ALASKA PUBLIC OFFICES COMMISSION
2221 E. NORTHERN LIGHTS, ROOM 128
ANCHORAGE, ALASKA 99508-4149
(907) 276-4176 FAX (907) 276-7018

Complaint

XX☐ AS 39.50 Public Official Financial Disclosure Law
XX☐ AS 24.60.200 Legislative Financial Disclosure Law

Office Use Only
Case Number:

1. Complainant (your name): *Ray Metcalfe.*	*1a. Telephone No.:* *Voice No.: 907-344-4514* *Fax No.: 907-349-1735*
1b. Address (street, city, state, and ZIP code): *P.O. Box 233809, Anchorage AK 99523*	*1c. Representative (if represented) (include address and telephone nos.):* *Ray Metcalfe*
2. Respondent (person, group, or entity believed to have violated the law): **State Senator Lesil McGuire**	*2a. Telephone No.:* *Voice 269-0200* *Fax No.: 269-0204*
2b. Address (street, city, state, and ZIP code): **State Capitol Building** **Juneau AK 99801-1182**	*2c. Representative (if represented) (include address and telephone nos.):*

Sections of law or regulation violated: *Sec. 39.50.030*

On December 18, 2007, APOC ruled that Sen. Lesil McGuire did "something" for the $10,500 paid to her by Providence Health System. However, based on the new information gained from the staff report and exhibits provided to APOC in the process of investigating the complaint leading to said decision, I now believe;

- if the information that Providence Health System, Lesil McGuire, and the Alaska Mental Health Trust Authority provided to APOC's investigator is true, that information demonstrates that the "something" McGuire was paid to do was not "Consulting and Research," as claimed.

On the contrary, it is my belief that the statements made are taken at face value to be true, Lesil McGuire was (1.) being paid to do the work of a lobbyist and (2.) being paid to formulate and propose an opinion (her opinion) of what she believed to be the most likely strategy for Providence's lobbyists to follow if Providence's lobbyists were to successfully lobby Providence's legislative agenda through the Alaska Legislature. Clearly "lobbying advice" would have been a more accurate description of McGuire's stated work product than "Consulting and Research." I believe that McGuire's use of the term "Consulting" is such a totally misleading description of McGuire's "financial affairs" that it constitutes a violation of AS: 39.50.030, which reads:

- Each statement must be an accurate representation of the financial affairs of the public official or candidate and must contain the same information for each member of the person's family, as specified in (b) and (d) of this section, to the extent that it is ascertainable by the public official or candidate.

Also, as stated in (2.) above, being ***paid*** to formulate "her opinion" on a matter of the people's business to be brought before the Legislature, for the benefit of Providence, I believe fits the definition of bribery set out in AS: Sec. 11.56.110, which again leaves McGuire's "Consulting and Research" description of her work product so sufficiently misleading as to represent a violation of AS: 39.50.030's requirement to provide "an accurate representation of her financial affairs."

AS: Sec. 11.56.110. Receiving a bribe.

(a) A public servant commits the crime of receiving a bribe if the public servant

(1) solicits a benefit with the intent that the public servant's vote, opinion, judgment, action, decision, or exercise of discretion as a public servant will be influenced; or

(2) accepts or agrees to accept a benefit upon an agreement or understanding that the public servant's vote, opinion, judgment, action, decision, or exercise of discretion as a public servant will be influenced.

(b) Receiving a bribe is a class B felony.

It is my opinion that if McGuire is allowed to boil a description of her work for Providence down to a few words, I believe APOC should require her to amend her description of her work to read "lobbying and bribery," to be sufficiently accurate to meet the requirements of Sec. 39.50.030.

DEC 2 8 2007

4. Description of violation *(include the source of your information; attach additional pages, if needed):*

Weighing, shaping and achieving the political objectives of constituents is part of what the State of Alaska pays our elected legislators to do. But when a private company pays an elected legislator to form an opinion and advise them on the best strategy to advance their legislative agenda, that's bribery.

- Providence Health System defined the objectives of their legislative agenda for Lesil McGuire at the beginning of their contractual agreement to pay McGuire for her consultation. Then, in violation of AS: 11.56.110, McGuire spent 90 days accepting payments for working with Providence Health System to formulate and propose an opinion (her opinion) that she formulated with the guidance of Providence's Lobbyist, and Director of Government Affairs, and put it in writing, claiming that opinion as her own. Part or all of the conclusions of McGuire's paid consultations were signed by her and delivered in the form of a "Confidential Memorandum," directed to Providence's Vice President and Chief Executive Officer Al Parrish. The memorandum defined her opinion, formed after consultation with other employees of Providence, stating what she had come to believe would be the most likely strategy for the successful implementation of the legislative agenda Providence had defined for her at the beginning of her consultation.

Breaking down the above statute as it applies to McGuire: "A public servant commits the crime of receiving a bribe if the public servant solicits or accepts a benefit."

- Lesil McGuire solicited and accepted the benefit of a $10,500 payment stream from Providence Health System in exchange for drafting her opinion.

The above statute also requires that the solicitation of payment be done with the intent or expectation that her ***"vote, opinion, judgment, action, decision, or exercise of discretion as a public servant will be influenced."***

By admission of both McGuire and Providence, McGuire was being paid to work with Providence's lobbyist. (See page 6, paragraph 3 of APOC investigator Jeff Berliner's report, dated Dec 14, 2007.)

As agreed, McGuire provided Providence's lobbyist with **her opinions, her judgments, and exercised her discretion,** as needed to formulate a plan to ***"require the State of Alaska to pay Providence the sum of $7 million."*** (See McGuire's contract with Providence Health System.) In exchange for pay, McGuire also spent hours formulating her **"opinion,"** of the best strategy to ***"get a cash strapped legislature to resolve a pre-existing obligation they didn't create."***

- The second part of the two-part demonstration used here for demonstrating bribery under AS: 11.56.110 was met when McGuire agreed to work with Providence's lobbyist Eldon Mulder and Providence's Regional Director of Government Affairs Laurie Herman, to formulate an **opinion** for a best strategy. An opinion that ultimately became McGuire's opinion after consultation, as is evidenced by the fact that McGuire signed the **"Confidential Memorandum"** expressing her opinion or **"Conclusion,"** which was formulated in consultation with, or **"influenced,"** as the statute requires for bribery, in consultation with Providence's Lobbyist Eldon Mulder and Providence's Regional Director of Government Affairs. It is fine for McGuire to do such things as constituent work. But when she did it in exchange for $10,500, it became bribery. (*Read the statute carefully and then see page 6, paragraph 3 of APOC investigator Jeff Berliner report dated Dec 14, 2007 and Confidential Memorandum from Lesil McGuire to Providence VP Al Parrish, dated December 30, 2003.)*

Continuing 4, description of violation):

- The first part of the two-part demonstration used here for demonstrating bribery under AS: 11.56.110 was met when McGuire solicited $3,500 per month in exchange for formulating her opinion under Providence's direction and ultimately wound up selling her newly formulated opinion to Providence for a total of $10,500.

Combined, the two acts outlined above provide all that is needed to demonstrate a violation of AS: 11.56.110, which is defined as the class B felony of bribery and is not accurately described as "Consulting and Research." As used here, the term "Consulting and Research" appears to have been used with intent to deceive the public and obviate the facts.

While APOC is not responsible for enforcing AS: 11.56.110, APOC it is responsible for requiring Sen. McGuire to accurately define what she did for the money. If "lobbying and bribery" equates a substantially more accurat description and she refuses to so amend her report, she is then in violation of Alaska Statute 39.50.030(a) which the Alaska Supreme Court said "requires candidates for elected office to file disclosure statements containing an "accurate representation" of their financial affairs.

But her infractions don't stop there. The fulfillment of the objective of McGuire's plan and contract required her to devise and propose a strategy to secure **21 votes** in the Alaska House of Representatives, and **11 votes** in the Senate, as necessary to ***"get a cash strapped legislature to resolve a pre-existing obligation they didn't create,"*** by passing an appropriation bill, appropriating $7 million to Providence Health System.

- **Quoting again from her contract with Providence: ...** ***"Consultant will work with Providence and any other parties so designated by Providence to ensure that at completion of this contract an agreement to fulfill this objective has been drafted, liability concerns have been addressed, and funding sources have been addressed and identified."***

That is, she agreed to be directed by Providence as to whom to work with while fulfilling the objective. These are the acts allowable only for a lobbyist. Paying a legislator to help get a tax break, as was the case with Pete Kott, or paying a legislator to help get an appropriation, as is the case with McGuire, when any person besides the Legislature, pays a legislator to advance their legislative agenda, that's bribery.

- McGuire's act of assisting Providence in the securing a $7,000,000 appropriation, acting under providences employee and direction, in exchange for $10,500 equals bribery.

The difference here is that it took a jury to conclude that Pete Kott's exorbitant paychecks for polishing Bill Allen's floors were in reality benefits that Bill Allen would not have been paying to Pete Kott had Pete Kott not been a reliable strategist and vote for the political agenda of Bill Allen and Veco.

In McGuire's case, there is no need to engage in elaborate efforts to connect the dots needed to persuade a jury that her paycheck was contingent upon her being a reliable strategist for Providence's political agenda. She put that part in writing. *(See Exhibit A of Consulting Services Agreement executed 10/23/2003/ by and between Lesil McGuire and Providence Health System.)*

While the above makes reference to state bribery laws, as demonstrated in the case of Pete Kott, federal bribery

laws don't require successful completion of the proposed deed in exchange for payment to warrant a conviction.

Proof of the agreement, irrespective of success is all that is required under Alaska law as well. However, according to the December 19, 2007 edition of the Anchorage Daily News, McGuire's efforts on behalf of Providence came to pass in the year following her agreement with Providence. While I am still in the process of ***Continuing 4, description of violation):***

tracking the precise appropriations that ultimately landed in the pockets of Providence, it doesn't matter how or whether they got there. What matters is McGuire's contract to pursue appropriations on behalf of Providence.

Regarding the question of whether or not Providence was paying McGuire to act as their lobbyist, Providence defined what Providence saw as a duty of their lobbyist when Providence assigned their paid lobbyist Eldon Mulder to the duty of developing, in team work with McGuire, a strategy ***to secure 21 votes in the Alaska House of Representatives, and 11 votes in the Senate, "as necessary to "get a cash strapped legislature to resolve a pre-existing obligation they didn't create."*** Providence assigned to McGuire the exact same task that they had assigned to their lobbyist but called it "consulting." ***How does one argue that McGuire was being paid as something other than being a lobbyist for Providence, when clearly she was assigned the exact same duty that Providence was paying a registered lobbyist to do?***

The definition of a legislator engaging in the practice of lobbying does not require speaking to fellow legislators as Jan DeYoung inferred at APOC's 12/11/2007 hearing. Influence can be attempted or delivered in many ways. Influence can be as simple as providing ones vote, or as complicated as trying to adjourn the Legislature for undisclosed reasons, as was attempted by Pete Kott. Even lobbyists who only seek to influence administrative actions are required to report. McGuire's "Confidential Memorandum," spoke quite clearly to strategizing to effect administrative actions. (See "Confidential Memorandum," and AS: Sec 24.45.081 below.)

- Sec 24.45.081. Reporting periods. Reports required under this chapter shall be filed during the calendar month following each calendar month during any part of which the legislature was in session and during the month following each calendar quarter when the legislature was not in session. However, if a lobbyist registered under this chapter has declared that the lobbyist seeks only to influence administrative action and not legislative action the lobbyist need only file a report required under this chapter for each calendar quarter. The period covered shall be the calendar month or the calendar quarter, as applicable, and shall in any event cover the period from the date of the last report filed under this chapter to the date of the end of the calendar month or quarter, as applicable, for which the report is being filed. The period covered shall not include any months covered in previous reports filed by the same person. When total amounts are required to be reported, totals shall be stated both for the period covered by the statement and for the entire calendar year to date.

All this begs one question. Why did a perfectly competent lobbyist (Eldon Mulder) need McGuire's help to figure out how to persuade the legislature to appropriate money to Providence? Was Providence paying McGuire to do something Mulder could not? Push a green button on the House Floor when their appropriation came up for a vote perhaps?

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A culture desensitization to corruption is part of the problem. If I don't address the proverbial "elephant in the room," (that elephant related to the above problem that nobody wants to talk about), I might as well be talking to the fence :

Scott Ogan said it best when he was defending against the citizens who stepped in to remove him from his senate seat when our own law enforcement refused to deal with his bribery.

- Ogan said: "Every body is doing it. Why can't I."

Ogan was right about one thing: Sweetheart business deals with political backers had become so common

Continuation of the elephant in the room):

amongst legislators, that Scott couldn't understand why it wasn't socially acceptable for him to do the same. Like the stench of the sewers running through the streets of an 18th Century slum, the stench was stifling to visitors but unnoticed by those who had been there too long.

Not much has changed with APOC since the two years Jan DeYoung spent vigorously defending APOC's do nothing approach to my many attempts to expose the improprieties of Ben Stevens. Maybe it is time for APOC's commissioners to ask the Attorney General's office to provide them with counsel capable of recognizing bribery when they see it. To prove my point, I have attached a copy of the scathing letter she sent to me the last time I was trying to get this commission to do its job.

With the clarity of written elements of a bribe squarely in front of them, some of those elements coming in the form of Lesil McGuire's own signed contracts and sworn affidavits, I believe the time has come for APOC to take two steps:

1. refer the evidence accumulated by APOC to the criminal division of the Attorney General's office for their consideration of seeking the indictment of Lesil McGuire for soliciting and accepting a bribe and;

2. advise the Ethics Committee of the Legislature that Lesil McGuire is not in compliance with the legislature's established terms for holding a seat in Alaska's Legislature, along with the recommendation that she be considered for removal from the Legislature for refusal to comply. Alaska's Supreme Court, made it clear in Grim v Wagoner that compliance with the requirement to "provide accurate representation of the financial affairs" is a condition of holding a seat in Alaska's Legislature. The Court made that ruling in response to an APOC complaint, making it clear that therefore, APOC has an obligation to rule on the question of a Legislator's compliance or non compliance with the obligation.

The Legislature has the absolute constitutional authority to seat or expel any member irrespective of any decision of a jury or the courts. That authority places the ultimate responsibility of cleaning its own house squarely in the hands of the Legislature. While the Court admitted it would have to ponder the question of whether it had the authority to remove a legislator for non compliance, there is no question with the Legislature.

If APOC is not willing to help with encouragement, the Legislature is likely to take advantage of every opportunity to sweep this issue under the rug. However, if APOC lays this issue squarely in their lap and holds their feet to the fire with recommendations of questions they should consider, the Legislature will have little

Continuation of the elephant in the room):

remaining wiggle room to continue ducking its responsibility to clean its own house.

APOC has the moral obligation to hold the Legislature's proverbial feet to the fire, imploring them to do the right thing. I was in the Legislature when APOC was created and I remember the debate. That is part of what was expected of APOC.

However doing the right thing disrupts coalitions and presents obstacles that the Legislature is unlikely to surmount without a little encouragement from APOC. The Legislature was not up to the task with Ben Stevens. They were not up to the task with Scott Ogan. They were not up to the task with Vic Kohring, and they haven't been up to the task with John Cowdery. When given the opportunity to take the steps necessary to identify Veco's illegal polling recipients within their midst, all but a handful of our Legislators ran for cover.

APOC's staff has developed a ***"job preservation legislative lapdog attitude."*** That attitude has transformed APOC into the role of an enabler -- rather than a corruption fighter. APOC did more damage than good in handling my efforts to expose Ben Stevens, APOC has provided plausible deniability and political cover for Ben Stevens and other legislators, who we now know beyond the shadow of a doubt, were taking bribes.

Those legislators and commissioners who feel compelled to wait for handcuffs or convictions to appear before they take action on such obvious improprieties are part of the problem.

This McGuire issue is strike two for APOC's staff and their assigned counsel. It equates a reconfirmation that APOC could not be more broken. Director Brooke Miles' APOC spent two years trying to whitewash Veco's Bribery of Ben Stevens and, under her direction, APOC's new investigator has done little more than attempt a better job of whitewashing McGuire's bribery.

Party affiliation should have absolutely no bearing on whether or not the criminal activities of our legislators are tolerated. But it most certainly did at the last meeting of APOC. All the above referenced documents were in the possession of APOC's staff when they recommended to APOC's five commissioners that the complaint be dismissed. Commissioners Elizabeth Hickerson and Claire Hall, the Democrats on the Commission, recognized the problem and wanted to refer the matter of McGuire's conflicts to the Legislative Ethics Committee. Hickerson's motion was rejected by a party line vote with three Republicans on the Commission voting no. The Commissioner who led the opposition to Hickerson's motion is Larry Wood. He is an attorney for Alyeska Pipeline Company, which is owned by ConocoPhillips, BP, and Exxon, the very companies who stood to gain from the bribery schemes of Veco and Ben Stevens which he also spent two years trying to cover up. In the December 11, 2007 meeting, Larry Woods' efforts to cover-up McGuire's bribery were joined by Republican Commissioners Roger Holl and Claire Hall, and they had the full support of Assistant AG Jan DeYoung who wrongly advised that McGuire had done no wrong. I believe Larry Wood's employment presents an unacceptable conflict of interest in the judgment of this matter and the commission should therefore consider this matter with his abstention or preferably his replacement.

Corruption in Alaska is entrenched and pervasive. As Ogan observed, graft is what greases the gears of our government. The trouble was he couldn't smell the stench. We now have a once in a lifetime opportunity to change that. If APOC is to be part of the solution, it is time to become proactive.

Continuation of the elephant in the room):

APOC should advise the Legislature to remove all restrictions on what criminal activities APOC is allowed to investigate, and ask for three investigators. APOC should also ask that the new investigators be moved into a special "Public Corruption Unit" embedded in the State Troopers. (Future replicas of Ben Stevens won't get away with threatening to un-fund the Troopers.) Send APOC's Executive Director Brooke Miles and her legislative lapdog attitude packing, and ask that you, the panel of commissioners sitting in judgment, be moved to fall under the purview of the Courts rather than the Executive Branch. And ask foremost, the Legislature to end the practice allowing commissioners to be chosen by Alaska's political party bosses.

5. All available documentation concerning the alleged violations are available in public files, attached hereto and/or in the possession of State Senator Lesil McGuire.

6. I request consideration at the next regular meeting of APOC's commissioners.

7. I declare that I have read the above statements and that the statements are true to the best of my knowledge and belief.

By Ray Metcalfe 12/28/07

(Signature) *(Title)* *(Date)*

8. Certificate of service.

I Ray Metcalfe herby certify that I have hand delivered a copy of this complaint to the legislative office of Lesil McGuire at 716 W. 4th Avenue in down town Anchorage.

MARIA BULFA NOTARY PUBLIC STATE OF ALASKA MY COMMISSION EXPIRES WITH OFFICE

Subscribed and sworn to or affirmed before me at:

ANCHORAGE, ALASKA on

Signature 12.28.07 Title

DEC 2 8 2007

STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907)269-5100
FAX: (907)258-4978

March 30, 2006

Ray Metcalfe
PO Box 223809
Anchorage, AK 99523

Re: *Republican Moderate Party (R. Metcalfe) v. B. Stevens*, APOC Nos. 05-06-LFD, 05-08-LFD, 05-09-LFD

Dear Mr. Metcalfe:

Your letter of March 25, 2006, to Attorney General Márquez has been referred to me for response. That letter inquires about the status of three complaints that you filed with the Alaska Public Offices Commission concerning Senator Ben Stevens' legislative financial disclosure reports and complaints that you have made about alleged criminal misconduct.

Initially, let me assure you that this department has proceeded appropriately in any matters that have been brought to its attention and that your complaints have not received any special treatment. This office neither drags its feet nor rushes to judgment in response to public pressure when a complaint is made about a public official.

I also want to correct your misunderstanding about the role of this office with respect to state agencies. You state that this office issued orders to APOC not to investigate your complaint against Senator Stevens. This office provides legal advice to administrative agencies, including the APOC. We do not issue orders and in this case absolutely did not order or direct APOC to investigate or not to investigate a particular complaint.

Your specific complaints to Attorney General Márquez about APOC are that APOC staff members are not investigating your complaints (05-06-LFD, 05-08-LFD and 05-09-LFD) and have failed to provide you with any written explanation for their inaction and that the staff of the Office of the Attorney General had a role in that inaction.

You complain that APOC failed to address all of your complaints at its December 1 hearing. The only complaint appropriately before the commissioners on that day was your appeal from the staff determination not to investigate the complaint in 05-06-LFD. As you acknowledge, you filed your appeal late, but nevertheless were permitted to present it to the commissioners at its December 1, 2005, hearing. Any consideration of your second complaint (05-08-LFD) or additional allegations would have violated APOC's procedures. You were not allowed to address your second complaint at this hearing because the staff had not had a sufficient opportunity to investigate the allegations, the matter had not been noticed, and it was not on the calendar to be heard. The complaint process is not informal and your remaining two complaints will not be heard until staff can make a determination or recommendation for the commissioners to consider.

Moreover, you overlook the fact that the first of your three complaints (05-06-LFD filed on July 14, 2005), has been decided. This was the claim that Senator Stevens did not disclose with particularity the work he performed for businesses that hired him to consult. APOC's investigator determined that the claim did not state a violation because the law, AS 24.60.200, did not require greater specificity, and she declined to investigate further because the complaint did not state facts that, if true, would be a violation of law. You appealed this determination to the commission, which heard your appeal at a public hearing on December 1, 2005. APOC issued an order dated January 12, affirming the investigator's determination, which was mailed to you on January 24. That order states that the decision became final 30 days after distribution. Because you did not pursue judicial review, that matter is final. Additional investigation or action on this complaint at APOC would be inappropriate.

Your second complaint (05-08-LFD, filed November 17, 2005) repeats claims that you raised in 05-06-LFD. It also makes new claims that the Senator omitted a position with the Alaska Fisheries Marketing Board from his 2003 and 2004 legislative financial disclosure reports and that he failed to disclose other financial interests (such as, a relationship with Trevor McCabe, an option to purchase that was not exercised, and lobbying activities for Trident Fisheries and VECO). Some of these issues were addressed by the commission when it addressed the staff's finding of substantial noncompliance for Senator Stevens' 2004 financial disclosure report, a matter independent of your complaints that the commissioners considered on December 1. This second complaint is pending with APOC's staff. As I understand, APOC did not complete its investigation of the 05-08-LFD complaint before the legislature convened in January. If an investigation of a complaint against a legislator does not conclude before the commencement of a legislative session, it may be delayed by legislative immunity.

That immunity appears in the state Constitution at Article 2, section 6,[1] and in AS 24.40.010.[2] Both provisions protect legislators from civil process, which would include administrative subpoenas, while the legislature is in session.

This office has interpreted these sections to mean that legislators are protected from process for the period they serve in the legislature until five days following the conclusion of the session. *See generally*, 1986 Alaska Op. Att'y Gen. (Inf.) 447, 1986 WL 81228 (Alaska A.G.); 1959 Alaska Op. Att'y Gen. (Inf.) (Mar. 12). A legislator is not required to invoke legislative immunity for it to apply. Because legislative immunity serves the broader public interest and is not the personal privilege of a legislator, the opinion of this office has been that a legislator cannot waive immunity. 1959 Alaska Op. Att'y Gen. at 2, 3-4. Thus, legislative immunity insulates Senator Stevens from APOC's subpoena power during the legislative session. Five days following the end of the legislative session, APOC may compel Senator Stevens to respond to the allegations in your complaint and to its investigative requests.

Although legislative immunity serves to limit the investigation of a legislator, it does not stop it completely. APOC staff should be able to continue other aspects of the investigation, such as interviewing witnesses and subpoenaing and reviewing documents from other sources, as appropriate.

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1 Alaska Const. Art. 2, § 6 states:

> Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. Members attending, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace.

2 AS 24.40.010 provides:

> A legislator may not be held to answer before any other tribunal for any statement made in the exercise of legislative duties while the legislature is in session. A member attending, going to, or returning from legislative sessions is not subject to civil process and is privileged from arrest except for felony or breach of the peace. The immunities provided in this section extend to a legislator attending, going to, or returning from a meeting of an interim standing or special committee of the legislature of which the legislator is a member. For the purposes of going to and returning from a session or meeting, the immunities provided extend to a legislator for a period of five days immediately preceding and following the legislator's attendance at the session or meeting.

Your third complaint, 05-09-LFD (filed on December 12, 2005) concerns allegations that the Southeast Seiners Association paid Senator Stevens funds that he failed to report in 2003 and 2004. Although legislative immunity would not stop the investigation, it could delay the investigation if information from a legislator were needed to complete it.

Your remaining allegations concern your request for a criminal investigation, which this letter will not address.

Sincerely,

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By:
Jan DeYoung
Assistant Attorney General
Alaska Bar No. 7907069

cc: Mary Bohanan

JHD/kg

FRANK H. MURKOWSKI,
GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
Physical: 123 4th Street, Ste 717
Juneau, AK 99801
Phone: (907) 465-3428
Fax: (907) 465-4043

DEPARTMENT OF LAW
CRIMINAL DIVISION CENTRAL OFFICE

April 6, 2006

Ray Metcalfe
Post Office Box 233809
Anchorage, AK 99523

Dear Mr. Metcalfe:

This is in response to your letter dated March 25, received on March 29, concerning this department's handling of allegations you have made against a state legislator. Your letter questions the actions of both the civil division and the criminal division of this department, as well as the Alaska Public Offices Commission. Your accusations about the civil division appeared to be the result of your mistaken perception of legal advice provided in connection with APOC complaints filed by you against the legislator, and your mistaken perception of the status of those APOC complaints. These matters were addressed in a separate letter sent to you last week by Assistant Attorney General Jan DeYoung.

Your letter also mentioned that you had submitted information to the criminal division, which you contend shows that the legislator committed certain crimes. This is much the same information submitted to APOC. Because the state has not launched a criminal investigation, your letter says that you "suspect" we have instructed state law enforcement officials to take a "hands-off" approach. Again, you are again mistaken.

At the outset, I want to assure you that no one outside this division has directed, influenced or even discussed our review of this matter. Neither I nor anyone in the criminal division have communicated with the Attorney General, the Governor's Office or any member of the Legislature, about this matter or the way it should be handled. The Attorney General did, however, direct that we reply in writing to your letter.

As you know, dealing with and responding to accusations, speculation, rumor and innuendo is often viewed as part and parcel of being a public official today. However, as a former elected public official yourself, I'm sure you would agree that it is not appropriate for the state troopers to begin a criminal investigation every time a press report, editorial, political commentator or "blog" on the internet alleges wrongdoing by a public official. Certainly the state should have more in the way of factual information before it engages the full weight of government investigative power, and diverts criminal investigators, to inquiring into the business dealings and motives of public officials and businesses.

Thus, in deciding whether to begin a criminal investigation, we believed it was appropriate to carefully review the information submitted to us. If the information provided, or which is readily available, does not present a reasonable factual basis to support the allegations and to believe that a criminal offense may have been committed, then in my opinion it is not appropriate to initiate a full criminal investigation. This is not to say that the person alleging criminal conduct must bring forward a fully investigated case, complete with authenticated documentary evidence or a "smoking gun," proving that a crime has been committed. However, suspicions and beliefs are simply not an adequate basis for launching a state criminal investigation.

We must also review such matters in light of the Alaska Constitution's broad immunity for legislators charged with conflict of interest or self-dealing. See Alaska Constitution, Article II, section 6; *State v. Dankworth*, 672 P.2d 148 (Alaska App. 1983) (affirming dismissal of indictment against state senator for criminal conflict of interest under Alaska's "speech and debate" immunity clause). As the *Dankworth* court explained, "If the motives for a legislator's legislative activities are suspect, the constitution requires that the remedy be public exposure; if the suspicions are sustained, the sanction is to be administered either at the ballot box or in the legislature itself." *Id.* at 152.

With these principles in mind, we reviewed your allegations and the factual information supporting them. Your letter to the Attorney General alleges that the legislator committed "bribery," "money laundering," and what you described as "plans for delivery of 'off the books' payments." Although bribery is certainly a state crime, the other matters may instead implicate federal law or questions of legislative ethics. However, we will assume for this analysis that the allegations, if true, would violate state criminal law.

The allegations you submitted to APOC and to the criminal division relate to payments to the legislator of consulting fees or other income from various entities with an interest in state legislative action, and the legislator's role on a board that receives and distributes federal funds to organizations that may have a business relationship with him. In support of those allegations, your letter states that you have provided the criminal division with copies of the complaints you submitted to APOC, plus "corroborating evidence," "sworn testimony," and "affidavits . . . from a variety of people."

In reviewing the information you provided to determine if there is a reasonable factual basis to support your allegations, three immediate observations can be made. First, I'm sure you can appreciate that the APOC complaints you filed are not evidence and therefore do not provide us with a factual basis for assessing your allegations. We have reviewed the APOC complaints to help us understand your allegations, but the complaints themselves do not help us know if the allegations are accurate.

Second, although your letter indicates that you provided "corroborating evidence," there is little in what you gave us that could be characterized that way. For example, the many newspaper articles and internet web pages that were included are not evidence. Although, those materials help explain your contentions, they do not provide a factual basis for starting a criminal investigation.

Third, although your letter says that you submitted affidavits from a variety of people, we found only a single affidavit. There were no other sworn statements, and we assume this one affidavit is also the "sworn testimony" that is mentioned in your letter. The person who wrote the affidavit expressed his suspicion and beliefs many times, but the only first-hand information he provided is that during a meeting in November 2004, attended by some 60 people, the executive director of an organization, which had anticipated receiving an appropriation for federal funds or a loan guarantee, expressed his opinion that contractual payments to the legislator would be kept "off [the organization's] books." There is also an indication in the affidavit that the referenced federal appropriation did not take place.

The affidavit also presents some second-hand information that the contractual payments to the state legislator were for the purpose of securing certain *congressional* action. This second-hand information is hearsay, and thus not admissible in court, but we will assume for this analysis that a witness with first-hand information would be available to testify. More fundamentally, however, the affidavit states that the legislator was to be paid to obtain *federal* legislative action, thus at least on the surface not implicating his *state* legislative responsibilities.

Based on the information provided to us, I conclude that there is not a reasonable factual basis to support the allegations. Therefore we have not requested the Alaska State Troopers or any other law enforcement agency to begin a criminal investigation.

I want to make it clear that my conclusion is based on the information reviewed at this point in time. We understand that some of your complaints are still pending review by APOC, and it is possible that additional information may be generated through that process or from other sources. If additional factual information comes to light that might cause us to reevaluate my conclusion, we will review such information at that time.

Sincerely,

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: Dean J. Guaneli
Dean J. Guaneli
Chief Assistant Attorney General