

Pro Se Access Plaintiffs: Helpful, If Imperfect, Agents for Change

BY KRISTEL TUPJA

On the defense side, pro se plaintiff cases often are cumbersome, rambling, and unfocused. They present unique challenges to litigators.¹

On the other hand, pro se plaintiffs in access cases—even if they are sometimes imperfect messengers—can provide welcome opportunities to press for reform. For example, in *Linn v. U.S. Department of Justice*, the court granted partial summary judgment to Kenneth Linn, a pro se plaintiff and federal prisoner, and ordered the release of documents withheld by the Bureau of Prisons, concluding that the bureau improperly withheld the identities of witnesses who had testified against him.² Linn had been convicted of operating a continuing criminal enterprise in Louisiana.

Similarly, Charles Neuman, the successful pro se plaintiff in *Neuman v. United States*, was a convicted felon, and federal prisoner, for crimes related to a counterfeiting ring.³ The court ordered the defendants, the U.S. Department of Justice and U.S. Immigration and Customs Enforcement, to submit redacted documents for in camera review that would permit the court to rule on the withholdings that the defendants had made under a Freedom of Information Act (FOIA) exemption. The defendants ultimately produced to Neuman the additional documents they previously withheld under the FOIA exemption, and the case was

dismissed.

Kaleb Basey may be another such helpful, if imperfect (to say the least), plaintiff. Basey was the subject of a criminal investigation conducted, in part, by Alaska State Troopers. He filed police misconduct records requests, which the government denied on the basis that the requested information pertained to a pending criminal prosecution.⁴ After the superior court ultimately held that such disciplinary records were also exempt from disclosure as “personnel records,” Basey appealed, and the Alaska Supreme Court invited amicus briefs. The case remains pending.

Police misconduct is under high scrutiny as a result of recent developments in cell phone technology that allow bystanders to videotape police interactions, especially with minorities.⁵ As a result, police misconduct records have become the subject of FOIA requests nationwide. A reversal of the superior court’s holding in Basey’s case will affect more than just Basey: Alaska police misconduct and disciplinary records will be available to the public and media alike. Access to such records is imperative in order to hold accountable those law enforcement officials who fall short of their duties.

Basey’s case, we hope, may join the roster of helpful precedents and move at least one state forward.

Facts and Procedural Background

Kaleb Basey was charged and convicted for distributing and transporting child pornography.⁶ Alaska State Troopers (AST) and the Fort Wainwright Criminal Investigation Division conducted the investigation that led to these charges and the subsequent conviction. In September 2016, Basey filed a public records request with AST, requesting the disciplinary records of two state troopers

involved in the investigation.

AST denied the request, justifying nondisclosure by claiming an exemption of the requested records under the Alaska Statutes section 40.25.122 “litigation exception.” Basey appealed AST’s denial to the commissioner of the Department of Public Safety, who agreed with AST, stating that under section 40.25.122, because the records pertained to a matter that was the subject of an ongoing civil and/or criminal litigation to which Basey was a party, the records could not be obtained through a public records request. Instead, Basey had to obtain them “in accordance with court rules.”⁷

The superior court upheld AST’s denial of Basey’s request for the disciplinary records. The state maintained the records were exempt from disclosure under section 40.25.122, and also asserted the records fell under section 40.25.120(a)(6)(A), which exempts records from disclosure when they pertain to an ongoing criminal prosecution. The Alaska Supreme Court held that the state’s reliance on the State Personnel Act exceptions was “unavailing.”

The supreme court found that the litigation exception in section 40.25.122 applied “only when the requestor is involved in litigation ‘involving a public agency.’”⁸ Basey’s criminal case was being prosecuted by the federal government, not the state, and the court found that the federal government was not a “public agency” as defined in the Public Records Act. With regard to the pending criminal prosecution exemption, the court found that the state failed to “offer any evidence showing—and did not even allege—that disclosure of the requested records could reasonably be expected to interfere with enforcement proceedings.”⁹

The supreme court then remanded

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the case for “further proceedings consistent with” its opinion. On remand, the superior court held that disciplinary records were exempt from disclosure as “personnel records.” That prompted Basey’s second appeal to the Alaska Supreme Court.

Relevant Alaska Law

In this appeal, the Alaska Supreme Court has been asked to decide whether police misconduct records should be exempt from disclosure under the State Personnel Act as “personnel records,” and whether there is a constitutional privacy interest in such police misconduct records. Its path to find that police misconduct records are not exempt as “personnel records,” and that there is no privacy interest in police misconduct records, is well laid out in state precedent.

In *Alaska Wildlife Alliance v. Rue*, the Alaska Supreme Court limited the definition of personnel records under the State Personnel Act to records that reveal information about an employee’s *private* life.¹⁰ Under Alaska’s Public Records Act, the public is guaranteed use and inspection of all public records¹¹ unless an exemption listed in the State Personnel Act is applicable.

*International Ass’n of Fire Fighters, Local 1264 v. Municipality of Anchorage*¹² established the following balancing test applicable after determining a record merits certain constitutional protections:

1. whether the party seeking to withhold constitutionally protected information has a legitimate expectation of privacy;
2. whether the state has a compelling interest in disclosure; and
3. whether disclosure occurs in a manner that is least intrusive with respect to the right to privacy.

Amici Argument

Upon invitation from the Alaska Supreme Court, Gray Media Group stations KTUU-TV in Anchorage and KTVF-TV in Fairbanks, the Reporters Committee for Freedom of the Press, and the *Anchorage Daily News* filed an amicus brief in support of Basey’s appeal.¹³ Amici argue that in order for misconduct concerns and

inquiries to be properly answered, misconduct records must be released to the public.

The crux of the joint amici brief is that disciplinary records do not reveal information about an employee’s private life, and thus are not exempt as “personnel records” under either the Alaska Public Records Act or the State Personnel Act. The brief points out that the records Basey is seeking consist of state trooper misconduct in performing *public* duties, and Alaska Supreme Court precedent leans in favor of releasing the subject disciplinary records, as they do not pertain to the matters of private life and are not exempt under the State Personnel Act.¹⁴

Amici further argue that even if disciplinary records are considered personnel records, there is no privacy interest under the Alaska Constitution in such records. The records do not warrant any expectation of privacy, as they pertain to matters of public interest that affect the public itself. The amici argue that such privacy expectations can only apply if the records contain private information about the employee.

Court precedent in Alaska has deemed “sex, religion, politics, acquaintances, personal finances and even one’s innermost thoughts” as “private information.”¹⁵ However, there is no precedent that has deemed employee disciplinary records as “private.” Even if such records are deemed to have some sort of expectation of privacy, amici assert that the state has a compelling interest in disclosing such records nonetheless: “State troopers are public employees paid by public dollars to protect and to serve the public, and it is axiomatic that the public has an interest in overseeing their official actions.”¹⁶

Future Implications

According to the Alaska Department of Public Safety, AST pledges to a mission of preserving the peace, enforcing the law, preventing and detecting crime, and protecting life and property. In an effort to meet this mission, they are expected to “[r]espond to the concerns and inquiries of citizens.”¹⁷ But what happens when said concerns and inquiries are about the state troopers themselves,

particularly about their professional misconduct?

Largely because of high-profile incidents calling police conduct into question, many states and police departments alike have adopted better procedures and transparency in connection with police misconduct inquiries. For example, in 2016, the First District Appellate Court of Illinois vacated the circuit court’s grant of preliminary injunctions enjoining the release of certain information contained in complaint registers—records containing investigations of citizen complaints of alleged police misconduct.¹⁸ Similarly, under a consent decree signed in 2017, the Baltimore Police Department must provide detailed summaries with prominent language that clearly indicates to the public information about misconduct investigations by its offices. The Alaska amicus brief in *Basey* highlights that even states with more restrictive access to disciplinary records, such as Kentucky¹⁹ and Maine,²⁰ have taken the position that the public has a right to view such disciplinary records after final actions have been taken.

Conclusion

Access to police misconduct records—whether sought by a pro se plaintiff or a media coalition—not only helps to foster better trust between the public and those who protect and serve the public, but it also allows journalists to more effectively and accurately report on matters of public concern. Hopefully, the Alaska Supreme Court will join the states that have made this category of records public. ■

Endnotes

1. For an amusing collection of war stories about defending pro se cases against the media, see Len Niehoff, *Here Comes the Pro Se Plaintiff*, 32 *LITIG.*, no. 4, Summer 2006, at 12, 16.
2. No. 92-1406 (GK) (D.D.C. May 29, 1997).
3. 70 F. Supp. 3d 416 (D.D.C. 2014).
4. *Basey v. State*, 408 P.3d 1173, 1174 (Alaska 2017).
5. See Sarah Almukhtar et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, *N.Y. TIMES* (Apr. 19, 2018), <https://www.nytimes.com/>

interactive/2017/08/19/us/police-videos-race.html.

6. Basey is currently serving a 15-year prison sentence in federal prison.

7. *Basey*, 408 P.3d at 1175.

8. *Id.* at 1178.

9. *Id.* at 1180.

10. 948 P.2d 976, 980 (Alaska 1997).

11. ALASKA STAT. § 40.25.110.

12. 973 P.2d 1132, 1135 (Alaska 1999).

13. *Amicus Curiae* Brief of Gray Television, Inc., dba KTUU-TV & KTVF-TV, Anchorage Daily News & Reporters Committee for Freedom of the Press, *Basey v. State*, No. S-17009 (Alaska May 31, 2019) [hereinafter *Amicus Brief*].

14. *See Alaska Wildlife Alliance*, 948 P.2d at 980 (holding that records that

“tell[] little about the individual’s personal life” are not personnel records under the State Personnel Act); *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 (Alaska 1990) (holding that a head librarian’s performance evaluations did not “in any way deal with the personal, intimate, or otherwise private life” of the employee, and were thus not exempt from disclosure under the Public Records Act).

15. *Int’l Ass’n of Fire Fighters*, 973 P.2d at 1135.

16. *Amicus Brief*, *supra* note 13, at 32; *see Jones v. Jennings*, 788 P.2d 732, 735 (Alaska 1990) (“The cornerstone of a democracy is the ability of its people to question, investigate and monitor the

government.”); *see also Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (“The press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”).

17. *See Division of Alaska State Troopers*, ALASKA DEP’T PUB. SAFETY, <https://dps.alaska.gov/AST/Home> (last visited Aug. 29, 2019).

18. *Fraternal Order of Police, Chi. Lodge No. 7 v. City Chicago*, 2016 IL App (1st) 143884.

19. *See City of Louisville v. Courier-Journal & Louisville Times Co.*, 637 S.W.2d 658, 659–60 (Ky. Ct. App. 1982).

20. ME. STAT. tit. 5, § 7070(2)(E).