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Governor



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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

September 26, 2014

Ms. Alexandra Gutierrez
Alaska Public Media
3877 University Drive
Anchorage, AK 99508

Dear Ms. Gutierrez,

This letter is in response to your request for emails related to alleged misconduct in the Alaska National Guard. I apologize for the delay in responding. Our office is focused on processing a number of extensive records requests received prior to yours. To be fair to requestors, we try to process requests in the order received.

Understandably, there is a significant level of public and media interest in the issue of misconduct in the Alaska National Guard. However, an active and broad assessment has been conducted and completed by the National Guard Bureau (NGB) which resulted in a detailed report. The full NGB report and the Command Climate Summary has been released to the public and is available through the Governor's website at http://gov.alaska.gov/parnell_media/ak-roa-combined.pdf.

The integrity and independence of the broad investigation and the ability of senior officials in the Executive Branch to discuss and deliberate such issues warrants withholding the emails. A primary reason for withholding the emails is protecting the right to privacy of victims and alleged victims. Making identities and circumstances of a victim public can cause additional harm. The harm victims can feel from disclosure has been documented in recent news stories, one of which involved an individual in the Alaska National Guard. Another news story involved the family of murder victims who felt so violated by a political ad and news coverage, they felt forced to leave the state. As you know, media outlets in Alaska usually withhold information related to alleged victims of sexual assault or misconduct as a matter of policy or choice.

Specific to your request for public records, exemptions from the Public Records Act (PRA) include AS 40.25.125(a)(4). That statute says: "records required to be kept confidential by a federal law or regulation or by state law" are exempt from disclosure. The definition of "state law" includes the Alaska Constitution. Article 1, Section 22, of the Alaska Constitution guarantees all Alaskans a right to privacy. That right is broader in scope than that guaranteed in the federal constitution. *Woods and Rhode, Inc., v. State*, 565 P.2d 138 (Alaska 1977).

Under the Alaska Constitution, parties to misconduct allegations have a constitutional privacy interest that exempts information from disclosure. *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976 (Alaska 1997). Federal cases involving the Freedom of Information Act (FOIA) are instructive. *Dunkelberger v. Department of Justice*, 906 F.2d 779 (D.C. Cir. 1990); *Carter v. Department of Commerce*, 830 F.2d 388, 390-91 (D.C. Cir. 1987). The “mere mention of an individual’s name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.” *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990). An individual’s privacy interest extends to information concerning assessment of an individual’s behavior, competence, and personal relationships where disclosure of that material could reasonably lead to embarrassment, harm, or retaliation. *McCutchen v. U.S. Dept. Health and Human Services*, 30 F.3d 183, 189 (D.C. Cir. 1994).

Alternatively, other provisions of State law protect information and communications by a victim or victim counselor from disclosure. AS 18.66.200. The chaplains, in this instance, were serving as a victim counselor. The fact that the victim counselors were also chaplains means another privilege from disclosure applies. Alaska Rules of Evidence, Rule 506, provides a specific privilege from disclosure for information and statements made to clergymen by a victim.

All three of these grounds, the constitutional right to privacy, AS 18.66.200, and the statements to clergymen privilege have the policy goal of protecting personal and confidential communications. This policy is important. Without it, victims would be deterred from coming forward and seeking help.

In addition, the Executive Branch needs to be able to discuss and investigate claims of misconduct. As mentioned above, AS 40.25.120(a)(4) provides an exception to disclosure when required by federal or State law. “State law” includes the deliberative and executive privileges. *Gwich’in Steering Committee v. State*, 10 P.3d 572, 578 (Alaska 2000). (“Public officials may assert this privilege and withhold documents when public disclosure would deter the open exchange of opinions and recommendations between government officials. The privilege is intended to protect the executive’s decision-making process, its consultative functions, and the quality of its decisions.”)

Invoking the privilege protects the public’s “vital interest . . . in the effectiveness of the decision-making and investigatory duties of the executive.” *Nero v. Hyland*, 386 A.2d 846 (1978). (Protecting from disclosure information relating to background investigations requested by the Governor.)

When claiming the privilege, the level of need by the public for the information should be considered. *Gwich’in* at 578. In this instance, a significant amount of information on the subject of alleged misconduct in the National Guard has already been made public through state and national news stories, and the NGB report itself has been made public. *See*, Enclosures. Information made available to the public and reported by the press, as recently as today, includes remedial actions taken in response to the NGB report. *Alaska Dispatch News*, Friday, September 26, 2014.

Alaska law provides additional reasons to deny your request. AS 39.25.080 provides that “personnel” or other similar records are not open to public inspection. (“[P]ersonnel records . . . examinations and other assessment materials are confidential and are not open to public inspections . . .”) State and federal law take a broad view of the type of records that qualify as a “personnel” record. *Alaska Attorney General Opinion*, November 25, 1994. (AS 39.25.080 not only “protects a person’s personnel

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file, but is broader and makes all personnel records confidential and not subject to disclosure.”) In addition, *see*, 5 U.S.C. 552(b)(6) which permits withholding of “personnel” records and “similar files.” A similar file is an employment record that applies to a particular individual. *Washington Post Co.*, 456 U.S. 595, 599-602 (1982). A “personnel record” includes “personal opinions and comments about job performance” by other employees and evaluation reports. *Smith v. Department of Labor*, 798 F.Supp.2d 274, 284 (D.Ct.D.C. 2011); *Ripskis v. Department of Housing and Urban Development*, 746 F.2d 1, 3-4 (D.C. Cir. 1984).

Similarly, AS 40.25.120(6) provides a broad exemption for information compiled for law enforcement purposes. The term “law enforcement purposes” is broadly construed to include records and documents generated in a civil personnel investigation of alleged misconduct by employees or particular identified officials. *Ford v. West*, 1998 WL 317561 (10th Cir. 1998) (Finding investigation into alleged racial harassment qualified as a law enforcement investigation for FOIA purposes); *Edmonds v. FBI*, 272 F.Supp. 2d, 35 (D.D.C. 2003) (Holding personnel investigation of alleged serious problems, misconduct, security lapses, and a breakdown in quality of work was a “law enforcement” investigation for FOIA purposes); *Fine v. US Dept. of Energy*, 823 F.Supp. 888 (D.N.M. 1993) (Agency met “law enforcement” purpose in FOIA case where specific allegations of misconduct were made against an employee); *Nagel v. HEW*, 725 F.2d 1438 (D.C. Cir. 1984) (Agency’s investigation into whether employee was performing job adequately was an authorized “law enforcement” activity); *Stearn v. Federal Bureau of Investigation*, 737 F.2d 84, 89 (D.C. Cir. 1984). “All records or information” compiled for law enforcement purposes is covered. *Abdelfattah v. U.S. Dept. of Homeland Sec.*, 488 F.3d 178, 184 (Third Cir. 2007). (“[T]he protection is now available to all ‘records or information’ compiled for law enforcement purposes.”)

For the reasons above, your request is denied. I have been delegated the authority to deny Alaska Public Records Act requests for the Office of the Governor. Under 2 AAC 96.335(a)(4), I am required by statute and regulation to inform you that you have the right to file an administrative appeal. You may administratively appeal a denial by complying with 2 AAC 96.340. Also, you may seek immediate judicial review of this denial by seeking an injunction from the Superior Court under AS 40.25.125. Choosing not to pursue an injunction in Superior Court will have no adverse effect on your rights in the administrative appeal. An administrative appeal, from the denial of a request for public records, requires no appeal bond. Copies of 2 AAC 96.335 – 2 AAC 96.350 are enclosed.

Sincerely,



Randal Ruaro
Policy Director and Special Counsel

Enclosures

cc: Michael A. Nizich, Chief of Staff, Office of the Governor