



## INVESTIGATIVE REPORT

Ombudsman Complaint A2003-0019  
November 19, 2006

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### **SUMMARY OF THE COMPLAINT**

This complaint is against the University of Alaska Fairbanks (UAF) and the UAF College of Rural Alaska, Cooperative Extension Service (CES).

The complainant, Mike Kellie, alleged that CES unreasonably denied his public records request for data from the quarterly Alaska food cost survey, unfairly delayed responding to his appeal, changed its basis for denying the request in a second decision four months after the first denial, and failed to follow its own appeal regulations.

The complainant formally requested the records in writing on October 18, 2002. CES denied the request in an e-mail letter dated November 20. Mr. Kellie objected to the decision and requested review by a higher authority in a November 22 e-mail letter to CES copied to UA president Mark Hamilton and UAF Chancellor Marshall Lind.

On January 6, 2003, Mr. Kellie complained to the ombudsman that the university had failed to respond to his appeal. At the same time he sent copies of this complaint and supporting documents to President Hamilton and UA General Counsel James Parrish. On March 25, 2003, following a series of contacts between the ombudsman and university staff, Associate General Counsel Ardith Lynch advised that Mr. Kellie would have to specifically use the word "appeal" to obtain review of the CES decision by a higher authority. Mr. Kellie responded using the word "appeal" on March 28, and Ms. Lynch forwarded Mr. Kellie's appeal to UAF Chancellor Marshall Lind.

Meanwhile, CES wrote a second decision on April 7, 2003, that effectively denied Mr. Kellie's request based on a different set of reasons from those cited in its November 20 denial. Mr. Kellie wrote to Chancellor Lind rebutting the reasoning in the April 7 letter and pointing out that university staff had not followed the appeal procedures set out in university regulations. On May

7, 2003, the chancellor granted Mr. Kellie's appeal and directed CES to provide the records Mr. Kellie had requested almost seven months before.

Mr. Kellie also complained that university staff had treated him dismissively and had unfairly held him to stricter procedural standards than they observed themselves.

The complainant's allegations, restated to conform to statutory guidelines for investigations by the ombudsman (AS 24.55.150), are as follows:

***Allegation 1: University of Alaska staff unfairly failed to provide adequate notice of the complainant's appeal rights pursuant to university regulation, failed to explain the appeal process, and failed to allow the complainant an adequate opportunity to respond to arguments against granting his appeal.***

***Allegation 2: University of Alaska Fairbanks staff unfairly delayed responding to the complainant's public records request.***

Assistant Ombudsman Tom Webster investigated this complaint with assistance from Ombudsman Intake Officer Denise Duff. In accordance with AS 24.55.140, he provided notice of investigation to UAF Chancellor Marshall Lind on October 30, 2003.

During the course of this investigation Mr. Webster discussed the complaint with Mr. Kellie, Professor Bret Luick, CES Director Anthony Nakazawa, and Associate General Counsel Ardith Lynch. Ms. Lynch provided the ombudsman copies of university records documenting Mr. Kellie's public records request and the actions of university faculty and staff in response to that request.

## **BACKGROUND**

UAF's College of Rural Alaska operates the Cooperative Extension Service (CES). The CES mission statement reads,

The Cooperative Extension Service mission is to interpret and extend relevant research-based knowledge in an understandable and usable form; and to encourage the application of this knowledge to solve the problems and meet the challenges that face the people of Alaska.

CES's principal focus is on home economics, 4-H youth programs, commercial agriculture and home gardening, and rural community development.

Since 1983 CES has conducted a quarterly Alaska food price survey of 104 staple items and the relative prices expressed as an index of these items in 20 Alaska communities. The survey has been directed by Associate Professor Bret Luick, Coordinator of the CES Expanded Food and Nutrition Education Program, since 1996. The survey results, converted into ratios keyed to the prices of those items as surveyed in Anchorage, can be viewed on the CES Internet web site. In 2002 Mr. Kellie found them at <http://www.uaf.edu/ace/fcs/fcs.html>. They are now located at <http://www.uaf.edu/ces/fcs>.

Mr. Kellie asked Mr. Luick in October 2002 for specific prices of the 104 survey items from the most recent survey in six communities: Bethel, Cordova, Dillingham, Homer, Kodiak, and Nome. Mr. Luick told Mr. Kellie to put his request in writing. Mr. Kellie submitted a written request to Mr. Luick by e-mail on October 18, 2002:

As a follow up to our phone conversation, I would like to request the following additional information related to the Alaska Food Survey data that you have collected:

1. for each of the 104 items on the food list, the dollar cost per unit used in the latest survey calculations for the following communities: Bethel, Cordova, Dillingham, Homer, Kodiak, and Nome.

If you have any questions please let me know. I appreciate your assistance.

Mr. Luick did not immediately respond to this message, so Mr. Kellie sent a reminder one week later, on October 25, with the original message included:

As we discussed in our phone conversation, I would like to get the information requested in the previous email below for use in a Business Plan I am preparing.

As I am working toward a deadline, I would appreciate a confirmation that you have received the request, and an estimate on when it might be available.

If you have any questions, or require additional information please let me know.

Mr. Luick replied the same day, declining to disclose the raw data but offering to help perform “post-hoc analysis”:

As I clearly stated on the phone I do not distribute my datasets. As you discovered, data collection is laborious, expensive and most meaningful in the context of the objective. It is unfortunate that the Food Cost Survey does not fully meet your needs. However, if there is a post-hoc analysis you’d like me to run, let me know, and I will see if I can provide a suitable summary.

Later the same day Mr. Kellie reiterated his request for the “dollar cost per unit” of the 104 items in six communities:

As I noted in my email request, I am not asking for your data sets. What you clearly stated on the phone was for me to submit my request for the unit costs to you by email. Which I did.

I’m not sure what you mean by a “post-hoc analysis” but what I am requesting is for the 104 items on the food list, the dollar cost per unit used in the latest survey calculations for the following communities: Bethel, Cordova, Dillingham, Homer, Kodiak, and Nome.

I sense from your email, and your tone in our phone conversation, that you think I am trying to use the data you have collected for some purpose other than what I have stated. That is not the case, and I really have no idea why you are reacting this way.

I am requesting some additional detail from the data that I believe you have collected using public funds. If there is some way for me to alleviate your concerns I would be very happy to try and do so.

I hope we can clarify the situation in the near future with further discussion.

On October 29, 2002, Mr. Kellie repeated his request to Mr. Luick, this time copying CES Director Tony Nakazawa with his e-mail message:

I would like to try once again to request the information you have collected as part of the Alaska Food Costs survey. As you are aware, we have corresponded by email, and I initiated a phone call to you on this subject as well. I must state that I am puzzled and somewhat offended by your attitude during our phone conversation, and by your subsequent evasiveness and lack of response. I have always believed that the Cooperative Extension Service was a Public Service organization dedicated to providing information and assistance within its areas of expertise.

In any event, my understanding is the data I am requesting is non-proprietary public information that has been collected and compiled using public funds. You also confirmed that this was the case during our phone conversation. As such, I would like to once again formally request the following:

For each of the 104 items on the food survey list, the dollar cost per unit used in the latest survey calculations for the following communities: Bethel, Cordova, Dillingham, Homer, Kodiak, and Nome.

If you are still unwilling to provide this information please provide a specific reason for your refusal. . . .

Mr. Kellie again stated that he was working toward a deadline and attached the previous email exchanges for reference.

Several days later, on November 9, Mr. Kellie wrote to University of Alaska President Mark Hamilton by email requesting assistance in getting a response from CES:

This is in regard to a request for information from the Cooperative Extension Service, University of Alaska. I apologize for tying up your time as I know you have many pressing matters. However, I have tried without success to get at least a response to my request for information through what I believe is the proper chain of command prior to contacting you. In addition to my email correspondence with the involved parties, which is also attached, I tried on Friday 11/08/02 to contact Mr. Tony Nakazawa, Ms. Bernice Joseph [Dean of the College of Rural Alaska], and Mr. Marshall Lind [Chancellor of UAF] by phone without success, however I did leave voice mail messages with each of them. Your Administrative Assistant did answer your phone on Friday [11/08] and indicated you were out of the office, but suggested I send this background information for your review on Monday.

The basic issue is I am requesting some additional information related to the Alaska Food Costs Survey which is conducted and published by the Cooperative Extension Service, University of Alaska Fairbanks, under the direction of Mr. Brent [sic] Luick. Specifically I have requested the dollar cost per unit for each of the 104 survey items for the communities of Bethel, Cordova, Dillingham, Homer, Kodiak, and Nome. My understanding, confirmed in my initial phone conversation with Mr. Luick, is that this is public and non-proprietary information. The information is also readily available, as it is used directly in the calculation of the Survey results. For reasons that I can not understand, Mr. Luick is apparently not inclined to release this data to me. The initial response to my request was evasive, and subsequent requests have been completely ignored.

In any event, my understanding is that the data I am requesting is non-proprietary public information that has been collected and compiled using public funds. As such I believe it is ethically and legally in the public domain and I would like to respectfully request this information. If there is any additional information or clarification that I could provide to

assist in resolving this problem I would be happy to discuss it further by either phone or email correspondence. I would suggest that a phone conference might be best, as sometimes email correspondence is misinterpreted, particularly when the parties have a difference of opinion.

Sincerely,

Mike Kellie  
B.S. Mechanical Engineering  
UAF 1986

On November 20, 2002, Tony Nakazawa wrote by e-mail to Mr. Kellie with copies to Mr. Luick and President Hamilton, College of Rural Alaska Dean Joseph, and UAF Chancellor Lind. Mr. Nakazawa cited AS 14.40.453 and termed the survey “an ongoing Extension research project” exempted under the statute. He also drew an analogy between the food survey and confidential attendance lists for CES workshops:

I am writing in response to your request for information from our Cooperative Extension Service Food Cost Survey. As I understand your request, you have requested the dollar cost per unit for each of the 104 survey items (contained in the survey) for the communities of Bethel, Cordova, Dillingham, Kodiak, and Nome.<sup>1</sup> The survey is undertaken by individuals located in various communities and with the cooperation of the local store operators and/or owners.

I am sorry to inform you that CES is unable to comply with your request other than to make our summary reports available to you. I have discussed your request with the project PI [principal investigator], Dr. Bret Luick, and we have reviewed our past practices on how CES has handled these types of requests by the public, and we have been consistent in not providing the information that you have requested. Unless we had specifically advised the information source that we would collect and make this information available to the general public – which we did not in this case – we cannot release the information to you. Additionally, because faculty of the University of Alaska, of which CES is a part, have a considerable range of responsibility regarding the confidentiality of information; specifically, that as the food cost survey is an ongoing Extension research project, that according to Alaska Statutes 14.40.453: “Confidentiality of Research,” the only obligation regarding requests such as yours is to make available the title, project description, project sponsor and other such summary information available.

I am sure you can understand the necessity for the careful handling of the information collected. For example, while we have several different data bases of agriculture producers for mailing workshop information and transmitting general information, we do not make this information available to the public as we have not informed beforehand those people taking our workshops and classes that their address information would be made available to the public. This very same information is available in a directory from the Alaska Division of Agriculture. Likewise, if you desire to obtain the names of the stores, and to contact those enterprises directly, there are several good sources on how you could obtain this information: via regional phone books or contact one of the several bush expeditors, etc. This way if you needed more specificity to the information we have provided in our food cost survey program, you could contact the stores directly yourself.

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<sup>1</sup> Mr. Nakazawa inadvertently omitted Homer from this list.

Thank you for your interest in our CES programs, and again, I am very sorry we could not fulfill your specific request for information.<sup>2</sup>

On November 22, 2002, Mr. Kellie rebutted Mr. Nakazawa's responses point by point in an e-mail message to Mr. Nakazawa copied to the same university officials Mr. Nakazawa copied with his message to Mr. Kellie: President Hamilton, Chancellor Lind, and Dean Joseph.

Dear Mr. Tony Nakazawa:

I would like to thank you for your consideration and response to my request for information.

I must say first of all that the logic and reasoning presented in your response is considerably different than the reasons originally provided by Mr. Bret Luick. Nevertheless, I do appreciate your follow-up considering my request, and responding as I asked with a clear reason for your refusal to supply the requested information.

I am sorry to note that I must still insist that your refusal is not in compliance with Alaskan Statutes, nor general Ethical standards. I do understand and appreciate your concern for the proper handling of confidential and proprietary information. I would expect nothing less. However, I would hope that you would also clearly understand that the information I am requesting is neither proprietary nor confidential. My request is for non-proprietary public information that has been collected and compiled using public funds. To be specific, this information is a survey of retail grocery store prices collected from various communities. In my opinion it could not be more clear that this is public information. I believe the law, and the application of the law, is very clear in that collecting this type of public information in a publicly funded survey does not then make the information either proprietary or confidential.

In your reply you also referenced Alaska Statutes 14.40.453 "Confidentiality of Research" as providing justification for not complying with my information request. For reference I have included the complete text of AS 14.40.453 below in italics.

***AS 14.40.453. Confidentiality of Research.***

*The public records inspection requirements of AS 40.25.110 – 40.25.121 do not apply to writings or records that consist of intellectual property or proprietary information received, generated, learned, or discovered during research conducted by the University of Alaska or its agents or employees until publically released, copyrighted, or patented, or until the research is terminated, except that the university shall make available the title and a description of all research projects, the name of the researcher, and the amount and source of funding provided for each project.*

I believe that the key point here again is that my request is clearly not for proprietary information. If you will again review my requests you will see that I have consistently asked for non-proprietary information. If we have a disagreement on whether or not retail grocery store prices are proprietary or not then hopefully we can resolve that disagreement fairly quickly. In short the clear intent and application of AS 14.40.453 is to protect the confidentiality of proprietary research records and discoveries until such information can be either properly legally protected or published. I believe the situation we are discussing is clearly a request for non-proprietary information. The situation we are discussing here also fails the legal test for application of AS 14.40.453 on a number of other points as well, which I don't intend to go into at this time. I think the more

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<sup>2</sup> The CES mission statement (quoted above in this report) was quoted at the bottom of Mr. Nakazawa's message.

important question is whether a reasonable, objective, unbiased person would come to the conclusion that a publicly funded survey of publicly available retail grocery store prices is proprietary information.

In my opinion, your comparison of my request for the survey results of publicly available retail grocery store prices to a request for data bases of individuals which have attended workshops and classes is not applicable. If the attending individuals personally posted their names and addresses on a bulletin board, or other public place, and you then collected that information in a survey, we might be getting closer to the circumstances. Although I would personally see a distinction, since we would be talking about personal information, not the price of a sack of potatoes for example. In any event, since I'm not asking for that information I won't venture an opinion on whether or not it is legal for you to withhold that type of information as well.

I would like to state very clearly that I have no interest or desire to turn this into a major dispute or to discredit the University or the Cooperative Extension Service. However, I do still believe that my request for information was, and is reasonable, and provided for by Legal and Ethical provisions and requirements. As such, I do intend to pursue this information request through what ever means are necessary. The real irony from my perspective is that the public right to information laws were enacted to help prevent this very situation from occurring.

My original phone conversations and email requests were met with evasiveness, and finally a complete lack of response. Even though we are still in disagreement, this most recent response from Mr. Tony Nakazawa is definitely a step in the right direction, and most appreciated. My request is that all the involved parties maintain a level of professional courtesy and objectivity to the facts and the opinions on both sides as well as a reasonable responsiveness. I'm convinced if we can stick to the facts and leave the emotions and hidden agendas out of the discussions we can come to a resolution fairly quickly.

I will be out of town until December 2nd so I will be unable to reply to any responses until I return after that date. I look forward to your reply.

As noted above, President Hamilton, UAF Chancellor Lind, and CRA Dean Joseph received copies of this exchange of e-mail correspondence from both Mr. Nakazawa and Mr. Kellie.

## **INVESTIGATION**

This section focuses on two chronological sequences of documents. The first group consists of documents written by Mr. Kellie and by various university officials responding directly to Mr. Kellie, to the ombudsman, or to legislative staff who inquired into the matter. The second group of documents consists of internal university correspondence discussing the complaint and what to do about it. The ombudsman obtained the latter group of documents from the University Counsel's office, as explained below.

### **Correspondence between Mr. Kellie, UAF, the ombudsman, and legislative staff**

On January 9, 2003 the ombudsman received a complaint form and letter from Mr. Kellie dated January 6 in which he detailed his public records request and complained that he had received no response to his November 22, 2002 letter challenging Mr. Nakazawa's November 20 decision. He attached copies of his correspondence with Mr. Luick and Mr. Nakazawa as well as his November 9 message to President Hamilton. Mr. Kellie explained his position:



The University of Alaska conducts a survey of Alaska communities to determine comparative food costs. Pursuant to AS 40.25.110, I requested that the University of Alaska provide me with all documents that provide the dollar cost per unit in the most recent survey for each of the 104 items on the food list. The University denied my request. Please see the attached e-mails. The University incorrectly relies on AS 14.40.453 as the basis to deny my request. AS 14.40.453 only applies to intellectual property or proprietary information received or discovered by the University until publicly released or until the research is terminated. AS 14.40.453 reads:

Confidentiality of Research. The public records inspection requirements of AS 40.25.110 – 40.25.121 do not apply to writings or records that consist of intellectual property or proprietary information received, generated, learned, or discovered during research conducted by the University of Alaska or its agents or employees until publicly released, copyrighted, or patented, or until the research is terminated, except that the university shall make available the title [and] a description of all research projects, the name of the researcher, and the amount and source of funding provided for each project. (Emphasis added).<sup>3</sup>

I do not believe that retail grocery prices collected from a store is intellectual or proprietary information, particularly since it is on public display at stores open to the public. Regardless, the University has terminated its research for the most recent survey and therefore the University must release all information “received, generated, learned, or discovered” during the last survey.

Mr. Kellie included with his ombudsman complaint a one-page “Chronology of discussions and correspondence” detailing his contacts with university staff:

1. October 18, 2002 – Contacted Mr. Bret Luick at the UAF Cooperative Extension Service to discuss the results of the Alaska Food Survey. At the end of the conversation Mr. Luick indicated that I should make my request for additional information in writing.
2. October 18, 2002 – Sent Mr. Bret Luick an email documenting my request for information, Appendix A attachment.
3. October 25, 2002 – After receiving no response, sent Mr. Bret Luick a follow up email documenting my request for information. Appendix B attachment.
4. October 25, 2002 – Received email response from Mr. Brent Luick. Appendix C attachment.
5. October 25, 2002 – Sent an email response back to Mr. Brent Luick. Appendix D attachment.
6. October 29, 2002 – After receiving no response, sent Mr. Bret Luick a follow up email again clarifying my request for information. Appendix E attachment.
7. November 08, 2002 – After receiving no response, called Mr. Tony Nakazawa, Director Cooperative Extension Services, left a voice mail. Called Ms. Bernice Joseph, Executive Dean Collage of Rural Alaska, left a voice mail. Called Mr. Marshall L. Lind, Chancellor University of Alaska Fairbanks, left a voice mail. Called Mr. Mark Hamilton, President University of Alaska, reached his Administrative Assistant who recommended that I send Mr. Hamilton an email documenting my issues.

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<sup>3</sup> Mr. Kellie added the emphasis.

8. November 09, 2002 – Sent Mr. Mark Hamilton an email with a summary of my request for information and the attached prior email correspondence. Appendix F attachment.
9. November 20, 2002 – Received an email response from Mr. Tony Nakazawa. Appendix G attachment.
10. November 22, 2002 – Sent an email reply to Mr. Tony Nakazawa requesting he reconsider his denial as I felt it was based on incorrect interpretation and application of AS 14.40.453. Appendix H attachment.

Mr. Kellie copied this letter, chronology, and packet of correspondence to President Hamilton and to UA General Counsel James Parrish, as well as to three elected officials.

On January 23, 2003, Ombudsman Intake officer Denise Duff wrote to Mr. Nakazawa to give notice of the ombudsman complaint and to ask five questions:

1. Mr. Kellie has indicated in his letter that the research has been terminated. Can you please tell me if the research has been terminated?
2. What is the status of the research?
3. Can you tell me the difference between the information on the Food Cost Survey posted on the web site as opposed to the information that Mr. Kellie is requesting?
4. How are the dollar costs per unit on these 104 food items considered proprietary if this is information available in a store to the general public?
5. What kind of authorization was received from the stores to be able to collect the information for the Food Cost Survey?

After writing to Mr. Nakazawa, Ms. Duff transferred the complaint to Assistant Ombudsman Tom Webster for further review.

On January 31, 2003, Mr. Kellie told Mr. Webster that when he initially made his request to Mr. Luick during their October 18 telephone conversation, Mr. Luick agreed that the prices were not in themselves proprietary or confidential but said the effort and expense to gather the information made the finished compilation of this information proprietary. Mr. Kellie contended CES was “in business to provide this sort of information” to the public. He said as a result of what he viewed as evasiveness and delay by CES staff, he was four months behind in the project for which he requested the data.

On February 3, 2003, Mr. Nakazawa contacted Ms. Duff to inform the Ombudsman that CES was not ignoring Ms. Duff’s e-mail giving notice of the ombudsman complaint. Mr. Nakazawa said he and Mr. Luick were working with the university general counsel to determine how they were going to respond to Mr. Kellie’s questions. Ms. Duff informed Mr. Nakazawa the case had been transferred to Mr. Webster in Fairbanks.

On February 4, 2003, Mr. Webster called Mr. Nakazawa and learned that Associate University Counsel Ardith Lynch was doing legal research on Mr. Kellie’s public records request. Mr. Nakazawa said some legislators had inquired into the matter. “We don’t want to be difficult,” he said, but CES wanted to proceed carefully to be sure it was responding appropriately to Mr. Kellie’s request.

On February 14 Ms. Lynch told Mr. Webster she was planning to work on CES’s request for legal advice regarding Mr. Kellie’s request but had deadlines on several other projects to meet first.

On February 18, 2003, Mr. Webster met with Mr. Nakazawa and Mr. Luick at CES on the UAF campus to discuss Mr. Kellie's complaint. CES business office manager James Levison participated in the meeting by speakerphone. Mr. Nakazawa told Mr. Webster before the others were present that Ms. Lynch had advised CES there appeared to be "no legal reason not to provide the information" to Mr. Kellie. Mr. Nakazawa said, "How we interface with the public is a concern to us, but we're concerned how the information will be used by Mr. Kellie. What is the long-term impact of his request?"

During this meeting Mr. Luick explained the on-going food cost survey and the quarterly reports he posts on the CES Internet website. Mr. Luick said part of the publication process was to "groom the data for accuracy" by smoothing out anomalies such as short term price variations due to "sale" price reductions at individual stores. Mr. Luick said the Attorney General's office sought food price information when it was reviewing the proposed buyout of Carr's food markets by Safeway a few years before, but the assistant attorney general he spoke with was satisfied with the CES quarterly reports. In addition, Mr. Luick said, "some people want to know the methodology" followed for the food survey. For example, the Department of Health and Social Services inquired about methodology when it was studying food stamp eligibility and distribution in rural communities. UAA economists had also "expressed interest" in the methodology of the survey, he said.

Mr. Luick said Mr. Kellie was the only person to have asked for the specific food cost data. He said Mr. Kellie had been "vague" and had "not been clear what he wants the data for." He said CES had the only historic data on food prices in Alaska, going back nearly two decades. He said granting Mr. Kellie's request could compromise both the survey and his own projected research, and for these reasons he was "reluctant" to disclose the information. Moreover, he said, even publication of the unspecific survey results had led to stories in the *Anchorage Daily News* comparing prices in various communities that had prompted complaints from store owners. He said one store owner in Tanana withdrew from the survey, leaving a gap in its coverage of statewide food prices.

Mr. Luick said he asked Mr. Kellie in October 2002, "How else can I help you? What is it you need to know?" Mr. Luick said the phone conversation became "testy," and he asked Mr. Kellie to submit his request in writing.

Mr. Luick said he had not written up or begun to write up research based on the survey data and did not at that time have a specific plan to do so. Mr. Nakazawa and Mr. Luick said they would be consulting with UAF Vice Provost for Research Ted DeLaca before responding again to Mr. Kellie.

Three weeks later, on March 11, 2003, Mr. Nakazawa advised Mr. Webster in a voice-mail message that CES was "still looking into some things" and had not sent a response to Mr. Kellie yet. He said "the faculty union is now involved" in the dispute over Mr. Kellie's records request.

On March 13 Mr. Luick told Mr. Webster he had heard that the faculty union vice president (David Porter) was using this dispute as one of three examples for labor/management discussions. Mr. Luick also said, "Tony told me the ombudsman doesn't really have jurisdiction" in the Kellie matter. Mr. Webster referred Mr. Luick to AS 24.55 and explained that if the matter turned out to be covered by the bargaining unit contract, the ombudsman would not investigate. Mr. Luick replied, "It seems to me the ombudsman doesn't have much to do with it. I already made my decision. I won't release the original data. I said I could provide what he needed. He doesn't want that." Mr. Luick said further that in any case he was "kind of busy" and did not have time to write a response to Mr. Kellie. He said a letter to Mr. Kellie drafted by Mr. Nakazawa was "not acceptable." Mr. Luick said Mr. Nakazawa had discussed the matter with Provost Paul Reichardt, who supported Mr. Luick's position on Mr. Kellie's request.

Mr. Luick said all Mr. Kellie really needed was the ratios for relative food costs in different communities. "If he knows the price of cheese in his town, he can calculate it for everywhere else," he said. Mr. Luick said he had given Mr. Nakazawa a draft letter to Mr. Kellie three weeks before. He also said he had contacted Marguerite Stetson, who worked for CES from 1978 to 1986 and started the food cost survey in 1983. From 1986 to 1996 Ms. Stetson did the survey on contract as a private consultant. "We have continuous data since 1983," Mr. Luick said, and again expressed concern that disclosing the information Mr. Kellie had requested might compromise the survey. He said Ms. Stetson told him she had "refused many times to release the raw data." Mr. Luick said he would respond to Mr. Kellie after making a few more contacts.

On March 14, 2003, Mr. Nakazawa told the ombudsman investigator that he was "in the process" of drafting a letter responding to Mr. Kellie's November 22 letter. He said he had received inquiries about the case from the faculty union, and a meeting with Associate General Counsel Lynch was scheduled for mid-April to discuss the matter.

On the same day, March 14, 2003, Ms. Lynch told Mr. Webster, "In a nutshell, it's not my call."

On March 18 Mr. Kellie told the ombudsman investigator that the university did not appear to be following its own regulations. He cited university regulation 05.08.02(A). The same day Mr. Webster e-mailed Ms. Lynch to inquire about this.

I spoke with Mike Kellie today and advised him that an April meeting is in the works to consider an appropriate response to his request for information from Prof. Luick.

Mr. Kellie points out that he first requested this information in writing on October 18, 2002. He is relying on Regents' regulation R05.08.02A in believing that a determination regarding his November 22 appeal of Mr. Nakazawa's response dated November 20, 2002 (sent via e-mail November 19) denying his request is long overdue. Is Mr. Kellie correct in relying on this regulation? If not, what standard does apply?

Also, should this become a labor/management issue (assuming a difference between faculty and administration, something hinted at by the faculty union's reported interest in Mr. Kellie's request for survey data), would a definitive response to Mr. Kellie have to await resolution of that issue?

Mr. Kellie believes it should not take 6 months to get either the information he requested or else a reasonable explanation for denial of his request. . . .

On March 25 Ms. Lynch told Mr. Webster on the telephone that the regulation Mr. Kellie cited did apply to his public records request and that she would start the formal appeal process if that is what Mr. Kellie wanted. Mr. Webster pointed out that Mr. Kellie had made his request long before and had objected to Mr. Nakazawa's response in a message copied to the chancellor and the president. Ms. Lynch replied that Mr. Kellie's letter "did not contain the word 'appeal'" and he did not address it directly to the chancellor. She acknowledged that Mr. Kellie copied the chancellor with his response to Mr. Nakazawa's decision but said, "people get copied on a lot of things here," and "they would not necessarily know it needed their attention." Mr. Webster said he would check with Mr. Kellie to make sure he wanted to pursue the matter as a formal appeal.

The same day, March 25, Mr. Webster wrote to Mr. Kellie as follows:

I talked to Ardith Lynch in the university counsel's office today. In response to an e-mail from me last week, she said your request for information is covered by the Regents regulations at R05.08.02A. However, she said no one at the university understood you

were appealing Mr. Nakazawa's reply to your first request to him under the regulations (even though you copied the president, the chancellor, etc.). She asked if you want her to make sure this is handled as a formal appeal to the chancellor. I told her I thought so but I would check with you. I don't know if this makes any particular difference—they still plan to meet about it in April and are committed to respond to you—but it is probably a good idea to get this situated in their formal process (where I gather you thought it already was). Let me know what you think, and I will clarify that to Ms. Lynch.

Mr. Kellie responded on the same day (March 25, 2003):

I am a little uncertain just what this response from Ardith Lynch means. As far as I can tell the University has not complied with any of the requirements of R05.08.02A up to this point. In fact, I have the distinct impression that at least the people I have had correspondence with on this issue up to this point were not even aware that the University had an obligation to respond to public requests for information, much less that the University had Regents regulations which specified certain requirements.

Is Ardith Lynch suggesting that I should have made a different or more formal request to appeal the response from Mr. Nakazawa? I would point out that the response I received from Mr. Nakazawa did not meet the University regulations in terms of either timeliness or required content. If there was, or is, some different or more formal appeal process I would suggest that the reply from Mr. Nakazawa should have so stated. I sent a reply to Mr. Nakazawa's response on November 22, 2002 requesting he reconsider his denial of my request. Since that time, over four months, I have not had any written or verbal response from the University. The only information and discussion on my information request has been through you [the ombudsman].

Given my experiences thus far, I am a little hesitant to agree that I now want this to be handled as a formal appeal starting now. I was under the assumption that the University would recognize their responsibilities and accountabilities to properly handle and respond to public requests for information. In any event, I'm like you in that I'm not sure what difference if any this would make going forward. I am hesitant to agree that we can now start the clock on a proper response when the University is clearly several months remiss and has not shown any good faith efforts in my view to respond to my request, much less comply with their own regulations.

My suggestion would be to have Ardith Lynch, or another University representative, contact me directly to discuss this general question and the issues around it. Is there some particular reason that the University feels it can not communicate with me directly?

In a telephone conversation with Mr. Webster on March 28, 2003, Mr. Kellie said he did not want to "start all over." He remarked that Mr. Nakazawa did not give him notice of a formal appeal process in his November 20 denial, and he questioned the fairness of requiring a member of the public to follow a process no one at the university told him about. Mr. Kellie said the university counsel ought to have noticed there was a problem in January 2003 when he sent to President Hamilton and to University Counsel Parrish a copy of the packet containing his complaint letter to the ombudsman with the correspondence between himself, Mr. Luick, and Mr. Nakazawa attached. "How could the university not know their own regulations?" he asked. He also questioned CES's contacts with the faculty union, and commented that "the statutes shouldn't conflict" with the union contract or with university regulations.

Following this telephone conversation, Mr. Webster forwarded Mr. Kellie's e-mail message to Ms. Lynch and informed her that Mr. Kellie did want his November 22, 2002 letter to be treated as a formal appeal.

On the same day, March 28, 2003, Ms. Lynch replied to Mr. Webster and Mr. Kellie, with a copy to Mr. Nakazawa:

This e-mail will confirm that Mr. Kellie's e-mail to Tony Nakazawa dated November 22, 2002, will be treated prospectively as an appeal of a denial of a public records request in accordance with University Regulation 05.08.02A.

In the interest of avoiding misunderstandings, I will reiterate the substance of my March 24 conversation with Tom Webster. In an e-mail dated March 18, Mr. Webster asked the following question (in pertinent part):

. . . Mr. Kellie points out that he first requested this information in writing on October 18, 2002. He is relying on Regents' regulation R05.08.02A in believing that a determination regarding his November 22 appeal of Mr. Nakazawa's response dated November 20, 2002 (sent via e-mail November 19) denying his request is long overdue. Is Mr. Kellie correct in relying on this regulation? If not, what standard does apply?

. . .

I called Mr. Webster on March 24 to respond to this question. We discussed the requirements of R05.08.02A, which state that a requester may seek reconsideration of a denial "by submitting a written appeal to the chancellor of the involved major administrative unit" which must be "mailed or hand-delivered." I advised Mr. Webster that the University did not consider Mr. Kellie's November 22 e-mail response, which was addressed to Mr. Nakazawa, to be a written appeal to the Chancellor. (Mr. Nakazawa copied his November 20 e-mail to Mr. Kellie to Bret Luick, President Hamilton, Chancellor Lind, and Dean Joseph, and it appears that Mr. Kellie similarly copied his response to the same individuals for informational purposes.) While Mr. Kellie is correct that R05.08.02 applies to public records request appeals, he did not mail a written appeal to the chancellor, and therefore no determination is overdue.

However, as Mr. Webster and I discussed, if Mr. Kellie intended his correspondence to be considered an appeal pursuant to R05.08.02, the University is willing to accommodate his request at this time. This accommodation is not made for the purpose of delaying a response to either of you. However, the Chancellor may require the full period of time allowed by R05.08.02 to make a determination. During our conversation, Mr. Webster was unsure if Mr. Kellie wanted to pursue an appeal at this time.

Mr. Webster informed me this morning that Mr. Kellie does want his letter to be considered as a formal appeal. Because Mr. Kellie's letter of January 6, 2003, with attachments, appears to contain the complete correspondence, I will forward it to Chancellor Lind as an appeal pursuant to R05.08.02A(1)(a) on Monday. If this is not in accordance with your desires, please let me know as soon as possible.

Finally, Mr. Kellie's e-mail of March 25 suggests that I contact him directly to discuss this general question and the issues around it. This office represents the University and I cannot give legal advice to Mr. Kellie. It was appropriate to direct my response to Mr. Webster because he asked the question about the status of the appeal.

On March 30, 2003, Mr. Kellie replied to Ms. Lynch, with copies to Mr. Webster and Mr. Nakazawa:

Thank you for your response and for moving my information request into the formal appeal process.

I would like to clarify the intent of my comments in my email to Mr. Webster to help avoid misunderstandings as we go forward.

First of all, my concern about agreeing to now moving the request into the appeal process without further discussion was that I did not want to give the false impression that I was agreeing that the University could now treat my appeal request as if it had been just made. I still believe strongly that it is the University's responsibility to understand their legal and regulatory requirements in regard to public information requests and to respond accordingly. I do not believe that this responsibility can or should be pushed off on members of the public requesting information. As I noted in my earlier email, I do not believe that Mr. Nakazawa's response to my information request meets the requirements of R05.08.02A in terms of either the required timeliness or the required content, including the required notification of the appeal process. In case you are wondering, I was not aware of the provision of R05.08.02A at the time of my request, or I would have provided that information as part of my request at that time. I found the regulation as part of my research for my appeal to the Ombudsman's office. However, I will state again that I believe the responsibility for responding properly to public information requests clearly rests with the public agency, in this case the University.

Secondly, if it becomes necessary to pursue my information request beyond the University system, I do not want to prejudice the circumstances or facts of my information request thus far by unconditionally agreeing to start an appeal process that I thought was, or should have been, already in progress.

Finally, my suggestion for direct communication was not in any way a request or suggestion that you or anyone from the University discuss the legal issues or provide any legal advice. That would clearly be inappropriate. I was simply suggesting that direct two-way communication is probably a better way to clarify my concerns and questions regarding the proposal to move my information request into the formal process. It would also provide a better means for me to understand the University's concerns and questions and possibly help to ultimately facilitate a resolution that would be agreeable to both parties.

On April 1, 2003, State Representative Mike Chenault's aide, Sue Wright, wrote to Mr. Nakazawa, "I would like a copy of all information Mike Kellie has requested from your office and the precise reason you have denied it."

On April 2, 2003, Mr. Nakazawa wrote to Mr. Kellie:

In response to your request for survey information from CES, I have met with the UA General Council's office, as well as with the State of Alaska Ombudsman's office. At the present time I am working with Dr. Luick on finalizing a response back to you; however, both Dr. Luick's and my travel schedules have made this process difficult. Hopefully by this next Monday, April 7, I will have it finalized.

I hope you will be understanding of our delay on this important issue.

Mr. Nakazawa copied this letter to Mr. Luick, Provost Paul B. Reichardt, Ms. Lynch, the ombudsman investigator, and Ms. Wright of Representative Chenault's office.

On the same day Mr. Kellie responded to Mr. Nakazawa, pointing out what appeared to Mr. Kellie to be confusion among university staff over who was supposed to respond to his appeal:

As I believe you are aware, Ms. Lynch of the University's legal department, has indicated to me that she has forwarded my letter of January 6, 2003, with attachments, to the Chancellor's office on Monday March 31, 2003 to be considered an appeal pursuant to R05.08.02.

Is the response to my request for survey information from CES that you hope to provide by April 07, referenced in your email of April 02, 2003 attached below, an amendment or modification of your original denial of my request dated November 20, 2002? Or is this latest response intended to be a formal response to the appeal with the Chancellor's office in accordance with R05.08.02?

The primary reason for my question is to point out that if your response is intended to be a response to my appeal in accordance with R05.08.02, my understanding of the regulation is that the response, if delegated by the Chancellor, must come from a full-time employee of the University not involved in the denial and not subordinate to the person responsible for the denial. If my understanding of the Regulation is correct, then I believe this would make you ineligible to make the response to the appeal. However, if your response is intended to be an amendment or modification of your original denial of my request, how does that impact the appeal currently filed with the Chancellor's office and possible future appeals?

Perhaps you could confirm with Ms. Lynch my understanding of the application of R05.08.02 and what impact if any this may have on the current appeal as well as possible future appeals. Hopefully clarifying these issues ahead of time will help to avoid additional problems and misunderstandings going forward.

Mr. Kellie copied this message to Mr. Luick, to Provost Paul Reichardt, to Associate General Counsel Lynch, and to UA Vice President for University Relations Wendy Redman. No one at the university ever responded to Mr. Kellie's questions in this message.

On April 7, 2003, Mr. Nakazawa sent by U. S. mail a second letter denying Mr. Kellie's public records request. The letter set out four areas of concern communicated by Mr. Luick to Mr. Nakazawa:

In response to your request, I have met with the UA General Counsel's office, as well as with the State of Alaska Ombudsman's office. There are indeed valid concerns and issues that both support and detract from your point of view; and, while I understand your request, I feel compelled to relate to you that the release of this data in its raw form is not consistent with CES policy. Dr. Luick has raised a number of objections to distribution of this data set as set out below.

Proprietors. The results of the survey on occasion invoke angry responses from retailers especially in small communities to the extent that CES surveyors have been refused entry into stores. This clearly is to the detriment of the survey. In consequence, we have agreed with retailers to minimize the impact our report may have, for instance we no longer graphically rank results. Additionally, we have requested various editors, most importantly the various editors of the Anchorage Daily News, to avoid misleading or inaccurate headlines, which have occurred, that cause public anger against the retailers in small communities (e.g. that a given community tops the state in food costs). These retailers make their dissatisfaction abundantly clear both to the paper and to CES. In one



such case a large retailer was particularly offended because they habitually sell at a 2% annual loss in a very high cost community. It is not clear in what way you intend to use the data, nor would your explanation be binding, but we are justifiably protective of the mechanism of our survey.

Faculty Research. It is a requirement of University Faculty to conduct and publish original research. An environment of academic freedom must be maintained if faculties are to meet this requirement. The process of collecting, editing and publishing is performed within this environment of academic freedom, where faculty are able to define within the professional and scientific methods how their data are collected and interpreted. Faculty must be protected from requirements to distribute or make available their original data except as agreed with the persons who cooperated in providing information, and/or to support the scientific research the data were collected to advance. It is integral to the processes of scientific advancement and to the livelihoods of faculty to have such protection. It is immaterial for what current purpose the data may be used as distribution sets a precedent for future requests and therefore violates the academic process. It is a professional duty of both the University Administration and individual faculty to protect such an environment for scientific inquiry.

Faculty Union. United Academics has filed a grievance on behalf of all faculties at the University of Alaska Fairbanks protesting the possibility that Professor Luick may be required to turn over raw data to a potential competitor of the firms who provided it. It is unlikely any action will be taken regarding access to Professor Luick's raw survey data until after this grievance is resolved.

Validity. Dr. Luick has no control over the use of his data once it has left his office and therefore no way to influence the conclusions drawn from them. Data are collected with a particular intent and are published accordingly. Unanticipated analyses are always weaker, but more importantly, the judgment of the original investigator, who can best evaluate the weaknesses of a data set, is separated from the analyses. Misuse of the data reflects on the source. By way of example, analysis of this data requires estimates of values in communities not exhibiting the full list of foods (104 items) in any or all of the retail outlets. Although we have a consistent decision process for missing data, another analyst may follow a different process and therefore arrive at different results. Indeed, in your original phone call to Dr. Luick you stated there was 'something wrong with his data' because you could not reproduce his results by your own efforts.

In discussions with both Dr. Luick and Emeritus Ms. Marguerite Stetson, who was the PI since the program's inception in the late 70's, CES in the long history of this program has never made available the primary data. I feel strongly that the request of the raw data does not take into account the University's or the public's interests; especially as it relates to the long-term viability of this highly successful program.

I hope you will be understanding of our position on this issue. And regarding the support you have requested, I would like to go back to Dr. Luick's initial offer of assistance to your research effort. Dr. Luick has, and still will, work with the food cost data set to address your specific information needs. For example, regarding the food prices for the communities you requested, Dr. Luick can provide you with the individual ratios of the 104 food items in Kenai to the survey communities of interest to you. With this information you can then determine the approximate price of any of the food items in these communities based on your local price. A ratio built on the average of a year's data should provide you with a stable tool to calculate individual food prices. This mechanism should satisfy your interests in food prices in various communities without demanding access to the original data.

I feel that our mutual concerns – your need for specific price information and our maintenance of the integrity of the food cost data set – can be successfully addressed if we can work together on this.

Thank you for your consideration of this request.

Mr. Nakazawa copied this letter to Representative Chenault's aide, Sue Wright, to Vice President Wendy Redman, University Relations, UA System, to UAF Provost Paul B. Reichardt, to Associate General Counsel Ardith Lynch, to the ombudsman, and to Mr. Luick.

On April 8, 2003, Mr. Kellie wrote by e-mail to Mr. Nakazawa, with copies to several other university officials, including Paul Reichardt, Bret Luick, Ardith Lynch, and Wendy Redman, requesting an update on his appeal.

The last communication I received from you was on April 02, 2003, in which you indicated that you expected to provide a response to my request for information on Monday April 7.

In addition, I sent you a response on April 02, 2003 requesting some clarification of your response.

As of yet, after end of business April 8, 2003, I have not heard from you in regard to either of the above communications.

It has been over four months since I made my original information request. I would very much appreciate an update on any further anticipated delay, and a revised estimate as to when you expect a response to be forthcoming.

In an undated letter postmarked April 9, 2003, Chancellor Marshall Lind wrote to Mr. Kellie that he had received the appeal forwarded by Ms. Lynch and was extending the deadline for issuing a decision to May 9, 2003:

I have received your public records request appeal. In accordance with University Regulation 05.08.02A(2)(b), I am extending the period in which to issue a determination to May 9, 2003.

Any person who desires to present input prior to my determination may do so in writing no later than April 24, 2003. A copy of any material provided to me for consideration in my determination in this appeal should also be furnished to the individuals listed below.

Chancellor Lind copied this letter to Provost Reichardt, Mr. Nakazawa, David O. Porter, Organizational Vice President of United Academics (the faculty union), Associate General Counsel Lynch, and the ombudsman.

On April 10, 2003, before a copy of this letter reached the Office of the Ombudsman, Mr. Webster called the UAF Chancellor's office to inquire who was handling Mr. Kellie's appeal. Office Coordinator Suzanne Noll said she would check, and commented about Mr. Kellie's appeal, "He just didn't like the answer he already got." Later the same day Ms. Noll faxed to Mr. Webster a copy of the Chancellor's April 9 letter to Mr. Kellie.

On April 14 Mr. Kellie told Mr. Webster in a telephone conversation that he believed it was inappropriate for UAF to have shared Mr. Kellie's correspondence with the faculty union. "I'm discussing this with the University of Alaska, not with the union," he said. Mr. Kellie said the

university should send him the union's position if it was inviting comment on his appeal by the union.

On April 21, 2003, Mr. Kellie wrote to Chancellor Lind by U. S. mail to amend his appeal by rebutting the new reasoning put forth in Mr. Nakazawa's April 7, 2003 letter denying Mr. Kellie's records request a second time:

In your letter of April 10, 2003 you indicated that I could provide additional input to you in writing for consideration in your determination of my appeal.

I would like to clarify first of all that I have received a second response from the University written by Mr. Nakazawa dated April 7, 2003. I did ask for a clarification on whether this latest response was intended to be a replacement or an amendment of the first University response to me dated November 20, 2002. Unfortunately I did not receive any reply back to my question from Mr. Nakazawa or from anyone at the University. Therefore, please consider this written reply to you an appeal and response to both of the replies I have received from the University.

#### **Basis for Information Request**

I am requesting a copy of what I believe to clearly be non-propriety and non-confidential information from the University of Alaska as provided for by AS-40.25.110 - 40.25.121, citizen's right to public records and other applicable University and State laws and regulations. Specifically the University of Alaska Cooperative Extension Service conducts a survey of Alaska communities to determine comparative food costs. I request that the University provide me with the results of the most recent survey for the specified communities in terms of either the actual collected data, or the dollar cost per unit for each of the 104 items on the food list, whichever is easiest for the University.

There has apparently been a lot of internal discussion by the University to which I have not been a party, and a lot of confusion generated by a number of individuals, regarding my information request. I believe that in the simplest terms the fundamental issue to resolve is does my information request fall under the provisions and requirements of AS-40.25.110 - 40.25.121 and other applicable University and State laws and regulations.

I believe it is very clear that the information I am requesting is neither proprietary nor confidential. My request is for non-proprietary public information that has been collected using public funds and resources. To be specific, this information is a survey of retail grocery store prices collected from various Alaskan communities. This information is on public display at stores open to the public. I believe the law, the application of the law, and the Legislative intent of the law, is very clear that this is public information subject to the public records release provisions of AS-40.25.110 - 40.25.121. In point of fact, the only reason the University has this information is that it was able to use public funds and resources to conduct the survey. There is absolutely nothing unique, confidential, or proprietary in the information I am requesting.

#### **First University Response (November 20, 2002)**

In the University's original response dated November 20, 2002, I believe that the University incorrectly relied on AS 14.40.453 to deny my request. AS 14.40.453 only applies to intellectual property or proprietary information received or discovered by the University until publicly released or until the research is terminated.

AS 14.40.453 reads:

Confidentiality of Research. The public records inspection requirements of AS 40.25.110 – 40.25.121 do not apply to writings or records that consist of intellectual property or proprietary information received, generated, learned, or discovered during research conducted by the University of Alaska or its agents or employees until publicly released, copyrighted, or patented, or until the research is terminated, except that the university shall make available the title [and] a description of all research projects, the name of the researcher, and the amount and source of funding provided for each project. (Emphasis added).

I do not believe that the information I am requesting, retail grocery store prices collected in a survey from retail stores, is intellectual or proprietary information, particularly since it is on public display at stores open to the public. Regardless, the University has terminated and publicly released its research for the most recent survey and therefore the University must release all information “received, generated, learned, or discovered” during the last survey.

#### **Second University Response (April 07, 2003)**

In its most recent correspondence dated April 07, 2003 the University did not rely on a statute or regulation to deny my information request. Rather it cited CES policy and vague concepts, none of which provides a basis for denial of a public information request as listed by the Legislature in Alaskan Statutes.

Although I am certain that my information request is clearly provide[d] for by Alaska State Statutes and University Regulations, I will respond briefly to the points raised in the University’s most recent denial of my request.

- **Proprietors**  
The University makes a number of assumptions and concerns as to the possible negative consequences of providing the information I have requested. Whether or not any of these assumptions and concerns would in fact occur is simply a matter of conjecture at this point. However, since my request is covered under the Alaska State Statutes and University Regulations, none of the stated assumptions and concerns is a valid reason to deny my information request.
- **Faculty Research**  
The University has expressed a number of concerns that providing my information request would somehow violate and/or inhibit the University’s research processes and scientific inquiry. I believe that these issues and concerns have been recognized and provided for by the Legislature through AS 14.40.453 and other provisions. Again, since my request is provided for under the Alaska State Statutes and University Regulations, none of the stated assumptions and concerns is a valid reason to deny my information request.
- **Faculty Union**  
The University has indicated that United Academics has filed a grievance on behalf of all faculties at the University of Alaska Fairbanks protesting the possibility that Professor Luick may be required to turn over raw data to a potential competitor of the firms who provided it.

Since I have not seen the actual grievance, or the provisions of the Union contract that the grievance alleges may be breached by providing my information request, it is difficult for me to respond in detail to this concern. I would note that I believe that this grievance would be considered a mute point if the University agrees that

my request is covered under the Alaska State Statutes and University Regulations. I do not believe that any provisions of a labor agreement, or subsequent grievances, can require or result in the University not complying with applicable Alaska State Statutes.

- Validity  
The University has expressed concerns and drawn conclusions that I might somehow make wrong assumptions or incorrect analysis based on the provided data. While this is certainly a possibility, it is also quite possible that I may make an analysis or unique correlation that provides additional insights and understanding. In any event, since my request is provided for under the Alaska State Statutes and University Regulations, none of the stated assumptions and concerns is a valid reason to deny my information request.

In summary, I respectfully request that you grant my information request as provided for under the Alaska public rights to public records Statutes and the University of Alaska Regulations. If you would like additional information or clarification to assist in your decision please let me know. I am also available and would welcome direct two-way communication to better understand concerns and possible solutions on both sides.

In your letter you requested that I copy a number of people with my response to you. I have copied those people shown below for which I have addresses through previous correspondence. If you feel it is necessary, please forward my response to others.

Mr. Kellie copied this letter to Mr. Nakazawa, Ms. Lynch, Rep. Chenault, and the ombudsman.

On May 7, 2003, UAF Chancellor Marshall Lind wrote to Mr. Kellie granting his appeal and directing CES to disclose the information Mr. Kellie requested in October 2002.

In accordance with University Regulation 05.08.02, this is my written determination on the public records request appeal by Michael E. Kellie.

The Cooperative Extension Service (CES) publishes a quarterly report of "Cost of Food at Home for a Week in Alaska," which consists of the total cost of weekly food consumption for individuals and families in various age groups in each of 21 communities, as well as the percent of change relative to prior quarters and three prior years. CES also collects and individually reports the cost per unit of electricity, heating oil, gas, lumber and propane.

The CES report is based on store surveys of the retail prices of a specific set of food and non-food items. The retail price information is generally available on store shelves. The 104 food items are based, with some modification, on the USDA Low-Cost Food Plan. The information is recorded by individuals paid by CES to conduct the store surveys.

CES has not used the retail price data to produce any reports other than the quarterly reports and at this time has no specific plans or proposals to do so.

CES received a public records request from Michael E. Kellie for the survey forms listing the prices of the specified items on the store shelves, or the dollar cost per unit of each of the 104 items, from the most recent report. Mr. Kellie's request was denied. CES's reasons for its denial are set out in several e-mails and in a letter dated April 7, 2003. Mr. Kellie sought reconsideration of the denial pursuant to University Regulation 05.08.02.

I have received and reviewed Mr. Kellie's January 6, 2003, letter to the State Ombudsman and its attachments; Anthony Nakazawa's letter of April 7, 2003; David Porter's Memorandum of April 18, 2003; and Mr. Kellie's letter of April 21, 2003.

AS 40.25.110(a) provides in pertinent part:

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 . . . a certified copy of the public records.

"Public records" are defined as "books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency." (AS 40.25.220(3))

Some research records are confidential. AS 14.40.453 provides as follows:

**Confidentiality of Research.** The public records inspection requirements of AS 40.25.110 – 40.25.121 do not apply to writings or records that consist of intellectual property or proprietary information received, generated, learned, or discovered during research conducted by the University of Alaska or its agents or employees until publicly released, copyrighted, or patented, or **until the research is terminated**, except that the university shall make available the title and a description of all research projects, the name of the researcher, and the amount and source of funding provided for each project. (emphasis added)

Under the relevant part of this statute, research records are confidential until the research is terminated. Mr. Kellie has asked for the price data for the most recent report and asserts that the research for that quarter is terminated. Since CES has not produced any reports with the survey data other than the quarterly reports, and has no specific plans or proposals to do so at this time, I have determined that the research for the prior quarter is terminated and therefore the requested records are no longer confidential. In other circumstances, research records may be protected from disclosure under AS 14.40.453, if, for example, the records are protected research notes, further research using the data in the records is ongoing, or if there were evidence that disclosure would ultimately harm the public welfare. In this instance, the records consist of information generally available to the public.

Therefore, my determination is that the records requested by Mr. Kellie, the survey forms listing the prices of the specified items, or the dollar cost per unit of each of the 104 items, from the CES "Cost of Food" report, will be disclosed in accordance with the Alaska public records law.

On May 8, 2003, Mr. Nakazawa wrote to Mr. Kellie that CES had received the chancellor's determination and would provide the information immediately.

On May 12, 2003, Mr. Kellie told the ombudsman investigator he was pleased with the chancellor's determination but was "still disappointed in the delay and evasiveness of Cooperative Extension." Mr. Kellie also expressed disappointment with the chancellor and other university officials "who were being copied all along" with the exchange of correspondence between Mr. Nakazawa and himself and yet "did nothing." Mr. Kellie said CES comments that his public records request was a matter of concern to the faculty union was "a phony issue the

professor used, like smoke and mirrors, to avoid sharing information with me.” He said the university’s “strategy to stall and ignore me made me less willing to compromise.” “I’m not out to mess up their research,” he said, but “their ‘screw you’ attitude led me to persist with the request when I might have been willing to desist and drop the request” had they been more reasonable.

On May 16, 2003, Mr. Luick sent Mr. Kellie the data he had requested. In a cover letter Mr. Luick addressed the shortcomings of the data and stated his view that Mr. Kellie was responsible for the delay in making this information available:

Please find enclosed the data you requested, namely, the cost of 104 food items in a short list of communities. These are the figures I used in calculating the cost of food in these communities for December 2002, which is the most current complete data set. By way of disclaimer, I cannot vouch that the prices are correct for the first week of December, as I do not check the shelf prices myself; the data are collected under contract. The values appear to be correct within reason by comparison to previous values, and as I said, they are the values from which I constructed my report.

I regret that communication with my office has been difficult for you, and that you did not accept my offer of calculating a relative pricing, because it has resulted in a considerable delay in providing the support you requested. It is my belief that the University in general, and Cooperative Extension in particular, take pleasure in providing timely and valuable public support. As outlined to the Ombudsman, the nature of your request raised a question of data stewardship for which I had no clear policy guidelines to follow.

Still, I suggest that you enter the values I have provided into a spreadsheet and re-express them as averages relative to your baseline community. The reason is that since the prices don’t change much (I ignore changes <5%), especially the weighted totals, you will be able to determine the dollar value of an item at a remote location in the future by appropriately multiplying your local value. Use line 18 of the *Cost of Food at Home* to extend this calculation for any of the communities I survey.

#### **UAF internal discussions of Mr. Kellie’s public records request**

In disclosing the documents quoted below, Associate University Counsel Ardith Lynch withheld documents she deemed “protected by attorney-client or attorney work-product privilege” in accordance with AS 24.55.330(3). In addition, she stated, “You will also note that some information that is not related to Mr. Kellie has been redacted.” For this reason, some facts and dates bearing on this investigation are not known to the ombudsman.

On or about January 21, 2003 (the university did not provide the original version of this document bearing the transmission date), Vice President for University Relations Wendy Redman forwarded to Mr. Nakazawa an inquiry from Senator Tom Wagner’s aide, Amy Seitz. Ms. Redman wrote,

Tony. . . I hope there’s a good reason why this information isn’t public, because I can’t imagine what it would be.

On January 27, 2003, Ms. Lynch wrote to Mr. Nakazawa in reference to the list of questions he received from Ombudsman Intake Officer Denise Duff on January 23:

Regarding the ombudsman's question 4,<sup>4</sup> I don't think that the costs can be considered "proprietary information" since they are available to the public. That's why I want to look into whether the research results can be considered intellectual property (the other category covered by the statute on confidentiality of research.)

On February 4, 2003, Mr. Nakazawa responded to Ms. Redman,

On this I am working with Ardith Lynch in Jamo's office [i.e., University Counsel James "Jamo" Parrish]. To let you know, the complaint has also went to the Ombudsman's office too. I will cc you an earlier letter that I responded to the person requesting this information (and I will keep you posted on what happens): [here Mr. Nakazawa pasted in his November 20, 2002, e-mail message to Mr. Kellie].

On February 4 Ms. Redman replied to Mr. Nakazawa,

Thanks for the info, but I must say, your reference to AS 14.40.453 is much too vague to be helpful to the general public. Why is the grocery information proprietary? If any individual can contact local grocery stores (as you state in your response) and get the same information it really doesn't fall into the category we assign to "proprietary information" and hiding behind AS 14.40.453 doesn't really seem appropriate. I'm either missing something here or we're not doing a very good job of explaining because so far I don't understand why we don't just give him the information. I can understand why the specific responses in certain kinds of industry surveys would be held confidentially, but food costs seems to stretch the envelope. Did you survey on wholesale costs as opposed to retail? Did you survey the cost of transportation and delivery? Is there information in the survey that really wouldn't be available to the general public if they called the grocery stores themselves? If so, that would make sense and we should just say that. If not, I really don't understand.

And what does the information about workshops have to do with this request or with AS 14.40.453? Confidentiality of name/address information on persons taking courses/workshops, etc at UA are protected under separate federal legislation. . . .

On February 4 Mr. Nakazawa also wrote to Ms. Lynch, Associate General Counsel Mike Hostina,<sup>5</sup> and Mr. Luick,

Just to update you, yesterday I have responded back to Denise Duff via phone to let her know that I am working with the UA General Counsels office to develop an appropriate response back to their office. She informed me that she has given this case to another caseworker who will contact me soon. In the meantime I have also been notified that Senator Wagoner in Kenai has had his office call the UA president's office to find out why we are not providing this information. . . .

On February 12, 2003, Ms. Lynch replied to Mr. Nakazawa, with copies to Wendy Redman, Mr. Luick, and CES administrative assistant Arlene Strandberg:

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<sup>4</sup> "How are the dollar costs per unit on these 104 food items considered proprietary if this is information available in a store to the general public?"

<sup>5</sup> In the interest of declaring any possible conflicts of interest, the Ombudsman points out that Mr. Hostina is a former Deputy Ombudsman in the Office of the Ombudsman and, as such, was a supervisor for both Assistant Ombudsman Tom Webster and current Ombudsman Linda Lord-Jenkins. Mr. Hostina left the Office of the Ombudsman in 1995.



I met with Diane McLean [Director, UA Office of Intellectual Property and Licensing] this morning to discuss whether the survey data could be considered intellectual property and is therefore not subject to release under the “confidentiality of research” statute (if the research is also terminated). We concluded that the data is not intellectual property and is therefore subject to the public records laws.

The law allows a person to request copies of public records. They are required to pay the normal cost of copying (but you can waive the cost if its under \$5). If the production of records in a calendar month exceeds five person-hours, the person must also pay the personnel costs to complete the search and copying tasks. You are not required to create documents -- just to give copies of documents (records) that already exist.

There are somewhat different rules for electronic records; let me know if you need that information.

If you are concerned that the information may be mis-interpreted, you are free to include a disclaimer, if you feel that is appropriate.

On February 12 Mr. Luick replied to this message, with copies to all original recipients, “I will want to be consulted a bit more on this before you distribute a decision based on what work has been ‘terminated’ and what constitutes intellectual property. I think we should meet and discuss this.”

On February 17 Mr. Nakazawa wrote to Mr. Luick,

I wanted to let you know I will meet you in my office around 1 pm so we can visit with Ardith. . .also I’ve asked James [Levison, CES executive business officer] to join us (is this ok with you??) I guess, I also have another concern, that if in fact we have to give this info to this person, does that mean he will ask us for it everytime your report comes out?? And who else will start asking us to do their work for them. . . .

On February 21, 2003, Mr. Luick wrote to Ardith Lynch thanking her for her “excellent work on the confidentiality of our records.” He also described his understanding of a February 18 meeting between Mr. Nakazawa, Mr. Luick, James Levison, and ombudsman investigator Tom Webster. “I made it clear that we wanted to help Mr. Kellie but did not want to be forced to set a precedent for releasing our data willie-nillie.” He continued,

I suggested to Tony yesterday that I calculate the ratios of food costs for each item among the communities of interest and from that Mr. Kellie could walk into a store in his community and know the cost of food in any of the communities in my list. It would not be the exact cost and would not include the stores themselves, but in fact by averaging I could provide him with BETTER information than the raw data themselves. Since the ratios are stable, he could use them with confidence for years to come and at the same time I will not have released any publishable information. This is the sort of idea I had in mind for him at the outset, if he had chosen to listen. [Caps in original.]

On March 6, 2003, David Porter, Organizational Vice President of United Academics, the faculty union, filed a grievance with UAF Provost Paul Reichardt concerning “three recent actions by the University that together constitute a serious assault on the atmosphere of academic freedom.” One of these actions concerned Mr. Luick:

The third case involves an assistant professor,<sup>6</sup> Bret Luick, who is being asked to turn over copies of raw survey data, collected to prepare a quarterly published reports [sic] on the prices of individual foods in a region of Alaska. The person demanding the data wants to use them in a business plan and is a potential competitor of the respondents providing the data to Professor Luick. He asked for guidance from the University about what to do. The Office of Sponsored Programs advised that the raw data need not be released.<sup>7</sup> The Statewide Office of the General Counsel reversed that advice and instructed the faculty member to release the raw data. Professor Luick's immediate supervisor, Director Anthony T. Nakazawa, has been instructed to request Professor Luick to release the data. Professor Luick is resisting these requests. I hope he will not be disciplined for insubordination.

Any one of these cases<sup>8</sup> represents a serious assault on academic freedom at UAF. . . .

On March 14, 2003, administrative assistant Wanda Peros notified university officials of an April 22, 2003 meeting "regarding intellectual property (the Luick matter)." Participants were to include Provost Paul Reichardt, Tony Nakazawa, Diane McLean, Ardith Lynch, and Associate General Counsel Mike Hostina.<sup>9</sup>

On March 18, as noted above, the ombudsman investigator confirmed with Ms. Lynch that Mr. Kellie's public records request was covered by university regulation R05.08.02(A), which provides appeal rights.

On March 27 Mr. Nakazawa circulated to Bret Luick and James Levison a draft letter to Mr. Kellie containing a formula for calculating "the relative price of the 104 food items in Kenai as a ratio of the price of the foods in any one of the survey communities across Alaska"<sup>10</sup>:

$$R_{it} = P_{it}/P_{\text{milk in Kenai for period } t} \quad i=1. . . . . n \text{ (survey communities)}$$

R-ratio  
P-price  
For time period t

On March 30, as quoted above, Mr. Kellie wrote to Ardith Lynch "to clarify the intent of my comments" in response to Ms. Lynch's statement that the university did not consider Mr. Kellie's November 22, 2002, message to Mr. Nakazawa (with copies to President Hamilton, Chancellor Lind, Dean Joseph, and others) to be an appeal, because he did not use the word "appeal" in the message and because he addressed Mr. Nakazawa directly instead of Chancellor Lind. On April 1 Ms. Lynch forwarded Mr. Kelly's message and the exchange between Mr. Webster and Ms. Lynch to Mr. Nakazawa, who forwarded it to Ms. Strandberg with the request, "Pls cc to Bret and James."

<sup>6</sup> Mr. Luick is listed in the UAF directory as Associate Professor.

<sup>7</sup> There appears to have been some misunderstanding on this point. Andrew Gray of the Office of Sponsored Programs, after conferring with former Director and Vice Provost for Research Ted DeLaca, told the ombudsman his office "took no official stand on this issue." See also then-Deputy Director Diane McLean's memo below at April 21, 2003.

<sup>8</sup> The details of the first two cases were redacted from the copy of this document provided to the ombudsman.

<sup>9</sup> Barely legible notes on a CES fax cover sheet show this meeting was held as scheduled. Attendees appear to have included Paul Reichardt, Jamo Parish, Ardith Lynch, Mike Hostina, and one other person.

<sup>10</sup> The fax cover sheet is addressed to Mr. Levison. A typewritten note at the bottom addresses Bret Luick. The letter refers to prices in Kenai because Mr. Kellie resided there.

On April 1, 2003, Director of Labor Relations Beth Behner wrote to Michael Jennings, Statewide President of United Academics-AAUP/AFT, the faculty union.

I wanted to give you a heads up (if you're not already aware of this) that Mike Kellie, the person who requested the research data from Bret Luick at Cooperative Extension Service, is appealing to the Chancellor under R05.08.02.

I thought that since the union referenced this issue in the grievance filed by [UAF professor] David Porter, you might want to ask to provide input to the chancellor. The regulation does not expressly provide for such input, but there's no reason you couldn't make a request to have the union's input considered. The regulation gives the chancellor 10 working days (April 10) to make a determination, but he can extend that for a period not to exceed 30 working days.

We're expecting to be copied with Mr. Kellie's appeal to the Chancellor. Please let me know if you would like us to send this along once it is received by Labor Relations.<sup>11</sup>

On Tuesday, April 1, 2003, Bret Luick sent a message to Research Associate Raymond D. Cameron, with a draft letter to Mr. Kellie attached.

Perhaps you could read this over from a conceptual and editorial point of view. I can't get back to it until Thursday even though I am supposed to have it done tonight. Tough on them. Any additional ideas you might suggest would be welcome. It is a laundry list of why faculty don't want to release data.

On the same date Mr. Luick sent a message to Professor David Porter, with the draft letter to Mr. Kellie attached.

This is a draft of a letter I'm proposing to send to Mr. Kellie. We think he is feeling that the University is simply ignoring him, which obviously is not true. Please give any suggestion you might have. I worded the paragraph regarding the union much more strongly, then removed the wording because I wasn't sure where we stood at this time. I'm sure you didn't mean to volunteer yourself as an editor but this letter also serves to inform you what I am doing.

Speaking of which we spent 1/2 h. on the phone with Ardith Lynch today who says that my case is being sent to the Chancellor (as a formal appeal of Tony's decision) for a decision by April 8. He has a week to respond, one of his responses could be to inform Mr. Kellie he is extending his deadline by 30 days (which is part of Uni policy). The upshot of the Chancellor's decision (he is allowed to delegate this responsibility) which will likely be given in 38 days will either be a yay or nay based on written Uni policy. I don't know what that is, but I don't think it is the same as Alaska Law. Hell, I don't know. In any event Paul Reichardt does not support handing out the data and said he wouldn't do it.<sup>12</sup> In conversation with Paul I said if ordered to hand over the data I'd give it to him and as chief academic officer he could do what was right for the University.

On April 1, 2003, Bret Luick also sent a message to Mr. Nakazawa, with a draft letter to Mr. Kellie attached.

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<sup>11</sup> Mr. Jennings replied on April 4, "I am not a lawyer but I don't think that the freedom of info. Act applies [sic] to development of the methodology and I would also question the human subjects aspects of this research and its release? Guess we'll see where you guys want to go with it?"

<sup>12</sup> According to the UAF website, Provost Paul Reichardt was formerly Professor of Chemistry and is an expert in bio-organic chemistry and chemical ecology.

I worked on the letter for a few hours, making it into a list of reasonable arguments in favor of our position. I am not comfortable with posting it at this time, but I can have it revised by the end of the week (not tomorrow, I'm in Anchorage). The reason is that I bring in arguments [sic] from other perspectives, such as the union and the Faculty/University relationship regarding the work environment, and I want that stated correctly.

If something must go out sooner I think it should simply be stated as you are revising a draft awaiting a time when we are both in the office and will have a statement for Mr. Kellie by some particular day. . . .

On April 2, 2003, Mr. Nakazawa replied to Mr. Luick,

That is fine...here is what I will ask Arlene [Strandberg] to send out to the group of Mr. Kellie and cc to you, Provost, Sue Wright of Rep. Chenault's office, Wendy, Ardith, and bcc James [Levinson] and Dean Joseph. . . .

Dear Mr. Kellie,

In response to your request for survey information from CES, I have met with the UA General Counsel's office, as well as with the State of Alaska Ombudsman's office. At the present time I am working with Dr. Luick on finalizing a final draft response back to you, however both Dr. Luick and my travel schedules have made this process difficult. Hopefully by "this next Monday or next Friday April 11???", I hope to be back in the office and have it finalized. (Bret is this date ok???)

I hope you will be understanding of our delay on this important issue.

In the revised version of this message sent to Mr. Kellie and several interested parties<sup>13</sup> on April 2, 2003, Mr. Nakazawa stated, "Hopefully by this next Monday, April 7, I will have it finalized."

On the same day, April 2, 2003, Mr. Kellie responded,<sup>14</sup> asking Mr. Nakazawa to clarify how the letter he and Mr. Luick were working on fit into the university appeal process. He copied this message to the other recipients of Mr. Nakazawa's message as well, including Provost Reichardt, Ms. Lynch, and Ms. Redman. Neither Mr. Nakazawa nor anyone else at the university ever responded to Mr. Kellie's questions.

Also on April 2, David Porter wrote to Mr. Luick with suggestions for the draft letter to Mr. Kellie:

Thanks for sending a draft of the letter. I suggest the following amendments to two of the paragraphs.

I am meeting with the Provost this afternoon on the grievance. . . .

Mr. Porter's suggested revisions were the following paragraphs:

Faculty Research. It is a requirement of University Faculty to conduct and publish original research. An environment of academic freedom must be maintained if faculty are to meet this requirement. The process of collecting, editing and publishing is performed

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<sup>13</sup> Mr. Nakazawa listed five people next to the "cc:" at the end of this email message, including Mr. Luick, Mr. Reichardt, Ms. Lynch, Mr. Webster, and Sue Wright of Representative Chenault's office. He sent it directly to Mr. Kellie and these five people, as well as to Ms. Redman, who is not listed in the message.

<sup>14</sup> Mr. Kellie's response is quoted above, p. 16.

within this environment of academic freedom, where faculty are able to define within the professional and scientific methods how their data are collected and interpreted. Faculty must be protected from requirements to distribute or make available their original data except as agreed with the persons who cooperated in providing information, and/or to support the scientific research the data were collected to advance. It is integral to the processes of scientific advancement and to the livelihoods of faculty to have such protection. It is immaterial for what current purpose the data may be used as distribution sets a precedent for future requests and therefore violates the academic process. It is a professional duty of both the University Administration and individual faculty to protect such an environment for scientific inquiry.

Faculty Union. United Academics has filed a grievance on behalf of all faculty at the University of Alaska Fairbanks protesting the possibility that Professor Luick may be required to turn over raw data to a potential competitor of the firms who provided it. It is unlikely any action will be taken regarding access to Professor Luick's raw survey data until after this grievance is resolved.

On April 3, 2003, Mr. Luick wrote to Ray Cameron,

Thanks for the excellent suggestions [regarding Mr. Luick's draft letter to Mr. Kellie]. I left the office Tuesday feeling that the letter had a defensive note. The tone needed to be changed. The great thing was I came back in to work to write that letter, which in effect gets the Chancellor out of a sticky spot (this issue is on his desk) and while I was here security gave me a \$60 ticket for parking on campus after hours. This place is relentless.

As noted above, on April 7, 2003, Mr. Nakazawa wrote to Mr. Kellie offering a different set of reasons why Mr. Kellie's information request "is not consistent with CES policy." The letter was sent by U. S. mail to Mr. Kellie's address in Kenai, so he received it after he sent another e-mail message to Mr. Nakazawa. On April 8 Mr. Kellie wrote to Mr. Nakazawa and several other university officials (Paul Reichardt, Bret Luick, Ardith Lynch, Wendy Redman) asking for a reply to his April 2 message and commenting, "It has been over four months since I made my original information request." The full text of his message is quoted earlier in this report.

On April 9, 2003, Chancellor Marshall Lind wrote to Mr. Kellie that he had received the appeal forwarded by Ms. Lynch and was extending the deadline for issuing a decision to May 9, 2003. He copied, among others, Mr. Nakazawa and David Porter, Organizational Vice President of United Academics (the faculty union). The chancellor instructed, "Any person who desires to present input prior to my determination may do so in writing no later than April 24, 2003. A copy of any material provided to me for consideration in my determination in this appeal should also be furnished to the individuals listed below" (at the "cc" notation).

On April 18, 2003, David Porter wrote to Chancellor Lind regarding "Public Records Request by Mr. Michael E. Kellie." Copies of this memorandum were provided to several university officials. University records show that CES administrative assistant Arlene Strandberg sent Mr. Porter's memorandum to Mr. Luick, to Dean Joseph, and to Sheryl Stanyck, District Home Economist at CES/UAA, none of whom appears in the cc list in Chancellor Lind's April 9 letter. The memorandum reads as follows:

As I understand, the Public Records Request from Mr. Michael E. Kellie relates to his demands that Professor Bret Luick turn over copies of raw survey data. These raw data are collected by Professor Luick from retailers as he prepares for a quarterly publication on the prices of individual food items in a region of Alaska. Mr. Kellie wants to use these data in a business plan and is a potential competitor of the respondents providing the data to Professor Luick.

Professor Luick considers these data, in their raw form, to be materials from which he retains the option to do continuing research. Professor Luick is rightfully worried that flawed inferences may be drawn by persons not acquainted with the methodologies used in collecting the data. He is also concerned that subsequent research he may do based on these data may be compromised if he is forced to turn over raw survey data.

Further, and perhaps more important, the respondents from which he gathers the data cooperate voluntarily, knowing that these data will be published in summary format that does not reveal the identity of individual respondents. If these respondents learn the information they provided has been turned over in its raw form to a potential competitor I suggest they may feel that the University is guilty of misrepresenting the uses to which this sensitive business information would be made.

The University has a positive obligation to protect vigorously a faculty member's research notes and raw data. An atmosphere of unfettered and free academic inquiry is absolutely essential if the University is to fulfill its obligations to democratic values and the advancement of scientific knowledge. The American Association of University Professors has repeatedly articulated, for over 100 years, the protection of academic freedom as one of its core principles. Courts at the highest levels have recognized the special duty universities have in advancing scientific knowledge and democratic institutions.

On March 6, 2003, I filed a grievance objecting to manner in which the University had already dealt with this matter. In subsequent meetings related to that grievance I have learned that the University is vigorously resisting Mr. Kellie's demands. I commend those efforts and urge in the strongest way that the University refuse to comply with those demands. All faculty research notes will be at risk if Professor Luick's raw data are compromised in this way.

Cc: Tom Webster, Office of the Ombudsman, State of Alaska  
Paul B. Reichardt, Provost, UAF  
Tony Nakazawa, Director, Cooperative Extension Service  
Ardith Lynch, Associate General Counsel

#### Attachment

The "Attachment" to Mr. Porter's memo was a four-page memorandum to Provost Paul Reichardt discussing union grievances. The third grievance involved Mr. Kellie's public records request to CES. Despite the "Cc" (carbon copy) annotation at the bottom of this memo, and despite the chancellor's directive in his April 9 letter that anyone submitting comments to be considered alongside Mr. Kellie's records request should also provide a copy to other interested parties, no one at the university sent Mr. Kellie a copy of this memorandum opposing his public records request. Nor did anyone send a copy to the ombudsman until Mr. Webster requested copies of university records pursuant to AS 24.55.160 after the issue had been decided.

On April 21, 2003, Mr. Kellie wrote to Chancellor Lind rebutting the points in Mr. Nakazawa's April 7 letter. (Mr. Kellie's letter is quoted above.) Mr. Kellie copied his letter to Tony Nakazawa and Ardith Lynch, among others. Mr. Kellie concluded his letter by asking that copies of it be given to those for whom he had no address.

In your letter you requested that I copy a number of people with my response to you. I have copied those people shown below for which I have addresses through previous correspondence. If you feel it is necessary, please forward my response to others.

On the same day, April 21, 2003, Diane McLean, Deputy Director of the UAF Office of Sponsored Programs and Director of Intellectual Property and Licensing, wrote a memo to Ardith Lynch concerning Mr. Kellie's public records request:

In October 2002 Michael E. Kellie requested that Dr. Bret Luick provide to him the documents containing survey data for the dollar cost per unit for 104 items in Bethel, Cordova, Dillingham, Homer, Kodiak and Nome. Dr. Luick used the data to develop his report "Cost of Food at Home for a Week in Alaska, September 2002." The data was obtained by surveying items for sale at stores in each of the communities. Dr. Luick denied Mr. Kellie's request, at least in part, because he believed the data to be proprietary and confidential intellectual property.

For the data to be proprietary and confidential, the owner of the data would treat the data as valuable and make efforts to keep it secret. In this instance, the data in question was affixed to goods offered for public sale. The original owners made no effort to either keep ownership of the data or goods restricted to themselves or maintain price secrecy. Although specific merchants might be displeased to have their stores named in a comparative survey, they themselves displayed the data before the public in such a way as to invite the public's attention. In my view, there are no proprietary or confidential attributes to the data.

Dr. Luick also believed that the documents contain university intellectual property that warrants protection from public dissemination. Presumably, the intellectual property would have to be trade secret or copyright. For the data to be trade secret, it would have to be of value and not generally known to the public. That is not the case here. For the data to warrant copyright, the data would have to be an original work of authorship fixed in a tangible form. The raw data taken from the items for sale does not constitute original works of authorship. Dr. Luick's selection and arrangement of the data arguably may have some value as intellectual property warranting copyright protection. However, that value would not be sufficiently substantial to justify denying its access to the general public.

On April 22, 2003, Mr. Kellie wrote to Chancellor Lind by email, with copies to Ms. Lynch and Mr. Nakazawa:

Dear Chancellor Lind:

Attached is a Word document with my written response for your consideration in my appeal of the University's denial of my information request.

I will send a signed hard copy by over-night express tomorrow Wednesday, April 23, 2003. It should arrive in your office on Thur[s]day April 24, 2003. Please advise if for some reason the hard copy does not arrive, or you have other questions.

Sincerely,

Mike Kellie

Mr. Kellie's attached letter, dated April 21, 2003, is quoted above in the previous section of this report.

According to Ms. Lynch, "On April 22, 2003, CES Director Nakazawa met with Provost Paul Reichardt, General Counsel Jamo Parish and Ardith Lynch."

On April 24, 2003, Ms. Lynch wrote a memorandum to Mr. Nakazawa explaining judicial decisions on public records requests and citing Alaska Supreme Court decisions, state law, law review articles, and a report by the American Association of University Professors on access to university records.

According to Ms. Lynch,

On July 10, 2003 UAF Provost Paul Reichardt convened a meeting to hear the grievance filed by David Porter. In the grievance, United Academics asserted that the university violated Article 6 of the collective bargaining agreement, "Academic Freedom and Responsibility," in its "actions in response to an external request for access to a faculty member's research data." The Provost's July 24, 2003 grievance response states as follows:

During our Step 2 meeting, I addressed the University's review of and response to a faculty member's inquiry as the proper handling of a request from a member of the public for research data. The University's intent was to support this faculty member's interest in not disclosing the data, as far as the law would allow. Once the issues were fully reviewed and the faculty member was further advised regarding the status of this matter, he agreed with the recommended handling of the request.<sup>15</sup>

#### **Ombudsman issues notice of investigation**

On October 30, 2003, Assistant Ombudsman Tom Webster sent written notice of investigation to then-Chancellor Marshall Lind. The notice letter requested copies of university records related to the matter and summarized Mr. Kellie's complaint as follows:

Mr. Kellie alleges that university staff unreasonably denied his public information request for data from the quarterly Alaska food cost survey, unfairly delayed responding to his appeal, changed their reasons for denying the request in a second decision four months after the first denial, and failed to follow university appeals regulations. Mr. Kellie also objected to the failure of university staff to give him notice of the appeal procedure while holding him to the letter of its requirements. As a result, he said, your [i.e., Chancellor Lind's] May 7, 2003 determination to grant his November 22, 2002 appeal was untimely.

Mr. Kellie also noted that several reasons CES gave for denying his request that Mr. Kellie was put to the trouble of rebutting were not addressed in your May 7 determination, potentially leaving the door open to future noncompliance with state public information law and university regulations by CES or other university staff.

#### **UA Associate General Counsel responds to notice of investigation**

On November 11, 2003, Associate General Counsel Ardith Lynch acknowledged receipt of the ombudsman's notice of investigation.

UAF is in the process of gathering the requested records. I believe you have already received copies of most of the records relating to this matter. Any additional records, except for attorney-client privileged records, will be mailed to you as soon as they have been collected.

On November 24, 2003, Associate General Counsel Ardith Lynch responded in a letter rebutting Mr. Kellie's allegations as summarized in the ombudsman's Notice of Investigation. Ms. Lynch

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<sup>15</sup> The university did not provide a copy of this document to the ombudsman.



rehearsed the history of Mr. Kellie's public information request and subsequent communications, and the university's responses to Mr. Kellie:

This is in response to your letter of October 30, 2003 to Chancellor Lind. As you know, the University worked with your office between January and May of this year to resolve the issue of the public records request directed to Cooperative Extension Service (CES).

In October, 2002, Mike Kellie requested certain records from CES. CES denied his request, based in part on its interpretation of A.S. 14.40.453. (See Mr. Kellie's January 6 letter to Linda Lord-Jenkins.) There were several e-mail exchanges between Mr. Kellie and CES. Both CES and Mr. Kellie copied their e-mail to the University President, UAF's Chancellor, and the Dean of the College of Rural Alaska. However, Mr. Kellie did not submit a written appeal to the chancellor pursuant to University Regulation 05.08.02.<sup>16</sup> His correspondence prior to his letter to Ms. Lord-Jenkins was addressed to Tony Nakazawa, Director of the Cooperative Extension Service.

In March, you asked me about the status of Mr. Kellie's "November 22 appeal of Mr. Nakazawa's response dated November 20, 2002." On March 24, we discussed the requirements of University Regulation 05.08.02A and I advised you that the University did not consider Mr. Kellie's November 22 e-mail addressed to Mr. Nakazawa to be a written appeal to the chancellor. (See my March 28 e-mail to you.) However, as I explained, the University was willing to accommodate Mr. Kellie's request for an appeal at that time. Subsequently, pursuant to Mr. Kellie's request for an appeal, Chancellor Lind issued a written determination on May 7, 2003, stating that the records that were the subject of the appeal would be disclosed.<sup>17</sup> CES sent the records to Mr. Kellie on May 16, 2003.

The University responds to the specific allegations in your letter of October 30 as follows:

1. UAF did not unreasonably deny Mr. Kellie's public information request. On May 7, Chancellor Lind determined that the records would be disclosed, and the records were disclosed on May 16.
2. UAF did not "unfairly delay responding" to Mr. Kellie's appeal. On November 22, Mr. Kellie sent an e-mail to Director Nakazawa requesting reconsideration of his decision. Mr. Kellie never mailed or hand-delivered an appeal to the chancellor as required by University Regulation 05.08.020(A)(1)(b). When Mr. Kellie inquired about the status of an appeal in March, 2003, the University promptly agreed to treat his letter to the Ombudsman as an appeal. Chancellor Lind issued his determination within the timeframe required by University regulation 05.08.02.
3. UAF did not change its reasons for denying the request or fail to follow university appeals regulations. Chancellor Lind's determination stated that the records would be disclosed. Except for the acceptance of an untimely request, the appeals process and the determination complied with University Regulation 05.08.02.

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<sup>16</sup> Ms. Lynch's footnote 1: "'An appeal must be mailed or hand-delivered to the appropriate university office within 30 working days after the denial is issued and must include the date of the denial and the name and address of the person responsible for the denial.' University regulation 05.08.02(A)(1)(b)."

<sup>17</sup> Ms. Lynch's footnote 2: "See University regulation R05.08.02(A)(2)(a)."

4. UAF did not “hold Mr. Kellie to the letter of the appeal regulations.” The regulations do not require CES to give notice of the appeal procedures. Furthermore, UAF accepted as an appeal, a letter that was sent to the Ombudsman (not to the chancellor) when Mr. Kellie’s request for an appeal was made over three months after the denial (not within 30 working days).

5. Chancellor Lind’s determination was timely. The regulations permit the chancellor to extend the time period for a determination by sending a written notice to the requester.

6. Chancellor Lind’s determination complied with University Regulation, which requires that the appeal determination state “which of the records that are the subject of the appeal will be disclosed and which records will not be disclosed.” There is no requirement that Chancellor Lind address every issue raised in an appeal.

Enclosed are copies of University records on Mr. Kellie’s public records request and appeal. I have combined and placed in original chronological order the records from CES, Chancellor Lind, and Provost Paul Reichardt, with duplicates omitted. I have not included records that are protected by attorney-client or attorney work product privilege. You will also note that some information that is not related to Mr. Kellie has been redacted.

## **STANDARDS: STATUTES, REGENTS’ POLICY, UA REGULATIONS**

### **AS 14.40.453. Confidentiality of research**

The public records inspection requirements of AS 40.25.110 - 40.25.121 do not apply to writings or records that consist of intellectual property or proprietary information received, generated, learned, or discovered during research conducted by the University of Alaska or its agents or employees until publically released, copyrighted, or patented, or until the research is terminated, except that the university shall make available the title and a description of all research projects, the name of the researcher, and the amount and source of funding provided for each project.

### **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 a certified copy of the public record.

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Cross references –

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University of Alaska. - The legislature intended to include the University of Alaska within the scope of state agencies subject to the public records statute. *Carter v. Alaska Pub. Employees Ass’n*, 663 P.2d 916 (Alaska 1983).

The president of the University of Alaska is a public officer for purposes of this section. *Carter v. Alaska Pub. Employees Ass’n*, 663 P.2d 916 (Alaska 1983). . . .

### **AS 40.25.123. Supervision and regulation.**

...

(d) The Board of Regents of the University of Alaska shall supervise and adopt procedures for the operation and implementation of AS 40.25.110 - 40.25.140 by the University of Alaska. . . .

**AS 40.25.220. Definitions for AS 40.25.100 - 40.25.220.**

In AS 40.25.100 - 40.25.220, unless the context otherwise requires,

...  
(2) “public agency” means a political subdivision, department, institution, board, commission, division, authority, public corporation, council, committee, or other instrumentality of the state or a municipality; “public agency” includes the University of Alaska. . . .

**University Regulation 05.08.02 Records Management****A. Public Records Request Appeal Process<sup>18</sup>**

In accordance with AS 09.25.123,<sup>19</sup> the Board of Regents adopts University Regulation 05.08.02.A as the rules governing public records request appeals. . . .

**1. Appeal of Denial of Request**

a. A requester whose written request has been denied, in whole or in part, may seek reconsideration of the denial by submitting a written appeal to the chancellor of the involved major administrative unit, or to the university president if a statewide administrative unit is involved.

b. An appeal must be mailed or hand-delivered to the appropriate university office within 30 working days after the denial is issued and must include the date of denial and the name and address of the person responsible for the denial. The appeal must also identify the records to which access was denied and which are the subject of the appeal.

c. If an appeal is from the failure of the university to respond to the records request within the appropriate time limit, the appeal must so state, must identify the records sought, and must identify the university office to which the request was directed and the date of the request.

d. The 30 working days within which an appeal must be filed begins to run upon the issuance of the denial or the expiration of the time period within which the university should have responded, whichever occurs first.

**2. Appeal Determination**

a. As soon as practicable, but not later than the 10th working day after the university receives an appeal, the chancellor or president or their designee will issue a written determination stating which of the records that are the subject of the appeal will be disclosed and which records will not be disclosed. The written determination must specify the legal grounds and factual basis for denying access to any records that are not being disclosed, specify that the decision constitutes a final university decision, and advise that the requester may seek judicial review of the denial by appealing the denial in superior court.

b. The chancellor or president may extend the 10-working day period for a period not to exceed 30 working days upon written request from the requester, or by sending a written notice to the requester within the 10-working day period.

**3. Delegation of Authority**

The chancellor or president may delegate authority and duties under 1. of this section to any full-time employee of the university not involved in the denial and not subordinate to the person responsible for the denial. The person delegated this authority may not further delegate such authority. . . .

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<sup>18</sup> The version quoted here (effective November 20, 1998) was in effect at the time of Mr. Kellie’s public records request. This university regulation was amended effective April 15, 04, to read:

**A. Public Records Request Appeal Process**

See Regents’ Policy 05.08.02.A. . . .

<sup>19</sup> The citation “AS 09.25.123” should have been updated to AS 40.25.123 when the statutes were renumbered in 2000. Recent research shows that the citation listed in the on-line version of Regents’ Policy 05.08.02 incorrectly cites “AS 49.25.100.” Title 49 does not exist in Alaska Statute.

(11-20-98)

### Regents' Policy P05.08.02 Records Management

#### A. Public Records Request Appeal Process<sup>20</sup>

In accordance with AS 49.25.100 [sic] et seq., the Board of Regents adopts University Regulation 05.08.02.A as the rules governing public records request appeals. Any amendments or changes to University Regulation 05.08.02.A will be approved by the Board of Regents. The regulation will be published in the University Regulation manual.

### ANALYSIS AND PROPOSED FINDINGS

AS 24.55.150 authorizes the ombudsman to investigate administrative acts that the ombudsman has reason to believe might be contrary to law; unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact; based on improper or irrelevant grounds; unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous. "The ombudsman may investigate to find an appropriate remedy."

Under 21 AAC 20.210 the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* "if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant's criticism of the administrative act is valid." Conversely, a complaint is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that a complaint is *justified* and that the complainant's action or inaction materially affected the agency's action, the complaint may be found *partially justified*. A complaint is *indeterminate* if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

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***Allegation 1: University of Alaska staff unfairly failed to provide adequate notice of the complainant's appeal rights pursuant to university regulation, failed to explain the appeal process, and failed to allow the complainant an adequate opportunity to respond to arguments against granting his appeal.***

The Office of the Ombudsman Policies and Procedures Manual discusses and defines *unfair* at section 4040(3):

"Unfair" means:

An administrative act violated some principle of justice.

Investigation of a complaint that an administrative act was "unfair" should consider both the process by which the action was taken or the decision was made and the equitableness

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<sup>20</sup> Effective November 20, 1998. The statute citation in paragraph A is erroneous. This policy was later amended (effective April 15, 2004); the text of paragraph A was revised to read as follows:

In accordance with AS 49.25.100 et seq. [sic], the Board of Regents adopts the following policy as the rules governing public records request appeals.

"The following policy" adopted by the Regents is the text of former University Regulation 05.08.02A, which ceased to be a regulation on the same effective date. The citation "AS 49.25.100 et seq." should cite AS 40.25.100.

of that decision, that is, the balance between the agency and a complainant in the decision-making process.

Procedurally, a complaint that an administrative act was “unfair” usually will involve an examination of one or more of the following elements:

- (A) adequate and reasonable notice of the matter was not provided to the complainant;
- (B) adequate opportunity was not given for a person having an interest in a decision to be heard or, if applicable, to conduct an examination or cross-examination to secure full disclosure of the facts;
- (C) the decision maker was not without bias or other disqualification;
- (D) the decision was not made on the record: the action or decision was made without consideration of pertinent facts and circumstances, or the testimony, evidence, or point of view of those having a legitimate interest in the decision was disregarded;
- (E) the decision was not supported by reasons or by a statement of evidence relied on; or
- (F) the agency applied standards or principles inconsistently in making a decision.

Mr. Kellie complained that the university did a number of things wrong that denied him timely access to the information he requested. He argued the following points:

- Mr. Nakazawa’s initial denial of Mr. Kellie’s request was based on a misinterpretation of AS 14.40.453.
- Mr. Nakazawa unfairly failed to advise Mr. Kellie of the public records request and appeals process set out at the time in university regulation at 05.08.02(A).
- Several other university officials who received copies of the correspondence between Mr. Kellie and Mr. Nakazawa —Mr. Luick, Dean Joseph, Provost Reichardt, Chancellor Lind, President Hamilton, University Counsel Parish, Associate General Counsel Lynch—similarly failed to advise Mr. Kellie or direct someone else to advise him about the university process for appealing the denial of a public records request.
- Mr. Nakazawa failed to advise Mr. Kellie what process and standards CES was using.
- Mr. Nakazawa failed to respond to Mr. Kellie’s request for clarification of the process after Mr. Nakazawa sent Mr. Kellie a lengthy letter, dated April 7, 2003, citing a variety of reasons why Mr. Kellie’s request was “not consistent with CES policy” and the subject of a faculty union grievance. In that letter Mr. Nakazawa suggested that Mr. Kellie should voluntarily retract his request and appeal. Mr. Nakazawa advised Mr. Kellie, “It is unlikely any action will be taken regarding access to Mr. Luick’s raw survey data until after this [faculty union] grievance is resolved.” No one at the university ever explained to Mr. Kellie why and how his request was complicated and delayed by the union grievance.
- Several other university officials who had knowledge of both Mr. Kellie’s public records request and Mr. Nakazawa’s long letter failed to explain, or answer

Mr. Kellie's questions about, what process Mr. Nakazawa was following and how that affected his appeal.

- Mr. Luick made Mr. Kellie's correspondence available to other faculty and faculty union representatives without asking Mr. Kellie's permission or notifying Mr. Kellie that he had done so.
- Mr. Porter of the faculty union opposed Mr. Kellie's request in a memorandum to the chancellor that Mr. Porter failed to provide to Mr. Kellie despite the chancellor's written direction to do so. At the same time, Mr. Porter sent a copy of the memorandum opposing Mr. Kellie's request to other faculty union representatives, including one at the Anchorage campus. Mr. Kellie had no opportunity at the time to learn the facts of this matter.
- Neither the chancellor nor Ms. Lynch (who researched the issue, forwarded Mr. Kellie's appeal to the chancellor, and advised the chancellor on the matter) advised Mr. Kellie how the chancellor would regard and evaluate Mr. Porter's arguments opposing Mr. Kellie's request. In addition, neither university official advised Mr. Kellie what Mr. Porter's arguments were or whether Mr. Kellie had the right to rebut them.
- Ms. Lynch knew in early February 2003 that Mr. Nakazawa had misinterpreted AS 14.40.453 and that Mr. Nakazawa had not advised Mr. Kellie about the appeal process set out in university regulation, yet she failed to advise Mr. Kellie of this or to ensure that Mr. Nakazawa advised him. Only when Mr. Kellie asked through the ombudsman several weeks later if university regulation 05.08.02(A) applied did Ms. Lynch explain the process.

Several weeks before CES disclosed the requested information, Mr. Kellie alleged that "the University is clearly several months remiss and has not shown any good faith efforts in my view to respond to my request, much less comply with their own regulations." He pointed out that on November 8, 2002, when it appeared that CES staff were ignoring him, he attempted to contact Mr. Nakazawa, Dean Joseph, and Chancellor Lind by telephone and left voicemail messages describing his records request. None of these officials returned his call. He also telephoned President Hamilton's office and spoke to the administrative assistant, who suggested that Mr. Kellie write out his concerns and direct them to the president. Mr. Kellie sent this message on November 9. Several days later, on November 20, Mr. Nakazawa denied his request, copying the president, the chancellor, and the dean. Mr. Kellie copied the same officials with his response.

Mr. Kellie contends university counsel ought to have noticed there was a problem in January 2003 when Mr. Kellie sent to President Hamilton and to University Counsel Parrish copies of the packet containing his complaint letter to the ombudsman with the correspondence between himself, Mr. Luick, and Mr. Nakazawa attached. As Ms. Lynch stated in her March 28, 2003 email message to Mr. Kellie and the ombudsman, it was this January 6 letter and attached 2002 e-mail correspondence that the university used as the basis for Mr. Kellie's appeal: "Because Mr. Kellie's letter of January 6, 2003, with attachments, appears to contain the complete correspondence, I will forward it to Chancellor Lind as an appeal pursuant to R05.08.02(A)(1)(a). . . ." This letter with attachments was also cited in Chancellor Lind's May 7, 2003 decision.

Mr. Kellie also questioned CES's contacts with the faculty union, and contended that "the statutes shouldn't conflict" with the union contract or with university regulations. "I still believe strongly that it is the University's responsibility to understand their legal and regulatory

requirements in regard to public information requests and to respond accordingly,” he wrote. He questioned the fairness of requiring a member of the public to follow a process no one at the university told him about until he discovered it himself and asked about it. Mr. Kellie concluded, “I do not believe that this responsibility can or should be pushed off on members of the public requesting information.”

On November 24, 2003, Associate University Counsel Ardith Lynch wrote to the ombudsman investigator responding to the ombudsman’s October 30, 2003 Notice of Investigation. Ms. Lynch commented at length on the section in the Notice summarizing the specifics of Mr. Kellie’s complaint (quoted above). She maintained the university was not responsible for the long delay in honoring Mr. Kellie’s public records request. Rather, she argued, it was Mr. Kellie who had failed to observe the requirements set out in university regulation.

Ms. Lynch told the ombudsman investigator that Mr. Kellie’s letter to Mr. Nakazawa “did not contain the word ‘appeal’” and was not addressed directly to the chancellor and transmitted by hand or by U. S. mail. She acknowledged that Mr. Kellie copied the chancellor with his response to Mr. Nakazawa’s decision, but said, “people get copied on a lot of things here,” and “they would not necessarily know it needed their attention.”

Meanwhile, Mr. Kellie’s records request was making the rounds at the university with little regard for a strict interpretation of the regulation. On April 1, 2003, to take one example, Director of Labor Relations Beth Behner wrote to Michael Jennings of United Academics, the faculty union, advising him that Mr. Kellie had appealed Mr. Nakazawa’s denial to the chancellor and suggesting,

you might want to ask to provide input to the chancellor. *The regulation does not expressly provide for such input*, but there’s no reason you couldn’t make a request to have the union’s input considered. . . . [emphasis added]

We’re expecting to be copied with Mr. Kellie’s appeal to the Chancellor. Please let me know if you would like us to send this along once it is received by Labor Relations.

Copies of the appeal were subsequently distributed to several persons not directly involved in the appeal, and Mr. Porter’s memorandum to the chancellor on behalf of the union was sent to faculty at the Anchorage campus. No one thought to send this document to Mr. Kellie.

Nevertheless, the circumstances giving rise to this complaint are a textbook example of an inequitable administrative process. Mr. Kellie’s initial request was denied once by Mr. Luick and twice by Mr. Nakazawa for reasons that changed over time.

Examination of the documentary record shows plainly that Ms. Lynch’s contention that Mr. Nakazawa did not change his reasons is incorrect. On November 20, 2002, Mr. Nakazawa cited AS 14.40.453 as the authority for denying Mr. Kellie’s public records request. In his April 7, 2003 letter to Mr. Kellie, Mr. Nakazawa did not mention the statute but instead stated that disclosure of the information to Mr. Kellie “is not consistent with CES policy.” The same letter cited “academic freedom” and a faculty union grievance, as well as Mr. Kellie’s unclear motives and his presumed inability to analyze grocery prices, as reasons to deny Mr. Kellie’s request. On May 7, 2003, the chancellor’s decision cited both of these letters as representing CES’s position on the matter.

Further, not one of several university staff familiar with Mr. Kellie’s request informed him that the process for requesting records and appealing a denial of such a request was set out in university regulation. Ms. Lynch’s argument that the regulation does not explicitly require university staff to disclose the process to the public is unreasonable and runs counter to the

purpose of the regulation, which is to provide a formal process for appealing the denial of a public records request. If the university fails to disclose the existence of the process, it cannot fairly criticize the public for not following that process. Indeed, forcing the public to play guessing games with University Regulations and Regents' Policy is inherently unreasonable and unfair, if not contrary to law. Mr. Kellie substantially complied with a process no one told him about. To argue that his failure to comply with the letter of undisclosed rules delayed the appeal is disingenuous and unfair.

Mr. Luick similarly cast blame for the delay on Mr. Kellie in his May 16, 2003 cover letter accompanying the information Mr. Kellie requested:

I regret that communication with my office has been difficult for you, and that you did not accept my offer of calculating a relative pricing, because it has resulted in a considerable delay in providing the support you requested. It is my belief that the University in general, and Cooperative Extension in particular, take pleasure in providing timely and valuable public support.

The expression of "regret" offered in Mr. Luick's letter is undercut by the assertion that had Mr. Kellie agreed to accept information he did *not* request, that information would have been provided promptly. Instead, Mr. Kellie's insistence on receiving the information he *did* request "resulted in a considerable delay." Moreover, university records show that CES staff did not in fact "take pleasure in providing timely and valuable public support" to Mr. Kellie. Rather, they impugned his motives (which Mr. Kellie rightly pointed out were irrelevant under the law) and dragged their feet. Prof. Luick's attitude toward Mr. Kellie and those who suggested that publicly posted grocery prices are not confidential information is exhibited in his own words: "Tough on them."

Nor was this negative attitude toward Mr. Kellie restricted to CES. When the ombudsman investigator contacted the UAF Chancellor's office to inquire who was handling Mr. Kellie's appeal, the person who answered the phone volunteered, "He just didn't like the answer he already got." The point of the university appeal procedure—of any administrative appeal procedure—is to secure reconsideration of a decision or "answer" the affected party "did not like." The fact that someone has appealed a decision does not warrant the presumption that he is being merely troublesome or unreasonable. Indeed, in this case the appeal was granted because the chancellor agreed with Mr. Kellie that CES had erred in denying his records request. These responses by university staff to Mr. Kellie's information request and appeal give the unfortunate appearance of gratuitous disrespect.

As a general rule, Ms. Lynch is probably realistic when she argues that those copied with correspondence to others cannot necessarily be expected to take special notice of it. However, if President Hamilton cannot be expected to notice a dispute between a member of the public and CES, certainly Dean Joseph should have noticed. Yet she contributed not one word to the record throughout this long and convoluted process involving nearly a dozen university staff in addition to her subordinate, Mr. Nakazawa. Instead, Mr. Nakazawa in effect spoke for the College of Rural Alaska. Mr. Kellie had good reason to wonder who was in charge and accountable in these proceedings. How was he to know who would or would not take an interest in his request and appeal? Ms. Lynch suggested that Mr. Kellie copied his messages to the dean, the chancellor, and the president of the university "for informational purposes." That is a convenient characterization, but one with which Mr. Kellie disagrees.

On this point the documentary record supports Mr. Kellie. He complained to Mr. Nakazawa on November 22, 2002, that CES staff were ignoring his public records request, which he explained in detail. Mr. Kellie could not have been more clear about his intentions:



I would like to state very clearly that I have no interest or desire to turn this into a major dispute or to discredit the University or the Cooperative Extension Service. However, I do still believe that my request for information was, and is reasonable, and provided for by Legal and Ethical provisions and requirements. As such, I do intend to pursue this information request through what ever means are necessary. The real irony from my perspective is that the public right to information laws were enacted to help prevent this very situation from occurring.

My original phone conversations and email requests were met with evasiveness, and finally a complete lack of response. Even though we are still in disagreement, this most recent response from Mr. Tony Nakazawa is definitely a step in the right direction, and most appreciated. My request is that all the involved parties maintain a level of professional courtesy and objectivity to the facts and the opinions on both sides as well as a reasonable responsiveness. I'm convinced if we can stick to the facts and leave the emotions and hidden agendas out of the discussions we can come to a resolution fairly quickly.

The reference in the second paragraph above to "Mr. Tony Nakazawa" in the third person clearly indicates that Mr. Kellie was speaking past Mr. Nakazawa to those he copied with the message, persons originally selected by Mr. Nakazawa as an audience for the correspondence. Mr. Kellie knew that someone had read his earlier, November 9 letter to President Hamilton. Shortly thereafter, Mr. Nakazawa broke his silence on the matter by writing to Mr. Kellie to deny his request and copying President Hamilton, Chancellor Lind, and Dean Joseph with the message. Mr. Kellie had every right to conclude that others at the university besides Mr. Nakazawa had taken notice of his public records request. When Mr. Kellie responded to Mr. Nakazawa's denial, he sent copies to the same officials Mr. Nakazawa had selected. His expectation that these officials were the appropriate ones to copy with his rebuttal of Mr Nakazawa's decision and request for reconsideration was both attentive and reasonable.

Further, Mr. Kellie had obviously researched state law on public records requests to the university and was attempting to follow a formal process. His rebuttal was courteous and clear. Yet no one responded to his request for reconsideration, no one advised him that there was a formal university appeal process for public records requests, and no one advised him that his request would be ignored until he followed the undisclosed formal university appeal process to the letter.

It is instructive that Ms. Lynch herself copied other university officials with her February 12, 2003 e-mail message to Mr. Nakazawa informing him that the grocery price data "is not intellectual property and is therefore subject to the public records law." Ms. Lynch copied this message to Ms. Redman, Mr. Luick, and CES administrative assistant Arlene Strandberg. It would be unreasonable to assume that Ms. Lynch thought they would ignore her message. Indeed, Mr. Luick in particular needed to know the outcome of Ms. Lynch's discussion of the matter with Office of Intellectual Property and Licensing Director Diane McLean. Ms. Lynch's argument on behalf of the university appears to be that university officials are expected to read messages from other university staff but are justified in ignoring messages from the public.

Further, on March 30, 2003, Mr. Kellie wrote to Ms. Lynch disputing her statement that the university did not consider his November 22, 2002, message to Mr. Nakazawa (with copies to President Hamilton, Chancellor Lind, and Dean Joseph) to be an appeal because Mr. Kellie did not use the word "appeal" in the message and did not address Chancellor Lind directly. On April 1 Ms. Lynch forwarded Mr. Kelly's e-mail message and the exchange between Mr. Webster and Ms. Lynch to Mr. Nakazawa, who forwarded it to Ms. Strandberg with the request, "Pls cc to Bret and James [Levison]." The record contains many examples of university

officials copying multiple other university officials with messages in the clear expectation that they would read them and act upon them as appropriate.

It is interesting to note that the account of Mr. Kellie's public records request in the chancellor's May 2003 decision letter begins with Mr. Kellie's January 9, 2003 letter to the ombudsman and not with Mr. Kellie's documented contacts with CES in October and November 2002. In addition, the documentation Ms. Lynch provided the ombudsman in response to the ombudsman's request for relevant university records begins chronologically with a January 21, 2003 request from Senator Wagoner's office for information about the university's position on Mr. Kellie's request, as if no one at the university had discussed the matter during the period between Mr. Kellie's mid-October 2002 phone conversation with Mr. Luick and Mr. Kellie's January 2003 complaint to the ombudsman.

This inattention to the passage of time is characteristic of university staff's responses to Mr. Kellie throughout the half-year and more he waited for information the university now agrees, on substantially the same basis as Mr. Kellie asserted in his early written requests, was never confidential. Time and again Mr. Kellie was put off with assurances that as soon as someone's travel or meeting schedule permitted, a response to his records request would be devised.

On January 6, 2003, Mr. Kellie stated in his letter to the ombudsman, which was copied to President Hamilton and University Counsel Parrish,

The University incorrectly relies on AS 14.40.453 as the basis to deny my request. AS 14.40.453 only applies to intellectual property or proprietary information received or discovered by the University until publicly released or until the research is terminated. AS 14.40.453 reads: . . . [Here Mr. Kellie quotes the statute.]

I do not believe that retail grocery prices collected from a store is intellectual or proprietary information, particularly since it is on public display at stores open to the public. Regardless, the University has terminated its research for the most recent survey and therefore the University must release all information "received, generated, learned, or discovered" during the last survey.

Four months later, UAF Chancellor Lind, in a decision drafted by Ms. Lynch, overturned Mr. Nakazawa's decision for precisely these reasons. Why did it take so long for the university to acknowledge that Mr. Kellie was correct and to remedy Mr. Nakazawa's mistake?

Some university officials immediately saw that mistake. Vice President for University Relations Wendy Redman cautioned Mr. Nakazawa in January 2003 that "hiding behind AS 14.40.453 doesn't really seem appropriate." Her understanding of the faulty legal basis of CES's denial of Mr. Kellie's request was later supported by Office of Intellectual Property and Licensing Director Diane McLean, as well as by Associate General Counsel Lynch. Mr. Nakazawa's faulty legal reasoning was submitted to Mr. Kellie by e-mail on November 20, 2002, with copies to the same people Mr. Kellie copied with his response.

Ms. Lynch's argument that "the university" did not deny Mr. Kellie's request, because the chancellor ultimately granted the request on appeal, suggests wrongly that Mr. Luick and Mr. Nakazawa do not work for "the university." In this case some university staff denied Mr. Kellie's request repeatedly before the chancellor ordered them to disclose the information. It is true that university staff had to resolve internal disputes before the matter could be resolved definitively, but the actions of CES and its supporters among the faculty and their union cannot seriously be regarded as somehow unrelated to the institution that employs them. To argue otherwise is to make a distinction without a difference.

Moreover, even after Associate General Counsel Lynch advised Mr. Nakazawa on February 12, 2003, that the information Mr. Kellie sought was not protected by AS 14.40.453, as Mr. Nakazawa had asserted to Mr. Kellie, CES failed to provide that information or the requested data to Mr. Kellie. By this time several university officials, including Ms. Lynch, Vice President for University Relations Wendy Redman, and Office of Intellectual Property and Licensing Director Diane McLean, knew of Mr. Kellie's request and the faulty basis of Mr. Nakazawa's denial, yet no one at the university directed Mr. Luick to provide the information, and no one advised Mr. Kellie of his appeal rights until he asked about it several weeks later.

The University of Alaska as a public institution has an obligation to the public to deal openly and honorably in matters affecting the public. In this case it is difficult to escape the conclusion that some university officials sought to delay disclosing to Mr. Kellie information that they had good reason to know he was entitled to receive under Alaska law. A reasonable citizen would expect that when university counsel sees university staff erroneously citing law to justify withholding information, counsel will ensure that the error is corrected. Instead, another three weeks passed before Mr. Kellie unearthed the regulation himself and asked about it, at which time Ms. Lynch confirmed that it applied in this situation. Only then did the university offer Mr. Kellie access to the appeal process.

In addition, Mr. Nakazawa persisted in refusing to order Mr. Luick to disclose the information even after he had been advised by the University's Associate General Counsel in February 2003 that his interpretation of public records law and confidentiality of university research was incorrect. (Ms. Redman had suggested to Mr. Nakazawa the likelihood that this was so three weeks earlier.) Instead, on April 8, 2003, Mr. Nakazawa sent out over his own signature a lengthy memorandum opposing Mr. Kellie's request for reasons not previously stated either by him or by Mr. Luick. This memorandum was composed by Mr. Luick after he learned of Ms. Lynch's legal opinion, and it incorporated arguments and wording submitted by other university faculty. No one at the university thought to inform Mr. Kellie of this collaborative effort behind the scenes to thwart his lawful public records request.

Further, Mr. Porter submitted to the chancellor an argument opposing Mr. Kellie's request without disclosing to Mr. Kellie that he was doing so. No one at the university disclosed this information to Mr. Kellie or offered him an opportunity to rebut it, contrary to the obvious intent of written directions by the chancellor. Yet at the same time, Mr. Porter made the information available to others, including faculty at the Anchorage campus, who had no say in the matter and with whom Mr. Kellie had had no contact. In contrast, Mr. Kellie sent copies of his April 21, 2003 letter addressed to Chancellor Lind (responding to Mr. Nakazawa's April 7, 2003 letter) to Ms. Lynch and Mr. Nakazawa and closed his letter with the following request:

In your letter you requested that I copy a number of people with my response to you. I have copied those people shown below for which I have addresses through previous correspondence. If you feel it is necessary, please forward my response to others.

Chancellor Lind closed his April 9 letter with the direction that "A copy of any material provided to me for consideration in my determination in this appeal should also be furnished to the individuals listed below." Mr. Kellie complied with the chancellor's directions; Mr. Porter did not.

In short, the university failed to afford Mr. Kellie full administrative due process and followed a process not prescribed in university regulation. In addition, some university staff treated Mr. Kellie in a disrespectful manner that was both unprofessional and unwarranted. The university is a public institution and looks to the public for support. Members of the public deserve better treatment than Mr. Kellie received from some university employees who

participated in this matter. He asked that university staff comply with state law. CES staff did so only grudgingly and after months of deliberate delay for which they blamed Mr. Kellie.

In view of the evidence, it appears that the university had inadequate guidelines for handling Mr. Kellie's request. University counsel knew that Mr. Nakazawa's citation of AS 14.40.453 was erroneous, as did several other university officials, yet no one at the university directed CES to comply with the regulation. From a faculty perspective the debate was both predictable and important because it involved a request for research data. Even those who view publicly posted grocery prices as a trivial instance of research data might be alarmed by the precedential effect of a decision to disclose such data to Mr. Kellie. The fact that state law trumped dubious claims that granting Mr. Kellie's request would violate academic freedom, or violate the ethical premises of human subjects research, or unfairly give him a competitive advantage over grocers in several Alaska communities, should not obscure that there were grounds for serious debate on this issue.

From an outside perspective, however, the process the university actually followed was disjointed, self-contradictory, ad hoc, secretive, and thus unfair to the appellant. His arguments were weighed alongside arguments he was not permitted to see despite a directive from the chancellor to make those arguments available to him. And all the while Mr. Kellie was viewed by some university employees as somehow unscrupulous just because he asked for the information in accordance with state law. Universities typically proclaim as an ideal open and reasoned debate. In this case the university excluded Mr. Kellie from a large part of the debate he initiated. At the same time, some university staff engaged in ad hominem criticism of Mr. Kellie. Such behavior seems inappropriate at an institution of higher learning.

### ***Finding on Allegation 1***

Under ombudsman standards, an administrative act is *unfair* if the agency failed to provide reasonable notice to the complainant; if the agency failed to give the complainant an adequate opportunity to be heard or to secure full disclosure of the facts; if the decision maker was biased; if the decision was made without consideration of pertinent information or the arguments of someone who has a legitimate interest in the decision; if the decision was not supported by a statement of evidence relied on; or if the agency applied standards inconsistently.

The evidence shows that university staff failed to inform Mr. Kellie of his rights under state law and university regulation, failed to respond to his requests for clarification of the simultaneous formal and ad-hoc processes university staff were following, and failed to disclose to him the full record of arguments against granting his request and appeal. It also reflects poorly on the process followed by the university that Mr. Kellie was put to the trouble of rebutting arguments that the chancellor and university counsel apparently considered irrelevant despite Mr. Kellie's request to be advised of their relevance to his appeal. The process the university followed in responding to Mr. Kellie's public records request was inequitable.

Accordingly, the ombudsman finds Allegation 1, that university staff "unfairly failed to provide due process to the complainant and failed to inform him of the process set out in university regulation for handling public records requests and appeals, ***justified*** by the evidence.

### ***Allegation 2: University of Alaska Fairbanks staff unreasonably delayed responding to the complainant's public records request.***

The Office of the Ombudsman Policies and Procedures Manual discusses and defines *unreasonable* at section 4040(2):

"Unreasonable" means:

- (A) the agency adopted and followed a procedure in managing a program that was inconsistent with, or failed to achieve, the purposes of the program,
- (B) the agency adopted and followed a procedure that defeated the complainant's valid application for a right or program benefit, or
- (C) the agency's act was inconsistent with agency policy and thereby placed the complainant at a disadvantage relative to all others.

After finally receiving the information he requested, Mr. Kellie told the ombudsman he was "still disappointed in the delay and evasiveness of Cooperative Extension." The CES mission statement reads, "The Cooperative Extension Service mission is to interpret and extend relevant research-based knowledge in an understandable and usable form; and to encourage the application of this knowledge to solve the problems and meet the challenges that face the people of Alaska."

Mr. Kellie, a UAF graduate residing in Alaska, requested public information from CES to work on a business plan. He first requested information about food prices from CES by telephone in mid-October 2002, and then followed up his request in writing on October 18, 2002. After prompting by Mr. Kellie, Mr. Luick responded on October 25, denying Mr. Kellie's request. Mr. Kellie repeated his request to Mr. Luick on October 29, copying his request to Mr. Nakazawa. When Mr. Nakazawa failed to reply, Mr. Kellie wrote to University of Alaska President Mark Hamilton on November 9 requesting assistance in getting a response from CES.

I have tried without success to get at least a response to my request for information through what I believe is the proper chain of command prior to contacting you. In addition to my email correspondence with the involved parties, which is also attached, I tried on Friday 11/08/02 to contact Mr. Tony Nakazawa, Ms. Bernice Joseph [Dean of the College of Rural Alaska], and Mr. Marshall Lind [Chancellor of UAF] by phone without success, however I did leave voice mail messages with each of them. Your Administrative Assistant did answer your phone on Friday [11/08/02] and indicated you were out of the office, but suggested I send this background information for your review on Monday.

Apparently in response to inquiry or direction by President Hamilton or one of his staff, on November 20 Mr. Nakazawa replied to Mr. Kellie, denying his public records request based on a misinterpretation of "Alaska Statutes 14.40.453" that he copied to several university officials, including President Hamilton, Chancellor Lind, and Dean Joseph. Neither the president, nor the chancellor, nor the dean appears to have noticed Mr. Nakazawa's mistake or his failure to inform Mr. Kellie about the university's regulation and policy on public records requests and appeals.

Two days later, on November 22, 2002, Mr. Kellie requested reconsideration of the matter in a message to Mr. Nakazawa copied to the same university officials Mr. Nakazawa had copied in his message. Receiving no response, on January 6, 2003, Mr. Kellie complained to the ombudsman and sent copies of his complaint packet to President Hamilton, University Counsel James Parish, and three elected officials.

On January 27, 2003, Wendy Redman forwarded to Mr. Nakazawa a message from a legislator's office and asked why CES would not disclose grocery prices to Mr. Kellie: "I hope there's a good reason why this information isn't public, because I can't imagine what it would be." Also on January 27, Ms. Lynch advised Mr. Nakazawa by e-mail, "I don't think that the costs can be considered 'proprietary information' since they are available to the public." Yet Mr. Nakazawa responded to Ms. Redman on February 4, saying he was "working with Ardith Lynch" on the

matter, and attached a copy of his November 20, 2002 e-mail message to Mr. Kellie denying his records request. Ms. Redman responded that “hiding behind AS 14.40.453 doesn’t really seem appropriate.” Two months later Mr. Nakazawa was still attempting to persuade Mr. Kellie that his request was illegitimate, sending him a four-page letter offering several reasons why sharing grocery prices with Mr. Kellie was “not consistent with CES policy.”

This response was unreasonable. As its mission statement implies, the Cooperative Extension Service exists to provide information to small businesses and the public. A member of the public, Mr. Kellie, requested public information in the possession of CES. Rather than assist Mr. Kellie, CES staff stonewalled him for seven months, then blamed him for the delay, even after receiving advice from university counsel and the intellectual property officer that the information was not privileged.

Forced to disclose the information, Mr. Luick later said Mr. Kellie should have asked for something else and attributed the delay to CES’s lack of clear policy guidelines on public records requests. CES is part of the University of Alaska and is bound by Alaska Statutes, Regents’ Policy and University Regulations. The record shows that CES responded to Mr. Kellie without researching university policy and regulation on public records requests, then ignored advice from university counsel and other university officials that the information Mr. Kellie sought was not confidential or proprietary, and only turned over the information when the chancellor directed them to do so.

### ***Finding on Allegation 2***

CES responded to Mr. Kellie’s public records request in a manner that was inconsistent with the purposes of the program, and followed a procedure that (1) defeated Mr. Kellie’s valid request for information in the possession of CES, (2) did not comply with state law, and (3) ignored Regents’ policy and university regulation on public records requests and appeals.

The ombudsman proposes to find Allegation 2, that UAF staff “unreasonably delayed responding to the complainant’s public records request,” ***justified*** by the evidence.

### **Overall Finding**

Under 21 AAC 20.210 investigation of a complaint with multiple allegations that results in some allegations being found *justified* and some *not supported* or *indeterminate* results in a finding of *partially justified* for the complaint taken as a whole.

The ombudsman proposes to find allegations 1 and 2 *justified*. Therefore, the ombudsman proposes to find this complaint taken as a whole ***justified***.

### **RECOMMENDATIONS**

Under AS 24.55.150(b), “The ombudsman may investigate to find an appropriate remedy.”

It is important that an institution that does as much business with the public as the University of Alaska should have fair decision-making and appeals processes. Based on the findings of fact in this investigation, the ombudsman proposed to make the following recommendations and explained why.

***Recommendation 1: The Regents should amend Regents’ Policy 05.08.02(A) to require that notice of the formal appeals process be given to those whose public records requests are denied, and to provide specific guidelines to university staff for fair and proper handling of appeals.***

Several university staff participated in debate over Mr. Kellie's public records request without disclosing to Mr. Kellie either their participation in the appeal process or their arguments against granting his appeal. CES improvised a procedure as it went along, faculty outside CES drafted portions of Mr. Nakazawa's second attack on Mr. Kellie's position, the faculty union took up Professor Luick's cause in a grievance against the university administration, and Labor Relations distributed copies of Mr. Kellie's appeal and invited responses from faculty union representatives even as it announced that "the regulation does not expressly provide for such input." (Later the regulation was converted to Regents' Policy.)

The university can prevent a recurrence of this procedural free-for-all by adopting in Regents' Policy or University Regulation specific guidelines for handling appeals that accord the public fair process and that provide a formal framework within which interested parties can engage in open, fair, and reasoned debate on the merits of a records request. The guidelines should specifically require faculty, staff, and union representatives to provide copies of their arguments against an appeal to the appellant. They should also spell out who has access to information submitted by the appellant.

***Recommendation 2: UA should ensure that all unit directors understand Regents' Policy on public records requests and that they disclose the appeal procedure to anyone whose request is denied.***

The concept of a fair administrative appeal was much compromised by the manner in which the complainant's records request and appeal were handled in this case. Simply informing him of the procedure set out in university regulation for making a public records request and appealing a denial would have saved Mr. Kellie, not to mention numerous university and other state officials, considerable effort and expense. If Mr. Nakazawa did not know this procedure, surely one of several other university officials who were informed of Mr. Kellie's request, including the Office of General Counsel, must have known. This failure to act was inefficient, was unfair to Mr. Kellie, and undermined the purpose of the university regulation. Unit directors at all campuses of the University of Alaska should understand the requirements of Regents' Policy.

***Recommendation 3: If the university wants to insist that appeals be mailed or hand-delivered, the statewide administration should instruct all university administrators to mail or hand-deliver their decisions, together with notice of the appeal procedure.***

University counsel argued that Mr. Kellie erred in using email instead of U. S. mail to deliver his November 22, 2002 request for reconsideration to the chancellor. Yet Mr. Kellie was merely responding to Mr. Nakazawa's e-mail message denying Mr. Kellie's public records request. Because the university failed to give Mr. Kellie notice of its appeal process, he had no easy way to know that using the same medium the director of CES had used would result in university officials simply ignoring his protest. This was unfair on its face, and, as Mr. Kellie rightly pointed out, it defeated the purpose of the appeal process itself, which is to provide an orderly method for appealing the denial of a public records request. Giving notice of the procedure would ensure that both university staff and the public understand how an appeal will be handled.

***Recommendation 4: CES should develop written policy guidelines for stewardship of data gathered in pricing surveys and other CES public service studies.***

In his May 16, 2003 letter to Mr. Kellie, Mr. Luick said the delay in providing requested data to Mr. Kellie resulted partly from lack of CES guidelines for safeguarding survey data: "the nature of your request raised a question of data stewardship for which I had no clear policy guidelines to follow." Mr. Nakazawa similarly told Mr. Kellie that his records request was "inconsistent with CES policy." That CES had inadequate policies for stewardship of survey data that had been collected quarterly for two decades is surprising. CES should develop written policy

guidelines for handling this data and other CES study data to ensure prompt decisions based on well-thought-out policy.

***Recommendation 5: The university should update Regents' Policy 05.08.02(A) to conform with existing statute.***

Regents' Policy 05.08.02(A) as provided to the ombudsman by university counsel and as currently available in the university's Internet web pages cites "AS 49.25.100" as the enabling legislation. Title 49 does not exist in Alaska statutes. The university should correct this reference.

## **UNIVERSITY OF ALASKA RESPONSE**

UA President Mark Hamilton responded to the ombudsman's preliminary investigative report with a cover letter dated February 24, 2005, a 15-page "Request for Modification of Findings and Opinion" discussing the issues, and an annotated copy of the report with suggestions for corrections and revision of the report as well as further comments on the issues. The length and detail of the university's response makes summarizing it here impractical, but with the exception of changing its position on the issues outlined in the report under Allegation 2, the university restated and augmented the arguments already set out in this report on pages 32-34.

In brief, the university accepted the proposed finding on Allegation 2 and accepted proposed recommendations 1, 2, 3, and 5 with minor suggested amendments. The university objected to the proposed finding on Allegation 1 and also to proposed recommendation 4.

The ombudsman accepted several of the university's specific suggestions for improving the report, but was not persuaded to change the proposed findings and recommendations except to alter the wording of the allegations, to make them more precise, and to amend recommendations 1 and 5 as explained below.

## **FINDINGS OF RECORD**

The complainant's allegations, restated to conform to statutory guidelines for investigations by the ombudsman (AS 24.55.150), were as follows:

***Allegation 1: University of Alaska staff unfairly failed to provide due process to the complainant and failed to inform him of the process set out in university regulation for handling public records requests and appeals.***

***Allegation 2: University of Alaska staff unfairly delayed responding to the complainant's public records request.***

The ombudsman proposed to find both of these allegations justified by the evidence. UA accepted the proposed finding on Allegation 2 and disagreed with the proposed finding on Allegation 1. UA suggested rewording both allegations to replace "University of Alaska" with a more restricted designation: "University of Alaska Fairbanks" in the first instance, and "University of Alaska Fairbanks Cooperative Extension Service" in the second. The ombudsman agreed that the focus of Allegation 2 was primarily UAF and altered the allegation wording accordingly. Statewide administration participated in the actions investigated under Allegation 1, so the more restricted wording proposed by UA was not adopted. However, in the interest of accuracy, the ombudsman amended the wording of Allegation 1 to specify the issues on which this investigation focused.

For the record, then, the allegations are as follows:



***Allegation 1: University of Alaska staff unfairly failed to provide adequate notice of the complainant's appeal rights pursuant to university regulation, failed to explain the appeal process, and failed to allow the complainant an adequate opportunity to respond to arguments against granting his appeal.***

***Allegation 2: University of Alaska Fairbanks staff unfairly delayed responding to the complainant's public records request.***

Based on a preponderance of the evidence developed during the course of this investigation, as well as on additional information provided in UA's response to the preliminary investigative report, the ombudsman finds both allegations *justified*. The Analysis and Findings section of the final investigative report discusses these allegations in light of the evidence.

## RECOMMENDATIONS

In his letter President Hamilton indicated that

UAF accepts Recommendations 1, 2, 3, and 5 with minor amendment and agrees to adopt University Regulation and/or amend Regent's Policy to include notice of the formal appeals process, procedures for participation in the appeal process, and correction of the typographical error, and to promote better understanding of the Regent's Policy and state law on public records requests.

The ombudsman reviewed the proposed changes to these recommendations and adopted some of them, as set out below. The ombudsman did not accept the proposed substitution of "UAF" for "the university." Only Recommendation 4 applied solely to a unit of UAF.

***Recommendation 1: The university should amend Regents' Policy 05.08.02(A) or adopt a university regulation to require that notice of the formal appeals process be given to those whose public records requests are denied, and to provide specific guidelines to university staff for fair and proper handling of appeals.***

The amended language proposed by the university met the intent of this recommendation.

***Recommendation 2: UA should ensure that all unit directors understand Regents' Policy on public records requests and that they disclose the appeal procedure to anyone whose request is denied.***

The university proposed amending "UA" to "UAF." The intent of the ombudsman's recommendation was to ensure that staff at all campuses of the university system follow this recommendation. The ombudsman appreciates UA's support for the concept that unit directors at UAF should extend fair notice to those who make public record requests. However, an unintended consequence of the proposed amendment would be to exempt unit directors at other campuses from this improved procedure. For that reason, Recommendation 2 stands as originally worded.

UA accepted **Recommendation 3** without any proposed amendment.

UA rejected **Recommendation 4** on the grounds that

Policy on public records and confidentiality of research has been established by the state legislature. CES's response to a public records request must conform to state law and the criteria set forth in state law must be applied to each request for records. Additional guidelines are likely to create, rather than resolve, confusion.

The ombudsman proposed Recommendation 4 because Mr. Nakazawa and Mr. Luick indicated that a primary reason for the delay in disclosing to Mr. Kellie the information he requested was that CES lacked guidelines: Mr. Nakazawa repeatedly told Mr. Kellie that disclosure of the information he requested was contrary to “CES policy.” “The nature of your request,” Mr. Luick wrote to Mr. Kellie, “raised a question of data stewardship for which I had no clear policy guidelines to follow.”

UA’s response to this recommendation is perplexing not only in light of these statements about “CES policy” and its deficiencies, but because it suggests that Mr. Luick and Mr. Nakazawa were confused about existing guidelines even after the Office of General Counsel explained the law to them. As our report pointed out, there is substantial evidence in the record to suggest that CES staff did everything in their power to avoid complying with counsel’s advice. This recommendation was intended as an opportunity for CES to develop appropriate guidelines to safeguard research data and to avoid drawing numerous other university staff into this type of dispute in the future. One component of such a policy, for example, might be a reference to the UA public information request appeal process. In short, if state law is all the guide that is necessary, the failure of CES to comply with the law promptly is even more difficult to explain and suggests the need for remedial measures.

The wide experience of state government agencies demonstrates that written policy need not conflict with state law or university regulation. The ombudsman was unwilling to withdraw Recommendation 4, and it remains a recommendation of record.

***Recommendation 5: The university should update Regents’ Policy 05.08.02(A) to reference existing statute.***

The change in wording UA proposed satisfied the intent of Recommendation 5.

For the record, this case was closed as ***justified*** and ***partially rectified***. If UA decides to implement Recommendation 4, the ombudsman will change the disposition of this case to ***fully rectified***.