the exceptions to confidentiality noted in AS 39.25.080(b) involve employee titles, authorized compensation, dates of appointment, and the like – "information [that] tells little about the individual's personal life, but instead simply describes employment status."[8] This Court held that time sheets, which indicate the hours that an employee worked, are properly included within the definition of public records in former AS 09.25.220(3) [now AS 40.25.220(3)], which states that public records include "papers . . . developed . . . as evidence of the organization or operation of the public

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5 AS 39.25.080(a).

6 948 P.2d 976 (Alaska 1997).

7 *Id.* at 980.

8 *Id.*

agency"; thus, time sheets are not subject to the confidentiality provision in AS 39.25.080(a).[9]

In *International Association of Fire Fighters, Local 1264 v. Municipality of Anchorage* ["*IAFF*"],[10] this Court relied on *Alaska Wildlife Alliance* as having established a definition of "personnel record":

> [W]e have defined the term "personnel record" narrowly, to include only information which reveals the details of an individual's personal life.[11]

The *IAFF* decision also discussed *Jones v. Jennings*,[12] where this Court held that documents related to a police officer's job performance, including records of citizen complaints, could be discovered in a §1983 case.[13] In *IAFF*, this Court called the *Jones* holding consistent with the view that constitutional privacy protections do not extend to employment records that do not disclose personal information.[14]

An earlier decision, *Municipality of Anchorage v. Anchorage Daily News*,[15] concerned a special performance evaluation report of a senior public employee – a

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9 *See id.*

10 973 P.2d 1132 (Alaska 1999).

11 *Id.* at 1135; *see also id.* ("Work history *is* personal information, but it only includes information like employment applications and examination materials – not information such as base salary and benefits. . . . When *Jones* [*v. Jennings*] and *Alaska Wildlife Alliance* are read together, it is clear that employees only have a legitimate expectation of privacy in the personal information contained in their personnel records.").

12 788 P.2d 732 (Alaska 1990).

13 *See IAFF*, 973 P.2d at 1134-35 (discussing *Jones*).

14 *See id.* at 1135.

15 794 P.2d 584 (Alaska 1990).

document some might consider part of a personnel record. Because the employee who was evaluated worked for a municipality, rather than the state, the definition of "personnel records" in AS 39.25.080(a) was not at issue. In that context, this Court had no trouble determining that the performance evaluation report was not exempt from disclosure under the Public Records Act: "Performance evaluations of government employees who exercise discretion in their duties are subject to release as a matter of law."[16] This Court explained that "public officials are properly subject to public scrutiny in the performance of their duties."[17]

A still earlier case, *Doe v. Alaska Superior Court*,[18] also did not define "personnel record," but likewise suggested a narrow meaning is most appropriate. There, the Court observed that letters to the Governor commenting on a potential appointee likely would not qualify as part of a personnel record.[19]

In short, all of this Court's past decisions are consistent with construing "personnel records" narrowly.

Plain meaning: The Alaska statute declaring that personnel records are confidential except as noted identifies a few core types of documents that traditionally are maintained within personnel files; it does not contain an expansive list of other materials

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16 *Id.* at 591 n.13.

17 *Id.* at 591 (footnote omitted).

18 721 P.2d 617 (Alaska 1986).

19 *See id.* at 622.

that might sometimes be included in an agency's "personnel records."[20] To determine the plain meaning of a term that has no formal statutory definition, this Court sometimes considers dictionary definitions.[21] Amicus's research did not locate a standard, agreed-on definition of "personnel records." Common usage seems to include certain key types of documents within the understanding of "personnel records" – including, for example, the employee's job application, salary information, basic personal information, and periodic routine performance reviews. Records of discipline and materials compiled in an investigation of whether to impose discipline are sometimes considered to be part of "personnel records,"[22] and sometimes are not.[23]

This Court also sometimes considers definitions of terms offered by other courts construing their own statutes,[24] but that exercise does not appear especially helpful here, given the wide variety of definitions of "public records" and the wording in different states' public records acts. Amicus has found no case that involved a statute where the definition

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20 *See* AS 39.25.080(a), (b).

21 *See, e.g., Naturopathic Physicians*, 414 P.3d at 635; *Alaskans for Efficient Govt., Inc. v. Knowles*, 91 P.3d 273, 276 n.4 (Alaska 2004).

22 *See, e.g., https://fitsmallbusiness.com/personnel-file/* (listing "[w]arnings and/or other disciplinary actions" as "nice-to-have" but not required in a personnel file); *http://www.duhaime.org/LegalDictionary/P/PersonnelFile.aspx* (defining "personnel file" as "[a]n employer's folder of employee records collected in regards to qualifications, promotion, transfer, compensation or disciplinary action").

23 *See, e.g., https://www.managementstudyguides.com/personnel-records.htm* (listing 5 types of personnel records, and not including disciplinary records); *https://fitsmallbusiness.com/personnel-file/* (listing 8 "must-have" types of documents for a personnel file, and not including disciplinary records).

24 *See, e.g., Michael W. v. Brown*, 433 P.3d 1105, 1111 (Alaska 2018); *Reasner v. State, Dep't of Health & Soc. Servs.*, 394 P.3d 610, 617 & n.37 (Alaska 2017).

of "personnel records" determined whether disciplinary records could be released under the state's public records act.

Some states have statutes devoted specifically to when police disciplinary records may be released.[25] Whether broad or restrictive, those statutes highlight a widespread understanding that police disciplinary records are special, and access issues should not necessarily be resolved under the standard approach to personnel files.

Some states have statutes with an express or implied balancing provision which dictates that, even records that might be considered confidential (such as personnel files no matter how that term is interpreted) should be released if the court determines that the

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[25] *See, e.g.*, CAL. PENAL CODE § 832.7(b)(1) (2019) (requiring disclosure of certain police personnel records, including *inter alia* those relating to the report, investigations, and findings of an incident involving a police officer's discharge of a firearm, or a police officer's use of force that resulted in death or serious injury, or relating to an incident where a "sustained finding" was made that an officer engaged in sexual assault or certain dishonest acts). This recently enacted statute replaced an earlier, more restrictive one, discussed in *San Diego Police Officers Ass'n v. City of San Diego Civil Serv. Comm'n*, 128 Cal. Rptr. 2d 248, 252-58 (App. 2003).

HAW. REV. STAT. § 92F-14(b)(4) (2019) (providing a different standard for disclosing records of misconduct in the personnel files of county police officers as compared to other public employees, such that, for a county police officer, records of misconduct may be disclosed only if the officer was discharged).

LA. REV. STAT. ANN. § 40:2532 (2018) (providing that no person may release an officer's home address, photograph, or "any information that may be deemed otherwise confidential"), discussed in *City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 4 So. 3d 807, 821-22 (La. App. 2008) (finding no legitimate expectation of privacy in most records related to a law enforcement officer's job-related misconduct), *opin. on reh'g*, 7 So. 3d 21 (La. App. 2009).

N.Y. CIV. RIGHTS LAW § 50-a (2014) (specifically exempting from disclosure all personnel records under the control of any police agency that were used to evaluate performance).

public interest in access outweighs any individual privacy interest.[26] The courts in those states need not decide whether police disciplinary records are part of a personnel file; they can in essence assume they are part of the personnel records, and then balance the competing interests – and most courts determine that the balance favors release.[27]

Vermont has a statute that exempts from disclosure "[p]ersonal documents relating to an individual, including information in any files maintained to hire, evaluate, promote

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[26] *See, e.g.*, CONN. GEN. STAT. § 1-210(b)(2) (2018) (exempting from disclosure "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy").

OR. REV. STAT. § 192.355(2)(a) (2018) (exempting from disclosure information "of a personal nature such as but not limited to that kept in a personnel, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance").

S.C. CODE ANN. § 30-4-40(a)(2) (2017) (allowing a public body to exempt from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy").

W. VA. CODE § 29B-1-4(a)(2) (2018) (exempting from disclosure "[i]nformation of a personal nature such as that kept in a personal, medical, or similar file, if the public disclosure of the information would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in this particular instance").

See also 5 U.S.C. § 552(b)(6) (federal Freedom of Information Act exempts personnel files from disclosure if the disclosure "would constitute a clearly unwarranted invasion of personal privacy").

[27] *See, e.g.*, *Tompkins v. Freedom of Information Comm'n*, 46 A.3d 291, 298-99 (Conn. App. 2012) (affirming trial court decision ordering disclosure of records of internal investigation of police officer that involved conduct that implicated his job performance); *Burton v. York County Sheriff's Dep't*, 594 S.E.2d 888, 895 (S.C. App. 2004) (affirming trial court order requiring disclosure of records of investigation of law enforcement officer's job-related misconduct); *Charleston Gazette v. Smithers*, 752 S.E.2d 603, 623-24 (W. Va. 2013) (requiring disclosure of records of internal investigation by state police responding to a complaint of misconduct by an officer in his work capacity, once the investigation had concluded and a determination about discipline had been made).

or discipline any employee of a public agency."[28] Despite the seeming breadth of this language, the state supreme court ruled that "personal documents" refer only to documents that implicate the privacy of an individual, and that, when applying the exemption, courts must balance any personal privacy interest against the public interest in disclosure.[29] Applying this test, the supreme court affirmed a trial court decision requiring disclosure of records from the investigation of misconduct by police department employees.[30]

The Wisconsin statute exempts from disclosure information in personnel files that is used for management planning, including "performance evaluations."[31] The appellate court of that state determined that records of an investigation and discipline of a law enforcement officer based on allegations of job-related misconduct do not fit within this exemption.[32] The court was influenced by a separate statutory provision that exempts from disclosure records pertaining to investigation of misconduct connected to employment, but only while an investigation is ongoing.[33]

Because neither the words of the Alaska statute nor other materials that define

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28 VT. STAT. ANN. tit. 1, § 317(c)(7) (2019).

29 *See Rutland Herald v. City of Rutland*, 48 A.3d 568, 579 (Vt. 2012), *citing Trombley v. Bellows Falls Union High Sch. Dist. No. 27*, 624 A.2d 857, 863 (Vt. 1993). In this respect, the Vermont courts follow the federal courts' interpretation of Exemption 6 of the federal Freedom of Information Act. *See Trombley*, 624 A.2d at 863, discussing *Dep't of Air Force v. Rose*, 425 U.S. 352, 370-82 (1976) (analyzing 5 U.S.C. § 552(b)(6)).

30 *See Rutland Herald*, 48 A.3d at 579-80.

31 WIS. STAT. § 19:36(10)(d) (2017).

32 *See Kroeplin v. Wis. Dep't of Natural Res.*, 725 N.W.2d 286, 294-97 (Wis. App. 2006).

33 *See id.* at 296-97.

"personnel records" provide a clear and widely accepted plain meaning of the term, this Court also must consider the legislative history and purpose of the statute.

Legislative history: The readily available legislative history sheds little light on how broadly the legislature intended the term "personnel records" to be interpreted when it adopted the provision in AS 39.25.080(a) that declares that personnel records are confidential. That provision was enacted in 1982.[34] Prior to that, the statute declared that personnel records of Alaska public employees were open to public inspection, except as provided by personnel rules.[35] The 1982 provision that enacted, in large part, the current version of AS 39.25.080(a) was part of a comprehensive revision of the state personnel laws, and most of the legislature's discussion of that bill focused on other aspects of the law.[36] The House and Senate Journals that track the legislature's treatment of the bill that ultimately passed contain no discussion of why the legislature opted to change the statutory language or how broadly it intended to extend the new confidentiality rule.[37]

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[34] *See* SLA 1982, ch 112 § 5. (This session law enacted the bill that originated as SB 193).

[35] *See* former AS 39.25.080, as enacted by SLA 1960, ch 144 § 18 ("The state personnel records, except such records as the rules may properly require to be held confidential for reasons of public policy, shall be public records and shall be open to public inspection, subject to reasonable regulations as to the time and manner of inspection.").

[36] *See generally* Press Amici Brief at 16-18 (providing greater detail on the legislative history of the amendment based on review of the voluminous committee files on SB 193).

[37] *See, e.g.*, 1981 Sen. J., Twelfth Leg. First Sess. at 288 (Feb. 20, 1981) (first reading of SB 193, sponsored by the Rules Committee by request of the Legislative Council, for the Blue Ribbon Commission on the State Personnel Act); 1982 Sen. J., Twelfth Leg. Second Sess. at 902-04 (Apr. 7, 1982) (voting on amendments unrelated to confidentiality); 1982 House J., Twelfth Leg. Second Sess. at 2032-33 (May 25, 1982) (voting on amendments unrelated to confidentiality); *see generally* Press Amici Brief at 16-17 (noting comments suggesting that the legislature essentially incorporated into the 1982 statute the

The legislative history pertaining to subsequent amendments of AS 39.25.080 is likewise uninformative with respect to the legislature's intended meaning of "personnel records." The legislature amended subsection (a) only once, in 2000, when the words "and other assessment [materials]" were added following "employment applications and examination [materials]."[38] That amendment was part of the legislature's adoption of a new approach to processing applications for state employment, in order to allow the Department of Administration to administer a statewide personnel program, including centralized services such as recruitment, assessment, and personnel classification.[39] In this context, "assessment" unambiguously refers to the process of assessing a job applicant's qualifications for purposes of making a hiring decision, and has nothing to do with either routine or special performance evaluations after a person is hired.[40]

Two other amendments changed other subsections of AS 39.25.080. In 1997, the

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provisions of the former personnel rules, effecting little or no substantive change as to which documents would be open to public inspection).

38 *See* SLA 2000, ch 111 § 1.

39 *See id.*; *see particularly* § 4 (codified in part in AS 39.25.150(3)), § 15 (codified in AS 44.21.020(8)).

40 *See* 2000 House J., Twenty-First Leg. Second Sess. at 1991-93 (Jan. 24, 2000) (reprinting Governor's transmittal letter); Minutes, House State Affairs Standing Comm. Hearing on HB 317 at 2655-82 (Mar. 9, 2000) (summarizing comments of Dave Stewart, Personnel Manager, Division of Personnel, Department of Administration: "He said that HB 317 is a clean-up bill designed to refresh the Personnel Act with respect to the state's recruitment and selection process. He noted that for a long time the state has used a paper and labor intensive method for accepting and reviewing applications . . . . He explained that Workplace Alaska is an electronic system that allows job seekers to file a single electronic resume . . . . He mentioned that HB 317 changes references to 'examination' and 'registers' to 'assessment' and 'lists of qualified individuals.'").

legislature added current subsection (e), which allows state personnel records to be made available to child support enforcement agencies.[41] The history surrounding this amendment is not instructive with respect to whether "personnel records" do or do not include discipline records. In 2003, the legislature added AS 39.25.080(b)(7), which declares to be non-confidential "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)."[42] This change was enacted as part of a bill, the centerpiece of which was the amendment of the criminal laws to add former AS 11.56.870 [now AS 11.56.845], declaring that failure to cooperate with the Legislative Budget and Audit Committee ("LBAC") is a violation.[43] The minutes of the several committee hearings on this bill[44] include only one reference to the proposal to amend AS 39.25.080(a). One legislator, in questioning Pat Davidson, the director of the LBAC and a primary witness in support of the bill, inquired about the proposed addition of AS 39.25.080(b)(7); Davidson answered that the change was necessary to ensure that the discipline could be publicized, because, in this witness's view, "disciplinary laws [sic] are

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41 *See* SLA 1997, ch 87 § 43; *see also* § 1 (stating that the statutory changes adopted in the bill were enacted "only under duress from the federal government").

42 SLA 2003, ch 67 § 4.

43 *See id.* § 1.

44 *See* Minutes, Sen. Jud. Comm. Hearing on SB 45 at 1:31 p.m. – 2:41 p.m. (Mar. 12, 2003); Minutes, Sen. Jud. Comm. Hearing on SB 45 at 1:32 p.m. – 3:22 p.m. (Mar. 19, 2003); Minutes, House Jud. Comm. Hearing on SB 45 at 0039-2205 [sic (note that tape numbers go *backward* after 2388)] (Apr. 16, 2003); Minutes, House Fin. Comm. Hearing on SB 45 at 1:49 p.m. – 4:40 p.m. (May 16, 2003).

confidential."[45] Conceivably, a lengthy, thoughtful discussion by the legislature might support an inference that, in making one type of disciplinary record public, the legislature meant to affirm that other types of disciplinary records are confidential. But the single brief reference by a witness, not a legislator, to how the witness thought disciplinary records are treated is too slim a reed to support any conclusion here about legislative intent with respect to types of disciplinary records not even discussed.[46]

In short, the legislative history is silent on whether the legislature intended to keep confidential records of disciplinary action against law enforcement officers.

Purpose: The evident purpose of declaring in AS 39.25.080(a) that "personnel records" are confidential was to create an exemption to the Public Records Act, which declares that most government records are accessible to the public, except as specifically exempted by that statute or by others.[47] This Court presumes that, when the legislature enacts a statute, it is aware of other statutes with which it interacts.[48] The Public Records Act reflects the legislature's commitment to ensure that government affairs are transparent

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45 *See* Minutes, House Fin. Comm. Hearing on SB 45 at end of Tape HFC 03-98, Side A (May 16, 2003).

46 *See generally Alaska State Comm'n for Human Rights v. Anderson*, 426 P.3d 956, 964 (Alaska 2018) (explaining that the doctrine of *expressio unius est exclusio alterius* is "less persuasive when applied to two acts passed far apart in time" (internal quotation marks omitted)); *Alaskan Crude Corp. v. State, Alaska Oil & Gas Conservation Comm'n*, 309 P.3d 1249, 1255 n.22 (Alaska 2013) (maxim of construction does not apply when it would contravene the statute's purpose).

47 *See* AS 40.25.110, .120(a)(4).

48 *See Burke v. Raven Electric, Inc.*, 420 P.3d 1196, 1208 (Alaska 2018).

and readily open to scrutiny by the public.[49] The statute implements the common law rule that "every interested person was entitled to the inspection of public records."[50]

In keeping with the common law, the legislature and this Court have recognized that the openness of public records is fundamental to democracy.[51] To effectuate the central purpose of the Public Records Act, this Court has always held that exemptions must be

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[49] *See Basey v. State, Dep't of Public Safety*, 408 P.3d 1173, 1176 (Alaska 2017) (recognizing a "'strong commitment in Alaska to ensuring broad public access to government records'" (quoting *Fuller v. City of Homer*, 113 P.3d 659, 665 (Alaska 2005) (internal quotation marks from *Fuller* omitted)); *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 589 (Alaska 1990) (referring to the "legislature's expressed bias in favor of broad public access").

[50] *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1319 (Alaska 1982). When statutory language and legislative history are ambiguous, the common law also may be a useful tool for discerning legislative intent. *See Young v. Embley*, 143 P.3d 936, 945 (Alaska 2006). Statutes that establish rights in derogation of the common law are to be construed "in a manner that effects the least change possible in common law." *Id.* (internal quotation marks omitted).

[51] *See* SLA 1990, ch 200 § 1 ("[P]ublic access to government information is a fundamental right that operates to check and balance the actions of elected and appointed officials and to maintain citizen control of government."); *Kenai Peninsula Newspapers*, 642 P.2d at 1323 (referring to the Act's implementation of the "'fundamental right of a citizen to have access to the public records,'" quoting *MacEwan v. Holm*, 359 P.2d 413, 422 (Or. 1961)); *see also Gwich'in Steering Comm. v. Office of the Governor*, 10 P.3d 572, 578 (Alaska 2000) ("The right of citizen access to public records has been characterized as a 'fundamental right.'"); *Anchorage Daily News*, 794 P.2d at 591; *Jones v. Jennings*, 788 P.2d 732, 735 (Alaska 1990) ("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." (footnote omitted)).

construed narrowly,[52] and doubtful cases must be resolved in favor of disclosure.[53]

The obvious purpose of the declaration of confidentiality in AS 39.25.080(a) is to protect personal privacy, since personnel records include sensitive personal information. But, as this Court has recognized, not all documents that arguably fit within a broad definition of "personnel records" contain sensitive personal information, and sometimes the public interest in the affairs of government strongly outweigh any personal interests in privacy.[54] Neither the statutory language nor its history supports concluding that the legislature's purpose in enacting AS 39.25.080(a) was to undermine the central purpose of the Public Records Act by enacting a broad exemption that would deny public access to significant information about how the government operates and how public officials behave. To adopt a broad interpretation of "personnel records" would greatly diminish the public's right to know about the conduct and misconduct of public servants. A narrow interpretation of "personnel records" is the best way to give effect to the core purpose of *both* the Personnel Act and the Public Records Act.

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52 *See Griswold v. Homer City Council*, 428 P.3d 180, 186 (Alaska 2018); *Fuller v. City of Homer*, 75 P.3d 1059, 1062 (Alaska 2003); *Anchorage Daily News*, 794 P.2d at 592.

53 *See Anchorage Sch. Dist. v. Anchorage Daily News*, 779 P.2d 1191, 1193 (Alaska 1989); *Kenai Peninsula Newspapers*, 642 P.2d at 1323.

54 *See generally IAFF v. Municipality of Anchorage*, 973 P.2d 1132, 1134-36 (Alaska 1999) (approving disclosure of documents that contain names and salaries of public officials because this is not sensitive or personal information that is entitled to protection); *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997) (requiring disclosure of time sheets in large part because they do not contain information about an employee's personal life); *Jones*, 788 P.2d at 736-39 (protecting documents that contain sensitive, personal information and requiring disclosure of documents reflecting work-related performance).

Conclusion: Consideration of all the factors that bear on interpretation of a statute supports construing "personnel records" narrowly, such that trooper disciplinary records do not fit within that term. If disciplinary records are not categorically exempt from disclosure, then disclosure issues should be resolved as they are in other Public Record Act cases, where the courts balance the interests served by disclosure against the interests served by non-disclosure. That balance is further discussed below.

II. THE BALANCE OF COMPETING INTERESTS FAVORS DISCLOSURE OF RECORDS OF POLICE DISCIPLINE FOR WORK-RELATED MISCONDUCT.

Well-established case law governs the analysis this Court should apply when determining whether public records subject to disclosure under the Public Records Act may be withheld. This Court balances the interest of the citizenry in knowing what the government is doing against the interest in having government carried on efficiently and without undue interference.[55] The public interest in disclosure is "fundamental,"[56] and "[d]oubtful cases should be resolved by permitting public inspection."[57]

When a party asserts a constitutional interest in privacy as a basis for resisting disclosure, the Court asks additional questions:

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55 *See Anchorage Daily News*, 794 P.2d at 590-91; *Kenai Peninsula Newspapers*, 642 P.2d at 1323.

56 SLA 1990, ch 200 § 1 ("[P]ublic access to government information is a fundamental right[.]"); *Gwich'in Steering Comm.*, 10 P.3d at 578 (quoted *supra* n.51); *Anchorage Daily News*, 794 P.2d at 591; *Kenai Peninsula Newspapers*, 642 P.2d at 1323 (quoted *supra* n.51).

57 *Kenai Peninsula Newspapers*, 642 P.2d at 1323.

(1) does the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the material or information will not be disclosed?

(2) is 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 confidentiality?[58]

For purposes of this appeal, Amicus accepts that police officers resisting disclosure of their employment files assert a legitimate, constitutionally-protected privacy interest with respect to truly personal information in those files, but they have no legitimate expectation of privacy in records related to discipline for work-related misconduct. In contrast, the public has a compelling interest in access to records regarding discipline of law enforcement officers for work-related misconduct. *In camera* review can ensure that disclosure occurs in a manner that is least intrusive with respect to legitimate interests in privacy.

A. POLICE OFFICERS HAVE NO LEGITIMATE EXPECTATION OF PRIVACY IN RECORDS RELATED TO DISCIPLINE FOR WORK-RELATED MISCONDUCT.

In *Jones v. Jennings*, this Court recognized that public employees, including police officers in particular, have a legitimate expectation of privacy in files that "contain the most intimate details of [their] work history."[59] In subsequent cases, not specifically related to police officers, this Court determined that a public employee's legitimate expectation of

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58 *Jones*, 788 P.2d at 738 (internal quotation marks omitted). This Court enunciated these tests in *Jones* in the context of a discovery dispute, but later, adopted these tests to analyze whether to protect confidentiality or require disclosure under the Public Records Act. *See IAFF*, 973 P.2d at 1134; *Alaska Wildlife Alliance*, 948 P.2d at 980.

59 *Jones*, 788 P.2d at 738 (internal quotation marks omitted).

privacy does *not* extend to matters that concern work performance rather than purely personal matters such as family names and address, social security number, medical information, and personal financial information.[60]

Even more so than many public employees, law enforcement officers perform their duties in public and in interaction with the public. Given the nature of their work and the extraordinary powers they are granted, law enforcement officers reasonably must expect public oversight of their work performance and therefore cannot have a reasonable expectation of privacy in records that concern only their work, rather than their personal data. As this Court stated in *Jones*:

> 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 and monitoring the machinations of the republic.[61]
>
> ***
>
> There 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.[62]

To promote democracy and public trust, those who accept employment as police officers reasonably must expect public scrutiny of their work.[63]

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60 *See IAFF*, 973 P.2d at 1134-36; *Alaska Wildlife Alliance*, 948 P.2d at 980-81.

61 788 P.2d at 735.

62 *Id.* at 738.

63 *See id.* at 738-39; *Booth v. State*, 251 P.3d 369, 373-74 (Alaska App. 2011) (police officers cannot expect absolute privacy of their employment records because the "cornerstone of a democracy is the ability of its people to question, investigate[,] and

Courts around the country have held that public officials in general – and police officers in particular – have no legitimate expectation of privacy in records that concern their on-the-job misconduct. Particularly instructive are the analyses of courts in other states that, like Alaska, have a guarantee of privacy in their constitution. In at least three of these states, the courts have held that police officers have no constitutionally protected privacy interest in information in about work-related misconduct contained in their employment files.[64] The Montana court observed that it would be poor public policy to recognize an expectation of privacy in the identity of law enforcement officers whose conduct is "reprehensible enough to merit discipline."[65] Other courts, considering the language of their states' statutes and common law privacy principles, likewise have concluded that police officers can have little or no legitimate expectation of privacy in records related to their misconduct on the job, especially if discipline has been imposed.[66]

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monitor the government in its exercise of coercive power" (internal quotation marks omitted)).

64 *See Peer News LLC v. City & County of Honolulu*, 376 P.3d 1, 13 (Haw. 2016); *City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 4 So. 3d 807, 821-22 (La. App. 2008), *opin. on reh'g*, 7 So. 3d 21 (La. App. 2009); *Bozeman Daily Chronicle v. City of Bozeman Police Dep't*, 859 P.2d 435, 439-41 (Mont. 1993).

65 *Bozeman Daily Chronicle*, 859 P.2d at 439.

66 *See Rutland Herald v. City of Rutland*, 48 A.3d 568, 579-80 (Vt. 2012) (holding that the "personal documents" exemption applies only to documents that reveal "intimate details of a person's life"; not determining whether employees have any expectation of privacy when using a public computer at work but holding that it is in the public interest to enable any citizen to review or criticize decisions of government officials); *Kroeplin v. Wis. Dep't of Natural Res.*, 725 N.W.2d 286, 301 (Wis. App. 2006) ("When individuals become public employees, especially in a law enforcement capacity, they should expect closer public scrutiny, which includes the real possibility that disciplinary records may be released to the public."); *see also Cowles Publishing Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988) (holding that any privacy interests that police officers have in records that

As the Wisconsin Supreme Court stated, "law enforcement officers necessarily relinquish certain privacy and reputational rights by virtue of the amount of trust society places in them and must be subject to public scrutiny."[67]

Based on this Court's own precedent and the well-reasoned opinions of other courts, this Court should find that law enforcement officers have no reasonable expectation of privacy in records revealing their discipline for misconduct related to their work.

B. THE PUBLIC INTEREST IN ACCESS TO RECORDS OF POLICE DISCIPLINE FOR WORK-RELATED MISCONDUCT IS COMPELLING AND THUS OUTWEIGHS OFFICERS' PRIVACY INTERESTS.

This Court previously stated: "[P]ublic employees are properly subject to public scrutiny in the performance of their duties."[68] In *Jones*, this Court specifically recognized a "compelling justification for public access to documents regarding citizen complaints against police officers," in order to preserve democratic values and foster public trust in law enforcement officers.[69]

Numerous courts from around the country have reached the same conclusion. The decisions cited in the previous section all discuss the very important public interest in

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implicate their fitness to perform public duties or that involve their performance of public duties deserve only "slight" weight); *Charleston Gazette v. Smithers*, 752 S.E.2d 603, 619 (W. Va. 2013) (recognizing that police officers have some privacy interest in records regarding incidents of misconduct that occurred *off* the job – such as incidents of domestic violence – but no legitimate privacy interest in records of misconduct while acting in their official capacity).

67 *Kroeplin*, 725 N.W.2d at 302 (internal quotation marks and brackets omitted).

68 *Anchorage Daily News*, 794 P.2d at 591.

69 *Jones*, 788 P.2d at 738.

access to information about police misconduct.

The Hawaii Supreme Court surveyed other cases and concurred in the conclusion that there is a compelling interest in access to records of police misconduct:

> These cases recognize the compelling public interest in instances of police misconduct given the importance of public oversight of law enforcement. Police officers are entrusted with the right to use force – even deadly force in some circumstances – and this right can be subject to abuse. Public oversight minimizes the possibility of abuse by ensuring that police departments and officers are held accountable for their actions.[70]

The Louisiana court, as described above, found no legitimate privacy interest on the part of officers investigated for improper activities in the workplace. In contrast, it held that the public has a strong, legitimate interest in disclosure of such information. In language broadly applicable to any misconduct by a public official, the court stressed the public interest both in knowing about misconduct by public officials and in knowing about how agencies address suspected misconduct by employees:

> One of the purposes of the Public Records Act is to insure that public business is subject to public scrutiny. The public has an interest in learning about the operations of a public agency, the work-related conduct of public employees, in gaining information to evaluate the expenditure of public funds, and in having information openly available to them so that they can be confident in the operation of their government. The public should be ensured that both the activity of public employees suspected of wrongdoing and the conduct of those public employees who investigate the suspects is open to public scrutiny. It would be an incongruous result to shield from the light of public scrutiny the workings and determinations of a process whose main purpose is to inspire public confidence.[71]

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70 *Peer News*, 376 P.3d at 22.

71 *Capital City Press*, 4 So. 3d at 821 (internal citations & quotation marks omitted); *see also Tompkins v. Freedom of Information Comm'n*, 46 A.3d 291, 299 (Conn. App. 2012) (public has a legitimate interest in records of an investigation of a police officer that implicate his job performance); *Rutland Herald*, 48 A.3d at 578 (quoting from *Capital City*

The Montana court focused specifically on the special role of law enforcement officers, as amicus urges this Court to do. In holding that the public interest in disclosure of records of wrongdoing outweighs any privacy interest of law enforcement officers, the court wrote:

> [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. The public health, safety, and welfare are closely tied to an honest police force. The conduct of our law enforcement officers is a sensitive matter so that if they engage in conduct resulting in discipline for misconduct in the line of duty, the public should know. We conclude the public's right to know in this situation represents a compelling state interest.[72]

Based on this Court's own precedent and thoughtful analyses by other courts, this Court should hold that the public has a compelling interest in access to police disciplinary records and that this public interest outweighs any privacy interest the officers have in the contents of these records. Each case must be reviewed on its own facts, but disclosure of

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Press and also noting, "The public interest in knowing what the government is doing is particularly acute in the area of law enforcement." (internal quotation marks omitted)); *Kroeplin*, 725 N.W.2d at 302 (discussing the general public interest in knowing about misconduct by government officials and how such misconduct is investigated and dealt with and adding, "The public interest in being informed both of the potential misconduct by law enforcement officers and of the extent to which such misconduct was properly investigated is particularly compelling[.]").

[72] *Bozeman Daily Chronicle*, 859 P.2d at 439, quoting *Great Falls Tribune Co., Inc. v. Cascade County Sheriff*, 775 P.2d 1267, 1269 (Mont. 1989) (ellipses and brackets omitted from the quotation); *see also Burton v. York County Sheriff's Dep't*, 594 S.E.2d 888, 895 (S.C. App. 2004) ("we find the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye"); *Cowles Publishing*, 748 P.2d at 605 (the public interest in knowing about instances of police misconduct on the job outweighs officers' privacy interest in these records).

disciplinary records rarely should be denied, and only on the extraordinary circumstances of a particular case. As discussed below, *in camera* review can ensure redaction of portions of a disciplinary record as to which legitimate expectations of privacy in sensitive personal information exist, while the remainder of the records are disclosed to effectuate the compelling public interests in openness and accountability.

C. *IN CAMERA* REVIEW WILL ENSURE THAT DISCLOSURE OCCURS IN A MANNER THAT ELIMINATES ANY UNWARRANTED INVASION OF PRIVACY.

If the party requesting documents believes the agency producing documents has withheld or redacted documents or portions of documents that should have been disclosed, *in camera* review by the superior court is the well-recognized method for ensuring that the balance of interests has been struck appropriately: Information that concerns the public has been disclosed, but redactions protect information in which individuals have a legitimate privacy interest that is not outweighed by the public's right to know about government affairs.[73]

The appropriate redactions will always be fact-specific, based on the kinds of information contained in the files where disclosure is ordered. As a general rule, appropriate redactions will include truly personal information about the officers involved,

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[73] *See Jones*, 788 P.2d at 739 ("The *in camera* inspection conducted by the trial court is the appropriate means for guaranteeing the privacy of the parties involved."); *see also Griswold v. Homer City Council*, 428 P.3d 180, 188 (Alaska 2018) (directing *in camera* review to resolve whether disclosure of documents would infringe on the attorney work-product privilege). Other states also regularly use *in camera* review to maximize disclosure while minimizing invasion of legitimate personal privacy interests. *See, e.g., Bozeman Daily Chronicle*, 859 P.2d at 442; *Burton*, 594 S.E.2d at 894-95.

such as home addresses, family members' names, social security numbers, and the like.[74] Other appropriate redactions might include names of victims and complainants.[75] Records of still-ongoing investigation also might need to be redacted in order to protect the due process rights of the officers being investigated[76]; any legitimate concern for interfering with an investigation disappears once the investigation is concluded.

Any other redactions the State might claim will need to be assessed on a case-by-case basis. But this Court can make an important general point: A claim for redactions based on an assertion that disclosure would cause harm to an individual or to the investigatory process must be based on evidence, not speculation.[77] For example, police organizations in other states have claimed that the possibility of disclosure of internal investigation files will cause police officers to refuse to cooperate with such

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[74] *See generally IAFF v. Municipality of Anchorage*, 973 P.2d 1132, 1135-36 (Alaska 1997); *Jones*, 788 P.2d at 734, 739.

[75] *See, e.g., Peer News*, 376 P.3d at 21; *Bozeman Daily Chronicle*, 859 P.2d at 441; *see also Ramsey v. City of Sand Point*, 936 P.2d 126, 135 (Alaska 1997) (holding that citizens have a reasonable expectation that their contacts with police will not be publicly disclosed simply because they signed a petition).

[76] *See, e.g., Peer News*, 376 P.3d at 12 (discussing statute that explicitly exempts disciplinary files from disclosure before an investigation is complete); *Kroeplin*, 725 N.W.2d at 296-97.

[77] *See generally Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997) ("where there are credible threats against the lives of public employees and private contractors, their expectation that the state will protect them by not disclosing their names is legitimate"); *id.* at 980 n.5 (noting that the party requesting information may contest the existence and credibility of threats claimed as a justification for non-disclosure, and, "[i]f so, it may be that the employing agency will bear a significant burden to show that the threats are both real and credible" – but not determining the precise burden of proof).

investigations.[78] This Court should not authorize records to be withheld based on generalizations and fears about the consequences of disclosure. To be sustained, objections should have to be based on solid evidence establishing that the harms from disclosure outweigh the compelling public interest in release of the information.[79]

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[78] *See, e.g., Capital City Press*, 4 So. 3d at 821.

[79] *See, e.g., Basey v. State, Dep't of Public Safety*, 408 P.3d 1173, 1180 (Alaska 2017) (rejecting claim under the law enforcement exemption where the state made no showing that disclosure reasonably could be expected to interfere with law enforcement proceedings); *Kroeplin*, 725 N.W.2d at 301 (rejecting as an insufficient basis for withholding documents a broad assertion about the impact disclosure of disciplinary records could have on frank discussions between supervisors and employees as part of the disciplinary process).

CONCLUSION

This Court should hold that police officers' disciplinary records are not encompassed within the definition of "personnel records" in AS 39.25.080(a). Applying the standard balancing test this Court uses to evaluate claims that privacy interests outweigh the public interest in disclosure of documents, this Court should hold that law enforcement officers have no legitimate expectation of privacy in records that disclose their work-related misconduct and discipline, and that the public has a compelling interest in knowing about the actions of law enforcement officers and holding them accountable.

Respectfully submitted, this 31 day of May, 2019.

Susan Orlansky [8106042]
ACLU cooperating attorney

Stephen Koteff [9407070]
Joshua Decker [1201001]
ACLU of Alaska Foundation