



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNEILL

Department of Transportation and
Public Facilities

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November 19, 2014

Stephanie A. Kesler
President, Government Hill Community Council
1057 West Fireweed Lane, Suite 100
Anchorage, AK 99503

Re: Appeal of denial of public records request

Dear Ms. Kesler:

I am responding to your October 7, 2014, appeal of the denial of your June 11 and August 20, 2014, public records requests. As I explain below, I am affirming the denial of those requests.

The Records Requests and Denials

On behalf of the Government Hill Community Council you requested the following records from the Knik Arm Bridge and Toll Authority on June 11:

1. A Cardno/Agnew::Beck report on projections of populations, households, and jobs by traffic analysis zones or neighborhoods for 2015 through 2040, including revisions to the 2012 baseline data for Anchorage and the Matanuska-Susitna Valley;
2. a CDM Smith traffic and toll revenue study based on the Cardno/Agnew::Beck report;
3. five-year projected traffic numbers for the Knik Arm Crossing and the Glenn Highway at the Old Glenn Highway or Eklutna Flats;
4. maps of the traffic analysis zone boundaries;
5. if those boundaries are different from the traffic analysis zone boundaries of the Anchorage Metropolitan Area Transportation Solutions or the Matanuska-Susitna Borough's Parks Highway Bypass projects, the reasoning behind the differences; and
6. traffic analysis zone data for population, households, employment, traffic counts, and revenue per traffic analysis zone area in an Excel format for the years 2015, 2020, 2025, 2030, 2035, and 2040, or "the five-year projected numbers produced by the contracts."

In a June 20 response, the Authority's executive director, Judy Dougherty, provided a map of the traffic analysis zones being used and explained that those zone boundaries were adopted from the

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modeling of the Anchorage Metropolitan Area Transportation Solutions and the Matanuska-Susitna Borough. That response seemed to satisfy parts 4 and 5 of your request. But Ms. Dougherty denied the remainder of your request because the documents were “under development” by consultants and did not then exist. Ms. Dougherty explained that the Cardno/Agnew::Beck study was incomplete, so the CDM Smith study was also incomplete. Ms. Dougherty advised you that both studies would be available once they were complete. She also explained that, because those studies were incomplete, the other information you requested (in parts 3 and 6 of your request) did not yet exist.

You then modified or clarified your request in an August 20 letter to Ms. Dougherty. You explained that you did not request “final” documents but wanted the latest work products from Cardno/Agnew::Beck and CDM Smith, including drafts, studies, and other items constituting key components of population projections or traffic and revenue reports.

Central Region Director Robert Campbell denied that request on September 4 on two grounds. First, he concluded that the deliberative process privilege applies to the requested records because they were “directly solicited on behalf of the State, are clearly pre-decisional, and form an important part of the State’s deliberative process with respect to the Knik Arm Crossing project.” He decided that the State’s interest in maintaining confidentiality of those records outweighs the public interest in their disclosure because “none of the work-product provided to date by Cardno or CDM Smith provides information that might be useful to the public—and in fact, disclosure would be misleading.”

Second, he concluded that a “balancing of interests” analysis also protects the requested records from disclosure. He explained that “Cardno/Agnew::Beck’s and CDM Smith’s work-product is incomplete and in many instances place-holder figures are inserted that are certain to change, making all of the documents generated to date misleading.” He decided that “at least until the reports are completed, the interest of the State in maintaining the confidentiality of the documents outweighs the interests of the public in disclosure.”

Your Appeal

You appealed that denial on October 7, asking that I direct Mr. Campbell to release the requested records. You contend that Mr. Campbell misinterpreted the scope of the deliberative process privilege. You explain that the privilege “applies only when public disclosure would deter the open exchange of opinions and recommendations between government officials” and “only to records that reflect a ‘give-and-take’ of the decision-making process and that contain opinions, recommendations, or advice about agency policies.” You note that Mr. Campbell did not claim that the requested records “contain opinions, recommendations or advice about agency policies” or that “disclosure of the data would deter the open exchange of opinions and recommendations between government officials.”

You also contend that “the information requested consists solely of factual *data*” and that “[t]his type of purely factual material is *not* deliberative as that term is defined by our supreme court.” You acknowledge that “[p]urely factual material can be protected by the deliberative process privilege if the manner of selecting or presenting those facts would reveal deliberative process, or if the facts are inextricably intertwined with policy-making process.” But you assert that “Mr. Campbell’s letter makes no mention of these situations and thus he cannot support his denial on these grounds.”

You argue that, even if the deliberative process privilege applies, the records should be disclosed because your organization's interest in disclosure outweighs the interest in confidentiality. You describe your organization as "a key stakeholder" in the process and explain that the organization has actively followed the Knik Arm Crossing project for more than a decade. You state that the project holds "broad public and legislative interest" and that "in particular the population and toll revenue data have received intense scrutiny both in the press and in the legislature." You contend that Mr. Campbell "cited no particular burden or interference that would weigh against [your organization's] right to know" and that "citizens' interest in government transparency far outweighs [the State's] incidental interest to be free from interference."

You characterize Mr. Campbell's reference to the "balancing of interests" analysis as "confusing" because the Alaska Supreme Court decision he cited in support of that analysis "concerned constitutionally protected privacy rights of state employees, but no such constitutionally protected interests are at stake here."

You also question how the requested records could be considered incomplete, as Mr. Campbell described them, given that the State already paid substantial amounts to both Cardno/Agnew::Beck and CDM Smith. And you assert that Mr. Campbell's concern about "'place-holder figures . . . that are certain to change' certainly cannot apply to the population and trip estimates, which are fairly straightforward numbers." You state that "[t]he idea that those figures are 'certain to change' is concerning, since the underlying factual data should not be 'changed' to support a desired outcome."

Applicable Law

Alaska law states that "[u]nless specifically provided otherwise, the public records of all public agencies" are open to inspection and copying.¹ The statutes define "public records" to include, among other things, drafts and documents "developed or received by a public agency, or by a private contractor for a public agency."² So even a draft document received from a state contractor is subject to the Alaska Public Records Act.

The Alaska Supreme Court has described the right of citizen access to public records as a "fundamental right."³ And to promote the legislative policy of broad access to public records, the court narrowly construes exceptions to the disclosure requirement.⁴

A specific statutory exception to the disclosure requirement exists for "records required to be kept confidential by a federal law or regulation or by state law."⁵ That exception covers records protected by the deliberative process privilege.⁶

¹ AS 40.25.110(a).

² AS 40.25.220(3).

³ *Fuller v. City of Homer*, 75 P.3d 1059, 1062 (Alaska 2003).

⁴ *Id.*

⁵ AS 40.25.120(a)(4).

⁶ *Fuller*, 75 P.3d at 1062-63.

Deliberative process privilege. The deliberative process privilege exists “to protect the executive’s decisionmaking process, its consultative functions, and the quality of its decisions.”⁷ The privilege’s purpose is to allow government officials to openly exchange opinions and recommendations without fear that their tentative opinions or proposals will become public.⁸

The privilege applies to communications that are both predecisional and deliberative.”⁹ A communication is predecisional if it occurs before the deliberative process is complete and a decision is made.¹⁰ And a communication is deliberative if it reflects “a ‘give-and-take’ of the decisionmaking process and contains opinions, recommendations, or advice about agency policies.”¹¹

As you noted, “[p]urely factual material is not protected unless the selection process or presentation would reveal the decisionmaking process, or if the facts are inextricably intertwined with that process.”¹² Also, while the privilege does not cover postdecisional communications, the privilege continues to apply to predecisional communications after a decision has been made.¹³

To qualify for the privilege a communication must be either an internal communication or one directly solicited by a government official.¹⁴ “Outside consultants’ reports have been held to be privileged if the agency uses them in its decisionmaking process.”¹⁵ For example, the Alaska Supreme Court held that the privilege applied to a draft media plan that the Office of the Governor solicited from a lobbying firm.¹⁶

If a communication is both predecisional and deliberative, the privilege presumptively applies.¹⁷ To overcome that presumptive privilege the party seeking disclosure must demonstrate that “the public’s interest in disclosure outweighs the government’s interest in shielding the information.”¹⁸ In balancing those interests, courts must consider “the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference.”¹⁹ But “[g]enerally, it is difficult for a requestor to override a presumptive privilege.”²⁰ Relevant factors to consider include “the degree of

⁷ *Gwich’in Steering Comm. v. State, Office of the Governor*, 10 P.3d 572, 578 (Alaska 2000).

⁸ *Id.* at 578, 583.

⁹ *Id.* at 579.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 579, 583.

¹⁴ *Id.* at 581.

¹⁵ *Id.*

¹⁶ *Id.* at 582.

¹⁷ *Id.* at 579.

¹⁸ *Id.*

¹⁹ *Id.* (quoting *Capital Info. Group v. State, Office of the Governor*, 923 P.2d 29, 37 (Alaska 1996)) (internal quotation marks omitted).

²⁰ *Id.* at 584.

confidentiality and sensitivity of the communication; the time elapsed after deliberation concluded and after communications were made; and whether deliberation is ongoing.”²¹

In a case concerning staff documents that a city manager used in preparing an annexation petition, the Alaska Supreme Court concluded that the interest in disclosure outweighed the interest in keeping the documents confidential.²² The court described the documents as “basically factual, dealing largely with issues of costs and the city’s ability to extend its services.”²³ The court also noted that the documents included “important annexation cost information not readily available elsewhere” but did not include any “tactical discussion that could be considered as ‘suggesting a strategy’ for presenting the case” in favor of annexation.²⁴

“*Balancing of interests*” analysis. In addition to the deliberative process privilege, Mr. Campbell cited the “balancing of interests” analysis as a basis for denying your requests. Courts may apply that analysis when no express exception to the disclosure requirement applies.²⁵ The Alaska Supreme Court has applied that analysis when governments asserted an interest in the confidentiality of documents that do not qualify for the deliberative process privilege.²⁶ But the balancing that courts do under the “balancing of interests” analysis is much the same as the balancing that courts undertake when the privilege applies.²⁷ The difference is that, when the presumptive deliberative process privilege applies, the presumption favors nondisclosure; without that presumptive privilege, disclosure is favored, “with doubtful cases being resolved by permitting public inspection.”²⁸

As you noted, the court has applied the “balancing of interests” analysis in cases involving persons’ privacy rights, such as the privacy rights of state employees and contractors directly involved in a wolf control program, the privacy rights of a head librarian, and the privacy rights of applicants for city manager and police chief positions.²⁹ Because of credible threats against those involved in the wolf control program, the court concluded that the balance of interests favored keeping those employees’ and contractors’ names confidential.³⁰ But the court concluded that the balance of interests favored disclosure of the head librarian’s performance evaluation report because of the importance to the public of the head librarian’s duties and the absence of any personal, intimate, or otherwise private information in that report.³¹ And because of the significance of positions such as city manager and police chief, the court concluded that the

²¹ *Id.*

²² *Fuller*, 75 P.3d at 1065.

²³ *Id.*

²⁴ *Id.*

²⁵ *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 590 (Alaska 1990).

²⁶ *Capital Info. Group*, 923 P.2d at 36-37.

²⁷ *Id.* at 37.

²⁸ *Id.*

²⁹ *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980-81 (Alaska 1997); *Municipality of Anchorage*, 794 P.2d at 589-91; *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1323-24 (Alaska 1982).

³⁰ *Alaska Wildlife Alliance*, 948 P.2d at 981.

³¹ *Municipality of Anchorage*, 794 P.2d at 591.

balance of interests favored disclosing the applications for those positions (except the applications of applicants who withdrew after learning their applications would become public).³²

But the Department of Law has applied a “balancing of interests” analysis even when persons’ privacy rights were not involved. For example, the department concluded that the Department of Fish & Game was not obligated to disclose the radio frequencies of telemetry transmitters used to track wildlife because having that information would allow hunters to easily locate collared animals.³³ The department determined that disclosing the frequencies would therefore harm the public welfare.³⁴ Similarly, in deciding an appeal from the denial of a public records request, the department declined to disclose a list of its lawyers’ direct-line phone numbers because disclosure would impair the department’s efficiency.³⁵ The department decided that the interest in efficiency outweighed the interest in disclosure of the direct-line numbers because members of the public could still reach the lawyers through the department’s main phone numbers.³⁶

Determination

Based on the applicable law, I am affirming the decision to deny your requests.

Deliberative process privilege. I conclude that the deliberative process privilege applies to the records you requested.³⁷ I believe there is no dispute that state officials solicited the contractors’ reports. I find that the requested records are both predecisional and deliberative. I find that they reflect a “give-and-take” of the decisionmaking process and include advice about agency policies. I also find that, to the extent they constitute factual material, the facts are inextricably intertwined with the decisionmaking process. In addition, I find that the selection and presentation of those facts would reveal the decisionmaking process.

As you point out, Mr. Campbell did not expressly state that the requested records “contain opinions, recommendations or advice about agency policies” or that “disclosure of the data would deter the open exchange of opinions and recommendations between government officials.” But I believe that was implicit in his decision that the privilege applies. Similarly, you point out that Mr. Campbell did not expressly state, with respect to factual material you requested, that “the manner of selecting or presenting those facts would reveal deliberative process” or that “the facts are inextricably intertwined with policy-making process.” Again, I believe that was implicit in his decision.

I also conclude that the interest in preserving the records’ confidentiality outweighs the interest in disclosure because the final versions of the reports you requested will become public. Ms. Dougherty advised me that the final reports are scheduled to be presented at a public meeting on December 8. Unlike the staff reports concerning annexation that the court addressed in *Fuller*,

³² *City of Kenai*, 642 P.2d at 1323-24.

³³ 1985 Inf. Op. Att’y Gen. (Oct. 21; 366-202-84), 1985 WL 70175.

³⁴ *Id.*

³⁵ 1997 Inf. Op. Att’y Gen. 175 (July 24; 663-97-0433), 1997 WL 1089549.

³⁶ *Id.*

³⁷ See AS 40.25.120(a)(4); *Fuller*, 75 P.3d at 1062-63; *Gwich’in Steering Comm.*, 10 P.3d at 578-79.

the records you seek are in the midst of the drafting process and are part of an ongoing deliberative process. I believe these factors substantially affect the balance between the interest in disclosure and the interest in preserving confidentiality.

“Balancing of interests” analysis. I conclude that the “balancing of interests” analysis also favors denial of your requests.³⁸ Again, because the records you requested are still in the drafting process, they are part of ongoing deliberations, and the final versions will become public on or before December 8, I conclude that the interest in preserving the records’ confidentiality outweighs the interest in disclosure.

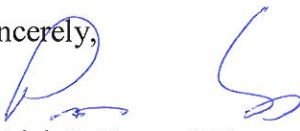
Records’ nonexistence. One basis for denial that Ms. Dougherty cited but Mr. Campbell did not is that the records you requested did not exist when you requested them. Of course, records’ nonexistence is a proper basis for denying a request for those records.³⁹

To assist me with this appeal Ms. Dougherty provided electronic versions of ten documents identified as being responsive to your requests. It appears that at least some of the documents she provided did not exist when you made your initial request on June 11, when you modified or clarified your request on August 20, or when Mr. Campbell denied your request on September 4: a draft Cardno/Agnew::Beck report is dated September 17, 2014; a draft CDM Smith report is dated September 15, 2014; and an RSG survey report, which apparently supports the CDM Smith report, is dated August 29, 2014, as are three appendices to the RSG report. Four Excel spreadsheets that Ms. Dougherty provided are undated, but Ms. Dougherty indicated that the contractor submitted the Excel files on July 30. She also stated that no earlier versions of these ten records exist, although she said the Authority “had seen various chapters . . . as the contractors developed them.”

It appears, then, that the Excel files—and possibly some draft chapters of reports—are the only records within the scope of your requests that existed when you made your requests. Although you note that the contractors already received substantial payments for their work, I don’t agree that their receipt of payments necessarily means that they had provided work product to the State. I conclude that, for records that did not exist when you made your requests, their nonexistence is also a basis for denying your requests in part.

This determination is the final agency decision. As Alaska Statute 40.25.124 provides, you may obtain judicial review of the denial of your records requests by appealing to the superior court. If you decide to appeal to superior court, the appeal is due within thirty days of the mailing or distribution of this determination.

Sincerely,



Patrick J. Kemp, P.E.
Commissioner

³⁸ See *Capital Info. Group*, 923 P.2d at 36-37; *Alaska Wildlife Alliance*, 948 P.2d at 980-81 (Alaska 1997); *Municipality of Anchorage*, 794 P.2d at 589-91; *City of Kenai*, 642 P.2d at 1323-24; 1985 Inf. Op. Att’y Gen. (Oct. 21; 366-202-84), 1985 WL 70175; 1997 Inf. Op. Att’y Gen. 175 (July 24; 663-97-0433), 1997 WL 1089549.

³⁹ See 2 AAC 96.335(a)(1)-(3).