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IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of the 2021 Redistricting Plan	Supreme Court No. S-18303

Trial Court Case No: 3AN-21-08869CI (Consolidated)

MATANUSKA-SUSITNA BOROUGH AND MICHAEL BROWN'S SUMMARY RESPONSE TO ALASKA REDISTRICTING BOARD'S EMERGENCY PETITION FOR REVIEW

Matanuska-Susitna Borough and Michael Brown (hereinafter collectively referred to as "MSB"), by and through their counsel of record, Homes Weddle & Barcott, P.C. hereby submit this summary response to the Alaska Redistricting Board's Emergency Petition for Review ("Petition") pursuant to the superior court's Order dated January 19, 2022 ("Order"). As the superior court denied the motion to stay prior to any response, MSB hereby submits this high-level summary of the most salient issues set forth in the briefing, as well as submits its briefing on the underlying matter.[1]

[1] *See* MSB's Joinder in Motion for Rule of Law Regarding Scope of Attorney-Client Privilege and Response to ARB's Opposition are appended hereto.

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As an initial matter, the Court should deny the Petition outright. The superior court properly found that the Board was subject to the OMA, as well as the Public Records Act ("PRA"). [2] The superior court went onto note that the PRA may be limited by the attorney-client privilege.[3] However, given the fact the Board is a governmental body of a public entity of the state, the superior court further found the Board's assertion of privilege must be construed narrowly.[4] Finally, the superior court correctly held that the attorney-client and work product privileges may be waived.

Further, the Board is not injured by the superior court's order. The Order refrained from ruling as to whether the Board improperly utilized executive sessions and instead recognized that as an issue for trial. The Order also denied the request for ruling as to whether discussions or legal advice received by the Board regarding senate pairings are not privileged by recognizing it as a fact issue for trial.[5] The Order similarly refused to decide whether the Board waived privilege by disclosing advice in public sessions, recognizing that it needs to be reviewed in light of the facts at trial.[6]

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[2] Sup. Ct. Order Re Motion for Rule of Law – Attorney Client Privilege (January 18, 2021).

[3] *Id.*

[4] *Id.*

[5] *Id.* p. 14-15.

[6] *Id.* p. 15.

The court properly found that in-camera review was proper in the instant matter. As the court noted, "in camera review is a ***private*** consideration of evidence by the court."[7] The Board argues that allowing for in camera review is an extreme and chilling remedy.[8] This argument ignores the fact that the review is private and falls squarely within the duties of the superior court judge. In camera review is the proper remedy to discern if the privilege has been properly claimed.[9]

Finally, in the Petition, the Board conflates the issues of the OMA, PRA, and waiver of attorney-client privilege. The Board appears to frame the parties' argument in the underlying matter as arguing that the OMA necessitates waiver of the attorney-client privilege for public entities. However, if not misdirection, that is simply a misinterpretation of the parties' presentation to the court. What has been set forth in the superior court is the argument that a waiver of privilege occurred when the Board would meet in executive session, adjourn from executive session, followed shortly by a recitation by counsel or the members in the open meeting of what occurred in executive session.[10] This act, by its very nature, constituted a waiver of the attorney-client

[7] *Id*. at p. 9 (emphasis added).

[8] This is despite the fact that the underlying court has already performed this type of review with regard to notes reviewed by a board member during the course of her deposition. The court ultimately found the notes to be privileged and withheld them from production to the parties.

[9] *See, e.g. Griswold v. Homer City Council*, 428 P.3d 180, 188 (Alaska 2018).

[10] Alaska R. Evid. 510.

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privilege through disclosure in an unprivileged fashion of that which occurred during executive session.

MSB respectfully requests the Court deny the Petition.

DATED this 19th day of January, 2022, at Anchorage, Alaska.

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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

JOINDER IN MOTION FOR RULE OF LAW REGARDING SCOPE OF ATTORNEY-CLIENT PRIVILEGE

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 joins the East Anchorage Plaintiffs' Motion for Rule of Law Regarding Scope of Attorney-Client Privileged Communications with Government Entities.

MSB joins with East Anchorage Plaintiffs' request for a ruling regarding the scope of the attorney-client privilege in the instant matter. MSB notes that in the intervening time, the parties have received a privilege log produced by the Alaska Redistricting Board ("ARB") on January 7, 2022.[1] As demonstrated in Exhibit A, this document reveals that ARB is withholding items which contain information that is believed to not be subject to the attorney-client privilege. In some instances the log lacks content which would allow the other parties to discern the veracity of the

[1] Exhibit A. This Exhibit is a marked up version of the privilege log including a column with comments demonstrating possible issues with the claim of attorney-client privilege.

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claim, in other instances there is no attorney copied on correspondence, and in other instances there are third parties who are not the attorney or the client copied thereby breaking the privilege.[2] Furthermore, the log indicates the ARB is withholding information which ARB relied on, and their subsequent deliberations regarding the information, which are required to be disclosed under the Open Meetings Act. In addition, the moment the ARB discusses content that is originally shared in a privileged fashion, the privilege is broken. Many of the documents that were withheld as privileged were discussed in public or related to deliberations, and are therefore not protected.[3]

Undersigned counsel reached out to counsel for the ARB to confer on the instant matter given the speed of the instant litigation, however, counsel refused to have any meaningful discussion.[4] Given time constraints, MSB requests that the court order ARB to produce all of the items in the privilege log which MSB has identified as possibly discoverable and thereby contested for immediate in-camera review.

I. Analysis

The Open Meetings Act ("OMA") requires, "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.[5]" The OMA was specifically crafted to require the transparency of government deliberations and proceedings by recognizing that, "the people of this state do not yield their sovereignty to the agencies that serve them,"[6] and "do not give their public servants the

[2] In addition, documents are included in the log which are believed to not even be relevant to the instant matter as they may relate to a different client of the Schwabe firm. Despite the request to clarify, counsel has refused to identify the same.

[3] In addition, the records are further discoverable given the implications of the Public Records Act. *See* AS 40.25, *et. seq.*

[4] Exhibit B.

[5] AS 44.62.310(a)

[6] AS 44.62.312(3)

right to decide what is good for the people to know and what is not good for them to know."[7] To that end, it further recognizes that claims of exemption from OMA "shall be construed narrowly" in support of the State's policy regarding meetings, "and to avoid exemptions from open meeting requirements and unnecessary executive sessions."[8]

On January 7, 2022 the ARB produced a privilege log specifying 2,425 e-mails and other documents withheld from production due to claims of attorney-client privilege, a number of which are further described as "Privilege: Mat-Su Privilege Log." No other region appears on the list identified with its own privilege log, begging the question as to why the Mat-Su region has been singled out in the ARB's review and deliberations. Further, while some documents claim work-product privilege, no other explanations have been provided as to why the documents are privileged even when the subject lines of the documents suggest that their contents are deliberations of Board members.[9] There are exceptions to OMA for certain subjects which may be considered in executive session,[10] however the privilege log does not assert that any of these

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[7] AS 44.62.312(a)(2), (a)(4)

[8] Alaska Statute 44.62.312(b)

[9] For example, document control number 1019.1 is identified as correspondence from Member Borromeo with the subject, "Valdez with Mat-Su," dated November 3, 2021.

[10] Alaska Statutes 44.62.310(c)(1)-(c)(4) provide the following exemptions to OMA for executive session:

> (1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity;
>
> (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;
>
> (3) matters which by law, municipal charter, or ordinance are required to be confidential;
>
> (4) matters involving consideration of government records that by law are not subject to public disclosure.

documents fall under those exemptions. Even if the executive session exemption applies to a conversation, the documents discussed in that session must themselves be privileged.

The Alaska Supreme Court recognized attorney-client privilege for public entities in *Cool Homes, Inc. v. Fairbanks N. Star Borough*, and found that when considering attorney-client privilege in the context of the OMA, "the applicability of the lawyer-client privilege must be narrow" in order to realize the objectives of the OMA, including the provision that, "the people's right to remain informed shall be protected so that they may retain control over the instruments they have created."[11] The court explained that, "The exception is not appropriate for 'the mere request for general legal advice or opinion by a public body in its capacity as a public agency,'"[12] and found that privilege, "should be applied only when the revelation of the communication will injure the public interest or there is some other recognized purpose in keeping the communication confidential."[13]

The court found a "specific exception" in *Cool Homes*, because the Board members had been threatened with personal liability in reference to ongoing litigation which required calling the contested executive session.[14] This exception does not apply here. All of the documents identified by MSB were produced before litigation was filed and pertain specifically to information used by ARB to inform its deliberations and make its ultimate findings, which must be disclosed under OMA.

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[11] 860 P.2d 1248, 1261 (Alaska 1993), citing AS 44.62.312(a)(5)

[12] *Id*. at 1261-1262, quoting *Minneapolis Star & Tribune Co. v. The Housing & Redevelopment Authority in and for Minneapolis*, 246 N.W.2d 448, 454 (Minn. 1976).

[13] *Id*. at 1262.

[14] *Id*. at 1262

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MSB also joins with East Anchorage Plaintiffs' position that ARB improperly used executive session to deliberate. The record shows that ARB regularly entered executive session for substantive discussion that should have occurred in the view of the public. For example, the minutes from the November 2, 2021 meeting show that after public testimony ARB went into executive session from 10:48 A.M. to 1:11 P.M. to discuss, "under Alaska Statute (AS) 44.62.310(c)(3) and Alaska Statute (AS) 44.62.310(c)(4) respectively involving matters which by law, municipal charter or ordinance are required to be confidential and matters involving consideration of government records that by law are not subject to public disclosure."[15] What the board actually did was have a meeting with their Voting Rights Act consultants, Federal Compliance Consulting, LLC to discuss whether the current redistricting plans were in accordance with the VRA. Then after the meeting counsel for ARB, Matt Singer, gave a presentation on what ARB had just heard from the consultants.

There is no legal reason to hide this discussion from the public under AS 44.62.310(c)(3) or (c)(4), as stated in the meeting minutes. All of the documents and data relied on by the consultants should have been the same data available to the public. Further, the consultant's analysis of that data should not be considered confidential under OMA. The consultants were hired for the very important purpose of advising on whether the redistricting maps are compliant with VRA, and yet the public was not afforded the opportunity to hear the analysis directly from the consultants or listen to the questions and discussion by ARB. Instead, the ARB relied on this information privately to deliberate and assist with its ultimate decision and public heard the information as filtered through ARB counsel. In fact, when discussing the adoption of a final

[15] Exhibit C.

redistricting plan in the November 5, 2021 meeting, ARB members repeatedly reference their support of different maps based on the input of the VRA consultants. Such analysis that the public did not get to hear firsthand but informs a decision that directly impacts the entirety of Alaska.

Under the OMA, the ARB is required to state the reason for going into executive session each and every time. If the analysis was as simplistic as that set forth by counsel for the ARB that "the board expected to be sued", then the ARB may as well throw out the OMA because they could then just go into executive session every day and come out with a plan. Further, if advice regarding potential future litigation was the deliberative factor for going into executive session, then each and every motion to enter executive session should have included that reason. Omitting the true reason for entering executive session effectively shields information that should be public record from the public in direct violation of OMA. The ARB should not be permitted to claim privilege for executive sessions entered and conducted in violation of the OMA.

The documents and records upon which the ARB relied upon in its public process should be readily and openly available to the public. Given the time constraints in this matter, the only reasonable solution is for the court to address the issue relating to the scope of privilege in the instant matter and order ARB to produce all of the items listed in the privilege log which have been identified as contested for <u>immediate</u> in-camera review. Further delay in disclosure of relevant discovery to the parties unfairly prejudices MSB.

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DATED this 10th day of January, 2022, at Anchorage, Alaska.

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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 Act[1] ("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.

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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).

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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.

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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 restrains 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.

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[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.

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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.

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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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