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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the
2021 Redistricting Plan

Case No. 3AN-21-08869 CI
(Consolidated)

Non-Anchorage Case No: 3PA-21-02397 CI

**MATANUSKA-SUSITNA BOROUGH AND MICHAEL BROWN'S
RESPONSE TO ALASKA REDISTRICTING BOARD'S OPPOSITION TO
EAST ANCHORAGE PLAINTIFFS' MOTION FOR RULE OF LAW**

Plaintiffs Matanuska-Susitna Borough and Michael Brown (collectively hereinafter referred to as "MSB"), by and through their counsel of record, Holmes Weddle & Barcott, P.C., hereby provides their responses to opposition raised by the Alaska Redistricting Board (hereinafter referred to as "ARB") to the East Anchorage Plaintiffs' Motion for Rule of Law Regarding Scope of Attorney-Client Privileged Communications with Government Entities dated January 7, 2022, which MSB joined by motion on January 10, 2022.

The ARB seeks to avoid disclosure of certain items claimed as privileged by asserting that it does not have to comply with the Open Meetings Act¹ ("OMA"), and that even if it does, its withholding of documents is warranted. Contrary to ARB's claims, the direct language of the

¹ AS 44.62.310 – AS 44.62.319.

OMA is broad enough to include the ARB in its directives, which is not only acknowledged by the ARB, but the OMA was directly adopted by unanimous consent.² As a public service the ARB should be operating with a view towards public transparency, not seek to cloud many of their deliberations under the veil of executive sessions. Combined with the ARB’s refusal to disclose many items claimed as privileged that hold dubious support for such claims, the ARB’s actions thwart the policy of openness espoused by the OMA and otherwise applicable to such public services, and seek to improperly substitute its discretion as to what should and should not be shared with and made available to the people of Alaska.

A. The ARB is and has elected to be subject to terms of the Open Meetings Act.

The ARB argues that the OMA does not apply to it because the OMA “does not apply to non-executive branch entities.”³ However, this statement is misleading at best. In fact, the OMA dictates that “all meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law.”⁴ “Governmental body” is defined to include “an assembly, council, board, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity,” and “public entity” is defined to include “an entity of the state or of a political subdivision of the state including an agency, a board or commission, the University of Alaska, a public authority or corporation, a municipality, a school district, and other governmental units of the state or a political subdivision

² Alaska Redistricting Board’s Public Meeting & Notice Requirement Policy available at: <https://www.akredistrict.org/files/5016/1281/5700/Public-Meeting-Policy.pdf>

³ ARB’s Opposition to Plaintiff’s Motion for Rule of Law at 14.

⁴ AS 44.62.310(a).

of the state.”⁵ Simply because the ARB operates independently from the executive branch does not exclude it from the direct coverage of the OMA. In fact, the OMA specifically includes in its coverage and the definition of “governmental body” and “public entity” a “board” or “other similar body”. This is demonstrated by the fact that the ARB itself acknowledges the broad coverage of such definitions and acknowledges that these can be read to include the ARB in its Public Meeting & Notice Requirement Policy adopted January 26, 2021 (“ARB Public Meeting Policy”).⁶

Regardless of the OMA’s ambit that it governs directly by statute, the ARB has explicitly elected to be governed by the OMA. In the ARB Public Meeting Policy, the ARB specifically agreed, pursuant to unanimous consent on January 26, 2021, that: “It is the policy of the Alaska Redistricting Board that the board comply with the Alaska Open Meetings Act”⁷

The ARB claims that *Abood v. League of Women Voters of Alaska*⁸ renders nonjusticiable the question of the ARB’s compliance with the policies of the OMA.⁹ Not only does this claim assume that the OMA does not directly include the ARB as a covered entity, but this case is also distinguishable. In *Abood*, the Court found the issue to be nonjusticiable due to “political questions” stemming from the separation of powers, finding constitutional authority granting to the legislature the authority to adopt its own rules of procedure which in turn made the legislature the only entity that could enforce such provisions.¹⁰ As the ARB has pointed out, it exists

⁵ AS 44.62.310(h)(1), (3).

⁶ Alaska Redistricting Board’s Public Meeting & Notice Requirement Policy available at: <https://www.akredistrict.org/files/5016/1281/5700/Public-Meeting-Policy.pdf>

⁷ *Id.*

⁸ 743 P.2d 333 (Alaska 1987).

⁹ ARB’s Opposition to Plaintiff’s Motion for Rule of Law at 18.

¹⁰ *Abood*, 743 P.2d at 335-340.

independently from the other government branches. As such, it is not part of the legislature, and thus is not subject to the same separation of powers political question as was present in *Abood*, and has not been granted specific powers to enforce its own procedural issues. *Abood* similarly acknowledges the justiciability of violations even of the legislature's own rules where the allegations involve the infringement on the rights of a third person not a member of the legislature, or where constitutional restraints or fundamental rights have been ignored or violated.¹¹

Because the OMA applies to the ARB both directly by its own terms and by the ARB's adoption, its failure to comply with its mandates constitutes a violation thereof.

B. The ARB is a public service and necessitates a transparent public process.

As a government entity, the ARB exists for the benefit of the people it serves. The ARB goes to great length to differentiate the legal advice given during open session as opposed to the advice given during executive session, relying largely on the carve-out from the OMA disclosure requirements contained in AS 44.62.310. However, the OMA exists for the purposes of maintaining open public information, and it is the stated policy of the state with respect to the OMA that:

- (1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;
- (2) **it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;**
- (3) the people of this state do not yield their sovereignty to the agencies that serve them;

¹¹ Id. at 339.

- (4) **the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;**
- (5) **the people's right to remain informed shall be protected so that they may retain control over the instruments they have created;**
- (6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.¹²

Further, the carve-out relied on by the ARB in 44.62.310(c) “shall be construed narrowly in order to effectuate the policy stated in (a) of this section and to avoid exemptions from open meeting requirements and unnecessary executive sessions.”¹³

The ARB has justified its withholding of certain items and discussions simply with unsupported claims of privilege.¹⁴ The ARB’s withholding of documents has prevented the public from understanding both the underlying contents of certain reports and analyses, as well as the scope and extent to which certain elements of such reports and analyses were implemented into the board’s plan. Such lack of openness and disclosure flies of the spirit and letter of the OMA and of how public services such as the ARB should operate.

¹² AS 44.62.312(a) (emphasis added).

¹³ AS 44.62.312(b).

¹⁴ As demonstrated in the attached exhibit and stated in the joinder, there are numerous issues with the claims, and each is identified in the exhibit.

C. The privilege log presented by the ARB does not contain sufficient detail to allow MSB to present the type of challenge claimed necessary by the ARB.

In seeking to preserve confidentiality and avoid disclosure, the ARB has produced a privilege log on January 7, 2022. However, as MSB has highlighted in its Joinder in Motion for Rule of Law dated January 10, 2022, there are numerous problems presented on such log, including subject lines that do not suggest any privilege, evidence that no attorney was involved in applicable discussions, and evidence that third parties may have been present in applicable discussions to break privilege.

The ARB seeks to avoid turning over the documents it claims to be privileged, claiming that the request is simply a fishing expedition lacking a factual basis to support a good faith belief that the documents are not privileged.¹⁵ Despite the ARB's claims, MSB has pointed out the apparent issues with the privilege log as presented and numerous items that do not appear to be privileged. Further still, many items simply lack sufficient detail or are missing entirely, making it impossible to adequately assess such claims. Although counsel for MSB has attempted to confer with counsel for MSB on these issues, the ARB's counsel has refused to have meaningful discussion, thwarting any attempts to provide a more thorough analysis. The ARB's refusal and lack of cooperation paired with its lack of specificity and thoroughness in its privilege log should not be determined to serve in its benefit in excluding such documents from appropriate review.

¹⁵ ARB's Opposition to Plaintiff's Motion for Rule of Law at 32.

D. The ARB does not have the discretion to determine what is and is not relevant to the present litigation.

When holding meetings to discuss various redistricting plans, the ARB made liberal use of executive session to discuss numerous topics, many of which appear to be exceeding reasonable bounds of what can reasonably be protected as outside the scope of the requirements of the OMA. As cited previously with respect to the OMA, “the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”¹⁶ On top of the ARB’s withholding of many documents claimed as privileged despite apparent lack of support for such claims, the ARB appears to have used executive session to discuss inappropriate topics not protected by the exclusions from open meeting requirements under the OMA, including nearly all discussion of whether and how the plan complies with the Voting Rights Act. However, the ARB’s counsel has refused to discuss its withholding of privileged documents with counsel for MSB, and the ARB now attempts to refuse submission of such documents for in camera review by the Court, claiming in part that the Alaska Supreme Court has included a requirement that sought-after materials otherwise claimed as privileged must be relevant and fulfilling a specific need.¹⁷ In doing so, the ARB seeks to use its sole discretion to determine both what is and is not relevant to the interests of the residents of the State of Alaska, as well as what is and is not relevant to the litigation. It is this discretion that is unwarranted under the stated policy of the OMA and a delegation of authority that is not extended to the ARB.

¹⁶ AS 44.62.312(a)(4).

¹⁷ ARB’s Opposition to Plaintiff’s Motion for Rule of Law at 32.

DATED this 14th day of January 2022, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 14th day of January 2022, a true and correct copy of the foregoing document was served via Email to:

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