

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-2450
LAA.Legal@akleg.gov
120 4th Street, Room 3

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

MEMORANDUM

March 24, 2023

SUBJECT: Right to privacy
(HB 105; Work Order No. 33-GH1072\A)

TO: Representative Jennie Armstrong
Attn: Tristan Walsh

FROM: Marie Marx 
Legislative Counsel

You requested an opinion relating to the governor's bill HB 105 and the constitutional right to privacy. Specifically, you asked whether the changes "requiring separation by biological sex, violate a student's right to privacy under the State Constitution if the student were gender non-conforming or transgender?"

Section 6 of HB 105, amending AS 14.33.120(a), provides:

Each governing body shall adopt a written school disciplinary and safety program. The program required under this subsection must be made available to students, parents, legal guardians, and the public and include written . . . procedures to address the physical safety and privacy of students in locker rooms and restrooms through the separation of students by biological sex, access to single occupant facilities, or other safety and privacy protocols consistent with AS 14.18.040.

If enacted, the draft bill will likely raise challenges under the Alaska Constitution's Privacy Clause. Article I, sec. 22, of the Alaska Constitution provides in part: "The right of the people to privacy is recognized and shall not be infringed." Right to privacy cases in Alaska "can be divided into two categories: those that claim a right of personal autonomy, and those that seek to shield sensitive personal information from public disclosure."¹ The draft raises issues under the second category. Prohibiting a gender non-conforming or transgender student from using the restroom of their choice, potentially requiring the student to abruptly begin using a different restroom, may publicly reveal the person's status as a transgender or gender-non-conforming student.

¹ *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 126 (Alaska 2019) (citing *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997); *Ravin v. State*, 537 P.2d 494, 500 (Alaska 1975)) (internal footnote omitted).

Representative Jennie Armstrong

March 24, 2023

Page 2

In the personal information context "[f]or the right to privacy to apply, there must be both a legitimate expectation of privacy and a claim of substantial infringement, as distinguished from a minimal one."² "A legitimate expectation of privacy is an expectation that 'society is prepared to recognize as reasonable.'"³ The Alaska Supreme Court has not directly addressed whether a person's status as a transgender or gender non-conforming student is the type of personal information protected by art. I, sec. 22.

The court has, however, described the personal information privacy interest as "an individual's interest in protecting 'sensitive personal information . . . which if, disclosed . . . , could cause embarrassment[,] anxiety,' humiliation, harassment, or economic and physical reprisals."⁴ Because disclosure of a student's status as a transgender or gender non-conforming student could, at a minimum, cause embarrassment, humiliation, and anxiety, and in more severe instances subject the student to harassment or other harm, it is likely that a court would conclude that a transgender or gender non-conforming student has a fundamental privacy interest in the student's status as a transgender or gender non-conforming student.⁵

A state disclosure of sensitive personal information protected by art. I, sec. 22 is unconstitutional unless "disclosure [is] nonetheless required to serve a compelling state interest . . . [and] the necessary disclosures occur in a manner which is least intrusive with respect to the right to privacy[.]"⁶ If a court finds that a transgender or gender non-conforming student has a protected privacy interest in the student's status as a transgender or gender non-conforming student, the state would have to show a compelling state interest necessitates the disclosure, and that no narrower means could be used to accomplish that interest.

Please let me know if I may be of further assistance.

MYM:mjt
23-116.mjt

² *Id.* at 126 - 27 (citing *Ranney v. Whitewater Eng'g*, 122 P.3d 214, 222 (Alaska 2005); *Alaska Wildlife Alliance*, 948 P.2d at 980).

³ *Id.* at 127 (quoting *International Ass'n of Fire Fighters, Local 1264 v. Municipality of Anchorage*, 973 P.2d 1132, 1134 (Alaska 1999)).

⁴ *Id.* (alterations in original) (citations and internal footnotes omitted).

⁵ *See, e.g., K.L. v. State, Dept. of Admin., Div. of Motor Vehicles*, 2012 WL 2685183 (Alaska Super., 2012) (concluding that a person's privacy interest in transgender status is entitled to protection, but not deciding whether it is a fundamental privacy interest subject to strict scrutiny because the challenged program failed to satisfy even less rigorous scrutiny).

⁶ *Doe*, 444 P.3d at 126 (quoting *Alaska Wildlife Alliance*, 948 P.2d at 980).