

LEGAL SERVICES

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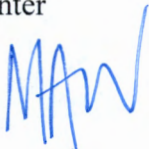
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

December 7, 2017

SUBJECT: Committee action on investigative report involving a complaint of sexual harassment (Work Order No. 30-LS1154)

TO: Senator Pete Kelly
Senate President
Attn: Heather Carpenter

FROM: Megan A. Wallace 
Legislative Counsel

You have asked for an opinion as to whether the Senate Rules Committee may meet to discuss the Investigatory Report for Incident June 15, 2017 ("Investigatory Report") involving Senator David Wilson, prepared by Skiff Lobaugh, Human Resources Manager, and whether the report may be made public.

Rules Committee Meeting

The Alaska State Legislature Sexual and Other Workplace Harassment Policy states:

You do not have to be the person being harassed to report harassment. You may make a written or oral report of violations of the Policy on Sexual and Other Workplace Harassment to any of the following: your supervisor, manager, or director; the legislative EEO Officer; designated staff in the Office of the Senate President or the Speaker of the House; designated staff in the Senate or House Rules Committee Offices; or designated staff in the Senate or House Finance Committee Co-Chair offices. . . .

All reports or complaints will be taken seriously and investigated to determine if there has been a violation of this policy. If the investigation reveals conduct in violation of this policy by a Legislator, the matter will be referred to the appropriate legislative body for resolution. If the investigation reveals conduct in violation of this policy by an employee, manager, or supervisor, appropriate action will be taken.^[1]

Because the Investigatory Report involves a legislator, the Alaska State Legislature Sexual and Other Workplace Harassment Policy specifically contemplates that "the

¹ Sexual and Other Workplace Harassment Policy (adopted by Legislative Council on January 20, 2000) (emphasis added).

matter will be referred to the appropriate legislative body for resolution." Accordingly, in my opinion it is appropriate for the Senate Rules Committee to meet to discuss the Investigatory Report and make recommendations based on the findings and conclusions contained in the Investigatory Report.² For reasons discussed below, matters involving personnel are confidential, and any discussion regarding the Investigatory Report should be made during an executive session.³

² In this regard, Uniform Rule 20 provides that the Rules Committee has jurisdiction over "the internal administration of the house and matters pertaining to the management of the legislature as a whole". Accordingly, even though the Sexual and Other Workplace Harassment Policy states that matters will be referred "[i]f the investigation reveals conduct in violation" of the policy, in my opinion, the Rules Committee is the proper body to consider and review such matters regarding a member even where no violation is found. For example, because the legislative body is ultimately tasked with resolving the matter, the Rules Committee may meet to discuss and determine whether it agrees with the investigator's recommendation.

³ Uniform Rule 22 provides:

Open and Executive Sessions. (a) All meetings of a legislative body are open to all legislators, whether or not they are members of the particular legislative body that is meeting, and to the general public except as provided in (b) of this rule.

(b) A legislative body may call an executive session at which members of the general public may be excluded for the following reasons:

(1) discussion of matters, the immediate knowledge of which would adversely affect the finances of a government unit;

(2) *discussion of subjects that tend to prejudice the reputation and character of a person;*

(3) *discussion of a matter that may, by law, be required to be confidential;*

(4) discussion of a matter the public knowledge of which would adversely affect the security of the state or nation, or adversely affect the security of a governmental unit or agency.

(c) When a legislative body desires to call an executive session in accordance with (b) of this rule, the body shall first convene as a public meeting and the question of holding an executive session shall be determined by a majority vote of the members present.

(d) The provisions of this rule may not be interpreted as permitting the exclusion of a legislator from an executive session, whether or not the legislator is a member of the body that is meeting. A legislator not a member of the body holding an executive session shall, however, be subject to the same rules of confidentiality and decorum as pertain to regular members of the body. (emphasis added).

Confidentiality

Under the Records Policy "personnel and payroll records maintained by the Legislative Affairs Agency Personnel Office are considered confidential and are not open to public inspection."⁴ As such, as a general matter, investigatory documents relating to personnel matters are usually kept confidential. However, because the legislative body has been tasked with resolving complaints of sexual harassment made against a legislator, if the legislative body wishes to take public action against a legislator, it may be permissible, depending on the circumstances, to make all or a portion⁵ of the Investigatory Report public.

First, please note that release of the Investigatory Report is not required for the Rules Committee to discuss the matter or make recommendations to the full body as a result of the findings and conclusions of the Investigatory Report. If the Rules Committee wishes to release or otherwise make public the Investigatory Report, privacy protections may be implicated. Article I, § 22, Constitution of the State of Alaska, provides:

SECTION 22. Right of Privacy. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

This right of privacy protects against government action. With regard to the state and federal rights of privacy⁶ the Alaska Supreme Court has stated:

Neither the state nor the federal right to privacy is absolute, but it is part of the judicial function to ensure that governmental infringements of this right are supported by sufficient justification. . . . Under the Alaska Constitution, the required level of justification turns on the precise nature of the privacy interest involved. . . . [Certain circumstances require] a

Subsection (b) of Uniform Rule 22 allows for an executive session in this instance. Please note, however, that under subsection (d) no legislator may be excluded from an executive session.

⁴ Records Policy (adopted by Legislative Council under AS 40.25.123(b) on March 14, 1997 - updated June 26, 2007, amended May 2, 2016).

⁵ It may be permissible to only release the conclusion of the Investigatory Report in an effort to protect the confidentiality of the complainant and/or witnesses. The most transparent release, on the other hand, would be the release of the entire report with all confidential material redacted. The committee should consider, however, the publicity this matter has received and whether releasing the full Investigatory Report, even with redactions, may not ultimately protect the identity of those named in the report.

⁶ A federal right to privacy has been found to exist in the penumbra of other rights contained in the United States Constitution. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

very high level of justification. There must be a "fair and substantial relation" between the statutory means and a legitimate governmental purpose. Thus, to determine the validity of [the law in question], we must consider both the nature and the extent of the privacy invasion [i.e. the nature and extent of the interference with the constitutionally-protected right] and the strength of the state interest in requiring [the action which, by law, is required to be taken].⁷

In this case, the Rules Committee will need to balance whether the need to distribute the confidential records of the legislator outweigh the privacy interest of the complainant or other person with regard to personal information contained in the report. If the Rules Committee ultimately decides to release the Investigatory Report, confidential information, including the names of the complainant and witnesses should be redacted from the report prior to release.

Furthermore, because certain actions taken by an employer in response to an allegation of sexual harassment might be deemed retaliatory, it is important that the release of the Investigatory Report be released or otherwise made public for the purpose of resolution of a complaint in accordance with the Alaska State Legislature Sexual and Other Workplace Harassment Policy.⁸ The release of the Investigatory Report for individual gain or other purposes may be later deemed retaliatory.⁹

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⁷ *Falcon v. Alaska Public Offices Commission*, 570 P.2d 469, 476 (Alaska 1977).

⁸ The U.S. Equal Employment Opportunity Commission warns that "[i]f retaliation . . . were permitted, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process or other employment discrimination proceedings. . . . The standard for proving a retaliation claim requires showing that the [employer's] action might deter a reasonable person from opposing discrimination or participating in the EEOC complaint process." See https://www.eeoc.gov/laws/types/retaliation_considerations.cfm.

⁹ AS 18.80.220(a)(4) provides that "it is unlawful for . . . an employer . . . to discharge, expel, or otherwise discriminate against a person because the person has opposed any practices forbidden under AS 18.80.200 - 18.80.280." AS 18.80.220(a)(1) bars workplace discrimination on the basis of sex; it applies to claims of sexual harassment. *French v. Jadon, Inc.*, 911 P.2d 20, 28 (Alaska 1996). Discharging an employee in retaliation for the reporting of sexual harassment is therefore a violation of AS 18.80.220(a)(4). *Bernard v. Alaska Airlines, Inc.*, 367 P.3d 1156, 1162 (Alaska 2016). See also *Mills v. Hankla*, 297 P.3d 158, 167 (Alaska 2013) (finding sufficient evidence to support a claim of constructive discharge where the complainant was subjected to "a campaign of hostility and retaliation").