June 7, 2004

The Honorable Frank H. Murkowski
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: CCS HB 375 -- Fiscal Year 2005 operating budget
Our file: 883-04-0035

Dear Governor Murkowski:

At the request of your legislative office, we have reviewed CCS HB 375, the operating budget for fiscal year 2005 (beginning on July 1, 2004, and ending on June 30, 2005). We have only a few comments on the bill overall.

The introductory language to sec. 1 of the bill at page 2, lines 4 - 6 includes a provision that "A department-wide, agency-wide, or branch-wide unallocated reduction set out in this section may be allocated among the appropriations made in this section to that department, agency, or branch." Unlike operating budgets for previous years, which included unallocated reductions affecting a number of departments and branches, this bill includes only one such reduction - a $100,000 agency-wide unallocated reduction for the Department of Law (page 26, line 12). In our review of the FY 2000 operating budget, we discussed unallocated reductions that purport to affect more than one appropriation. 1999 Inf. Op. Atty. Gen. (June 28; 883-99-0062). We noted that this approach raised constitutional questions, but we did not recommend any vetoes as a result of those possible questions. We adhere to that discussion and advice.

The remaining introductory language to sec. 1 sets out legislative intent regarding two topics. First, the language at page 2, lines 7 - 24 expresses the legislature's intent that the Administration work with, and submit certain reports to, the legislature regarding department missions and measures, promotion of effective activities and change, elimination of ineffective programs and activities, and development of mutually agreeable "End Results." Second, the language on page 2, lines 25 - 28 expresses the legislature's intent that state agencies actively pursue implementation of the state procurement pilot program authorized by ch. 51, SLA 2003. The 14 lines of text that follow that expression of intent consist of reasons why the procurement pilot project is a desirable means to achieve cost savings.

These provisions in sec. 1 of the bill provide examples of expressions of legislative intent accompanying an appropriation item that are non-binding - you may choose to follow the intent or ignore it. However, as we advised in our reviews of intent language in previous appropriations bills, such an expression of intent may no longer be vetoed by you as a line item veto separate from the appropriation itself. In *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001), the Alaska Supreme Court ruled that expressions of intent do not constitute "items" subject to your veto power under art. II, sec. 15, of the Alaska Constitution. The legislature may use "minimum necessary" language to explain what purpose the legislature intends to permit for the appropriation (i.e., to explain how, when, or on what the money is to be spent). *Id.* at 377.

Expressions of legislative intent that may be followed or ignored appear throughout the bill, and we do not address individual provisions that do not raise other legal issues. We will discuss particular expressions of intent that need analysis as to whether they violate the confinement clause of the Alaska Constitution by using qualifying language that 1) is more than minimally necessary; 2) administers the program of expenditures; 3) enacts law or amends existing law; 4) extends beyond the life of the appropriation; or 5) expresses intent that is not germane to an appropriations bill.[1]

On page 12 of the bill, under the allocation of money for "Quality Schools" from the appropriation to the Department of Education and Early Development for Teaching and Learning Support, the following language appears:

> It is the intent of the legislature that the department expend funds appropriated for a new Education Specialist II position to create an office uniquely focused on maximization of all Alaska alternative public school initiatives, including charter schools. Duties of the office shall include the following: (1) monitor and evaluate the expenditures of state funds in accordance with state statutes and regulations; (2) monitor and evaluate curriculum as it pertains to state education and graduation requirements; and (3) monitor and evaluate benchmark and other standardized test results to insure that a quality education is being provided by Alaska's alternative educational system. "Maximization" means: finding ways to use alternative schools to accomplish the requirements of the federal No Child Left Behind Act (NCLB); increasing public choices for quality education; monitoring and overseeing alternative schools in the context of

[1] Under the confinement clause of art. II, sec. 13, of the Alaska Constitution, "[b]ills for appropriations shall be confined to appropriations." In *Alaska Legislative Council v. Knowles*, 21 P.3d at 377-79, the court used these five criteria to analyze whether intent language violates the confinement clause, referring to them as the "Hammond factors." The factors were first set out in the superior court decision in *Alaska State Legislature v. Hammond*, Case No. 1JU-80-1163 (Alaska Super., May 25, 1983).

> these goals; and providing information to the legislature regarding alternative school legislation, challenges, evaluation and opportunities. Existing alternative schools include: charter schools, boarding schools, correspondence schools and district-operated alternative schools.

Only the first sentence of this provision contains "intent" lead-in language. The remaining language might be seen as an attempt to enact binding substantive law and to administer a program. However, if read in this manner, this language would violate the confinement clause. Also, the language does not specifically make compliance with the language a condition of the appropriation. We therefore think that the language must be read simply as part of an overall expression of legislative intent, which the agency may follow or not, as previously discussed. Similar analysis applies to language found at page 17, lines 22 – 30 (regarding the Alcohol Safety Action Program).

A closer question is presented by language on page 22, lines 3 - 11 of the bill, accompanying a $250,000 allocation for "Assessment and Planning" from the appropriation for Departmental Support Services for the Department of Health and Social Services (DHSS). That language provides:

> It is the intent of the legislature that the Assessment and Planning funding is specifically provided to identify and implement actions and regulatory changes necessary to achieve Medicaid and related program growth cost containment requested in this budget with the least possible effect on the most vulnerable beneficiaries. The Department is to dedicate necessary resources to analyze and project future entitlement growth of Medicaid and related program spending and to identify alternatives to mitigate or stop increases. A progress report is to be provided to the legislature prior to the beginning of the 2005 session and will include a rationalization for any supplemental budget request expected to be made as a result of failure to achieve Medicaid growth cost containment requested in this budget.

This language sets out the purpose for which specifically identified money is to be spent, and therefore is not mere intent language that may be followed or ignored at the department's discretion. The language does not enact new law or amend existing law, but provides funding for an assessment to implement Medicaid cost containment measures authorized by AS 47.07.036 (Supp. 2003). However, the language arguably goes beyond the "minimum necessary to explain the legislature's intent" about how the money is to be spent, by seeking to administer the program. The particulars set out in this language as to how to accomplish the study and report may be considered directory, not mandatory.

Our final comment regarding intent language in the bill concerns language found on page 32, lines 30 - 33 and page 33, lines 3 - 7:

> It is the intent of the legislature to give notice as permitted by AS 15.13.145, and regulations of the Alaska Public Offices Commission,

> that the Alaska Permanent Fund Corporation may use amounts appropriated for operations of the corporation within the corporation's fiscal Year 2004 and 2005 budgets to educate voters concerning the Percent of Market Value Amendment to the Alaska Constitution and the reasons why the Trustees recommended this change in law. It is further the intent of the legislature that the Alaska Permanent Fund Corporation not advocate a position on the ballot question, must permit persons with all viewpoints to participate in a public forum, and shall present all known effects that the Percent of Market Value proposal could have on the Alaska Permanent Fund.

This is an unusual provision, in that it provides notice as required by AS 15.13.145 and regulations of the Alaska Public Offices Commission. The provision authorizes the Alaska Permanent Fund Corporation (APFC) to use amounts appropriated for APFC's operations in FY 2004 and 2005 to provide the public with education regarding the Percent of Market Value (POMV) proposal to amend the Alaska Constitution, including the reasons why the trustees recommended the POMV. The likely purpose of the provision is to make it clear that money was specifically appropriated in a public forum to fund an information campaign pertaining to a possible ballot proposition regarding POMV. We recommend that the APFC work closely with the Department of Law to assure that the voter education project complies with state statute and regulations.

Regarding other issues raised by the bill, two parts of sec. 1 attempt to limit the expenditure of money appropriated to DHSS for abortions. The first of these appears at page 17, lines 6 - 12, and provides:

> No money appropriated in this appropriation may be expended for an abortion that is not a mandatory service required under AS 47.07.030(a). The money appropriated for Health and Social Services may be expended only for mandatory services required under Title XIX of the Social Security Act and for optional services offered by the state under the state plan for medical assistance that has been approved by the United States Department of Health and Human Services. This statement is a statement of the purpose of the appropriation and is neither merely descriptive language nor a statement of legislative intent.

Nearly identical language appears at page 19, lines 5 - 11, applicable to health care services.

Like virtually identical language that appeared in the past two years' operating budget bills, this language is intended to prevent expenditures from these appropriations for therapeutic or medically necessary abortions, even though the department is under a court order to operate its Medicaid program in a constitutional manner by providing payment for them. That order has been upheld by the Alaska Supreme Court, which specifically rejected an argument that the separation-of-powers doctrine precluded the superior court from ordering the state to pay. *State of Alaska, Dept. of Health & Social Services v. Planned Parenthood of Alaska*, 28 P.2d 904

(Alaska 2001). Thus, the DHSS is faced with a ruling from the state's highest court that the limit on payment for abortion services results in the operation of the Medicaid program in an unconstitutional manner, while DHSS is ostensibly without the money available to pay for services to operate the program legally. A veto of these two provisions is not available under the analysis of *Legislative Council v. Knowles* that is discussed above.

Three years ago, the plaintiffs in the *Planned Parenthood* case asked the superior court to clarify how similar budget restrictions impacted its judgment. The superior court, three days after the supreme court affirmed the judgment, issued an opinion ordering the DHSS not to comply with the restrictions. To date, therefore, DHSS has obeyed the superior court's order and we must advise DHSS to continue to obey it; *i.e.*, to continue to pay for these medically necessary abortions, until such time as a court reverses the order that is now in effect.

On page 30 of the bill, lines 25 - 27, the following language appears regarding an appropriation to the Department of Public Safety for the Council on Domestic Violence and Sexual Assault (CDVSA):

> Notwithstanding AS 43.23.028(b)(2), up to 10% of the amount appropriated by this appropriation under AS 43.23.028(b)(2) to the Council on Domestic Violence and Sexual Assault may be used to fund operations and grant administration.

This is another unusual provision, although it appeared in last year's budget and escaped comment. Under AS 43.23.028(a)(3), the commissioner of revenue is required to disclose to the public the amount by which each permanent fund dividend has been reduced as a result of appropriations from the dividend fund. However, money appropriated from the dividend fund to specified corrections and crime victims programs is not subject to the disclosure requirement, to the extent the amount appropriated from the fund to all the programs is less than the dividends that would have been paid to criminals who are ineligible under AS 43.23.005(d). Under AS 43.23.028(b)(2), appropriations from the dividend fund to the CDVSA "for grants for the operation of domestic violence and sexual assault programs" are among the appropriations that need not be included in the disclosure under AS 43.23.028(a)(3).

The exemption from disclosure under AS 43.23.028(b)(2) is limited to appropriations "for grants for the operation of domestic violence and sexual assault programs." The "notwithstanding" language in the bill is apparently intended to allow the CDVSA to use up to 10 percent of its appropriation from the dividend fund for the CDVSA's operations and grant administration, without affecting the appropriation's exemption from the disclosure requirement. This should be accomplished by a substantive amendment to AS 43.23.028(b)(2), not by language in an appropriation bill. Therefore, this provision is ineffective to alter the limitations on the exemption from the disclosure requirement for appropriations to the CDVSA.

Section 30 of the bill appropriates a sum for benefit adjustments for officials and employees of the executive, judicial, and legislative branches. It constitutes approval under AS 23.40.215(a) of the monetary terms of collective bargaining agreements for the bargaining units

listed. For the executive branch units listed in subsec. (a), the appropriations applicable to a particular collective bargaining unit are contingent upon ratification of the agreement by the membership of the unit. Subsection (b) of sec. 30 is not mentioned in the appropriation item in (a), or the contingency provision of (c). Subsection (b) does indicate that operating budget appropriations made to the University of Alaska include sums for the monetary terms of four University collective bargaining units. In this bill, subsec. (b) is an add-on to an appropriation section related to executive branch collective bargaining agreements. Since this same language is duplicated at sec. 59(c) of FCCS SB 283(Corrected), your office of management and budget recommends that the SB 283 provision be retained, and that sec. 30(b) of this bill be vetoed, to avoid confusion. We agree and likewise recommend that you strike sec. 30(b).

Although we have identified no other constitutional or legal issues in this bill, please be advised that it is not always possible to identify or comment on all legal issues in a bill of this complexity. However, we will assist the agencies throughout the year in interpreting and applying the provisions of this bill, as well as related legislation, to make certain that appropriations are implemented in a manner that is consistent with enabling statutes and valid legislative intent.

Sincerely,

Gregg D. Renkes
Attorney General

GDR:VBR:rca