

TO: Alice Ruby, Mayor, and City Council members
FROM: Robert Palmer, MCS, Attorneys for City *Robert H. Palmer*
RE: Cosgrove Investigation Report as a public record
DATE: April 17, 2025

attorney client privileged

In early February 2025, an information technology audit identified three Council members had potentially accessed confidential files in the City's database, SharePoint. Additionally, the annual audit discovered recent purchases that appeared to violate the purchasing code, audit standards, and/or the City's conflict of interest code.

With the advice of counsel, the Mayor initiated an investigation via DMC 2.03.080 to discover facts. The City hired an independent investigator, Mila Cosgrove of Workplace Solutions, to conduct fact-finding and draft a report on three topics:

1. August 2023: Three \$29,999 contracts to Bennett Enterprises.
2. September 2024: Bingman Property cleanup project and Council member Michael Bennett's involvement.
3. August 2024-February 2025: Council member access to City's digital records.

Ms. Cosgrove recently delivered her final report. As the Council determines next steps, which may be guided by DMC 2.04.040, the Council should be aware that Ms. Cosgrove's report is likely a public record. The following supports that conclusion.

Every person has a right to inspect a municipal record unless an exception applies, and the Legislature expressed a bias in favor of public disclosure.¹ Exceptions are narrowly construed to further the Legislature's goal of broad public access, and doubtful cases should be resolved by public disclosure.² Potential exceptions could have applied during Ms. Cosgrove's development of her report, but the exceptions do not likely apply anymore.

A recent lawsuit from Petersburg reinforces those conclusions and demonstrates how a judge would likely analyze a public records act dispute. In *Koenigs v. Petersburg*,³ the police chief lodged a complaint with the city clerk that two assemblymembers had improperly harassed the police chief related to covid-19 health measures and police

¹ AS 40.25.120; DMC 2.01.040; *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1323 (Alaska 1982).

² *Cap. Info. Grp. v. Governor*, 923 P.2d 29, 33 (Alaska 1996); *City of Kenai*, 642 P.2d at 1323.

³ *Koenigs v. Petersburg Borough*, 1PE-22-00046CI, Partial Order Granting Motion for in Camera Review and Denying in Part Motion for Summary Judgment (Alaska Superior Court, First Judicial District, Oct. 30, 2023).

functions. An attorney was hired to investigate and provide a report/legal opinion regarding the alleged harassment. The report was shared with the police chief and the two assemblymembers. Mr. Koenigs later filed a public records act request for records related to the complaint and report, which Petersburg generally withheld (i) due to the right to privacy of the police chief and the assemblymembers, (ii) due to employee harassment complaints being confidential, (iii) due to the deliberative process privilege, (iv) due to the common interest privilege, and (v) due to the attorney client privilege. The judge rejected all of those “exemptions” for a variety of reasons. Importantly, the judge buttressed her decision with the following facts and points of law:

1. “The [elected public officials] do not have a legitimate and reasonable expectation of privacy in reports of workplace harassment or bullying lodged against them. In fact, public officials must recognize their official capacities often expose their private lives to public scrutiny. Therefore, certainly the actions of public officials taken in the scope of their employment are not protected.”⁴
2. Elected officials and high-level city employees are subject to greater public scrutiny than regular municipal employees.⁵ The public has a compelling interest in reviewing actions of their elected officials and high-level city employees.⁶ The investigation report did not involve medical, financial, or other personal intimate details that are typically the basis for withholding from public disclosure.
3. The deliberative process privilege and executive privilege can prevent disclosure of predecisional and deliberative records.⁷ Final investigation reports are not deliberative when they lack the open exchange of ideas. Additionally, once the report was disclosed to the police chief and elected officials, the privilege no longer exists.

⁴ Koenigs, Oct. 30, 2023 Order, at 17-18 (internal quotations omitted); *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1324 (Alaska 1982) (concluding the public has a right to review a high-level public officials job application, like applicants for City Manager or Police Chief).

⁵ Koenigs, Oct. 30, 2023 Order, at 18.

⁶ Koenigs, Oct. 30, 2023 Order, at 21-22; E.g., *City of Kenai*, 642 P.2d at 1324 (“The qualifications of the occupants of such [high-level city] offices are of legitimate public concern.”); *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 (Alaska 1990) (head librarian’s performance evaluation was a public record subject to disclosure).

⁷ Koenigs, Oct. 30, 2023 Order at 28-31; *Gwich'in Steering Comm. v. Governor*, 10 P.3d 572, 578 (Alaska 2000); *Griswold v. Homer City Council*, 428 P.3d 180, 187 (Alaska 2018) (“Postdecisional communications are not protected”); The attorney-client privilege can be wrapped into the deliberative process privilege, but it does not generally protect fact finding reports. Koenigs, Oct. 30, 2023 Order at 23-28; see also DMC 2.01.060(A)(11).