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**Ombudsman Complaint A2009-0390
Finding of Record and Closure**

Public Report per AS 24.55.200

*Redacted to remove information made confidential by Alaska Statute
and to protect privacy interests.*

March 18, 2010

On March 14, 2009 an inmate being held by the Alaska Department of Corrections filed a complaint against the Department of Revenue, Tax Division Gaming Unit. The Inmate, who will be known as the complainant from here out, complained that he sent written requests for public information to the Gaming Unit on two separate occasions in 2008 but both of these requests went unanswered as of the date he contacted our office, March 14, 2009. The first request was dated October 28, 2008, the second December 22, 2008.

The ombudsman opened an investigation into the following allegation stated in terms that conform with AS 24.55.150:

Contrary to Law: The director of the Department of Revenue Division of Taxation Gaming Group twice did not respond to formal written requests for public information in violation of Alaska Statute AS 40.25 and Alaska Administrative Code at 2 AAC 96.100-900.

Ombudsman Intake Secretary Linda Ritchey investigated this complaint with assistance from Assistant Ombudsman Beth Leibowitz and forwarded her report to the ombudsman. The ombudsman forwarded a preliminary investigative report to the Tax Division on December 31, 2009, and the Tax Division responded to the preliminary report on January 12, 2010. The agency's response has been incorporated into this final report.

Ms. Ritchey contacted the Gaming Unit Director, Jeffrey Prather, on March 16, 2009. He stated that he remembered receiving the complainant's letters; in fact he said the second letter "had been hanging on the side of my cubicle since Dec. 29, 2008 waiting for me to do something." He further stated that he did not realize the complainant

was making a public records request because he did not specifically use those words anywhere in the letter. Mr. Prather told the ombudsman investigator that he felt the information was available to the Complainant on-line and therefore his letter did not require a response, even though the Complainant's request letter specifically said he did *not* have Internet access.

The Complainant is an inmate incarcerated at an Alaska Correctional facility. He requested the following information from the Gaming Group:

- Records on pull-tab and bingo revenues;
- The state-approved list of distributors and manufacturers;
- A list of state-approved tobacco manufacturers.

After the ombudsman contacted Mr. Prather, he responded to the Complainant's requests. The Complainant confirmed to our office that he received the information he originally sought. The Complainant's complaint is resolved, for practical purposes, but the question of whether the Gaming Unit office complied with Alaska Public Records Act remains.

The Alaska Public Records Act (AS 40.25) is implemented in regulations promulgated by the Department of Administration and applicable to all executive branch departments. One regulation, 2 AAC 96.300, addresses requests for information that is routinely made public, such as information an agency places on the Internet for public access:

A request for production of materials prepared by a public agency for routine public distribution, including pamphlets, published maps, copies of speeches, press releases, educational materials, blank forms and applications, must be honored and the information supplied in reasonable quantities as determined by the public agency. . . . No determination under 2 AAC 96.325 - 2 AAC 96.335 is necessary in these cases, since preparation of the records for routine public distribution itself constitutes a determination that the records are disclosable. Copies must be furnished with reasonable promptness in response to the request.

During Ms. Ritchey's conversation with Mr. Prather on March 16, 2009, he noted that some of the information the Complainant had requested was available on the Internet. The fact that an agency places some or all of the records on the Internet does not exempt the agency from honoring the request of an individual who is clearly without Internet access. The regulation requires an agency to provide copies with "reasonable promptness."

The agency may charge a reasonable fee for copying. The publishing of material on the Internet expedites public access in most cases and avoids the administrative burden of making copies and the burden on the requestor of paying for those copies. As illustrated by the Complainant's situation, however, Internet access is not uniform and cannot be treated as a prerequisite for access to public records. The fact that the

Complainant is incarcerated (and therefore lacks Internet access) does not negate his statutory ability to request public records.

Alaska Administrative Code at 2 AAC 96.310 explains that an agency may provide a form for public record requests, but may not deny a request based on the failure to use the agency's form or some other standardized format. According to 2 AAC 96.315, all that is required is an adequately detailed explanation of what information/records the requestor is seeking. In other words, as long as the requestor is able to explain what information he is asking for, the failure to print "Freedom of Information Act" or "Public Records Request" on the letter is irrelevant.

Also, if the records in question are properly requested from a different agency, the first agency is obliged to forward the request, as stated in 2 AAC 96.320(a):

If the request is received by the office of the public agency that does not maintain the requested records, the receiving office shall *promptly* forward the request to the office responsible for maintaining those records." (Emphasis added)

For any records not already routinely distributed to the public, the agency must respond by either providing the records or explaining the denial of the request.

Alaska Administrative Code at 2 AAC 96.325 requires the response to the requestor, and states in part:

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

(1) furnish all requested records that are disclosable; and

(2) advise the requestor which of the requested records are nondisclosable, if any, and the specific legal authority and specific facts supporting nondisclosure.

Mr. Prather did neither.

The remainder of 2 AAC 96.325 lists grounds for extension of the 10-day deadline for a response. It is common for state agencies to use these extensions; however, the regulation does not provide for simply leaving the request unacknowledged and unanswered indefinitely.

FINDING OF RECORD

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.

The standard used to evaluate all Ombudsman complaints is **a preponderance of the evidence**. If a preponderance of the evidence indicates that the administrative act took place and the complainant's criticism of it is valid, the allegation should be found justified.

According to the Office of the Ombudsman's Policies and Procedures Manual at 4040(1), an administrative act is **contrary to law** if it involved:

- (A) failure to comply with statutory or regulatory requirements;
- (B) misinterpretation or misapplication of a statute, regulation or comparable requirement; . . .

Based on Mr. Prather's admissions and the clear language of the Alaska Statutes and Alaska Administrative Code, the ombudsman found this allegation to be **supported**. Mr. Prather for more than five months ignored and did not respond to a formal request for public records apparently because the request did not include the magic words "public records request." That is simply unacceptable.

RECOMMENDATION

The ombudsman may investigate to find an appropriate remedy. The ombudsman provided the following recommendation to the Tax Division:

Recommendation: The Department of Revenue should ask that the Department of Law schedule training for Department directors and line staff on the specifics and nuances of statute and regulations applicable to public records requests.

The ombudsman made this recommendation because Mr. Prather's failure to recognize a public records request when twice faced with it suggests that Revenue should ask the Department of Law to schedule training for Mr. Prather and other staff who will encounter public records requests.

Agency response to Ombudsman proposed findings and recommendations:

The Department of Revenue Commissioner Patrick Galvin responded as follows:

I received your preliminary findings regarding a complaint of the Tax Division's failure to properly respond to a public records request. After conferring with the Tax Division's Director and Deputy Director, we completely agree with your findings. On March 20, 2009, Mr. Prather's supervisor, Johanna Bales, Tax Division deputy Director, became aware that there was an outstanding public records request for gaming and tobacco records. Ms. Bales immediately instructed Mr. Prather to respond to the request. In addition, Ms. Bales instructed him to make her aware of all requests for records in the future. She also impressed upon him the importance of responding to these requests in a timely manner.

After this incident, the Tax Division realized that there was a potential problem regarding the proper and timely response to public records requests. On April 10, 2009, Jon Iversen, Tax Division Director, contacted the Department of Law and requested training for all Anchorage staff in the proper handling of public records requests. That training was conducted on April 16, 2009. Although Mr. Prather was not in attendance, Mr. Iversen disseminated information to all managers, including Mr. Prather, regarding the proper response to these requests. In addition, he identified a single individual, Janis Hales, as the Tax Division's point of contact for all public records requests. All employees were instructed to inform Ms. Hales immediately when they receive a request. Ms. Hales has been tasked with tracking all requests to ensure that they are responded to in a timely manner.

Two managers in the Juneau office, other than Mr. Prather, also received public records request training within the past year. The Tax Division will ensure that Mr. Prather and all managers in its Juneau office receive public records request training from the Department of Law within the next few months. Thank you for bringing this serious matter to my attention.

Ombudsman's comments:

Commissioner Galvin's response outlines positive and immediate steps that the Department has taken to resolve this problem.

FINDING OF RECORD AND CLOSURE

The ombudsman found the complaint to be *justified* and the Tax Division agreed. The Department has implemented the ombudsman's recommendation by providing training to Tax Division staff regarding the requirements of the public records act. Therefore, this complaint will be closed as *justified* and *rectified*.

Public Version Per AS 24.55.200