

June 17, 1998

The Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: CCS HB 325(brf sup maj fld H/S) -- Relating
to the FY 99 Operating Budget
A.G. file no: 883-98-0127

Dear Governor Knowles:

At the request of your Legislative Director, Pat Pourchot, we have reviewed CCS HB 325(brf sup maj fld H/S), making appropriations for the operating and loan program expenses of state government, for certain programs, and to capitalize funds. Among other things, this bill finances operations of state government for the fiscal year ending June 30, 1999.

Results-Based Budgeting

This bill marks the first attempt of the legislature to implement results-based budgeting, which was added to the Executive Budget Act by the enactment of HCS CSSB 76(FIN) am H (ch. 27, SLA 1998). Mission statements are placed irregularly throughout the bill with some agencies totally escaping the legislature's attention. Appropriation items in the bill do not appear to be conditioned on compliance with the statements. The mission statements are intended to serve as

- . . . a guide to implement and execute the law. • AS 37.07.016. The legislature is going beyond the making of appropriations in the bill and is intending to supervise the activities of agencies. The performance measures are also a very uneven product. Some agencies have advised us that these measures are appropriate to determine the success or failure of programs. However, others report that insufficient money was appropriated to pay for the cost of measuring the performance of programs. Others, particularly the Department of Corrections, were given numerous specific measures for which there may be no hope of showing successful performance. *See* page 23, lines 17 - 32; *see also* page 30, line 17 (DEC performance measured by the ambiguous standard of •workable• permits).

The legislature is using the general appropriation act as the platform from which to dictate the mission and performance measures for state agencies and other activities. At some point

during its consideration of the results-based budgeting process, the legislature was advised that through the exercise of its lawmaking power it is responsible for setting policy for agency operations. It is correct that the establishment of missions and performance measures are policy-making activities. However, it does not follow that all policymaking activities are in fact lawmaking activities. According to the legislature,

A mission statement and desired results constitute policy under which an agency shall operate, and where appropriate, the mission statement may be implemented by statute.

AS 37.07.014. Complete domination of the results-based budgeting process by the legislature would be an expansion of the lawmaking powers of the legislature beyond the boundaries intended by the framers of the Alaska Constitution.

There is no doubt that the legislature is the lawmaking branch of government. The executive branch is responsible for executing the law. By enacting law, the legislature may prescribe the powers and duties of state agencies. However, it is within the governor's power to supervise agencies in the execution of the law. Alaska Const., art. III, sec. 24. We believe that, overall, the specific mission statements and performance measures inserted in the bill are activities that are not amenable to being formalized in law. An attempt to do so amounts to supervision of the agencies in the execution of the law, which is beyond the legislature's power. In our opinion, the legislature's intent to enact binding mission statements and performance measures outside the context of a general law bill would be a violation of the separation of powers doctrine. As explained below there is another legal issue that brings into question the validity of the method used by the legislature to implement results-based budgeting.

We advised the Senate Finance Committee during the session that implementation of mission statements and performance measures through the insertion of provisions in the body of an appropriation bill would violate the confinement requirement of the Alaska Constitution. According to the Alaska Constitution, "[b]ills for appropriations shall be confined to appropriations." Alaska Const., art. II, sec. 13. The validity of our advice was recently affirmed by the Superior Court's decision in *Alaska Legislative Council v. Knowles*, 1JU-97-2063 CI. In *Knowles*, the court broadly construed the confinement requirement to limit the insertion of extraneous material in an appropriation bill. We advised that a valid way to implement this budgeting philosophy would be to establish the mission statements and performance measures in the budget instructions given to the agencies at the beginning of each budget cycle. The Legislative Budget and Audit Committee could consult with your office of management and budget in the preparation of the instructions. The mission statements could be formally reviewed by the House and Senate Finance Committees for consistency with bills reported out of committee and be finally set in agency program documents after the governor takes action on appropriation bills passed by the legislature. This is the model that has been followed in other states. Performance measures could be established based on available data or could be created when sufficient resources are available to gather the relevant data.

The next question is what to do about the offending mission statements and performance measures set out in the bill. In the past, you have used the line item veto power to strike

offending riders or intent provisions inserted in appropriation bills. This exercise of the veto power is consistent with past interpretations applied by your predecessors in office. The validity of this power has been the subject of litigation, with mixed results. Following the reasoning of *Legislative Budget and Audit Committee v. Hammond*, 1JU-80-1163 CI (Mem. Dec. May 25, 1983), a superior court decision that was not appealed, *Knowles* held that the item veto could not be used to strike textual material inserted in appropriation bills enacted for the current fiscal year. The court took a somewhat narrow view of the term "item," holding that the "the item veto power encompasses only the power to reduce or strike sums of money." This does not bode well for the past practice of striking all offending provisions of legislative intent inserted in major appropriation bills. The case could provide authority for a claim that a veto of the mission statements and performance measures would not be valid. The *Knowles* court evidenced a bias in favor of establishing the validity of each disputed item through adjudication, rather than allowing the item veto to be the check on logrolling by the legislature. There is some basis for distinguishing the results-based budget provisions from the items under dispute in *Knowles* because there is a weak connection between the mission statements and the appropriations set out in the bill. By being limited to striking only sums of money, the ability to reach so-called "non-dollar" items is foreclosed. We believe that the Alaska Supreme Court will assess the validity of each veto on a case-by-case basis. At present, there is no agreement with the legislature to either limit the insertion of inappropriate subject matter in appropriation bills or to waive legislative immunity to permit suit. Under these circumstances, a broad pronouncement that the item veto may be used only against sums of money set out in an appropriation bill should be considered binding precedent only if that interpretation is affirmed by the Alaska Supreme Court. This dispute between the legislature and the executive should be settled by the parties rather than risk a loss of control over the definition of their essential powers by further appeal through the courts.

Another valid approach for dealing with the mission statements and performance measures in the bill would be to simply ignore them. Because the legislature is operating in an area reserved for executive action, the mission statements and performance measures are at best non-binding expressions of legislative intent. When viewed in this way, the only purpose served by striking them would be to provide executive branch agencies with a formal direction from higher authority to act contrary to provisions in the bill. You could accomplish this by issuing an administrative order or other formal written directive to the agencies. The benefit of this strategy would be to focus any dispute with the legislature on the separation-of-powers doctrine or the confinement requirement rather than the method used by the executive in the exercise of the veto power.

Other Issues

Other significant issues for your consideration are set out below:

Page 3, lines 16 - 28: Section 8 provides authority for the expenditure of federal, trust, and other program receipts that are not anticipated in the bill. We believe that this section provides enough authority to cover the receipt and expenditure of amounts from the Exxon Valdez Oil Spill (EVOS) trust for the purchase of land. A land sale transaction is not a capital project. Once the contract of sale is executed, EVOS trust receipts may be fully encumbered to cover the transaction.

To the extent that there is a question about the duration of the authorization granted by this section, the authority granted in sec. 44, ch. 100, SLA 1997 would also be a valid authorization to cover a multi-year appropriation if that is needed for the project.

Page 21, lines 3 - 5: This provision states the intent that the Department of Community and Regional Affairs develop a competitive process for regional development grants. This process is to be linked in some unexplained way to •performance management and measurement. Existing regulations state that money for these grants is on a first-come, first-served basis. 3 AAC 57.070. Successful grant recipients are given a priority for funding in the succeeding fiscal year. This provision would require a change in law, which introduces subject matter into an appropriation bill in violation of the confinement requirement of art. II, sec. 13 of the Alaska Constitution. This item may be vetoed or considered not binding on the department and ignored.

Page 25, lines 18 - 26: This item contains three elements that must be met before amounts can be spent for the continued use of the Point Mackenzie Rehabilitation Facility. The first two elements are not a problem. The third element relates to the status of the facility under the *Cleary* settlement. This provision introduces subject matter into an appropriation bill that violates the confinement requirement of art. II, sec. 13 of the Alaska Constitution. This item may be vetoed or considered not binding on the department and ignored.

Page 29, line 31: This provision attempts to set an order of priority for the use of federal money received for wetlands grants and for nonpoint source water pollution pass-through grants. This provision introduces subject matter into an appropriation bill that violates the confinement requirement of art. II, sec. 13 of the Alaska Constitution. This item may be vetoed or considered as not binding on the department and ignored.

Page 32, lines 26- 32: This item attempts to allocate amounts appropriated to the commissioner of fish and game for specific positions in the commissioner's office. The legislature can limit the amount spent for a particular purpose but it cannot determine the number of positions or other resources necessary to accomplish the purpose. That is an executive function. This provision introduces subject matter into an appropriation bill that violates the confinement requirement of art. II, sec. 13 of the Alaska Constitution. This item may be vetoed or considered not binding on the department and ignored.

Page 34, line 10: This item contains a negative \$443,500 allocated to the Office of the Governor. *See also* page 65, line 23 (unallocated budget reduction of \$2.2 million for Alaska Court System). The intent of this provision is to permit the agency to allocate a budget reduction among the included units at the discretion of the agency head. This provision may be an excessive delegation of lawmaking power to an executive branch official. We understand that an agency may request this authority because those in charge of program execution want to determine where the reductions will be made. To the extent that you desire to overlook the use of this technique in this bill, it does not constitute a waiver of your right to object to its use in the future. Depending on the circumstances, it may be appropriate to force the legislature to make the hard decisions about budget reductions instead of offering an easy way out by delegating those decisions to executive officers.

Page 41, lines 8 - 9: This provision expresses the intent that the Department of Health and Social Services •strictly comply with federal law• when awarding grants under the federal abstinence grant. If this provision is asking the department to apply strict construction to the provisions of federal law, it is misguided and is an invasion of executive power. It is up to executive agencies to construe federal law as intended by Congress. Depending on the nature of the statute involved, a liberal rather than a strict interpretation may be warranted. The department should consult with this department for assistance in applying the proper means of statutory construction to federal law.

Page 43, lines 5 - 7: This provision attempts to set the terms of COMPASS grants, including the maximum amount of grants and reapplication periods. This material goes beyond the limits imposed by the confinement limitation imposed in art. II, sec. 13 of the Alaska Constitution. This provision is not binding and can be either vetoed or ignored.

Page 48, lines 5 - 8: This provision states an intent that the Department of Natural Resources request authority to receive and expend designated program receipts generated under a statute authorizing the department to charge buyers for certain costs of disposing of state land. This intent section exhibits a basic misunderstanding of the program receipts authorization process. The authority to expend program receipts is contained in sec. 8 of the bill. The appropriation of these receipts is conditioned on an opportunity for the Legislative Budget and Audit Committee to review plans for the expenditure of this source of money. We presume that this provision was included because the committee has been generally reluctant to endorse authorizations of program receipts and the provision would indicate legislative approval of the method.

Page 57, lines 9 - 13: These provisions express the intent that the Department of Public Safety charge cadets for room and board and that cadets agree to serve in Alaska for three years after graduation from the Trooper Academy. These provisions are more appropriate for enactment in general law. It is a violation of the confinement requirement for them to be enacted in an appropriation bill. The provisions are not binding and may be either vetoed or ignored.

Page 58, lines 21 - 28: This provision expresses the legislature's intent in anticipating the receipt of revenue from the Alaska Housing Finance Corporation and how that revenue may be affected by the passage of SB 360, which authorized bonds for public projects to be repaid from a part of the revenue.

Page 61, lines 30 and 31: This provision appears for each region of the Department of Transportation and Public Facilities and states an intent that •budget cuts which would hamper Rural Airport operations be minimized to the extent possible.• This provision is fairly unintelligible. It is unclear whether the •budget cuts• referred to are those made by the legislature or the governor. The section also sets a very low standard by limiting the action •to the extent possible.• This section is not binding and may be ignored.

Page 63, lines 16 - 17: This provision states the intent that the Alaska Marine Highway System contract for travel agents in five Southeast communities. If this provision is meant to require the department to contract with travel agents it introduces subject matter into an appropriation bill that violates the confinement requirement of art. II, sec. 13 of the Alaska Constitution. If objectionable, this item may be either vetoed or considered not binding on the department and ignored.

Page 64, lines 19 - 20: This provision states the intent that the University of Alaska honor all collective bargaining agreements through June 30, 1999. This is apparently an indication that the legislature has approved the monetary terms of these agreements if sufficient amounts are appropriated to cover their cost.

Statement of Reasons for Vetoes

Finally, it is necessary that when you return a vetoed bill to the house of origin you state the reasons for your actions. Alaska Const., art. II, sec. 15. Failure to state a reason leaves the veto vulnerable to successful attack. The purpose for this requirement is to permit legislators to understand your position on the bill in question and to take action to meet your concerns if there is support for it. Your statement of a reason need not be elaborate or detailed. A court will decline to decide whether your reason is a good one. However, a court will resolve a claim that a veto was entered without a reason given and will invalidate the veto in such a case. This occurred in *Knowles* and it is unclear what the effect of this decision will be. For instance, would the courts require a statement of objection for each reduction veto made in a substantial appropriation bill? Out of an abundance of caution we advise that reasons be given for each action taken on the bill, or there is a risk that it could be undone by court challenge. A rule of reason will likely be applied to this exercise in that similar actions can be grouped under a single explanation. However, it would provide strong evidence of compliance if each occurrence of the veto is listed under the appropriate reason.

Other than the issues set out in this letter, there are no other legal issues that would warrant your consideration while taking action on this bill.

Sincerely,

Bruce M. Botelho
Attorney General

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