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PUBLIC PER AS 24-55-200



State of Alaska
ombudsman

INVESTIGATIVE REPORT

Ombudsman Complaint A2009-1640

Finding of Record
December 15, 2011

Public Report per AS 24.55.200

This investigative report has been edited and redacted to remove information made confidential by Alaska Statute and to protect privacy rights.

SUMMARY OF OMBUDSMAN COMPLAINT A2009-1640

An Eagle River resident complained to the Office of the Ombudsman about the Department of Fish & Game (ADF&G), Division of Wildlife Conservation (DWC). Specifically, the Complainant alleged that ADF&G did not give her everything she asked for, or was entitled to receive, under an Alaska Public Records Act request. She also complained that DWC staff purposely thwarted her efforts to install trails in the Eagle River area by engaging in activities inconsistent with their official job duties.

The ombudsman opened a complaint with the Complainant's allegations restated to conform to ombudsman standards at AS 24.55.150:

Allegation One: Contrary to Law, ADF&G failed to disclose documents as required by the Alaska Public Records Act.

Allegation Two: Contrary to Law, ADF&G failed to disclose documents requested under the Alaska Public Records Act within the time limits required by 2 AAC 96.325.

Allegation Three: Contrary to Law, a DWC employee violated the Executive Branch Ethics Act by interfering with potential funding sources for the complainant's proposed trails, by providing agency data to a local media outlet but refusing to provide the same information to the complainant, and by soliciting negative comments for the Draft Chugach State Park Trail Management Plan from an advocacy group, all of which fell outside the scope of his professional duties.

The Complainant also alleged that a DWC employee provided agency data to another member of the public while withholding the same information from the complainant. However, the Complainant provided nothing to corroborate her belief that this had happened and the ombudsman discontinued investigation of that accusation.

Ombudsman Linda Lord-Jenkins gave written notice of investigation to then-ADF&G Commissioner Denby Lloyd on February 26, 2010, in accordance with Alaska Statute (AS) 24.55.140. Assistant Ombudsman Kate Higgins investigated this complaint and forwarded her report to the ombudsman.

***Ombudsman Note:** This report does not comment on the issue of whether Parks should approve and construct the two trails supported by the complainant in the Eagle River/South Fork area. This report addresses only the issues outlined in the allegations.*

BACKGROUND

Eagle River Trails Project

The Complainant is an advocate for a trail system in the Eagle River area linking Eagle River High School, on the south side of the Eagle River waterway, with Gruening Middle School, Lions Park, and surrounding neighborhoods on the north side of the river. The Complainant has been, and continues to be, a tenacious advocate for the Eagle River Trails Project. The Eagle River Trails Project is a group composed primarily of parents of Eagle River High School students, and the group has promoted the building of an improved trail system for use by the school's students.

This complaint, A2009-1640, is the Complainant's second complaint to the ombudsman. In 2008, the Complainant filed a complaint against DWC alleging that Wildlife Biologist Rick Sinnott committed misconduct by making derogatory comments about her; that Mr. Sinnott provided inflammatory statements to the Anchorage Daily News (ADN) regarding her trail plans; and that Mr. Sinnott engaged in trail-setting policy, an activity that the Complainant alleged was outside the scope of Mr. Sinnott's official duties.

The Complainant also alleged that it was a conflict of interest for Wildlife Biologist Jessica Coltrane to sit on the Eagle River/Chugiak Parks and Recreation Board of Supervisors. The Complainant asked that Mr. Sinnott issue a public apology, that the ADN publish a retraction, for DWC to refrain from setting trail policy, and for DWC to assign staff other than Mr. Sinnott or Ms. Coltrane to work with the Complainant regarding her trail plans.

In reviewing the Complainant's prior complaint, the ombudsman determined that Mr. Sinnott's comments regarding the Complainant were discourteous and asked that Mr. Sinnott provide an apology. Mr. Sinnott complied and provided a brief letter of apology. The Complainant was dissatisfied with the apology because, she said, Mr. Sinnott's tone was insincere and the apology was not made public as she requested. The ombudsman office determined that the letter was sufficient under the circumstances, notwithstanding the Complainant's disagreement. Additionally, the ombudsman found it unreasonable for the Complainant to expect DWC to refrain from providing input regarding wildlife management issues to the appropriate land-owners where the Complainant's trails were proposed, nor was it reasonable (or feasible) for DWC to assign other staff to assist the Complainant with her efforts. Lastly, the ombudsman could not ask the ADN to issue a retraction of its news articles because the ombudsman lacks jurisdiction over private entities like a newspaper.

In filing the present complaint, the Complainant told the ombudsman that her efforts to establish trails are at a critical juncture as the Department of Natural Resources (DNR), Division of

Outdoor Parks & Recreation (Parks) is in the process of revising the Chugach State Park Trail Management and Access Plans.

The Complainant provided a map to the ombudsman showing the existing trails in the area as well as the proposed trails; this map was prepared by the Eagle River Trails Project. A copy of the map is appended to this report as Exhibit A. According to the map, land ownership in the area is divided between the Anchorage School District, the Municipality of Anchorage, and Chugach State Park.

Alaska Department of Fish & Game, Division of Wildlife Conservation

The Alaska Department of Fish & Game's (ADF&G) mission is:

To protect, maintain, and improve the fish, game, and aquatic plant resources of the state, and manage their use and development in the best interest of the economy and the well-being of the people of the state, consistent with the sustained yield principle.¹

The Division of Wildlife Conservation's (DWC) mission is "to conserve and enhance Alaska's wildlife and habitats and provide for a wide range of public uses and benefits."² One of DWC's core services is:

Wildlife Information, Education, Viewing, and Permitting Services: Issue scientific, educational and special use permits and provide regulatory, technical, planning and other support services to a variety of users, including educators, researchers, nonresident visitors, and wildlife control officers at public facilities such as airports. [Emphasis added]³

DWC staff told the ombudsman investigator that the agency is involved with land-planning proposals only to the extent that the project involves wildlife concerns. Commonly, members of the public will contact ADF&G regarding a project, but "sister" agencies such as DNR may also request ADF&G's advice. ADF&G's role is that of wildlife expert and the agency's staff are expected to work with project developers to identify and mitigate wildlife concerns.⁴

Although DWC provides planning services to outside entities regarding wildlife issues, the landowner makes the ultimate land use determinations. For example, Parks is ultimately responsible for making trail siting decisions within Chugach State Park. As such, ADF&G's role in the trail-planning process is that of an information resource or commenter. However, because ADF&G is the state agency tasked to manage the state's fish and game resources, the ombudsman expects that the agency's comments regarding wildlife impacts would receive considerable weight.

¹ <http://www.adfg.state.ak.us/mission.php>

² <http://www.wildlife.alaska.gov/index.cfm?adfg=info.overview>

³ Id.

⁴ Ombudsman interview of then-DWC Director Doug Larsen and former DWC employee Grant Hilderbrand, November 19, 2008.

Chugach State Park Planning Process

The Department of Natural Resources (DNR), Division of Parks and Outdoor Recreation (Parks) shall “develop, manage, and maintain state parks and recreational areas” including the Chugach State Park.⁵ AS 41.21.121 established Chugach State Park and states, in part:

The park is established to protect and supply a satisfactory water supply for the use of the people, to provide recreational opportunities for the people by providing areas for specific uses and constructing the necessary facilities in those areas, to protect areas of unique and exceptional scenic value, to provide areas for the public display of local wildlife and to protect the existing wilderness characteristics of the easterly interior area. The eastern area of the park shall be operated as a wilderness area, the central area as a scenic area, and the periphery areas as recreational areas.

AS 41.21.122 addresses management responsibility within Chugach State Park and provides in part:

The Department of Fish and Game shall cooperate with [DNR] to provide for those purposes under AS 41.21.121 relevant to the duties of the Department of Fish and Game.

The current Chugach State Park Master Plan and Trail Plan were adopted in 1980 and 1986, respectively. In response to rising population in the Anchorage area and increased use of the park, DNR began a planning process in 2008 to revise both plans.⁶ In August 2009, DNR released the Draft Chugach Park Trail Management Plan (Draft Plan). The trails at issue in this complaint are identified as 223a-b and 224a-d in the Draft Plan. Copies of the Draft Plan maps applicable to this complaint are appended as Exhibit B.

The Eagle River Trails Project and the Draft Plan

The Complainant said her concerns about the trails were three-fold:

- Improving safety for students who had been running in school athletic events on nearby roads and highways;
- Averting injuries that students suffered from running on improper running surfaces, and
- Keeping students in the school area instead of busing them to Chugiak High School to practice on ski trails there.

She said she became interested in the trail issue when she was the parent of a Gruening Middle School student. She said many Gruening parents became concerned about the safety of students running up Eagle River Road, and crossing Eagle River Loop Road. She said a car nearly hit four of the female runners.

The parents' concern grew when their children entered Eagle River High School. Student runners there have to run along the breakdown lane of the divided four-lane Eagle River Loop Road, a 55 mph highway bypass between the Glenn Highway and the Glenn Briggs Bridge.

⁵ Alaska Statute (AS) 41.21.020(4)

⁶ <http://dnr.alaska.gov/parks/units/chugach/planning.htm>

The ombudsman herself has seen Eagle River track athletes running along the road. On one occasion she saw the athletes stop their run to help corral a loose dog on the highway, creating a safety hazard to themselves and drivers.

An asphalt bike trail along Yosemite Drive runs past the school and connects to the Loop Road but the Complainant said the bike path is still not adequate for cross-country racers who need natural surfaces to train on to prevent injuries.

The bike path also cannot be used for cross-country ski practice or meets because it is shoveled and graveled in the winter. During ski season, the ERHS students are bused to Chugiak to use their ski trails, which the Complainant argues takes time away family and homework.

She said that she and other parents were discussing their concerns with an Eagle River High School track coach, who asked the parents for help in mustering support for creation of a trail system linking to the school track.

The ombudsman investigator asked the complainant to compare the Draft Plan with the Eagle River Trails Project map and identify whether the trails the Complainant advocates for were included in the Draft Plan. The Eagle River Trails Project map lists eight trails located within Chugach State Park;⁷ of those two of the trails the Complainant advocated for were not included in the Draft Plan in any form.⁸ Of the six trails that appear on both the Eagle River Trails Project map and the Draft Plan, four are listed as proposed snow and terra trails and two are listed as proposed snow trails.⁹

The Complainant's Comments on the Draft Plan

The Complainant submitted comments to Parks on the Draft Plan, praising it as “one of the best park plans I have ever seen” and that she supported the inclusion of trails 223a-b and 224a-d in the Draft Plan. She also requested that Parks include two trails that were not included in the Draft Plan, which would allow winter use of the Eagle River Campground roads for skiing and “connect Eagle River Campground with recently constructed Trail 223a-b near Eagle River High School and the Glenn Highway bike path on the bluff above.” The two trails that the Complainant requested are shown on the Eagle River Trails Project map as segments 9 and 10.

A South-Central Alaska news outlet published a story about reaction to the Draft Plan in 2009. The ombudsman concluded from the story that the Draft Plan appeared to match most of the Complainant's goals for improving and extending the trail system in Eagle River.

ADF&G's Comments on the Draft Plan

ADF&G submitted comments on the Draft Plan July 27, 2009, as well, stating that “in general, ADF&G supports the maintenance and development of trails in [Chugach State Park] and believe the plan does a good job balancing the needs of various user groups with wildlife conservation and public safety.” ADF&G comments included several pages addressing its concerns about human-bear interactions in the Eagle River canyon area.

The agency offered the following specific recommendations for the Draft Plan:

⁷ Eagle River Trails Project map segments 4-11, plus a footbridge crossing Eagle River.

⁸ The two trails not included in the Draft Plan are segments 9 and 10 on the Eagle River Trails Project map.

⁹ The two trails listed for snow, but not terra use, are segments 6 and 7 on the Eagle River Trails Project map.

The agency review draft of the CSP Trail Management Plan proposes that new and improved trails between the Glenn Highway and the South Fork (e.g., 223a, 223b, 224b, 224c) be Trail Class 5. Trail Class 5 is characterized in the plan as having 1) a surface commonly hardened with asphalt or other imported material, 2) low grades, 3) trailside amenities, 4) two-directional travel, 5) a typically rural to urban setting, 6) intensive use, 7) users with limited trail skills and experience, and 8) a high level of accessibility. This is not the kind of trail network that is appropriate for an area of high brown bear concentration; it will create a false expectation of safety by trail users, especially inexperienced trail users (e.g. children and tourists).

ADF&G has the following recommendation specific to the Eagle River Greenbelt area:

- 1) Do not add new or improve existing trails in the park between Glenn Highway and South Fork, particularly within ½ miles of any salmon-spawning stream or the river because these are the areas where there is a high likelihood of encountering brown bears.
- 2) Do not install the pedestrian bridge across Eagle River because it will increase the number of trail users even without additional improvements, and it will inevitably lead to new and improved trails throughout the Eagle River canyon.
- 3) If developed, close the trail network to all public use from July 1 through September 1 (maybe longer) when brown bears frequent the salmon-spawning streams and connecting trails and river banks. Instead of a seasonal trail closure, a night-time closure during this period should also minimize the number of surprise encounters because some bears appear to visit feeding areas at night to minimize encounters with trail users.
- 4) Enforce the trail closures with rangers or other on-site enforcement staff. Otherwise, the closure will be ignored.

In addition to our comments specific to the Eagle River Greenbelt area, ADF&G agrees with the general Trail Design and Development recommendations listed in the plan, and we have the following additional recommendations:

- 1) Minimize the number and lengths of new trails.
- 2) Keep all trails in a primitive condition (i.e., Trail Class 1 or 2) to discourage fast-moving activities more likely to surprise bears at close range.
- 3) Develop trails with a clear line of sight to avoid surprising wildlife.
- 4) Create at least ½ mile buffers along salmon-spawning streams to avoid disturbing foraging bears and consider seasonal or nighttime trail closures.
- 5) Avoid bear access to garbage, by providing bear-proof waste receptacles and emptying them before they are overflowing.
- 6) Put up numerous bear-warning signs at each access point on the trail, and intermittently along the trail.
- 7) Install kiosks at the main access point with bear and moose safety warnings and information.

ADF&G also appended to its comments, a copy of the agency's 2004 comments on a similar plan for a trail to connect downtown Eagle River with the Eagle River Nature Center. ADF&G's 2004 comments noted concerns over human-bear interactions:

We have been lucky so far; no one has been killed. However, putting thousands of people on a paved bike path within a few yards of brown bear feeding areas and along bear trails is problematic for humans and bears alike.

It appears that ADF&G had taken a consistent stance regarding trails in the Eagle River canyon area since at least 2004.

ADF&G's actions on the trail since June 2010

DWC Director Corey Rossi and DNR Parks Director James King did a walking tour and inspection of the area of proposed riverside parks in early September 2010 after which Mr. Rossi wrote to Mr. King "clarifying" ADF&G's prior statements on the project. Specifically, Mr. King asked Mr. Rossi to quantify ADF&G's prior statement that the stretch of Eagle River was "utilized significantly by multiple brown bears in a given year." He asked

Can you characterize this statement in a temporal and spatial context for us? Is this a lot of different bears, over a long period, in the entire drainage or is it a few bears, over a short period of time, in a discreet area?

Mr. Rossi responded:

In a spatial context, during the past two years photos taken by trail cameras, as well as public reports and staff observations, indicate that at least eight individual brown bears frequent the Meadow Creek confluence area. These bears generally arrive after the first week in June and become more prevalent once salmon arrive in Meadow Creek. Most of their activity is in the late night hours. We estimate that at least eight black bears also utilize this area. However, black bears typically avoid areas where brown bears concentrate, and are seen more frequently in housing areas adjacent to Meadow Creek.

...

Your letter also asks for clarification of our statement that the bridge and trail were "likely to result in human injury or death." That rationale was based upon the assumption that an improved trail would result in increased human activity and thus greater potential for bear-human interactions. Assuming that at least some of these interactions would be negative, it was further assumed that at least some would result in human injury or death, or deaths of brown bears. However, since it is impossible to predict the precise behavior and travels of individual bears or people, we have no way of quantifying the potential for negative interactions. While the most conservative approach is to avoid all human/bear interactions, we recognize that such a strategy would be inconsistent with the policies, programs, and projects in which each of our agencies engage daily.

Your final questions involve the current human/bear use of the area near the Meadow Creek confluence. As you and I walked through that area a few weeks back, it was quite clear that the existing narrow brushy trails along Eagle River have been heavily used by bears and people for quite some time. Our previous letter made no attempt to analyze the relative risk associated with existing trail use versus that of the proposed trail and bridge system.

Beyond completely isolating people and bears, the most important factor in reducing negative interactions is to make the actions of people and bears as predictable as possible. We all too often hear that someone was mauled because they surprised a sow with cubs. Clearly, the existing “brushy” foot path puts the public directly in a bear movement corridor with a tremendous potential for bears and people to surprise one another. Our previous letter provided suggestions concerning design and placement of the proposed trail that should reduce the potential for “surprise” human-bear encounters. A properly designed, constructed and maintained trail in that area may well improve public safety over existing conditions.

If your agency chooses to move forward with this project, we would recommend that the trail design incorporate a mechanism to allow an unencumbered corridor for the bears to move up and down Eagle River. Perhaps the proposed trail could be elevated on the north side of the river where the proposed bridge would terminate. The idea would be to create a trail overpass that would allow bears to pass freely under the trail, thus creating a separation from people where the bear and human trails intersect. In addition, your agency should actively discourage people from using the existing footpath along Meadow Creek and Eagle River (at least seasonally) When bear activity is high, we would be glad to advise your agency in an effort to help you provide proper notice to the public.

Ombudsman Observations on the Draft Plan

The ombudsman investigator noted that, out of the approximately 400 pages of comments submitted to Parks regarding the Draft Plan, many of the comments specifically referenced the Eagle River Trails at issue in this complaint. Out of those, the comments were mixed between supporting and opposing the proposed trails.

Upon review, it appears that the majority of the trails proposed by the Eagle River Trails Project were included in the Draft Plan and that the Complainant suggested that the agency consider including the remainder of the trails in the final plan. While the ombudsman recognizes that the Draft Plan is just that, a draft, it appears that the Complainant’s efforts have thus far proven successful notwithstanding ADF&G’s staff’s position on the proposed trails. Any changes to the Draft Plan, however, will be made by Parks and not ADF&G after the agency reviews and considers all comments received on the plan.

In the course of investigating this complaint, the ombudsman investigator reviewed:

- The Alaska Public Records Act as well as applicable regulations and case law
- The Executive Branch Ethics Act and regulations
- ADF&G’s disclosure in response to the Complainant’s APRA request(s) and subsequent communications with her regarding her supplemental requests for information
- ADF&G’s internal e-mail communications regarding the Complainant’s requests
- Wildlife Biologist position specifications
- ADF&G policy regarding staff communications with the public

- Meeting minutes for the South Fork Community Council¹⁰ and the Eagle River/Chugiak Parks and Recreation Board of Supervisors¹¹
- ADF&G's Website, including meeting minutes for the Anchorage Bear Committee and the 2010 Wildlife Survey
- Chugach State Park Planning Documents on DNR's Website¹²
- Public Comments on the Draft Trail Management Plan
- Relevant newspaper articles in the Anchorage Daily News and The Alaska Star

Relevant Parties:

- The Complainant
- Rick Sinnott –ADF&G Anchorage Area Biologist during the events at the center of this complaint. Mr. Sinnott retired in 2010.
- Jessica “Jessy” Coltrane –ADF&G Anchorage Area Biologist
- Grant Hilderbrand –ADF&G employee during the events at the center of this complaint
- Gino Del Frate –ADF&G Wildlife Biologist IV
- Sean Farley –ADF&G Wildlife Physiologist II
- Doug Larsen –ADF&G, Division of Wildlife Conservation (DWC) Director during the events at the center of this complaint
- Corey Rossi –ADF&G, DWC Director
- Jennifer Yuhas –ADF&G Legislative & Communications Liaison during the events at the center of this complaint
- Denby Lloyd – Former ADF&G Commissioner
- Cora Campbell –ADF&G Commissioner appointed in 2010
- John Rodda – Anchorage Parks & Recreation Director during the events at the center of this complaint
- James King – Former DNR, Division of Parks and Outdoor Recreation Director
- Tom Harrison – Chugach State Park Superintendent
- John Schoen – Audubon Alaska staff
- Anna Fairclough – Alaska State Representative

INVESTIGATION OF ALLEGATIONS ONE AND TWO

Allegation One: Contrary to Law, ADF&G failed to disclose documents as required by the Alaska Public Records Act. (AS 40.25.100-295)

¹⁰ Can be viewed at: <http://www.communitycouncils.org/servlet/content/33.html>

¹¹ Can be viewed at: <http://www.muni.org/departments/erparks/pages/default.aspx>

¹² Can be viewed at: <http://dnr.alaska.gov/parks/units/chugach/planning.htm>

Allegation Two: Contrary to Law, ADF&G failed to disclose documents requested under the Alaska Public Records Act within the time limits required by 2 AAC 96.325.

The Alaska Public Records Act grants citizens the right to access the public records produced and maintained by state agencies. The statutes and regulations governing APRA can be found at AS 40.25.100-.295 and 2 AAC 96.100-.900, respectively.

As a general rule, “the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours.”¹³ The term “public records” is defined broadly and the Alaska Supreme Court has said that “[e]xceptions to these disclosure requirements are construed narrowly in furtherance of the legislature's expressed bias in favor of broad public access.”¹⁴

Certain types of state documents, however, are excluded from public inspection under the Public Records Act.¹⁵ Examples of some items not open to the public include vital statistics and adoption records, public health information, certain law enforcement records, and “records required to be kept confidential by ... state law.”¹⁶

In addition to exempting records required to be kept confidential by state law, i.e. statute or regulation, the Alaska Supreme Court has also ruled that the “state law” exception includes common law exceptions.¹⁷ One of the common law exceptions to disclosure is the “deliberative process privilege.”¹⁸ This privilege, similar to the executive privilege, protects the internal communications of executive-branch staff during the decision-making process.

Additionally, in 1985, the Department of Law (Law) issued an informal opinion hypothesizing that the courts might recognize as another common law exception to APRA’s disclosure requirements, a “public interest” exception.¹⁹ Law’s opinion was offered in response to ADF&G’s request for advice regarding a public records request for radio frequencies used by the agency’s telemetry transmitters to track wildlife in the state. The opinion noted that the public may have a legitimate interest in the information to ensure minimal harm to the collared animals but noted that the information would most likely be used to track and/or hunt collared animals with detrimental effect on ADF&G’s mandate to manage and protect the state’s wildlife. Law concluded that the public interest exception would justify withholding the telemetry information from the public. Law also noted, however, that the “authority to deny disclosure under certain circumstances is not an obligation to do so under all circumstances” and, in that vein, disclosure of the telemetry information would be permissible where the disclosure would serve the public interests, such as to coordinate with federal agencies or private contractors.²⁰

Also, while the Public Records Act requires agencies to disclose records, it does not require agencies to summarize their records or manipulate data to create a new record in response to a

¹³ AS 40.25.110(a).

¹⁴ Municipality of Anchorage v. Anchorage Daily News, 794 P.2d 584 (Alaska 1990).

¹⁵ AS 40.25.120(a)

¹⁶ AS 40.25.120(a)(4).

¹⁷ Common law, also called “case law,” refers to law created by court decisions.

¹⁸ Capital Information Group v. State, Office of the Governor, 923 P.2d 29 (Alaska 1996).

¹⁹ Op. Alaska Att’y Gen. (Oct. 21, 1985).

²⁰ Id. at pg. 6.

request for public records.²¹ As such, requestors must distinguish a request for *documents*, which would be covered by APRA, from a request for *information*, which would not.

Requestors must pay for the personnel time spent locating and copying public records as well as for the copies themselves, except that an agency may waive its fees if it determines that the request benefits the public interest.²²

Time limits for responding to public records requests are prescribed by 2 AAC 96.325. Agencies have 10 working days to comply with a request for records but any time that elapses between the time the agency notifies the requestor that the request will generate fees and when the requestor provides the fee is excluded from the deadline. Additionally, agencies may extend the disclosure deadline for an additional 10 days under certain circumstances but must notify the requestor of the extension.

The specific statutory and regulatory provisions pertinent to this complaint are as follows:

AS 40.25.110. Public records open to inspection and copying; fees.

(a) Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of the fee established under this section or AS 40.25.115 [referring to electronic services] a certified copy of the public record.

(b) Except as otherwise provided in this section, the fee for copying public records may not exceed the standard unit cost of duplication established by the public agency.

(c) If the production of records for one requester in a calendar month exceeds five person-hours, the public agency shall require the requester to pay the personnel costs required during the month to complete the search and copying tasks. The personnel costs shall not exceed the actual salary and benefit costs for the personnel time required to perform the search and copying tasks. The requester shall pay the fee before the records are disclosed, and the public agency may require payment in advance of the search.

(d) A public agency may reduce or waive a fee when the public agency determines that the reduction or waiver is in the public interest. Fee reductions and waivers shall be uniformly applied among persons who are similarly situated. A public agency may waive a fee for \$5 or less if the fee is less than the cost to the public agency to arrange for payment.

AS 40.25.120. Public records; exceptions; certified copies.

(a) Every person has a right to inspect a public record in the state, including public records in recorders offices, except

...

²¹ 2 AAC 96.210.

²² AS 40.25.110, 2 AAC 96.240, and 2 AAC 96.360.

(4) records required to be kept confidential by a federal law or regulation or by state law

AS 40.25.220. Definitions for AS 40.25.100 – 40.25.295.

In AS 40.25.100 – 40.25.295, unless the context otherwise requires,

...

(3) “public records” means 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 evidence of the organization or operation of the public agency; “public records” does not include proprietary software programs.

2 AAC 96.210. Access to records; rights; requirements; format.

...

(b) A public agency is not required to compile or summarize its public records in response to a request for public records

(c) A public agency is not required to manipulate its data to create new records in response to a request for public records. A public agency may manipulate its data to create electronic services and products if

(1) the public agency can do so without impairing its functioning;

(2) the data is protected from intentional or accidental modification or destruction; and

(3) the requestor pays for the cost of developing the requested electronic service or product, based on fees established by the public agency under 2 AAC 96.460.

2 AAC 96.315. Description of records sought.

(a) A requestor must describe the public records sought in sufficient detail to enable the public agency to which the request is made to locate the records. The public agency shall make reasonable efforts to assist in the identification and description of records sought, and to assist the requestor in formulating the request. If the records are described in general terms, the agency shall attempt to communicate with the requestor in order to identify the public records requested, speed the response, and lessen the administrative burden of processing an overly broad request. These attempts may not be used as a means to discourage requests.

(b) If a public agency determines that the description of the records sought by the request[or] is not sufficient to allow the public agency to identify the requested records, that agency shall, no later than 10 working days after the receipt of the request, notify the requestor that the request cannot be processed until additional information is furnished. Time limits set out in this chapter do not begin to run until a sufficient description of the records is received in the office of the public agency responsible for maintaining the records.

2 AAC 96.325. Response to request; time limits.

(a) Except as otherwise provided in this section, as soon as practicable, but not later than the 10th working day after the date the agency receives a request for public records that complies with this chapter, the public agency shall

- (1) furnish all requested records that are disclosable; and
- (2) advise the requestor which of the requested records are nondisclosable, if any, and the specific legal authority and specific facts supporting nondisclosure.

...

(c) Any time that elapses between the time a requestor is sent notice that processing the request will generate chargeable fees and the time the requestor makes suitable arrangement for payment of those fees under 2 AAC 96.355 and 2 AAC 96.360 is excluded from the 10-working-day period of (a) of this section, or any extension of that period.

(d) A public agency may extend the basic 10-working-day period established under (a) of this section for a period not to exceed 10 additional working days by providing notice to the requestor within the basic 10-working-day period. The notice must state the reasons for the extension and the date by which the office expects to be able to furnish the requested records or to issue a determination that the records are not disclosable. The notice must include a statement that the extension is not invoked for purposes of delay. The basic 10-day period may be extended only when one or more of the following circumstances exist, and then only as to those specific documents within the request as to which the circumstances apply:

- (1) there is a need to search for and collect the requested records from field or other offices that are separate from the office responsible for maintaining the records;
- (2) there is a need to search for, collect, and examine a voluminous amount of separate and distinct records sought in a single request;
- (3) there is a need for consultation with an officer or employee who is absent on approved leave or official business;
- (4) the basic response period comes during a peak workload period; or
- (5) there is a need to consult with legal counsel to ensure that protected interests or private or governmental persons or entities are not infringed.

Communications between the Complainant and ADF&G.²³

²³ In investigating this complaint, the ombudsman obtained e-mail communications between ADF&G and Assistant Attorney General Kevin Saxby, in which Jennifer Yuhus at ADF&G sought advice regarding the public records requests. Those e-mails have been redacted due to attorney-client privilege.

On **October 4, 2009**, a Sunday, the Complainant submitted a public records request via e-mail to Jennifer Yuhas, ADF&G Communications and Legislative Director. The Complainant's requests in her own words, follows:

- 1) Any notes/emails regarding the Eagle River Trails project from ADF&G staff on all levels.
- 2) Bear-Camera information that was recently in the ADN²⁴ – dates cameras were placed and location, conclusions drawn from the data and the expense of the research.
- 3) Although I have already asked Rick [Sinnott] in person for the information, I would like to have a copy of the draft [urban wildlife attitudes] survey about trails/bears that is being conducted by ADF&G. I do not know what the survey in [sic] entitled but it has to do with trails and wildlife in the city.

Ms. Yuhas responded:

I will address your requests tomorrow from the office. There is a whole process that must be started for an actual FOIA request that requires more than a simple e-mail. You are certainly entitled to file any Freedom of Information requests you desire, some things may be easier to provide for both ends here, so I'd like to inquire tomorrow. [**Ombudsman note:** FOIA refers to the federal Freedom of Information Act. The Complainant's request is actually governed by the Alaska Public Records Act, but it is not uncommon for people to refer to all records requests as "FOIA requests."]

Ms. Yuhas sent a second e-mail to the Complainant on **October 6, 2009**²⁵, stating:

Here are the statutory references for your formal request in case you have any questions: I must follow up with a formal letter outlining the timeline and cost associated with the request as you have stated it. With regards to your first point, all e-mails, I suspect you may want to narrow your search to a specific group or named individuals. The rationale here is that it would significantly limit the time required for the search and therefore the cost to you of implementing the formal process. For instance, you may only believe certain positions would have issued or received these e-mails, or may generally believe that certain positions outside Wildlife Conservation would not have ever initiated or received such e-mails negating any reason to search for them. Again, I will be following up with a formal letter now that the formal process is to be initiated. In the mean time I've pasted the statutory references below for you. Please let me know if you intend to narrow your search or require any further assistance. [Emphasis added]

Ms. Yuhas attached the text of AS 40.25.110 and AS 40.25.120, addressing public records requests, to the body of the e-mail.

On October 7, 2009, Assistant Attorney General (AAG) Kevin Saxby sent an e-mail to several ADF&G employees discussing the Complainant's public records request. The content of Mr. Saxby's e-mail was forwarded to the ombudsman by Ms. Yuhas. Per AS 24.55.160, the

²⁴ Refers to an article published in the Anchorage Daily News (ADN) on September 21, 2009, titled *Cameras Reveal Fault in Eagle River Trail Plan*. The article can be located on the ADN's website: www.adn.com.

²⁵ It appears that Ms. Yuhas attempted to send this email on October 4, but it was returned as undeliverable.

ombudsman has access to confidential records of an agency but, per AS 24.55.330(3) attorney-client information is not a record that the ombudsman can access. The ombudsman, therefore, knows what the attorney general advised ADF&G but cannot legally release the information.

On **October 12, 2009**, the Complainant sent a second APRA request via e-mail, writing:

I would like to make a formal foia request for any boards, committees, commissions Jessy Coltrane, Rick Sinnott or Gino Del Frate [sit] on in the community on a municipal, state, federal or private level.

On **October 16, 2009**, Ms. Yuhas e-mailed the Complainant regarding the first request. Ms. Yuhas wrote:

Please find attached the formal response necessary for the formal information request. I did not hear back from you regarding a narrowed search request, so I have attached this letter thus far in the process. We are also working with our legal department regarding the request that was sent this week.

Ms. Yuhas attached two documents to the e-mail. One attachment was a letter authored by Ms. Yuhas outlining the procedure for Public Records Act requests. The letter restated the Complainant's request, verbatim from her October 4 e-mail, and also included the following:

ADF&G has a standard fee schedule applicable to public records requests, SOP III-400-8, a copy of which is attached, and does not waive fees except where the costs of searching for the requested records is below \$25 and copying costs are below \$5. Actual costs of personnel needed for electronic and email searches range from approximately \$74 per hour up to approximately \$135 per hour; and depending on the search parameters, we estimate that search times range from two to 15 hours per employee email account. We estimate that it costs approximately \$47 per hour for an "average" ADF&G employee to search through physical records, though actual costs vary by position.

As worded, your request would involve physical and electronic searches of all ADF&G employees, and would result in extensive search fees. Even if assumed that the scope could be narrowed to personnel within the Division of Wildlife Conservation and the Commissioner's Office, we would need to search through records of over 260 employees. Because of the nature of the searches, search fees will be considerable even if the search is narrowed to even a smaller number of individuals. We are therefore requesting clarification prior to commencement of a search. You may be able to narrow the number of individuals whose files you want searched or to limit search, time period, and/or the files you wanted searched. Depending on whether and how you would like to narrow your search, the type of documents you want the search to extend to, and the time period requested, the scope and cost of a search could vary considerably.

For that reason, ADF&G requests confirmation that you want all documents of any type (i.e. official letters, hard copies, email) and clarification regarding whose files and for what time period you wish to search.

These searches would yield massive numbers of documents. Also please note that if this search is to include any individuals who are no longer employed by the

department retrieval of these emails would be more difficult and would require involvement of Department of Administration programmers.

As you are considering clarification or payment, please be aware that some of the records you requested may be considered confidential in accordance with AS 39.25.080 and would thus not be a matter of public record and that other documents or portions thereof protected under state or federal law, including documents subject to deliberative process privilege or attorney client privilege, may be withheld under AS 40.25.120(a)(4) and 2 AAC 96.335(a)(4). ADF&G does not have the option of searching only for records that it believes are nonconfidential; it must locate all responsive documents, review all of them, and then specifically identify those withheld and the basis for each withholding. Thus, the narrower your request, the more likely we are to be able respond in a timely manner.

ADF&G will be happy to work with you to try to determine more precisely what documents you are interested in and what kind of search you are interested in having conducted. Please give me a call (465-6137) or send an email (jennifer.yuhas@alaska.gov) if you would like to discuss possible refinements to your request. Once you've decided how you wish to proceed, I would request that you put that in writing so we are clear on what records we will be providing to you.

After receiving clarification of the scope of your request and confirmation of your willingness to pay, we would then be able to develop a refined search strategy. We would then provide you with a better estimate of costs, and then commence the search and copying upon receipt of payment of those estimated costs.

The other attachment was ADF&G's standard operating procedure (SOP) outlining the fee schedule for public records requests.

On **October 16, 2009**, the Complainant responded via e-mail. She wrote:

Thanks for your follow up. I thought my response on Oct 8 (below) was a narrowed search. I wish the records were "free" due to the nature of my complaint. If I must pay, I do not wish to spend more than \$250.00, for as a volunteer, that is already a significant chunk on [sic] change. I would hope ADF&G would use the money efficiently.

Attached to the Complainant's e-mail was another e-mail dated October 8, 2009, stating:

Regarding my foia request from last week – I can streamline the request to include emails from Rick Sinnott, Jessey Coltrane, Sean Farley, Gino Del Frate and Grant Hildebrand that reference me or the Eagle River Trails project. Let me know if you feel this has narrowed the request enough to get the information I need.

Ms. Yuhas responded that she did not have the Complainant's October 8 e-mail in her inbox. It appears that Ms. Yuhas did not receive the Complainant's October 8 e-mail because, according to the e-mail's address line, the Complainant sent it to herself rather than ADF&G.

On **October 17, 2009**, the Complainant sent Ms. Yuhas another e-mail clarifying her public records requests. She wrote:

The “nuts and bolts” of my inquiry & request for information are as follows:

In order of priority, I would like the recent info on the bear/camera “study” and the protocol, analysis, peer-reviewed info & conclusions that were drawn in the **article published in ADN on Sept 21, 2009 “Camera’s find fault in the Eagle River Trails”**. Also, what is ADF&G **official position** on this article and the one published on **July 18, 2008 “Eagle River Trail Would be Bear Road”**? This article is also very alarming to me, as the project champion behind these trails. The implications of publishing this information has been extremely damaging to the public image of the project. Rick [Sinnott] seems to be inferring that the liability of a bear attack lies in the trail builders/land owners hands if we “ignore” him? Does not Rick have the bear management authority? Doe[s] he not have public safety mandate? How can he attempt to shift blame to others for his responsibility? What scientific information does he use to make these conclusions of risk and shift liability? Additionally, there is incorrect information in these article – is it not ADF&G responsibility to correct the errors (i.e. Rick alludes to many bears, when in fact only 1 bear crossed under the bridge one time) Rick appeared to incorrectly quote Dr. Farley’s telemetry study. This attempt at shifting liability and promoting incorrect information has officials and trail builders alarmed and has left the public with a false impression of the reality of the already established trail system that already exists in the area (the ADN article states the trails are **proposed** when in fact many of the trails are **established**). There is also a state campground and day use area, that has been used for decades. If the area is so infested with brown bears, as Rick implies, why is the state putting people at risk at the campground? There is a neighborhood, condominiums and a bike path with little/no warning of these risks. Is this not **negligence** on the part of the state, in particular ADF&G, if the risks are being published in the paper, yet the area of known risk, the public is not being warned or protected from the bears? Many believe the area is much safer than what Rick is inferring in the ADN. A true analysis of the risk needs to be conducted and then addressed appropriately by the state.

Second, I would like information on the new wildlife/city **survey** that Rick is informing people about. Rep. Fairclough, John Rodda, James King and I all requested information on the survey in our Sep 16th 2008 meeting. Is a social scientist and a trail advocate on the team formulating the survey with DWC to help prevent bias and help get a real pulse on the community?

Third priority: emails from Rick Sinnott, Jessey Coltrane, Sean Farley, Gino Del-Frate, Grant Hildebrand regarding **my character** (Mata-Harri/reality challenged/not having aptitude...etc). A human resource’s acknowledgment that this was (in)appropriate treatment of the public, on many levels, would help diffuse the problem. Why did the supervisors not reign concerning treatment of the public but rather appear to propagate the situation? Why has not a **public apology, as requested** been made to all the public officials that were sent the defaming information about me?

Fourth, I would like the information on the **science/reasoning and costs** associated with DWCstaff [sic] opposing trails in general especially the Eagle River Campground trails: (for example time spent on: emails, various meetings, state trails conference time in May where the Eagle River Trail Project was a key part of Rick[‘s] presentation of what NOT to do, time spent on public/ADN interviews etc.). An objective analysis of whether this is a productive use of our biologist (and his co-workers) energies in Anchorage would be good information for the public to know. Would not managing the bears in Anchorage/Eagle River rather than crusading against trails be a better use of our biologists time?

Last the public needs to see the **written protocol**, used by DWC, when they recommend trails to be open, closed, or not built or improved in an area. The information that was recently given to the parks and recreation commission, that is being use to make key trail decisions in our city, needs to be provided to the public without delay. A federal park planner recently requested this information and was denied the information. Key decisions are being made that affect our city’s trails without allowing the public to weigh in or even see the information DWC is presenting to our Parks & Rec commission. An investigation of this needs to take place as well. I am meeting with the Mayor this week to discuss what data was presented by DWC staff, to the commission, that have helped formulate decisions on city trail recommendations/policy.

Please keep this as confidential as possible for mis-information (ouch) is being spread rapidly right now.

Please ensure foia and the expenses associated with my requests are required. If there is any way I can simply obtain the information, as a public citizen without a foia or being charged that is preferable. If I must pay to get the information, please use the \$250.00 limit in order [of] priority above, as stated earlier, this is a significant amount of money for a community volunteer. My key motive is to protect my personal character and the public’s image of a viable, community-supported trails project.

What is the time-line? The most critical information is the “camera info” I would like as soon as possible. [Emphasis in original]

On **October 19, 2009**, the Complainant e-mailed Ms. Yuhas about a problem within the Eagle River Nordic Ski Club relating to her trail planning efforts. She also wrote:

Last, I need to ask you about the foia request regarding DWC employees on boards on the city, state, federal or community level. If you think I will be denied this information, I would rather rescind the request, for I do not want money spent on something I may not be able to get information on.

On **October 21, 2009**, the Complainant sent the following e-mail to Ms. Yuhas:

Thank you for the brief phone call & update on methodology ADF&G is using to fulfill my request for information. I have 2 issues to follow up with you on. 1) Where do I send the check for the foia request? 2) The reason I brought up the fact the foia request and the reprimands I am getting is because some staff @ DWC do not see the true purpose of my foia request which are: A) to understand

DWC research protocols relating to trail recommendations, B) understand DWC media protocol so public damage of a trail project is not done unnecessarily, C) request for the public to be treated professionally and request for information presented to our boards by DWC be made available to the public so the public can weigh in on public land decisions. D) Ensure the community in its entirety is respected for projects it has chosen to endorse.

In some cases, it appears I am being labeled as trying get someone in trouble, therefore, these staff members are getting sympathy from some (and I am being reprimanded by) who do not understand the true basis for the request, which is stated above. I believe the mis-information is where some of the backlash is occurring toward me, which is very unfortunate.

I hope that is clear. You know you can always contact me for clarification & updates as you deem necessary.

Thanks for your attention to details & taking time to effectively work on this important issue brought to you by a community enthusiast & trails advocate.

On **October 25, 2009**, the Complainant e-mailed Ms. Yuhas to let her know that her payment for the public records request was on its way.

On **October 30, 2009**, ADF&G South-central Office Regional Manager Mark Burch distributed the draft urban wildlife attitudes survey via e-mail to employees of ADF&G, the Department of Natural Resources, the Municipality of Anchorage, the federal Bureau of Land Management, and state representative Anna Fairclough.

On **November 12, 2009**, Ms. Yuhas sent the following e-mail to ADF&G employee Maria Gladziszewski regarding the Complainant's APRA request:

Per the e-mails below and our follow up conversation by phone with [the Complainant], myself, and Tom Lawson, [the Complainant] stated her order of priority would be:

- Documents including notes and e-mails regarding the E.R. Trails in the following order:
 - Rick Sinnot[t],
 - Jessey Coltrane,
 - Sean Farley,
 - Gino Del Frate
 - and Grant Hilderbrand
- Drafts, documents, and notes regarding the urban wildlife attitudes survey (our attorney has already determined this will be withheld, so I would not like us to spend any time gathering this so we don't waste any of [the Complainant's] money on something we know will not be provided. [Emphasis added]
- Documents including notes and e-mails regarding [the Complainant] in the following order:
 - Rick Sinnot[t],

- Jessey Coltrane,
- Sean Farley,
- Gino Del Frate,
- and Grant Hilderbrand

Our time frame is as soon as possible – thank you so much for your assistance.
[Emphasis added]

Ms. Yuhas attached to her e-mail the October 8 e-mail from the Complainant, but not the October 17 e-mail with the Complainant’s revised priority list.

Later that day, Ms. Gladziszewski sent the following instructions to Mr. Sinnott:

Here is the request from [the Complainant]. As we discussed, please work with Dave Mesiar²⁶ when you search for emails. Please search your inbox and outbox plus any folders you may have created. Also, if you have any paper files, please remember to copy those, too.

Your hourly cost is \$64 and Dave’s is \$66 so if the two of you work together, it costs the state \$130 an hour.

Cost per page for printing is \$.25 (so 100 pages costs \$25)

Once the costs exceed \$250, please stop searching and printing.

If you are able to search for and print/copy all the documents “regarding the Eagle River Trails” in under 2 hours, then I would ask Jessy to begin searching her files.

On **November 27, 2009**, ADF&G provided the Complainant with the documents gathered in response to her Public Records request. Ms. Yuhas prefaced the disclosure with a letter stating:

I am writing in response to the public records request refined on October 18, 2009. You asked for the following records:

- 1.) Any notes/emails regarding the Eagle River Trails project from ADF&G staff on all levels.
 - a.) Refined to begin with Rick Sinnott, then Gino Delfrate, then Jessy Coltrane [**Ombudsman Note:** This order is incorrect. [The Complainant’s] priority ranking for the biologists’ e-mails was Mr. Sinnott, Ms. Coltrane, Sean Farley, then Mr. Del Frate.]
- 2.) Bear- Camera information that was recently in the ADN- dates cameras were placed and location, conclusions drawn from the date and the expense of the research.
- 3.) Although I have already asked Rick in person for the information, I would like to have a copy for the draft survey about trails/bears that is being conducted by ADF&G. I do not know what the survey is entitled but it has to do with trails and wildlife in the city.

Attached are the records in accordance with your request per your instructions to process up to the amount of \$250.00 per our previous correspondence. I

²⁶ Mr. Mesiar is an ADF&G Data Technician based in Anchorage.

understand that in following the process outlined in my previous letter to you some staff remained fixed on the task rather than the clock going slightly over the time allotted. As this was our error, the items retrieved during that process have been included for you.

ADF&G released 479 pages of documents to the Complainant. All of the released items appear to be e-mails from Mr. Sinnott's state e-mail account, along with any attachments, regarding the Eagle River Trails Project. In short, it appears that ADF&G was only able to fulfill part of the Complainant's first priority item before her \$250 ran out.

On **December 27, 2009**, ADF&G Division of Wildlife Conservation Director Doug Larsen sent the Complainant the following letter addressing the concerns the Complainant raised in her October 17 e-mail:

Jennifer Yuhas forwarded to my staff and me a request from you for information on a number of matters related to wildlife management in and around Anchorage. Your request included five priority items and within each of these items you identified several questions, issues, and/or complaints. I will attempt in this letter to address as completely as possible each of those questions, issues, and complaints.

First priority (trail camera study): Department biologists are currently analyzing data obtained through a trail camera study. While our intent was to have the results compiled and the final report completed by the end of November, analysis of the more than ten thousand photos collected has taken longer than expected, in part because of additional work duties and responsibilities that have required staff attention. We anticipate the final report being available in February, at which time it will become a public document.

You asked where the appropriate blame, and hence liability, will lie should someone be injured as the result of a new or improved trail. While liability is something only the courts can decide, case law suggests that any parties involved with projects could be sued should issues arise with them. Our department does not make the final decision about whether or not to build or improve trails in Chugach State Park; we advise land managers on potential human-wildlife interactions and offer recommendations on avoiding adverse impacts. We have repeatedly raised concerns about placing trails in proximity to salmon spawning streams and suggest that if trails are built in certain areas, public safety may be compromised. This is the type of analysis our department routinely provides on projects where wildlife may be involved.

You asked who manages wildlife (bears in this case). Through the Alaska State Legislature, the Alaska Board of Game maintains the authority to manage wildlife, which in [turn] promulgates regulations to ensure the conservation of wildlife species. Our department's role is to collect and analyze information that enables the Board and us to conserve and enhance Alaska's wildlife and habitats. Public safety is the responsibility of enforcement agencies such as the Alaska State Troopers and municipal police departments. In the case of Alaska State Parks, the Department of Natural Resources (DNR) may also have a public safety responsibility. In many instances our staff is the most knowledgeable about local

wildlife resources and is best able to suggest the most appropriate actions and responses to human/wildlife conflicts.

The final report for the trail camera study will evaluate bear use at distinct locations in the Eagle River Valley near the proposed trail projects. Much of the preliminary information collected demonstrates that bears use the area. This information is corroborated by data from Dr. Sean Farley's radio telemetry study. We are not aware of inconsistencies between the results of the Elmendorf bear study and bear-movement information provided by Rick Sinnott.

You suggest that a risk analysis be undertaken as part of the trail-development process. We agree and suggest that land managers are the most appropriate entities to accomplish such assessments. Indeed, it's our understanding that DNR will be assessing the risks of activities with the Eagle River Canyon as they proceed with their comprehensive planning process.

Second Priority (wildlife/city survey): The wildlife/city survey you refer to is in the final stages of information gathering. Our department contracted with a professional survey consultant, Responsive Management, Inc., to assist with this study of resident attitudes towards wildlife in the Anchorage area. We anticipate that results of this study will be available in February. We will be happy to provide you a copy of the survey results when they are available.

Third priority (miscellaneous information and public records requests): In response to your Public Records Request, we have provided you over 400 pages of emails and other documents. The remainder of your questions and concerns was addressed in a previous letter to you dated December 11, 2008. As I'm sure you know and appreciate, personnel issues are confidential and cannot be discussed.

Fourth priority (costs for commenting on public projects): It is not possible for us to determine the costs associated with commenting on public projects, such as trail development. Such efforts are among the job duties expected of our biologists in both urban and rural areas of the state. Biologists in urban areas routinely spend a great deal of time assessing and managing the interactions of wildlife with humans in these settings, and these efforts include reviewing management plans and projects. While our department has never opposed trails "in general," we have suggested modifications to a few specific trails in an effort to minimize wildlife impacts and, in some cases, to minimize bear encounters. In a couple of instances we have recommended that trails not be built or improved in particular locations because we cannot identify safe and feasible on-site alternatives. Such recommendations have affected less than 1% of the maintained trails in the municipality of Anchorage. We have provided trail recommendations, both written and in public meetings, to the Anchorage Parks and Recreation Commission (for city parks) and to the Chugach State Park staff for that park. Our written comments are published with other agency and public comments and are available to the public through those agencies.

Fifth priority (written protocol): You asked that we provide a written protocol for how we deal with human-wildlife interactions. While we are unable to provide

such a protocol because wildlife-human interaction are individually unique and require on-scene assessments, one document that helps guide management activities related to bear-human encounters is our division's "Policy for Managing Bear/Human Conflicts in Alaska." I have enclosed a copy of this policy for your information. When appropriate, educational materials have been created and distributed to address reoccurring issues. These tools are constantly being revised and produced to enhance positive wildlife activities and minimize negative encounters.

While I respect your desire to keep your email confidential, I am unable to guarantee this because it is considered a public record.

I hope you find this information helpful and responsive to your requests. Please let me know if I can be of further assistance.

ALLEGATIONS ONE AND TWO: ANALYSIS AND FINDINGS

The Office of the Ombudsman's Policies and Procedures (P&P) at 4040(1) defines *contrary to law* as:

- (A) failure to comply with statutory or regulatory requirements;
- (B) misinterpretation or misapplication of a statute, regulation, or comparable requirement;
- (C) failure to follow common law doctrines;
- (D) individual misconduct in which a state employee:
 - (a) performed for an illegal or improper purpose, or
 - (b) performed in an illegal manner (see AS 11.56.850, AS 11.56.860, or the Executive or Legislative Ethics Act)

Allegation One: Contrary to Law, ADF&G failed to disclose documents as required by the Alaska Public Records Act.

This complaint illustrates the particular difficulties presented by public records requests. In this case, the Complainant submitted multiple requests for a mix of documents and information, which is not covered by the Alaska Public Records Act. Her initial request was very broad and, in light of the payment regulations, the agency suggested that she consider narrowing her requests. This led to additional requests and additional delay.

Following, the ombudsman has broken down the Complainant's requests by date and category, and by whether the item was a document or an information request:

October 4, 2009

Items Requested by the Complainant	Category of item
Notes/Emails of all ADF&G staff regarding the Eagle River Trails project	Documents
Information about ADF&G's bear-camera study	Possible mix of documents and

	information
Draft urban wildlife attitudes survey	Documents

October 12, 2009

Information about specific ADF&G staff involvement on municipal, state, federal, or private boards, committees, commissions (The Complainant rescinded this request on October 19)	Possible mix of documents and information
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October 16, 2009

Request narrowed to just e-mails from Rick Sinnott, Jessy Coltrane, Sean Farley, Gino del Frate, and Grant Hilderbrand that reference either the Complainant or the Eagle River Trails project (this revises item 1 from the October 4 request)	Documents
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October 17, 2009

Bear/Camera study, but also requesting ADF&G's position on news articles, information about bear management authority and liability, and suggesting that ADF&G conduct a risk analysis of the area in question	Mix of documents and information and suggestions
Whether ADF&G included a social scientist and a trail advocate when formulating its wildlife attitudes survey	Information
E-mails from Rick Sinnott, Jessy Coltrane, Sean Farley, Gino del Frate, and Grant Hilderbrand regarding the Complainant's character, and questioning why ADF&G supervisors allowed staff to treat her, as a member of the public, shabbily and why the agency failed to issue a public apology (this appears to be another revision of item 1 of the October 4 request)	Mix of documents and information and explanation
Information about the science, reasoning, and costs for ADF&G staff to oppose trails	Information
DWC's written protocol for making trail recommendations	Documents

On **November 12**, Ms. Yuhás sent an e-mail to Maria Gladziszewski directing Ms. Gladziszewski to begin the search for the Complainant's requested documents. Ms. Yuhás referenced a follow-up conversation that she and ADF&G employee Tom Lawson had with the Complainant where the Complainant revised her priority list again. The Complainant confirmed, via an e-mail to the ombudsman investigator, that the priorities laid out in Ms. Yuhás' email appeared to correctly reflect the priorities that the Complainant set. Her requests follow:

Notes/e-mails regarding the Eagle River trails, in the following order: Rick Sinnott, Jessy Coltrane, Sean Farley, Gino del Frate and	Document
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Grant Hilderbrand	
Drafts, documents, and notes regarding the wildlife survey	Document
Notes/e-mails regarding the Complainant in the following order: Rick Sinnott, Jessy Coltrane, Sean Farley, Gino del Frate, and Grant Hilderbrand	Document

Additionally, because the Public Records Act requires agencies to charge requestors for the personnel costs of locating responsive documents, broad document requests can be prohibitively expensive for members of the public. In this case, the Complainant imposed a monetary limit of \$250 on the search, which meant that she had to narrow and prioritize her requests.

It appears that ADF&G exhausted the Complainant's \$250 after searching only Mr. Sinnott's state e-mail account for responsive documents and disclosed 479 pages of documents. The disclosed documents thus represents only a portion of the first item on the Complainant's final priority list.

The limited nature of the disclosure appears to be a product of how the Complainant prioritized her requests and the monetary limitation that she placed on her request, however, and not because ADF&G refused to release all of the documents that she requested. In fact, in disclosing the documents, ADF&G noted that staff kept searching for documents even after the allotted time had elapsed and the additional documents were included in the disclosure at no additional cost to the Complainant.

Further, one of the e-mails DWC disclosed essentially fulfilled another one of the Complainant's requests. The Complainant requested the bear-camera study results as part of her October 4 and October 17 requests. Although the final study results were not complete at the time of the Complainant's request, DWC's disclosure included a two-page document containing the agency's preliminary findings in the bear study.

Additionally, approximately a month after DWC fulfilled the Complainant's request, then-DWC Director Doug Larsen sent the Complainant a lengthy letter in response to the various requests for information and suggestions that she had submitted to the agency on October 17.

One of the items that the Complainant requested merits further attention - namely the draft urban wildlife attitudes survey. Under the Public Records Act, draft documents are considered public records and, thus, are disclosable unless the document falls within one of the exceptions of AS 40.25.120(a) or existing common law. And, even though the Complainant was forced to prioritize her requests due to the monetary limit she placed on the search, the draft survey was easily identifiable and would not have taken significant staff time to locate and copy. As such, it seems that DWC should have disclosed the draft survey unless there was a valid reason to withhold it.

The draft survey does not appear to have been subject to any specific statutory exception to APRA. Although some DWC records are protected by AS 16.05.815(d), the draft survey does not, on its face, fall within one of the protected categories in AS 16.05.815(d). Therefore, any grounds for withholding it would need to arise from a common law exception recognized by the Alaska courts. Given that this was a draft document, it might have qualified for "deliberative process" privilege, which is described by the Alaska Supreme Court as follows:

[W]e have held that the deliberative process privilege is “one of the judicially recognized ‘state law’ exceptions” to public access under the public records act. In so holding, we have explained that the deliberative process privilege is intended to “protect[] the mental processes of government decisionmakers from interference.” And we have noted, generally, that “[p]ublic officials may assert this privilege and withhold documents when public disclosure would deter the open exchange of opinions and recommendations between governmental officials.” [Footnotes omitted]

See *Fuller v. City of Homer*, 75 P.3d 1059 (Alaska 2003). To qualify for deliberative process privilege, a record must memorialize opinions or consultations prior to a decision, and the application of the privilege must be for the purpose of preserving free discussion within the agency.

The draft survey might have qualified for the deliberative process privilege; however, on October 30, 2009 ADF&G South-central Office Regional Manager Mark Burch distributed the draft urban wildlife attitudes survey via e-mail to employees of ADF&G, the Department of Natural Resources, the Municipality of Anchorage, the federal Bureau of Land Management, and state representative Anna Fairclough. The e-mail was probably intended to allow for consultation among the government agencies, and consultation outside an agency is somewhat protected by deliberative process privilege.²⁷ In this case, however, the generous distribution of the draft outside ADF&G weakened the argument for deliberative process privilege. Although ADF&G had an interest in avoiding public distribution of the draft, as public access could arguably bias the survey results, ADF&G may not have had a valid exception to the public records law to justify withholding the document.

Despite wide distribution of the draft survey on October 30, 2009, on **November 12**, Ms. Yuhas directed fellow ADF&G staff *not* to search for any “drafts, documents, and notes regarding the urban wildlife attitudes survey.” The problem is that Ms. Yuhas did not necessarily obtain or follow advice evaluating the effect of the October 2009 release of the draft survey. Before that distribution of the draft on October 30, 2009, she might have relied on deliberative process privilege; afterwards, such reliance was probably misplaced.

Technically, DWC complied with APRA by responding to the Complainant’s records request according to her budgetary limit and the priorities she set. However, DWC could have provided the draft survey at negligible cost in either time or material. The argument that DWC did not provide the document because the Complainant’s funds were exhausted is disingenuous. Instead, review of DWC’s records indicates the Ms. Yuhas specifically instructed staff not to search for or provide the record in question, apparently because she believed it was confidential. When an agency withholds a record because it is confidential under state or federal law, the agency is required by 2 AAC 96.325 (a)(2) to cite the law relied upon, so the requester can pursue a meaningful appeal. By claiming that it withheld the draft survey because the requester ran out of money, despite the lack of additional cost to provide a copy of the draft survey, DWC avoided stating a claim of privilege. This means that DWC avoided providing the Complainant with opportunity to seek judicial review of the decision. This violates at least the intent of APRA. The agency may have had a reasonable justification for withholding the draft wildlife survey but it

²⁷ In *Gwich'in Steering Committee v. State, Office of the Governor*, 10 P.3d 572 (Alaska 2000), the Alaska Supreme Court protected memoranda prepared by a private consultant for the Governor’s Office.

did not cite the reason in accordance with the Public Records Act. The ombudsman therefore found this allegation *partially justified*.

Allegation Two: Contrary to Law, ADF&G failed to disclose documents requested under the Alaska Public Records Act within the time limits required by 2 AAC 96.325.

ADF&G did not timely disclose its documents in response to the Complainant's request. Public Records Request regulation at 2 AAC 96.325 specifies that agencies have 10 working days to comply with a public records request, notwithstanding any time while the agency is waiting to receive payment from the requestor.

ADF&G received the Complainant's payment by the end of October 2009, yet did not disclose its documents until November 27, 2009. And, although agencies can extend the 10-working-day timeline, the ombudsman could find no evidence that ADF&G did so in this case.

Therefore, the ombudsman found this allegation *justified*.

INVESTIGATION OF ALLEGATION THREE

Allegation Three: Contrary to Law, a DWC employee violated the Executive Branch Ethics Act by interfering with potential funding sources for the complainant's proposed trails, by providing agency data to a news media outlet but refusing to provide the same information to the complainant, and by soliciting negative comments for the Draft Chugach State Park Trail Management Plan from an advocacy group, all of which fell outside the scope of his professional duties.

The Executive Branch Ethics Act (Ethics Act) applies to all employees of the Executive Branch, such as ADF&G employees. Statutes and regulations pertaining to the Ethics Act can be located at AS 39.52.010 - .460 and 9 AAC 52, respectively.

The statutes and regulations pertinent to this complaint are as follows:

AS 39.52.110. Scope of Conduct; prohibition of unethical conduct.

(a) The legislature reaffirms that each public officer holds office as a public trust, and any effort to benefit a personal or financial interest through official action is a violation of that trust. In addition, the legislature finds that, so long as it does not interfere with the full and faithful discharge of an officer's public duties and responsibilities, this chapter does not prevent an officer from following other independent pursuits. The legislature further recognizes that

- (1) in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without personal and financial interests in the decisions and policies of government;
- (2) people who serve as public officers retain their rights to interests of a personal or financial nature; and
- (3) standards of ethical conduct for members of the executive branch need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material.

(b) Unethical conduct is prohibited, but there is no substantial impropriety if, as to a specific matter, a public officer's

(1) 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

(2) action or influence would have insignificant or conjectural effect on the matter.

AS 39.52.120. Misuse of official position.

(a) 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.

(b) A public officer may not

...

(3) use state time, property, equipment, or other facilities to benefit personal or financial interests

AS 39.52.140. Improper use or disclosure of information.

(a) A current or former public officer may not disclose or use information gained in the course of, or by reason of, the officer's official duties that could in any way result in the receipt of any benefit for the officer or an immediate family member, if the information has not also been disseminated to the public.

(b) A current or former public officer may not disclose or use, without appropriate authorization, information acquired in the course of official duties that is confidential by law.

AS 39.52.960. Definitions.

In this chapter, unless the context requires otherwise,

...

(3) "benefit" means anything that is to a person's advantage or self-interest, or from which a person profits, regardless of financial gain, including an 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

...

(9) "financial interest" means

(A) an interest held by a public officer or immediate family member, which includes an involvement or ownership 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;

(B) holding a position in a business, such as an officer, director, trustee, partner, employee, or the like, or holding a position of management;

(10) “gain” includes actual or anticipated gain, benefit, profit, or compensation;

...

(18) “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, or as a result of which, a person or organization receives a benefit;

9 AAC 52.070. Information disseminated to the public

(a) For purposes of AS 39.52.140, information has been disseminated to the public if it has been published through newspaper publication; broadcast media; a press release; a newsletter; a legal notice; a nonconfidential court filing; a published report; a public speech; or public testimony before the legislature, a board or a commission.

(b) Information that is available to the public but that has not been published as described in (a) of this section has not been disseminated to the public.

The Ethics Act, in addition to proscribing certain types of behavior, also imposes reporting requirements on state employees to disclose certain types of situations, like the receipt of some types of gifts, outside employment, and real or potential conflicts of interest. It also sets forth a procedure for handling complaints alleging that a state employee has violated the Ethics Act and prescribes remedies for violations.

Wildlife Biologist III Position Specifications²⁸

The Department of Administration, Division of Personnel and Labor Relations maintains position descriptions for all employee positions. The relevant portions of the wildlife biologist specifications are as follows:

Class Definition:

Wildlife Biologist III performs advanced professional level biological work, either planning, developing, conducting and evaluating wildlife management and research or information and education projects, or researching, analyzing, and consulting on specific wildlife issues or species impacting divisional operations and position statements.

...

Examples of Duties:

...

Conduct and coordinate interagency project reviews and writes recommendations for land use planning and permitting and for policy and regulation development and other management and research programs.

²⁸The position descriptions provided by Division of Personnel and Labor Relations were current as of December 10, 2010.

Review, edit and approve written products of staff. Write and present technical reports and divisional publications, including preliminary reports, project summaries, post-season and annual management plans, federal aid reports, briefs, regulatory proposals, and reports to the Board of Game, advisory committees, regional councils, and public groups. Explain study objectives, management strategies, regulations, licensing and permitting requirements, wildlife habitat requirements, or the status of stocks to audiences. Author or co-author management or research papers for publication. Provide input to regional management plans.

Participate as a member of regional or statewide research, technical or educational teams, providing input during Board of Game, local, state and federal wildlife meetings, workshops and educational sessions. [Emphasis added]

On **January 15, 2010**, ADF&G established a policy regarding employee communications with the public. Please note that this policy was established after the Complainant filed her current complaint to the ombudsman.

The policy provides, in part:

GENERAL: ADF&G staff, when acting as the department's representative, shall present the department's information or position professionally and objectively, without expression of personal bias or value judgment. This policy applies to all venues and modes of communication including, but not limited to: press inquiries, public meetings and hearings, general public inquiries, official written and e-mail correspondence, external coordination and planning processes involving other government and non-government entities, and other opportunities for comment. All staff contacted by press, legislators, or legislative staff should report the details of that contact as soon as possible after contact occurs using a Media Contact Form or Legislative Contact Form.

ROUTINE ISSUES: Many issues can generally be addressed directly by area or regional employees; they include routine and descriptive information regarding regulations, bag limits, seasons, and other readily available information previously formatted for public dissemination. Staff are expected to confer with their regional supervisors or division directors to determine what types of inquiries and information can be routinely addressed on subjects of which they are knowledgeable.

NON-ROUTINE ISSUES: Staff need to keep their director's office/management staff apprised of topics known or expected to be controversial or complex. Directors, in turn, will apprise the commissioner's office of these topics, and seek coordinated guidance as needed. Regional supervisors and/or division directors shall identify appropriate staff to serve as department representative(s) for controversial or complex topics. These staff shall work with division management and the commissioner's office as necessary, to respond appropriately.

PERSONAL OPINIONS: When speaking in an official capacity, staff should refrain from offering speculation or personal opinion. Answers should remain fact based. ADF&G staff may have personal feelings, concerns, or opinions that are

not consistent with department positions or decisions. The department recognizes that staff have rights as citizens to express their personal opinion or viewpoints. However, all staff must guard against confusing the public or jeopardizing their own integrity and effectiveness as ADF&G employees. Every employee must avoid the appearance of impropriety or conflict of interest. Certainly, no employee may discuss privileged information gained through their employment.

...

Disciplinary action taken as a result of a violation of this policy may range from a verbal warning, to written instructions or reprimands, to termination depending upon the severity of the violation and any extenuating circumstances. [Emphasis added]

Rick Sinnott was the Anchorage Area Biologist until he retired from state service in the summer of 2010. The Complainant contends that Mr. Sinnott violated the Executive Branch Ethics Act by engaging in activities outside of his responsibilities as a Wildlife Biologist III, by communicating with third parties, in order to thwart her trail planning efforts.

The Complainant also alleges that Mr. Sinnott provided factually inaccurate information to the Anchorage Daily News regarding bear activity in the Eagle River canyon and provided the newspaper with comments designed to negatively influence public perception and support for her proposed trails. As explained elsewhere in this report, the ombudsman does not have the expertise necessary to make a determination one way or another regarding these allegations.

On December 31, 2008, the Complainant submitted a proposal to then-Mayor Mark Begich requesting funding for several trails from the Get Outdoors! economic stimulus package.

The Complainant alleged that Mr. Sinnott tried to block potential funding of the Eagle River Trails Project. The Complainant identified an e-mail exchange between Mr. Sinnott and John Rodda, Anchorage Parks and Recreation Director, which she believes supports her allegation that Mr. Sinnott acted outside the scope of his duties as a Wildlife Biologist in an effort to block support for the Eagle River Trails Project. The exchange is as follows:

On **January 13, 2009**, Mr. Rodda sent the following e-mail:

To all,

Here is the proposal packet I referred to last night. The packet was submitted by [Complainant] on behalf of the former Eagle River Trail Development Committee. To my knowledge, only two people participated in the process and submittal (Complainant and another name redacted). I will pass on info as received.

John

Attached to Mr. Rodda's e-mail was a proposal that the Complainant submitted to then-Mayor Mark Begich on behalf of the Eagle River Trail Development Committee requesting funding for the Eagle River Trails Project from the federal economic stimulus funds.

On **January 15, 2009**, Mr. Sinnott responded:

Thanks, John. Jessy [Coltrane] forwarded this packet to me. I'd heard previously that the committee had been disbanded. On what authority is [Complainant] pitching this grant request? [Emphasis added]

On **March 10, 2009**, Mr. Rodda sent an e-mail regarding the status of the trails committee, which stated in part:

There have been several e-mails regarding the status of the former MOA appointed Eagle River Trails Development Committee and questions raised as to its' authority as well as what extent MOA support was intended to provide or continue.

...

Recognizing the successful completion of the two trail segments, Mayor Begich thanked the ERTDC for their service and contributions on October 28, 2008 and which, in effect, ended the term of their original appointment.

A final ERTDC meeting was held on November 3, 2008 during which several issues were addressed including the need for trail grooming, spring work for trail cleanup or final grading, parking and signage on ASD and MOA properties, possible lighting, and longer term opportunities for additional phases of trail development.

...

As of November 2008, however, the former Eagle River Trail Development Committee does not exist as a formally appointed body and no member of the former ERTDC has any authority for signing documents or proposals on behalf of the MOA or ERTDC.

The following day, **March 11, 2009**, the Complainant sent a reply disagreeing with Mr. Rodda's assertion that the committee was no longer active. She also addressed the funding request she submitted to the mayor's office stating, in part:

Next, the proposals that were submitted on behalf of the ERTDC, were completely legitimate. On December 17, 2008 Mayor Mark Begich sent a memo to our committee, which I will attach, requesting we submit a proposal as part of the GET OUTDOORS South Central Economic Stimulus Project. This was sent out to all committee members. As Co-Chair on the committee I took the initiative to complete the paperwork after hearing back from 4/7 members on the committee. I did not receive any objections to the proposals from any committee members, until yesterday's e-mail, which came as a surprise to me. In January 2009, once again with no objection from committee members, we followed the lead from the now Senators office to submit a proposal for our project in the FY 2010 U.S. Senate Appropriation Funding.

However, on **March 23, 2009**, the Complainant told the ombudsman investigator, via e-mail, that she had just learned from the mayor's office that the Eagle River Trails Development Committee was no longer in force.

The Complainant also identified the following e-mail from Mr. Sinnott to U.S. Fish & Wildlife Service Biologist Maureen DeZeeuw, dated **June 10, 2009**:

Hey, Maureen. I'm looking for a little advice. This proposal has been around for over a year. The first three emails I've attached are some background information on the project and my concerns. The last attachment is a new wrinkle, wherein the trail proponents are trying to obtain federal money for the project. Feel free to share this information with others.

Although the project is completely or mostly on state land, wouldn't the use of federal funds require an EA [environmental assessment] or EIS [environmental impact statement]?

Ms. DeZeeuw responded that generally the use of federal funds requires at least an environmental assessment. Ms. DeZeeuw speculated that there may be reasons why an environmental assessment or environmental impact statement might not be conducted, such as the percentage of federal funding, whether a federal permit is involved in the project, or because the project applicant determined that the project had only a negligible environmental impact. Ms. DeZeeuw inquired about the project's funding and Mr. Sinnott responded that he believed the main source of funding would be federal or state funds other than those dedicated to Parks. It does not appear that Mr. Sinnott communicated further with Ms. DeZeeuw regarding this matter.

On **September 9, 2009**, Mr. Sinnott e-mailed Daily News then-outdoor editor Mike Campbell about his concerns regarding the Eagle River Trails Project and attached a copy of ADF&G's comments to Parks on the Draft Chugach State Park Trail Management Plan. Mr. Sinnott also wrote:

Our comments on the trails plan include some trail camera photos. I've drafted a preliminary report of our trail-camera findings in the Eagle River greenbelt this summer. I'd be happy to share that with you, if you're interested.

On **September 14, 2009**, Mr. Sinnott forwarded a two-page summary of ADF&G's bear-camera findings to Mr. Campbell after Mr. Campbell responded that he was interested in the findings.

On **September 17, 2009**, Mr. Sinnott forwarded four photos from the bear-camera and a schematic map of the area. Later that day, Mr. Campbell asked Mr. Sinnott to confirm the accuracy of a proposed quote for his article:

The proposed Eagle River trails prompting Sinnott's concerns is a 14-miler from the Glenn Highway Bridge over Eagle River to the Eagle River Nature Center which includes a pedestrian bridge near the campground, two pedestrian bridges upstream and two feeder trails less than 2 miles long on the south side of Eagle River.

Already, the highway and expanding Eagle River neighborhoods funnel bears into an increasingly narrow corridor "greatly restricted and channeled by human development," Sinnott said.

"If all of these trails are built," he said, "brown bears will have precious few places to avoid people in Eagle River canyon."

"Bears can be expected to use any new or improved trails in the Eagle River canyon and will use a proposed pedestrian bridge across Eagle River, near the campground, to avoid swimming across the river to access the salmon in Meadow Creek."

Mr. Sinnott responded:

Thanks for letting me look it over. We're not opposed to the entire 14-mile trail, just the part in the canyon (the movement corridor) between the Glenn Highway and Briggs Bridge, and near salmon-spawning streams. I clarified below.

My main concern is that I know the number of bear maulings will increase if these trails are built. We don't need another summer like 2008 where three Anchorage residents were mauled by brown bears on trails within 30 yards of a salmon-spawning stream.

Mr. Sinnott edited the first paragraph of the quote, as follows:

The proposed Eagle River trails prompting Sinnott's concerns is a 5.3-mile section of a 14-miler from the Glenn Highway Bridge over Eagle River to the Eagle River Nature Center which includes a pedestrian bridge near the campground, two pedestrian bridges upstream and two feeder trails loops less than 3 miles long on the south side of Eagle River.

On **September 21, 2009**, the ADN published an article titled *Cameras Reveal Fault in Eagle River Trail Plan*. Mr. Sinnott's quote, as edited above, was included in the story.

Mr. Sinnott submitted Notification of Press Contact forms for each of his contacts with Mr. Campbell and disclosed that he initiated the contact with Mr. Campbell on September 9, 2009.

On **September 17, 2009**, Mr. Sinnott contacted John Schoen, Senior Scientist for Audubon Alaska, via e-mail, and informed him of the just-released Draft Chugach State Park Trail Management Plan. Mr. Schoen had been an ADF&G Wildlife Biologist before leaving the agency and moving to the Audubon Society. Detailing some of his concerns regarding the trails in the Eagle River Canyon, Mr. Sinnott wrote:

I'd like to talk to you about the revised Chugach State Park trails plan just released for public review. The park has long wanted a trail from downtown Eagle River to the Nature Center. We've worked with them in the past. I've always recommended staying well away from brown bear concentration areas such as Clearwater Creek (near the Nature Center), South Fork of Campbell Creek, and Meadow Creek (across the river from the campground). State Parks has avoided the first two in their proposed alignments. However, they are being pressured by [Complainant], an Eagle River resident with lots of political connections (including, apparently, Governor Parnell) to build a network of trails in Eagle River canyon. These trails, and an accompanying pedestrian bridge, are in the just-released draft of the trails plan. I've heard from several reputable sources that Gov. Parnell wants the trail built.

Between Sean [Farley]'s GPS collar research, lots of anecdotal evidence and reports, and my trail-camera work this summer, we believe the portion of the greenbelt between the Glenn Highway and Briggs bridges is the last remaining movement corridor for brown bears across the Glenn Highway between Anchorage and the Knik River bridges. Further, Meadow Creek is a king and pink salmon spawning area that attracts brown bears from June through early September. The bears have learned to thread their way between all the new

residential development in Eagle River by staying in the greenbelt and at least some cross under the Glenn Highway bridges.

Currently, the greenbelt has a network of social trails used by dozens of people a day in summer (less in winter). Widening, extending, and paving the trails, and throwing a pedestrian bridge across the river next to the campground, will greatly increase human use of the trails. Judging by the proximity of neighborhoods, I'd anticipate hundreds of people will use the trails in all seasons and at all hours. Improving the trail surface will facilitate higher-speed use; relatively few people ride bikes or run on these trails now. These factors will surely lead to more maulings. The brown bear activity is mostly at night, but a lot of people will use these trails at night. I'm also particularly worried about use by unsupervised kids, who would be able to reach the river on foot or bikes in a matter of minutes from their homes and schools. This portion of Chugach State Park is like no other in the sense that it is a finger jutting between densely populated neighborhoods. Very few park access points are close enough to a residential area to attract large numbers of kids without adult supervision. The bears will continue to use the greenbelt because they have to. In essence, we will have an inner city park with brown bears.

Fish and Game will be forced to shoot brown bears that threaten trail users, especially bears that will continue to be attracted by spawning salmon in Meadow Creek, a few feet from a trail access point. But shooting bears won't stop maulings because more bears will come. The only way to avoid a collision in Eagle River canyon between recreational use and brown bears is to keep the area primitive and to continue to offer the opportunity to use the area without facilitating and encouraging human use. This new trail network will happen unless many members of the public ask State Parks and the governor to oppose to it.

Mr. Schoen responded that he "would like to help if [he] can." Mr. Schoen suggested that Mr. Sinnott reference the Kenai Peninsula Brown Bear Conservation Strategy, a 2000 ADF&G publication, and utilizing language about reducing bear-human interactions and trails to bolster ADF&G's comments. Mr. Schoen also suggested that Dr. Steve Herrero, a noted expert in bear-human conflicts, could be invited to analyze and testify regarding the draft plan.

Mr. Sinnott replied, in part:

I'd like to think we have six weeks or more to make a difference on this issue, but we may not. Public comments are due in mid-October and DNR hopes to have them summarized and addressed by early November. I think we'll need lots of public comments just to stop forward momentum. Particularly if the governor tells state parks to fast-step this, never mind the public process, which I think is highly likely at this point.

So. I think referring to Audubon's experience in other forums and the recommendations that experts have agreed to is a good introduction on the issue. But any letter from Audubon or its individual members will have to grapple with the specifics of the trail in Eagle River canyon: pro or con. Herrero is also a great idea, but I'm not sure when or where he might be effective. Ideally, he would

come up far enough in advance of the mid-October comment deadline for people to hear him and voice their opinion. Short of that goal, Steve might be very useful in talking directly to the governor or the state parks director even after the public comment deadline.

Mr. Schoen replied:

OK, let's chat more in early Oct. I think the best use of Steve H. would be talking to DNR, the Gov, and Mayor. Could we get him scheduled at one of the Monthly wildlife talks that ADF&G sponsors?

On **October 12, 2009**, Mr. Sinnott e-mailed Mr. Schoen and asked if he had time to talk soon. Mr. Schoen responded that he would call Mr. Sinnott the following day.

On **October 14, 2009**, Mr. Sinnott sent the following e-mail to Mr. Schoen:

Here are my previous comments on the agency draft of the trails plan and a brief summary of trail-camera research to date. I don't think these need to be sent to others, but I thought they might help you understand the issue. I'm writing more comments on the current public review draft of the plan.

Here's a schematic illustration of known and presumed routes used by brown bears to cross the Glenn Highway through the Eagle River area. This doesn't need to be sent to others either. It'll be in my written comments. But it'll help you understand the funneling effect the Eagle River greenbelt. [Emphasis added]

On **October 15, 2009**, Mr. Schoen, on behalf of Audubon Alaska, submitted comments referencing recent research by ADF&G "that determined that a number of brown bears use the Eagle River area around and above the Glenn Highway bridges." Audubon Alaska also urged DNR to work with ADF&G to "avoid developing new trails in areas that will increase bear-human conflicts leading to serious public safety issues and increasing conservation risks to bears."

It does not appear that Mr. Sinnott notified other ADF&G staff of his contacts with Mr. Schoen via the Notification of Press or Legislative Contact forms and ADF&G Commissioner Campbell advised the ombudsman that the agency has no other type of contact forms for ADF&G employees to use to document other contacts.

Mr. Sinnott's communications with Mr. Schoen regarding the Eagle River Trails Project were not the first communications they have had regarding trails in that location. On **February 9, 2004**, Mr. Sinnott forwarded to Mr. Schoen a copy of ADF&G's comments regarding the proposed Eagle River Greenbelt Trail that Parks was then considering. Mr. Schoen wrote back, "Thanks, Rick: Your recommendations look good. I will forward the memo to the chapter and encourage them to support your recommendations."

Additionally, Mr. Sinnott served on the Anchorage Bear Committee (ABC) between 2002 and 2006. The ABC meeting minutes indicate that the committee and Mr. Sinnott worked with Audubon Alaska, and Mr. Schoen specifically, on bear issues in the Anchorage area during that time.²⁹

²⁹ Further information about the ABC and the committee's meeting minutes can be located at: <http://www.adfg.alaska.gov/index.cfm?adfg=livingwithbears.abchome>.

ANALYSIS AND FINDINGS: ALLEGATION THREE

Allegation Three: Contrary to Law, a DWC employee violated the Executive Branch Ethics Act by interfering with potential funding sources for the complainant's proposed trails, providing agency data to a local media outlet but refusing to provide the same information to the complainant, and soliciting negative comments for the Draft Chugach State Park Trail Management Plan from an advocacy group, all of which fell outside the scope of his professional duties.

The Office of the Ombudsman's Policies and Procedures Manual at 4040(1) defines *contrary to law* as:

- (A) failure to comply with statutory or regulatory requirements;
- (B) misinterpretation or misapplication of a statute, regulation, or comparable requirement;
- (C) failure to follow common law doctrines;
- (D) failure to comply with valid court of administrative orders;
- (E) individual misconduct in which a state employee:
 - a) performed for an illegal or improper purpose, or
 - b) performed in an illegal manner (see AS 11.56.850, AS 11.56.860, or the Executive or Legislative Ethics Acts)

AS 39.52.120 prohibits executive branch employees from using their official position for personal "gain" and from using state time, equipment, and facilities to benefit their "personal or financial interests." Further, the Ethics Act defines the terms "gain," "personal interest," and "financial interest" in terms of monetary benefit.

Here, we have seen no evidence to indicate that Mr. Sinnott received a monetary benefit in exchange for his communications with the ADN, U.S. Fish and Wildlife, Anchorage Parks & Recreation, or the Alaska Audubon.

AS 39.52.140 also prohibits employees from benefitting from information gained during the course of employment that has not been disseminated to the public or from disclosing information that is confidential by law.

There is no evidence that Mr. Sinnott derived a personal benefit, i.e. monetary benefit, from disclosing his preliminary study findings or the agency's comments on the Draft Plan to outside entities. Further, the information that Mr. Sinnott disclosed was not confidential under state law. In fact, when Mr. Sinnott released his preliminary findings and the agency's comments to Mr. Schoen, the findings had already been detailed in the ADN and the agency's comments had already been provided to Parks. As such, it does not appear that Mr. Sinnott violated AS 39.52.140.

Therefore, the ombudsman proposes to find this portion of the Complainant's allegation that Mr. Sinnott violated the Ethics Act *not supported*.

We also reviewed, however, whether Mr. Sinnott's activities, while not violative of the Ethics Act, fell outside of his official job duties as the Anchorage Area Biologist.

The Wildlife Biologist III position description contemplates that the employee will be responsible for “conduct[ing] and coordinat[ing] interagency project reviews and writ[ing] recommendations for land use planning and permitting and for policy and regulation development.” In communicating with U.S. Fish and Wildlife and Anchorage Parks and Recreation, Mr. Sinnott inquired whether the Eagle River Trails Project required federal environmental studies prior to approval and whether the Complainant was authorized to take action on behalf of the former Eagle River Trails Development Committee.

Neither of these communications involved matters precisely within ADF&G’s expertise – namely fish and game management. However, that does not mean that Mr. Sinnott was acting outside his official job duties. While the Complainant interpreted his inquiry as a way to delay or derail her project, Mr. Sinnott was expected to communicate with outside entities regarding land use projects. As a long-time state employee, he was likely very familiar with the process and requirements necessary for approving a project like the Eagle River Trails Project. It does not seem outside the scope of Mr. Sinnott’s duties of coordinating with outside agencies regarding land use projects for him to question whether the usual requirements have been met or to confirm that the Eagle River Trails Development Committee had authority to involve ADF&G in labor intensive work.

The e-mail trail on the issue also shows his inquiry regarding the status of the trail project was fairly straightforward: Mr. Sinnott received an e-mail from the Municipality about the ERTDC, a group Mr. Sinnott believed had been disbanded. He inquired of the municipality to determine if his understanding was correct. The Municipality responded that the ERTDC had been disbanded. The Complainant objected that she, as co-chair, had taken action in the ERTDC’s name but later admitted to the ombudsman investigator that the group had indeed been disbanded.

Likewise, Mr. Sinnott’s inquiry of U.S. Fish and Wildlife about the necessity for an environmental assessment or impact statement was similarly brief and to the point; he asked if the proposed project required a federal environmental assessment or impact statement. U.S. Fish and Wildlife responded and the ombudsman could find no further evidence of contact about the issue. Asked and answered.

The ombudsman does not find that Mr. Sinnott exceeded his authority in asking his basic questions and found this aspect of the allegation ***not supported***.

The Complainant alleged that Mr. Sinnott provided information regarding his bear-camera study to the ADN on September 14, 2009 but then refused to provide the same information to her when she requested it one month later on October 17, 2009.

The complainant is correct; Mr. Sinnott did provide preliminary information on his bear camera study to the Anchorage Daily News.

However, the Complainant’s public records request for the bear study was filed with and handled by Jennifer Yugas, ADF&G’s communications director, who worked with the department’s assistant attorney general to respond to the request. While Mr. Sinnott gathered information in his own e-mail account to respond to the Complainant’s records request, he did not respond to her or her records request; Ms. Yugas did.

The Complainant received a copy of the preliminary bear camera study findings – the same information that Mr. Sinnott provided to the ADN reporter – on November 27, 2009 pursuant to her Public Records Request when ADF&G released almost 500 pages of documents to her.

The Complainant also alleged that Mr. Sinnott's communications with the ADN fell outside the scope of his duties because she believed his communications were intended to sway public support *away* from the Eagle River Trails Project. While the goal of Mr. Sinnott's communications was clearly to alert the public to ADF&G's concerns regarding the dangers of one aspect of the trails project, it does not appear that the communications fell outside of his job duties.

Then-Director Larsen expected his staff to be available to speak with the public and the media regarding wildlife management issues. Mr. Sinnott's job description as area wildlife biologist specifically states that he is expected to communicate with outside entities. Additionally, Mr. Sinnott provided the ADN with a copy of the agency's official comments on the Draft Plan and provided statements that matched the agency's official position on the trails at issue. Further, Mr. Sinnott apprised ADF&G staff of his contacts with the ADN using the agency's Notification of Press Contact forms.

ADF&G provided the documents to the Complainant at the same time that the department responded to her lengthy records request. The ombudsman believes that ADF&G could have easily provided the preliminary bear-camera results to the Complainant the day she requested it without requiring her to jump through the hoops of ranking its priority in relation to Mr. Sinnott's emails. However, ADF&G provided the information.

The ombudsman has already proposed to find the department acted contrary to law in delaying that response. Mr. Sinnott bore no responsibility for the agency's response on the bear study. He also was acting within the scope of his job in communicating the agency's position on an issue of great public interest. Therefore, the ombudsman found this aspect of the allegation **not supported**.

The Complainant alleged that Mr. Sinnott crossed an "ethical line" when he contacted Audubon Alaska and encouraged the organization to submit comments opposing the Eagle River Trails Projects to Parks.

As noted earlier, Mr. Sinnott previously provided Mr. Schoen with a copy of ADF&G's comments on a similar plan in 2004, before the Complainant became involved in advocating for the two river trails. As such, Mr. Sinnott was likely aware that Mr. Schoen would be interested in the current trail proposal.

Although Mr. Sinnott indicated that the agency's comments and his preliminary bear-camera research did not need to be "sent to others," ADF&G had already submitted its comments to Parks and the preliminary study results had already been detailed in the ADN. As such, it does not appear that Mr. Sinnott was providing Mr. Schoen with confidential agency information.

Further, Mr. Sinnott's communications appear intended to garner support *for* ADF&G's position, not against it. As such, the ombudsman fails to understand how this communication would be outside the scope of his duties.

While the Complainant may find Mr. Sinnott's communications objectionable because the position directly counters *her* position, the ombudsman can find no ADF&G policy in effect at the time Mr. Sinnott communicated with Mr. Schoen that would have prohibited such contact. Therefore, the ombudsman found this overall allegation **not supported**.

OMBUDSMAN RECOMMENDATIONS

Recommendation 1: ADF&G should provide the bear camera study and the wildlife survey to the Complainant immediately.

On December 27, 2009, then-DWC Director Doug Larsen promised to provide the Complainant with the final findings of the bear camera study and the wildlife survey once completed. At that time, Mr. Larsen anticipated that both the study and the survey would be complete around February 2010. However, by December 20, 2010, the Complainant had yet to receive the documents and, on December 27, 2010, present DWC Director Corey Rossi told the Complainant via e-mail that the agency is “still missing the final report of the bear/camera work.”

DWC should make good on its promise to provide the documents to the Complainant. The wildlife survey results have been out since February 2010 and, as such, it should not be difficult to provide a copy to the Complainant. Likewise, if the results of the bear-camera study have been finalized, DWC should provide a copy to the Complainant. If, however, the results are not yet final, DWC should provide the Complainant with a revised estimated date of completion.

Recommendation 2: ADF&G should conduct regular trainings refresh its staff of the APRA requirements to ensure that future APRA requests are fulfilled in a timely fashion.

ADF&G failed to disclose the records that the Complainant requested within 10 working days as required by state regulation. To ensure that this does not happen again, ADF&G should review the disclosure requirements with staff responsible for fulfilling public records requests.

Recommendation 3: Because ADF&G records occasionally require the agency to operate under a different set of disclosure rules, ADF&G should consult with and listen to the advice from its attorney general in public records request cases.

Ms. Yuhas assumed that the draft survey was privileged, despite the October 2009 distribution of the draft. DWC staff would benefit from appropriate consultation with Law and from following any advice provided.

ADF&G RESPONSE TO FINDINGS AND RECOMMENDATIONS

The purpose of the preliminary findings and proposed recommendations in the ombudsman’s preliminary investigative report was to allow ADF&G staff whose actions were examined in this investigation the opportunity to correct any mistakes of fact, omissions, or incorrect interpretations. The ombudsman also asked that ADF&G review the analysis and findings for areas where ADF&G might disagree and asked the department to consider the proposed recommendations.

The department’s September 30, 2011 response, signed by Division of Administrative Services Director Kevin Brooks, accepted the findings. Mr. Brooks commented on Allegation One as follows:

Your report does a good job of illustrating some of the difficulties encountered in responding to public records requests. [The Complainant] submitted multiple requests for a mix of documents and information. The initial request was quite broad and became more specific, even placing an order of priority on requested information to stay within a \$250 fee estimate. What seems clear in retrospect

looking at a chronological rendering of events was not so straightforward as events were unfolding over a period of several months at the end of 2009.

As department staff followed this prioritized order of providing requested documents, the wildlife survey was not included since it was listed as a lower priority. The draft survey could have been withheld under the deliberative process privilege, but the department failed to invoke this privilege. Again, in retrospect, it would have been a simple action to send [the Complainant] the survey when it was distributed to numerous governmental entities by regional manager Mark Burch on October 30, 2009. Therefore, the “partially justified” finding to allegation one seems appropriate.

The ombudsman notes that ADF&G did not simply “fail to invoke” the deliberative process privilege, but may have waived any argument supporting that privilege. ADF&G may have complied with the letter of the public records act by withholding the document because the Complainant listed it as a lower priority; however, compliance with the spirit of the law demanded that ADF&G either provide the document or state the privilege relied upon to withhold it. Regarding Allegation Two, Mr. Brooks responded:

[The Complainant's] \$250 payment was received at the end of October and requested documents were submitted to her approximately four weeks later on November 27, 2009. The department spent this time completing the compilation of documents and information and consulting with the Department of Law on legal review. There was no intent to arbitrarily delay the response, but an extension request should have been processed as provided for in 2 AAC 96.325. Therefore, the “justified” finding to allegation two seems appropriate.

Ombudsman Comment:

ADF&G has acknowledged that problem. Possible remedies to prevent similar compliance problems are discussed in the ombudsman's recommendations and ADF&G's response to the recommendations.

Allegation Three: Mr. Brooks responded that ADF&G concurred with the finding. Given that the ombudsman found that allegation unsupported, no further comment was necessary.

Recommendation One: ADF&G should provide the bear camera study and the wildlife survey to the Complainant immediately.

ADF&G responded that the wildlife survey has been provided to the Complainant, and is also available on the department's Web site. Regarding the bear camera study, ADF&G responded:

The bear camera study is scheduled to be completed and submitted for publication in the spring of 2012. To date, over 70,000 photos have been reviewed for potential inclusion in the report. A copy of the report will be presented to [the Complainant] upon completion and publication.

Ombudsman Comment on ADF&G Response to Recommendation One:

ADF&G did not indicate whether the estimated date of publication has been provided to the Complainant; if it has not, then the recommendation has not been fully implemented.

Also, the ombudsman notes that if the Complainant makes another records request for the bear camera study records, ADF&G will need to either deliver the records or be able articulate grounds for withholding the data pending completion of the study. The ombudsman cannot advise whether deliberative process privilege, or any other exception, would apply to the photographs; that issue would warrant consultation with the Department of Law. Of course, the cost of obtaining such data may be prohibitive for the Complainant, but ADF&G should be prepared to address this issue in a timely fashion, should it arise.

Recommendation Two: ADF&G should conduct regular trainings to refresh its staff of the APRA requirements to ensure future APRA requests are fulfilled in a timely fashion.

ADF&G concurred with this recommendation. Mr. Brooks wrote:

On July 27, 2011 the department held a half-day training session for selected staff in all divisions, and from various levels of the organization. The training was video-conferenced between Juneau and Anchorage. The department is also updating its public information SOP and accompanying “help” document that will be distributed to all staff and posted on our internal “Info Center” website for ready access by staff. Future training sessions will be scheduled periodically as the need arises.

The ombudsman concludes that ADF&G is implementing this recommendation.

Recommendation Three: Because ADF&G records occasionally require the agency to operate under a different set of public records disclosure rules, ADF&G should consult with and listen to advice from its attorney general in public records requests cases.

ADF&G responded as follows:

The department concurs with this recommendation. The July 2011 training referenced above was conducted by attorneys at the Department of Law at the request of Commissioner Campbell. The department works closely with the Department of Law on numerous issues and we rely heavily on their good advice.

The ombudsman believes that ADF&G intends to comply with the recommendation.

FINDING OF RECORD

Based on ADF&G’s response, this complaint is closed as ***partially justified*** and ***partially rectified***.