MEMORANDUM

State of Alaska
Department of Law

TO: Deborah Vogt
Deputy Commissioner
Department of Revenue

DATE: February 24, 1998

FILE NO.: 663-98-0248

TELEPHONE NO.: 465-3600

SUBJECT: Privacy Considerations and the Governor•s Child Support Bill

FROM: Dan N. Branch
Assistant Attorney General
Human Services Section - Juneau

You have asked whether any provisions of HB 344/SB 252 (•the Governor•s child support bill•) would violate the privacy rights guaranteed Alaskans by article I, section 22, of the Alaska Constitution. Since the Governor•s bill would repeal the sunset provision of SB 154 (ch. 87, SLA 1997), a child support bill passed into law in 1997, you also asked whether the provisions of SB 154 violate privacy rights under the Alaska Constitution. In our opinion, a court is unlikely to find that the provisions of either child support bill would be found to violate the right of privacy afforded under the Alaska Constitution.

BACKGROUND

The U.S. Congress, in an effort to reform the country•s welfare system, enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193 (PWRORA). The Act imposed a set of child support mandates upon the states.[1] The federal mandates raise privacy issues by requiring the production and sharing of social security numbers, employee hire information, and information in government and bank records for child support purposes. In 1997, the Alaska Legislature complied with most of the federal mandates by enacting SB 154.[2] Section 148(c) of SB 154 will sunset all the legal changes of the bill on July

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[1] Article I, section 8, of the U.S. Constitution gives Congress the authority to condition receipt of federal funds upon compliance with federal and administrative statutory directives. *South Dakota v. Dole*, 107 S. Ct. 2793 (1987). If a state does not substantially comply with the child support mandates of the Social Security Act, the Secretary of the Department of Health and Human Services is authorized to penalize the state. *Blessing v. Freestone*, 117 S. Ct. 1353 (1997).

[2] For example, SB 154 did not satisfy the federal mandate that requires states to require all employers to report each new hire and rehire to the child support agency within 20 days, because it was not required to be in effect until this year. A provision designed to comply with this mandate is part of the Governor•s child support bill.

1, 1999. The Governor•s current child support bill would repeal this sunset provision and comply with federal child support mandates which were not addressed by SB 154.[3]

DISCUSSION

Right to Privacy Guaranteed by the Alaska Constitution

In 1972, the right to privacy was made explicit in Alaska by an amendment to the Alaska Constitution. *Ravin v. State*, 537 P.2d 494, 498 (Alaska 1975). The privacy amendment provides:

> **Right of Privacy.** The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Alaska Const. art. I, sec. 22.

You asked if the sections of the Governor•s child support bill or of SB 154 violate this provision. The following sections of the Governor•s bill and SB 154 are most likely to be challenged as violations of article I, section 22, of the Alaska Constitution: sections mandating the production of social security numbers, employee hire information, financial information, utility records, and the sharing of information in government records.

The right to privacy under the Alaska Constitution is not absolute. *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1981). One asserting a right to privacy must exhibit a subjective expectation of privacy that society is prepared to recognize as reasonable. *State v. Glass*, 583 P.2d 872, 875 (Alaska 1978). Courts do not approach the right to privacy in a vacuum. Rather, there must be a balancing of conflicting rights and interests. *Messerli*, 626 P.2d at 83.

The Alaska Supreme Court applies the following three-part test when evaluating an informational privacy claim:

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[3] After the Alaska Legislature enacted SB 154, Congress added more mandates by adopting technical amendments to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

> (1) does the party seeking to come within the protection of the right to privacy have a legitimate expectation that the materials or information will not be disclosed?
>
> (2) is disclosure nonetheless required to serve a compelling state interest?
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> (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to privacy?

The Alaska Wildlife Alliance v. Rue, 948 P.2d 976, 980 (Alaska 1997); *Jones v. Jennings,* 788 P.2d 732, 738 (Alaska 1990).

Social Security Numbers

The Governor•s bill would require applicants for driver•s licenses and for sport hunting and fishing licenses to provide their social security numbers on the license application. These numbers would then be shared with the child support agency in this and other states for child support purposes. SB 154 requires anyone applying for a professional or occupational license to provide his or her social security number on the application so that the numbers may be shared with child support agencies. It also requires that vital statistics records contain the social security numbers of those mentioned in them.

It is possible that someone in the state will assert that these provisions violate their right to privacy guaranteed by article I, section 22, of the Alaska Constitution. To prevail in court, anyone asserting such a challenge must meet the three-prong test set out in *Alaska Wildlife Alliance*, 948 P.2d at 980.

The first prong of the privacy test requires a court to determine whether the party raising the right to privacy has a legitimate expectation that the Alaska Constitution prevents the state from disclosing information the party considers private. In this case, this means the court will have to determine if the party has a legitimate expectation that the state will not disclose the party•s social security number to child support agencies. *Alaska Wildlife Alliance*, 948 P.2d at 980. It is doubtful that a court would make such a finding because the U.S. Congress which created the social security system, and initially mandated that the numbers be kept private, has now mandated that they be disclosed on state license applications and given to child support agencies upon request.

Congress created the social security number. It also passed the Privacy Act of 1974,[4] 42 U.S.C. • 405(c)(2)(C), and 42 U.S.C. • 408(a)(8) to enhance the privacy protections

[4] P.L. 93-579, section 2, set out in note following 5 U.S.C. • 552a.

for social security numbers. Section 7 of the Privacy Act of 1974 prohibited states from denying benefits to their citizens as a penalty for refusing to produce social security numbers. 42 U.S.C. • 405(c)(2)(C)(viii)(I) and 42 U.S.C. • 408(a)(8) made it a criminal offense to disclose social security numbers in violation of federal law. These laws are responsible, in large part, for creating an expectation that social security numbers are private, and not subject to release. At least one court has found that the Privacy Act of 1974 creates an expectation of privacy in the minds of employees concerning the use and disclosure of their social security numbers. *Tribune-Review v. Allegheny County Housing Authority*, 662 A.2d 677 (Pa. 1995).

The Privacy Act of 1974 does not apply where disclosure is mandated by federal law. Sections of SB 154 and the Governor•s child support bill would not violate the Privacy Act, 42 U.S.C. • 405 or 42 U.S.C. • 408(a)(8) because they are enacting federal mandates. Therefore, a court is not likely to find that an Alaskan resident has a legitimate expectation that the Alaska right to privacy prevents the state from requiring the production of his or her social security number on license applications or from sharing the numbers with child support agencies.

There are other reasons that it is unlikely that a court would find that expectation to be reasonable. In *State v. Chryst*, 793 P.2d 538 (Alaska Ct. App. 1990), the court held there is no reasonable expectation of privacy with respect to a person•s name and address and the locations where he receives utility services. The Alaska Supreme Court has held that the right to privacy embodied in the Alaska Constitution is only implicated by the disclosure of personal information about oneself. *Doe v. Alaska Superior Ct., Third Jud. Dist.*, 721 P.2d 617, 629 (Alaska 1986). This is the type of personal information which, if disclosed, could cause embarrassment or anxiety. *Doe*, 721 P.2d at 629; *Falconer v. Alaska Public Offices Commission*, 570 P.2d 469, 479 (Alaska 1977). The disclosure of one•s social security number is not likely to evoke such a response.

Furthermore, in AS 44.99.300 - 44.99.350, the Legislature has indicated that "personal information" does not include a person•s name, address, or telephone number, if the number is published in a directory. In our opinion, a court is likely to find that a person•s social security number is a specific identifying number, like an address or telephone number, that has become so widespread in use that an expectation that one can keep it private is unreasonable. Social security numbers are divulged for identification purposes in a wide variety of circumstances. For instance, social security numbers generally appear on drivers• licenses, which must usually be shown to cash a check.[5] While there may once have been a higher expectation

[5] Before passage of PRWORA, Congress gave states permission to use social security numbers to establish the identity of those applying for driver•s licenses and to require applicants to provide their social security number on the drivers• license application. *See* 42 U.S.C. • 405(c)(2)(C)(I). In Alaska, a driver•s social security number usually appears on his or her driver•s license. Drivers are given the option of not having the number appear on their license. While the Governor•s child support

of privacy for social security numbers, we believe that a court is likely to recognize that, in this day and age, the use of that number for identification purposes has made the expectation of keeping it private an unreasonable expectation.

The inquiry may not end there, however. Perhaps a court will decide that the expectation of privacy in one•s social security number is a legitimate one. In such a case, the court would have to determine if the mandated disclosure will serve a compelling state interest. *See Alaska Wildlife Alliance*, 948 P.2d at 980. This involves balancing the state interest served by the mandate provision with the right of privacy asserted. *See, e.g., Welcome to the "Last Frontier," Professor Gardner: Alaska•s Independent Approach to State Constitutional Interpretation*, 12 Alaska L. Rev. 1, 21 (1995).

In our opinion, a court reviewing this issue is likely to find that the important issues served by the welfare reform mandates far outweigh the interests of an individual in keeping his or her social security number out of the child support enforcement system. The court would consider the same information about child support enforcement efforts that was considered by the Congress when it enacted the requirements relating to social security numbers in the federal welfare reform act that is implemented by SB 154 and the Governor•s child support bill. The Congress found that this use of social security numbers would enhance efforts to locate child support obligors and collect child support payments. The Congress has determined that children•s poverty, national and state expenditures on welfare programs, and other societal problems could be decreased by more effective methods of child support enforcement.

The Alaska Legislature has consistently recognized that there is a compelling public policy favoring enforcement of child support obligations. *Anderson v. Anderson*, 736 P.2d 320, 323 (Alaska 1987). The Legislature attempted to enhance the collection of child support in 1977 when it passed the Child Support Enforcement Act. The Legislature stated that the act was passed for the following reasons:

> The state . . . declares that the common law and Alaska statutes pertaining to the establishment and enforcement of child support obligations shall be augmented by additional remedies in order to meet the needs of children. It is declared to be the public policy of this state that this Act be construed

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bill would require production of the social security number on the driver•s license application, it would not require that the number appear on the driver•s license.

> and administered to the end that children shall be maintained from the resources of responsible parents, thereby relieving, at least in part, the burden presently born by the general citizenry through welfare and welfare-related programs.

Section 1, ch. 126, SLA 1977.

In 1984, the Alaska Legislature passed amendments to the Child Support Enforcement Act "to encourage the efforts of those persons who seek to enforce the payment of child support obligations by noncustodial parents having the duty of support." Section 1, ch. 144, SLA 1984.

In its statement of findings and purpose for the 1984 amendments, the Legislature made the following finding:

> a disproportionately high percentage of lower-income, single-parent families are headed by women. The difficulties in obtaining child support from non-custodial parents contributing significantly to the hardship of those families . . . . The legislature also finds that the hardship experienced by children in families who may rely on support from a noncustodial parent should not be a necessary condition that must be endured by those families.

Section 1, ch. 144, SLA 1984.

We believe that a court, looking at this type of information, is likely to find that, even if there is some right of privacy in one•s social security number, that right is outweighed in this instance by the societal interests in more effective child support enforcement.

If the first two criteria were met, the final prong of Alaska•s right to privacy test would require the court to determine whether the necessary disclosure will occur in the manner which is least intrusive with respect to one•s interest in the right to privacy. *See Alaska Wildlife Alliance*, 948 P.2d at 980. Here again, we believe the proposed legislation, and SB 154, meet this requirement.

SB 154 and the Governor•s child support bill use the existing state licensing system to collect social security numbers. Since this approach involves self disclosure on forms that the license applicants will have to complete anyway, it is less intrusive than other systems that could be used to obtain the applicants• social security numbers. The Alaska Supreme Court has found that, generally, self-disclosure, accompanied by the appropriate use of the summons power, constitutes the least intrusive method of obtaining information. *State, Dep't of Revenue. v. Oliver*, 636 P.2d 1156, 1167 (Alaska 1981). While applicants must provide their social security

numbers on the license applications, there is no requirement that an applicant•s social security number appear on the license itself, thereby reducing the chance of unnecessary disclosure. *See*, footnote 4, above. The child support bills provide that social security numbers may only be shared with child support agencies for child support purposes. These provisions will help to ensure that the mandated disclosure not exceed what is necessary to serve the compelling state interest that justifies it.

Almost all of the programs affected by SB 154 and the Governor•s child support bill are carried out by state employees. The system for dispensing hunting and sport fishing licenses is an exception. It relies upon private vendors to sell these licenses to applicants. This might raise some concern that the social security numbers of fish and game license applicants will be more at risk of unwarranted disclosure. 42 U.S.C. • 405(c)(2)(C)(viii)(I) should alleviate those concerns. It provides that social security numbers obtained by any provision of law enacted after October 1, 1990, shall be kept confidential. This mandate extends to government employees or anyone who has legal access to the numbers. *See* 42 U.S.C. • 405(c)(2)(C)-(viii)(III). Therefore, the federal privacy mandate extends to private vendors who sell sport fish and hunting licenses to the public. Violation of the mandate could result in conviction, in federal court, of a felony punishable by fine and a maximum five-year jail sentence under 42 U.S.C. • 408(a)(8).

New Hire Information

The Governor•s child support bill would require all employers and labor unions in the state to report all new hires and rehires to the state child support enforcement agency. Each report will contain the name, address and social security number of each newly hired employee, and the name, address, and federal tax identifying number of the employer. Currently, only those Alaskan businesses that employ more than 19 employees are required to provide this information for long-term employees. *See* AS 25.27.075.[6]

We do not believe a court would find that AS 25.27.075, as amended by the Governor•s child support bill, would violate the right to privacy guaranteed by article I, section 22, of the Alaska Constitution. Any court considering such a challenge would apply the three-prong test discussed above. The first prong would require the court to determine if the party asserting the right to privacy has a legitimate expectation that the information will not be disclosed. *Alaska Wildlife Alliance*, 948 P.2d at 980.

AS 25.27.075 requires employers to report the social security numbers and other personal identifiers like names and addresses to the state child support agency. In *State v. Chryst*,

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[6] AS 25.27.075 was rewritten into its current form in 1992 and has not been challenged in court.

793 P.2d 538 (Alaska App. 1990), the Court of Appeals held that a defendant did not have a reasonable expectation of privacy with respect to address information given to an electric utility for purposes of obtaining utility service. There is no reason to believe that a person would have a greater expectation of privacy if the information is given to an employer rather than to a utility.

Furthermore, all of the information sought is shared on income tax returns and other government records where, in the course of their use, they are bound to be seen by others. Therefore, the legitimate expectation of privacy is lower. *See Oliver*, 636 P.2d at 1167.

Even if a person did have a legitimate expectation that his or her name, address, and date of hire would not be disclosed by the employer, a court is likely to uphold AS 25.27.075 because its disclosure requirements serve the compelling state interest of enforcing child support obligations. *Alaska Wildlife Alliance*, 948 P.2d at 980. The analysis is similar to that for disclosure of social security numbers as set out above.

Finally, the method of employer reporting, designated by AS 25.27.075 to ensure that the state child support agency obtains new hire information, meets the third prong of the Alaska privacy test because it is least intrusive on the right to privacy. *Alaska Wildlife Alliance*, 948 P.2d at 980. We believe a court would find that employer reporting, like self-disclosure, constitutes the least intrusive method of obtaining the needed information. *Oliver*, 636 P.2d at 1167.

Access to Government Records For Child Support Purposes

SB 154 gave child support enforcement agencies access to information in the following government records: vital statistics, state and local taxes, real and personal property, employment security, public assistance, motor vehicles, and corrections. The information may only be used for child support purposes. Under the *Alaska Wildlife Alliance* test, the first question to ask is whether residents have a legitimate expectation that these government records will not be disclosed for child support purposes. 948 P.2d at 980.

This question must be viewed in light of Alaska•s policy favoring open state records. AS 09.25.110 mandates that, unless specifically provided otherwise, the public records of all state agencies are open to inspection by the public. *See* AS 09.25.110; *see also City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316 (Alaska 1982) (the statute articulates a broad policy of open records).

Specific exemptions to AS 09.25.110 could give rise to a legitimate expectation that the state records protected by the statutory exemptions will not be disclosed. For example, Vital Statistics records are protected from public inspection. *See* AS 09.25.120(a)(1) and AS 18.50.310. On the other hand, statutory sections like those contained in SB 154, which require that designated portions of state records be made available to child support agencies, make any

such expectation of privacy unreasonable.[7] Therefore, it is unlikely that a court would find that Alaska residents have a legitimate expectation that information concerning them in state records would not be shared with child support agencies.

The analysis of the second prong of the Alaska privacy test is the same as for social security numbers and employer hire information. We believe that the strong state interest in securing payment of child support, and in complying with federal mandates, would greatly outweigh any interest a resident might have in preventing a child support enforcement agency from having access to the information needed to establish or enforce a child support obligation.

If a court found that residents did have a legitimate expectation of privacy, and that disclosure of state records serves a compelling state interest, it would have to determine if the necessary disclosure will occur in that manner which is least intrusive with respect to the privacy right. *Alaska Wildlife Alliance*, 948 P.2d at 980. We believe the court would make such a finding.

The disclosure statements only require agency-to-agency production of information already in the state records. This limits the scope of information to be released. Without access to government records, child support agencies would be required to make more intrusive investigations which could result in a far greater invasion of privacy.

Financial Records

SB 154 amended the Banking Code, AS 06.05, to require that a bank provide child support agencies, upon request, with a certified copy of a record concerning an individual who either owes or is owed child support. The information could be provided by electronic means and may only be used for child support purposes.

Starting down the now familiar road, we first must determine whether someone who owes or is owed child support has a legitimate expectation that information contained in his or her bank account will not be disclosed to a child support agency. *Alaska Wildlife Alliance*, 948 P.2d 976 (Alaska 1997); *Jones v. Jennings*, 788 P.2d 732 (Alaska 1990).

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[7] For example, SB 154 amended AS 18.50.330 to provide child support agencies access to vital statistic records for child support purposes. *See* AS 18.50.333(6).

The United States Supreme Court has ruled that bank customers have no legitimate expectation of privacy concerning their bank records. *United States v. Miller*, 425 U.S. 435, 442, 96 S. Ct. 1619, 1624 (1976). In reaching this conclusion the Court observed:

> The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including statements and deposit slips contain only information voluntarily conveyed to banks and exposed to their employees in the ordinary course of business.

Miller, 425 U.S. at 442, 96 S. Ct. at 1624.

While the *Miller* Court•s findings concerning expectations of privacy do not foreclose a challenge under the Alaska Constitution,[8] they do help establish that one may not have a legitimate expectation, under the Alaska Constitution, that bank records will not be disclosed to a government child support agency.

Even if participants in a child support case had a legitimate expectation that their bank records would not be disclosed to child support agencies, the compelling state interest in establishing and enforcing child support obligations justifies the disclosure. This satisfies the second prong of the Alaska privacy test. *Alaska Wildlife Alliance*, 948 P.2d at 980.

The only remaining question is whether the bank record provisions of SB 154 provide that the records disclosure will be made in the manner which is least intrusive with respect to the right to privacy. *Alaska Wildlife Alliance*, 948 P.2d at 980.

The bank record disclosure requirement of SB 154 is contained in AS 06.05.537. That statute only requires disclosure of bank records of the assets and liabilities of individuals who owe or are owed child support. The agency receiving the information may only use it for legal child support purposes. It is hard to imagine a less intrusive way to obtain this information.

Public Utilities Records

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[8] The right to privacy embodied in the Alaska Constitution is broader than that provided by the U.S. Constitution. *Pratt v. Kirkpatrick*, 718 P.2d 962 (Alaska 1986).

SB 154 also requires public utilities to give child support agencies access to locate information concerning their customers. The Alaska Court of Appeals has ruled that a utility customer does not have a reasonable expectation of privacy concerning information about the customer•s name and address contained in the utility•s records. *Chryst*, 793 P.2d at 542. Therefore, the customer cannot have a legitimate expectation that the information will not be disclosed and the information is not protected by article I, section 22, of the Alaska Constitution.

CONCLUSION

SB 154 increased the access of child support enforcement agencies, to personal information, such as social security numbers, concerning Alaskan residents. The Governor•s child support bill would make even more information available to the agencies. You asked whether these informational mandates would violate the right to privacy of an affected individual, guaranteed by the Alaska Constitution. We believe the answer is no. Federal law required Alaska to adopt laws providing child support agencies such access to personal information for child support purposes. After passage of the federal mandates, it is not reasonable for the residents of Alaska to expect that the designated information about themselves in government and other affected records will not be made available to child support agencies for child support purposes.

Even if such an expectation were reasonable, an Alaskan court would be still likely to order disclosure of mandated information because the disclosure would serve the important state interest in seeing that child support obligations are honored. Finally, the informational disclosure provisions of SB 154 and the Governor•s child support bill provide for least intrusive disclosure of personal information.

If this memo does not fully answer your questions, or if I can be of other assistance on this matter, please let me know.

DNB:bap