STATE OF TENNESSEE
COMPTROLLER OF THE TREASURY
OFFICE OF OPEN RECORDS COUNSEL
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Justin P. Wilson
Comptroller

February 8, 2011

Mr. Lance Baker
City Attorney, City of Clarksville
One Public Square
Clarksville, Tennessee 37040

You have requested an opinion from this office that addresses the following issue:

> If a city employee uses his/her own personal phone to conduct city business and the city pays that employee a set amount each month as a stipend to defray the cost of using the phone for city business, and the phone is a smartphone that can send and receive emails, are those emails sent and received subject to the Tennessee Public Records Act if the emails relate to city business?

I. Analysis

This office has been unable to find any case law in any jurisdiction that directly addresses the issue that you present.[1] However, it is the opinion of this office that the Tennessee Court of Appeals' discussion in *Brennan v. Giles County Board of Education* provides some insight on this issue. In *Brennan*, the court was asked to decide if the trial court erred when it reviewed certain requested records *in camera* to determine whether or not the records were "public records." *Brennan v. Giles County Board of Education*, 2005 WL 1996625 at *2 (Tenn. Ct. App. August 18, 2005). The appellant made a public records request to the Giles County Board of Education for "digital records of Internet activity, including emails sent and received, web sites visited and transmissions sent and received and the identity of any and all Internet Service Providers." *Id.* at * 1. After reviewing the records *in camera*, the trial court determined that the records did not fall within the statutory definition of "public records" found in Tenn. Code Ann. Section 10-7-301(6). *Id.* On appeal, the appellant argued that "by virtue of the fact that the requested documents were created during school hours and/or by virtue of the fact that the requested were created and/or stored on school owned computer equipment, these facts, per se, make them public records under the Act." *Id.* at *2. In response to this argument the court said the following:

> . . . the legislature placed some limitation on those documents that may be accessed under the Public Records Act. By the plain language of the definition, this limitation involves the purpose behind the creation of the document (i.e. whether it was "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency"). However, the limitation does not, as the Appellant argues, rest upon an inquiry into the time (i.e. whether during business hours) or upon the place where the document was produced and/or stored (i.e. on school owned computers).

Id. at *3. The court concluded by affirming the trial court's decision. *Id.*

[1] While I could find no case law that addresses this issue, I was able to find an Alaska Attorney General's opinion that addresses this issue. I have attached the opinion as Exhibit A.

In addition to looking at the the court's analysis in *Brennan*, this office examined the definition of "public record" as part of the analysis for this opinion. The definition that the court in *Brennan* relied upon to determine that the requested records were not "public records" is the same definition that is now codified in Tenn. Code Ann. Section 10-7-503. In 2008, the General Assembly amended what is known as the Tennessee Public Records Act (hereinafter "TPRA") and for the first time established a statutory definition of what constitutes a "public record" for purposes of the TPRA. When defining "public record," the General Assembly made no mention of where, when or on whose equipment a record has to be made or received in order for it to be accessible to the public. Instead, the General Assembly focused on the content of the record and the purpose for which it was made or received. Tenn. Code Ann. Section 10-7-503(a) now reads:

> As used in this part and title 8, chapter 4, part 6, "public record or records" or "state record or records" means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.

Based upon the analysis of the court in *Brennan*, how the General Assembly chose to define "public record" for purposes of the TPRA, and the fact that in Tenn. Code Ann. Section 10-7-505, the General Assembly instructed courts to construe the Act broadly "so as to give the fullest possible public access to public records", it is the opinion of this office that if a city employee uses his/her own personal phone to conduct city business and the city pays that employee a set amount each month as a stipend to defray the cost of using the phone for city business, and the phone is a smartphone that can send and receive emails, any email sent or received on that phone that is related to Clarksville City business is a public record.

Please feel free to call me at (615) 401-7891 if you have any further questions.

Elisha D. Hodge
Open Records Counsel

SARAH PALIN, GOVERNOR

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August 21, 2008

Annette Kreitzer
Commissioner
Department of Administration
P.O. Box 110200
Juneau, AK 99811-0200

Re: Personal Use of Electronic Equipment
AGO File No. 661-08-0388

Dear Commissioner Kreitzer:

You requested an attorney general opinion addressing the applicability of the Executive Branch Ethics Act, AS 39.52., to the personal use of a state-owned cell phone, personal digital assistant, such as a BlackBerry (PDA), laptop computer, and other state-owned equipment. We conclude that the questions posed involve matters of general applicability and therefore, the standards should be addressed by promulgation of regulations by the Department of Law. Our advice regarding the considerations leading to adoption of particular standards is addressed in Part I of this opinion.[1]

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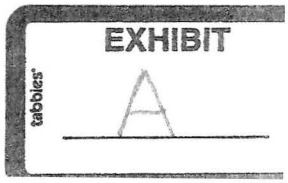
[1] Part I of this opinion principally addresses use of cell phones and PDAs, which are both issued subject to a usage plan. It also addresses other equipment used away from the regular workplace, such as satellite phones and portable computers, but is not applicable to office equipment, such as copiers. This opinion also does not apply to the use of state-owned vehicles, which is regulated by AS 44.68.010-44.68.040, the Department of Transportation and Public Facilities Policy and Procedure No. 11.04.010 and the Department of Administration policy addressing the personal use of state vehicles, dated January 29, 2007. An acceptable personal use under the state's vehicle policies is an insignificant use for purposes of the Ethics Act. Designated ethics supervisors must address other circumstances on a case-by-case basis.



You also asked that we address whether a public officer who elects to receive an allowance to purchase a personal cell phone or PDA to be used in part for state business, waives confidentiality for personal emails and call records. We conclude that personal emails and call records are not public records and public disclosure of such personal information would likely run afoul of the individual's right to privacy under the Alaska Constitution. However, because business related calls and business related email messages would also be generated through these personal devices, it is possible that a state official or a court could be required to review all call records and messages in order to locate the calls and email messages that concern state business and thus are public records. This issue is addressed in Part II of this opinion.

I. PERSONAL USE OF STATE-OWNED ELECTRONIC EQUIPMENT

You asked that we answer the following questions addressing the applicability of the Ethics Act to the personal use of state-owned equipment: What constitutes de minimis or insignificant use?[2] Can we establish a bright line for determining when usage is no longer insignificant? What are the criteria for determining whether insignificant use is permissible? What should a work supervisor do upon determining that the Ethics Act has been violated? What is a work supervisor's authority to address an Ethics Act violation? You also asked that we discuss the remedies and penalties available for an Ethics Act violation for misuse of state-owned equipment. Our advice and answers to your questions are set out below.

A. Applicable Ethics Act Provisions and Regulations

The Ethics Act contains several provisions applicable to the personal use of state equipment by public officers.[3]

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[2] Your request used the phrase "de minimis or insignificant." The term "de minimis" has occasionally been used in ethics opinions to describe a minor use that does not violate the Ethics Act. The term "insignificant" as used in the Ethics Act and applicable regulations describes interests or circumstances that do not violate the Ethics Act or that result in no substantial impropriety, even if there was a violation. We have not used the term "de minimis" in this opinion to avoid confusion with the use of that term to describe a nontaxable fringe benefit under the Internal Revenue Service rules.

[3] We use the term "public officer" as defined in the Ethics Act to include both state employees and the members of state boards and commissions. AS 39.52.960(21). The prohibitions and standards discussed in this opinion apply equally to both.

1. Prohibition on Use for Personal Benefit or to Benefit Another

Alaska Statute 39.52.120(a) states that a "public officer may not use, or attempt to use, an official position for personal gain and may not intentionally secure or grant unwarranted benefits or treatment for any person." "Gain" includes "actual or anticipated gain, benefit, profit, or compensation."[4] Thus, as a general rule, a public officer may not use state equipment for personal benefit, regardless of whether there is financial gain.[5] The officer also may not use state equipment to intentionally give an unwarranted benefit to any person.[6]

2. Prohibition on Use to Benefit Personal or Financial Interests

Alaska Statute 39.52.120(b)(3) states that a public officer may not "use state time, property, equipment, or other facilities to benefit personal or financial interests." The terms "personal interest" and "financial interest" are specially defined in the Ethics Act. "Personal interest" means "an interest held or involvement by a public officer, or the officer's immediate family member or parent, including membership, in any organization, whether fraternal, nonprofit, for profit, charitable, or political, from which,

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[4] AS 39.52.960(10). "Personal gain" has been further defined to mean "a benefit to a person's or immediate family member's personal interest or financial interest." 9 AAC 52.990(b)(6). We construe this regulation as explaining, not limiting, the definition of "gain" and the scope of the language in AS 39.52.120(a). There is a presumption that every word of a statute was intended for some useful purpose, that some effect is to be given to each word and that no superfluous words were used. *Alaska Transp. Comm'n v. Airpac, Inc.*, 685 P.2d 1248 (Alaska 1984). In addition, to be valid, a regulation must be consistent with and reasonably necessary to implement the statute authorizing its adoption and not conflict with other statutes. *O'Callaghan v. Rue,* 996 P.2d 88 (Alaska 2000). Thus, all words in the statutory definition of "gain" must be acknowledged and "gain" is not limited to situations involving "personal interests" or "financial interests," as defined in the Ethics Act.

[5] "Benefit" means "anything that is to a person's advantage or self-interest, or from which a person profits, regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan or loan guarantee, promise to pay, grant, contract, lease, money, goods, service, privilege, exemption, patronage, advantage, advancement, or anything of value." AS 39.52.960(3).

[6] "Person" includes a natural person, a business, an organization and a governmental entity. AS 39.52.960(17); 9 AAC 52.990(b)(5).

or as a result of which, a person or organization receives a benefit."[7] "Financial interest" means –

> (A) an interest held by a public officer or an immediate family member, which includes an involvement or ownership of an interest in a business, including a property ownership, or a professional or private relationship, that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit;
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> (B) holding a position in a business, such as an officer, director, trustee, partner, employee, or the like, or holding a position of management.[8]

A public officer violates the Ethics Act by using state equipment to benefit an organization with which the officer or an immediate family member has a relationship or to benefit an interest held by the officer or an immediate family member, including an interest in a business or other professional or private relationship, that is a source of income or financial benefit.

A related regulation, 9 AAC 52.050, provides a limited exception:

> A public officer who uses state time, property, equipment, or other facilities to benefit the officer's personal or financial interest is not in violation of AS 39.52.120(b)(3) if the officer's designated supervisor determines that the use is insignificant, the attorney general has not issued a general opinion against the use, and the attorney general does not advise the officer against the use.

Therefore, if use to benefit a personal or financial interest occurs, the designated ethics supervisor may review the circumstances and determine that the public officer has not violated the Ethics Act, if the ethics supervisor concludes that the use was "insignificant" and the attorney general has not either generally or specifically advised against the use.

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7 AS 39.52.960(19). The term "benefit" is broadly defined. *See supra* note 5.

8 AS 39.52.960(9).

3. Prohibition on Use of State Equipment for Partisan Political Purposes

Alaska Statute 39.52.120(b)(6) states that a public officer may not "use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for partisan political purposes."[9] As stated in the subsection, the phrase "for partisan political purposes" means "having the intent to differentially benefit or harm a (i) candidate or potential candidate for elective office; or (ii) political party or group." It does not include "having the intent to benefit the public interest at large through the normal performance of duties."

We interpret this provision stringently to prohibit any use of state equipment for political activity. Also, under the State of Alaska's *Personal Use of State Office Technologies Policy (SP-017)* it is unacceptable to use state equipment "for fundraising, political campaign activities, or public relations activities not specifically related to state government activities."

A state officer may reply to a communication relating to a partisan political activity only to advise the sender that use of state equipment for such purposes is prohibited and to provide an alternate place of contact, if courtesy would require it, without violating the Ethics Act. Any other activity related to partisan political activity is prohibited. The considerations discussed in the next section of this opinion do not create an exception when the use involved is related to partisan political purposes.

B. Standards for Determining Permissible Insignificant Personal Use[10]

The Ethics Act recognizes that public officers come to state service with private and independent outside interests. The Act acknowledges that public officers may pursue independent interests so long as the activity does not interfere with the full and faithful discharge of their public duties and responsibilities. It also directs that we distinguish between minor and inconsequential conflicts that are unavoidable and those that are

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[9] The subsection states exceptions for use of the governor's residence and so long as there is no charge to the state, use of communications equipment in the residence and some limited use of state aircraft.

[10] The term "personal use" as used in this section includes a use addressed in AS 39.52.120(a) or (b)(3) as discussed above; that is, a use for personal gain or benefit, to provide an unwarranted benefit to any person or to benefit personal interests or financial interests.

substantial and material.[11] Those judgments are ordinarily based on the particular circumstances.

The Ethics Act provides guidance for determining when conduct that might otherwise be unethical under the Act's code of conduct, results in no violation because there is no substantial impropriety. Alaska Statute 39.52.110 excuses potential violations or permits action when a conflict exists if a public officer's "personal or financial interest in the matter is insignificant, or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs," or when the "action or influence would have insignificant or conjectural effect on the matter."[12] These standards do not provide specific guidance for establishing a rule governing the personal use of cell phones or PDAs in the course of day-to-day activity. They do confirm that potential violations of the Ethics Act that may be characterized as "insignificant" are not the type of conduct that the Alaska Legislature considered "substantial and material" and to be avoided.

The Alaska Legislature amended the Ethics Act in 2007 to set standards for determining the significance of certain activities and these standards provide additional guidance for application of the Ethics Act to the use of state-owned electronic equipment. Alaska Statute 39.52.110, discussed above, was amended to provide that stock or other ownership interest in a business is presumed insignificant if its value is less than $5000.[13] Thus, the legislature set a bright line for defining an insignificant ownership interest in a business, but, by stating the rule as a presumption, it gave ethics supervisors the flexibility to address unusual circumstances.[14] The legislature also limited the use of state aircraft for partisan political purposes to use that is collateral or incidental to the normal performance of official duties and that is no more than 10 per cent of the total use of the aircraft for official state purposes on a single trip. The person using the aircraft for this purpose must reimburse the state for the proportionate share of the actual cost of the

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[11] AS 39.52.110(a).

[12] AS 39.52.110(b).

[13] AS 39.52.110(d).

[14] The legislature also amended the gift provisions to prohibit the receipt of gifts from registered lobbyists, but that bar was again stated as a presumption, providing flexibility to address circumstances where gifts are given to public officers by lobbyists for reasons unrelated to their state service. *See* AS 39.52.130(a).

use.[15] Thus, the legislature reaffirmed its original intent that the responsibilities of an officer's state position should be reconciled with the officer's independent activity and interests where possible and that the state may accommodate outside matters that are insignificant and have limited impact on state business so long as there is no cost to the state.

We propose to promulgate regulations to set standards for determining when personal use of certain state equipment is presumed not to violate the Ethics Act. At this point, we contemplate proposing regulations that reflect the standards discussed below with respect to the equipment identified. We expect that the proposed regulations would permit designated ethics supervisors to review personal use that is inconsistent with the standards and therefore presumptively violates the Ethics Act and determine on a case-by-case basis whether the personal use was unavoidable and insignificant under the circumstances.

1. Cell Phones and Personal Digital Assistants

We assume that cell phones and PDAs are issued to state officers to ensure out-of-office accessibility, during the day but particularly after hours and on weekends. PDAs may also be needed when public officers travel and require access to email. Based on information provided by the Department of Administration, use of each individual state cell phone and PDA is governed by one of several plan options under a contract with a service provider. Plans typically provide a block or allowance of minutes, such as 500 or 800 minutes, for a set monthly fee, with additional fees for minutes that exceed that amount, out-of-state long distance, roaming, text messaging or data transfer.[16]

Generally, state equipment is not a substitute for an officer's personal equipment and personal use should be collateral or incidental to the performance of official duties. Personal calls or contacts during the work day should be of short duration as reasonably necessary to tend to family and individual matters, such as child care, medical appointments or social appointments, or to address matters relating to personal or financial interests, similar to the permitted use of a desk telephone. No use of state equipment may be made for partisan political purposes, except for limited replies to incoming contacts as stated earlier in this opinion.

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15 AS 39.52.120(f).

16 The possible fees vary from plan to plan. This opinion is based on the current state of technology and contracts for cell phone and PDA use. Advances in technology or changes to plans may require modification of the standards discussed in this opinion.

Considering the legislature's intent, the standards defining conduct resulting in no substantial impropriety under the Ethics Act and input from the Department of Administration, we intend to propose regulations establishing that a public officer's personal use of cell phones and PDAs that is consistent with the following standards is presumed not to violate the Ethics Act.

- Personal use that does not exceed the greater of 30 minutes or five percent of the allowance of minutes under the applicable plan per month.

- Any personal use that results in a separate charge must be reimbursed to the state in full. Charges for minutes of use exceeding the monthly allowance of minutes under the officer's plan are presumed to have been incurred for the officer's personal benefit and must be reimbursed to the extent of the officer's personal use that month.[17]

In summary, personal use of state-issued cell phones and PDAs will be presumed insignificant if the amount of use does not exceed the greater of 30 minutes per month or five percent of the monthly minute allowance and all extra charges attributable to personal use are reimbursed.[18] Personal use of this equipment is presumed to violate the Ethics Act if the personal use exceeds the allowed usage or the officer fails to reimburse charges incurred for personal use.

2. Field or Satellite Phones

A public officer may be issued a field or satellite phone to facilitate communication regarding state business when on assignment in the field. For such phones, not covered by an individual usage plan, a state officer may make personal calls, as described above, without limitation so long as the officer reimburses the state for all costs incurred for personal calls and the personal use does not interfere with use of the phones for state business. Work supervisors should advise officers being sent to the field

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[17] One contract has a "local call only" option, charging a set fee per minute for all calls. We presume that the business use of a cell phone under this option is intended to be limited, resulting in charges less than the least monthly fee. Any personal use is subject to the same charge and must be paid by the employee, as is the case for field or satellite telephone use.

[18] These standards may be reconsidered as a result of comments on the proposed regulations. In addition these standards are not intended to address what is a de minimis fringe benefit under Internal Revenue Service regulations and may also be revised if necessary to address IRS requirements.

of this policy and any special limitations or modifications on use that may be warranted by the circumstances.

3. Portable Computers

Portable computers may be provided to employees to facilitate state business when the employees must work out of the office and when on travel. Portable computers may also be provided to members of boards and commissions in connection with official meetings and other state business. These public officers may make reasonable incidental personal use of portable computers, including use for private email or personal entertainment, so long as there is no cost to the state and any use is acceptable under the State of Alaska's *Personal Use of State Office Technologies Policy (SP-017).*[19]

C. Procedures for Addressing Ethics Act Violations

The Ethics Act authorizes designated ethics supervisors, the attorney general and the Personnel Board to take certain actions relating to potential or actual ethics violations.[20] It also provides that agency disciplinary action may be taken to address ethics violations by a public employee. Alaska Statute 39.52.420 states that "an agency may reprimand, demote, suspend, discharge, or otherwise subject an employee to agency disciplinary action commensurate with the violations of [the Act]" and that the Act does not prohibit review of the discipline under applicable collective bargaining agreements or personnel statutes and rules. The regulations implementing the Ethics Act recognize that the attorney general may forward information obtained in the course of an ethics investigation to a designated ethics supervisor or other appropriate superior for potential disciplinary action.[21]

In situations where misconduct first comes to the attention of a work supervisor or designated ethics supervisor, the Department of Law recommends that executive branch agencies and public corporations conduct internal investigations into the misconduct and take appropriate disciplinary action with guidance or assistance from human resource

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[19] The minute limitation applicable to personal cell phone use is not applicable. We assume that batteries are rechargeable or the computer may be plugged in and internet access is free or the employee pays for the charges, such as a fee imposed by a hotel, related to personal use.

[20] *See generally* AS 39.52.210; AS 39.52.220; AS 39.52.310 – 39.52.460.

[21] 9 AAC 52.160(b).

managers.[22] A work supervisor should generally follow the same procedures and exercise similar judgment when addressing ethics issues as any disciplinary matter. The work supervisor should consult with the designated ethics supervisor about all matters believed to involve violations or potential violations of the Ethics Act. If, after a decision regarding discipline is made, the work supervisor and ethics supervisor believe the circumstances warrant review under the Ethics Act for consideration of additional penalties, the designated ethics supervisor may then refer the matter to the attorney general for review and additional action. The work supervisor or other officer imposing discipline should notify the subject employee that a referral is being made at the same time the employee is notified of the discipline being imposed.

D. Remedies and Penalties under the Ethics Act for Misuse of Equipment

If a public officer, whether public employee or board or commission member, has made inappropriate use of state equipment, a work supervisor or the designated ethics supervisor should initially direct that it not happen again.[23] In addition, state policy provides that incremental charges on invoices to the state resulting from personal use of cell phones and electronic equipment must be reimbursed to the state.[24]

The particular circumstance of misuse by a public employee may require other discipline, up to and including termination. Care should be taken to ensure that appropriate personnel rules and the terms of collective bargaining agreements are followed to protect the integrity of the action taken. Work supervisors should consult with the appropriate human resource manager for guidance. Work supervisors should also coordinate with the agency's designated ethics supervisor.

Under the Ethics Act, the remedies available to a designated ethics supervisor of a public employee are limited to certain actions to address potential violations, i.e. reassignment of duties or ordering divestiture, and these remedies are not generally

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[22] If the circumstances suggest significant Ethics Act violations and the need for external investigation, matters may be referred to the attorney general initially for issuance of a complaint. The designated ethics supervisor should consult with the state ethics attorney if this course of action is believed necessary.

[23] Access to the equipment may also be removed, but we assume that there will be a continuing business need for the officer to use the equipment so that taking away the equipment will not usually be an option.

[24] AAM 320.340.

applicable to the inappropriate use of equipment addressed in this opinion.[25] The designated ethics supervisor for a board or commission may direct a member to refrain from action to avoid a further violation.[26]

The Ethics Act gives the attorney general authority to recommend action to correct or prevent a violation and provides that the subject must comply. The Act does not limit the scope of possible corrective action.[27] It may include reimbursement to the state of costs incurred in violation of the Act or other action suitable to the circumstances, such as increased reporting or monitoring of use. The attorney general has authority to recover a benefit received by a person as a result of a violation of the Act.[28] Thus, the attorney general may seek to recover expense avoided by a public officer by making use of state electronic equipment. The attorney general also has broad authority to void actions taken in violation of the Ethics Act and to pursue other legal or equitable remedies.[29]

The Personnel Board has varied authority to address Ethics Act violations depending on the circumstances. As appropriate to the misuse of equipment by a public employee, the board may order the employee to stop engaging in any official action related to the violation, direct the employee to make restitution or recommend disciplinary action, including termination.[30] The board may order a board or commission member to make restitution or recommend removal of the member from the board or commission to the appointing authority, which is required to immediately act to do so. Violation of the Ethics Act is grounds for removal for cause.[31] If the board determines that a former public officer violated the Act, it may issue a public statement of its

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25 *See* AS 39.52.210.

26 AS 39.52.220.

27 AS 39.52.330. In so doing, the attorney general is guided by the remedies and penalties that may be imposed by the Personnel Board for violations.

28 AS 39.52.430(d). Action must be brought within two years of discovery of the violation.

29 AS 39.52.430(a)-(c).

30 AS 39.52.410(a).

31 AS 39.52.410(b). If the officer is only removable by impeachment, the board must report its findings to the president of the Senate. AS 39.52.410(d).

findings and request the attorney general to take action seeking appropriate relief.[32] In addition, the board may impose civil penalties of up to $5000 per violation and require a public officer who has benefited a person in violation of the Act to pay the state up to twice the amount that the person realized.[33]

In most instances, misuse of equipment would likely result in direction to stop the misuse and a demand for reimbursement of state expenses incurred or the value of the benefit received, absent serious violations of the Ethics Act or the Personal Use of State Office Technologies Policy, such as recurring misuse after direction to stop or misuse resulting in a substantial expense to the state or benefit to the officer.

II. CONFIDENTIALITY OF PERSONAL INFORMATION WHEN STATE ALLOWANCE IS USED FOR PERSONAL CELL PHONE OR PDA

You also asked whether an employee: (a) who is required to be accessible for business purposes by cell phone or PDA; (b) owns his or her own personal cell phone or PDA; and (c) elects to receive from the state an allowance to defray the additional cost of using these personally owned devices for business purposes, waives the confidentiality of his or her personal emails and call records. As explained below, the answer is that personal emails and call records are not public records under the definition in the Public Records Act and public disclosure of such personal information would likely run afoul of the individual's right to privacy under the Alaska Constitution. However, a state official or a court could be required to review all call records and messages in order to locate records generated through these personal devices that concern state business and that are public records. **In summary, state business records generated on a personal cell phone or PDA are public records subject to review and disclosure, unless the Public Records Act permits them to be withheld. Personal records are likely protected from public disclosure but are not protected from state official or court review to the extent necessary to identify state business records.**

Alaska Statute 40.25.110 provides, with certain exceptions, that public records of all public agencies are open to inspection by the public. The Public Records Act defines the term "public records" to mean "books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as

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32 AS 39.52.410(c).

33 AS 39.52.440 and .450.

evidence of the organization or operation of the public agency; 'public records' does not include proprietary software programs."

From the definition of public records, it appears that personal emails and call records from a personal cell phone or a PDA are not "accounts" or "writings" "developed or received by a public agency," and are not "preserved for their informational value or as evidence of the organization or operation of the public agency." Instead, they are writings developed or received by people in their personal, non-employee capacities and preserved for personal reasons. The personal emails and call records thus do not fit the definition of public records. Additionally, the Alaska Constitution provides, in article I, section 22, that the right of the people to privacy is recognized and shall not be infringed. This provision of the constitution provides additional protection from public disclosure by the government of personal emails and call records.

As stated above, however, a state official or a court could be required to review personal call records and emails while seeking to locate and identify the business related calls or business related emails sent or received through the personally owned devices. **Thus, again, although generally personal call records and emails would not be disclosed to the public, they could be reviewed by a state official or court in the limited circumstances described to comply with the Public Records Act.** We recommend that you advise all state officers who request the allowance of this information and have each acknowledge that he or she was so advised.

Please do not hesitate to contact us if you have further questions regarding the issues addressed in this opinion.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By:
Julia B. Bockmon
Assistant Attorney General

JBB/WEM