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IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Matter of the 2021 REDISTRICTING PLAN.	Case No. S-18303

Trial Court Case No. 3AN-21-08869CI

OPPOSITION TO (I) PETITION FOR REVIEW; AND (II) MOTION FOR STAY OF SUPERIOR COURT ORDER REQUIRING PRODUCTION OF ATTORNEY-CLIENT COMMUNICATIONS

COME NOW Plaintiffs Felisa Wilson, George Martinez, and Yarrow Silvers (the "East Anchorage Plaintiffs") and hereby oppose the Alaska Redistricting Board's ("Board") Petition for Review and its concurrent Motion for Stay of Superior Court Order Requiring Production of Attorney-Client Communications.

On the evening of January 18, 2022—fewer than three days before trial is set to begin in the above-captioned case—the Board filed an Emergency Petition for Review with this Court seeking review of Judge Matthews' Order Re: Motion for Rule of Law – Attorney Client Privilege dated January 18, 2022 (the "Privilege Order"). The

Board asks that the Privilege Order be stayed pending resolution of the Petition for Review. It does not request a stay of trial while the Alaska Supreme Court considers the Board's petition. The Superior Court's determination regarding the Motion for Rule of Law and the Joinder in Motion for Rule of Law regarding Scope of Attorney-Client Privilege was sound. Despite the Board's claims to the contrary, Judge Matthews narrowly tailored the relief granted to maintain the integrity of the attorney-client privilege while also protecting the plaintiffs, and most importantly the public, from the harm that arises from misuse of the attorney-client privilege in an action involving a matter of public interest by a government body serving that interest. For all of these reasons and as more thoroughly addressed below, the East Anchorage Plaintiffs respectfully request that the Petition for Review and request for stay be denied and that the Board complies with the directives issued by Judge Matthews.

The Board's Petition for Review failed to identify a procedural or legal error in the reasoning adeptly communicated by Judge Matthews and appears to recast a very simple order consistent with well-established law and procedure as a catastrophic overreach by the court. This is disingenuous, at best, and ignores the limited scope and application of the Judge's order. To be clear, Judge Matthews did not order the Board to produce attorney-client privileged documents to plaintiffs; He merely ordered the Board to present to the court, *in camera*, a small subset of documents identified in the Board's privilege log and disputed by plaintiffs. Similarly, the court did not grant a remedy to East Anchorage Plaintiffs for the Board's past failure to respond to questions concerning general principles of law discussed in executive session. He

only stated the rule of law that such general principles of law are not protected by attorney-client privilege. Indeed, the judge denied the East Anchorage Plaintiffs' request for a rule of law that required greater disclosure by the Board. While the East Anchorage Plaintiffs continue to be extremely frustrated with the Board's lack of transparency as it relates to senate pairings, the limited rule of law granted by Judge Matthews will, in theory, at least permit the East Anchorage Plaintiffs to inquire about principles of law considered by the Board when adopting senate pairings, regardless of where Board members were when they considered such principles. Further, the *in camera* review by the judge assures that the attorney-client privilege was properly applied without destroying that privilege.

Much like the Board's underlying Opposition to the Motion for Rule of Law and oral argument on that motion, the Board's Petition for Review conflates several separate and distinct aspects of the Privilege Order, requiring deconstruction and separation of these conflated arguments before they can be addressed. Although the Privilege Order is lengthy, detailed, and thoughtful—particularly in light of the extremely expedited nature of this redistricting case—the Privilege Order carefully and accurately addresses each of the Board's challenges and does so with narrowly tailored findings grounded in well-established law. First, Judge Matthews finds that the Board is subject to the Open Meetings Act, AS 44.62.310-312 because it is a governmental unit of the state and/or a political subdivision of the state.[1] In light of

[1] Privilege Order at 10-12.

this context, Judge Matthews then explains that, consistent with *Cool Homes, Inc. v. Fairbanks North Star Borough,*[2] general principles of law are not protected by the attorney-client privilege and do not fall within any of the exceptions to the Open Meetings Act.[3] In essence, Judge Matthews underscored that the Board cannot use the executive session exception to the Open Meetings Act to protect from disclosure those general principles of law expressed during such an executive session. As a result, these communications are subject to discovery, through depositions, trial testimony or otherwise.[4]

In light of these findings, the Privilege Order determined that many of the email communications withheld by the Board on claims of attorney-client privilege which were "addressed to specific executive sessions and meetings conducted between November 2-9 2021 would very likely be relevant."[5] Therefore, Judge Matthews ordered these communications produced to the court for *in camera* review, though it also permitted Plaintiffs to request additional *in camera* review of specifically-identified emails on the Board's privilege log "upon a showing that either there is no facial showing of privilege, or there is a reasonable basis to believe that review may show the documents are not privileged."[6] This *in camera* review was ordered because the

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[2] 860 P.2d 1248 (Alaska 1993)

[3] Privilege Order at 12-13.

[4] AS 40.25.110-125.

[5] Privilege Order at 17-18.

[6] *Id.* at 18.

Board was claiming both that these documents fell within the scope of the attorney-client privilege as articulated within Alaska Rule of Evidence 503, and because the Board was claiming that general principles of law were an appropriate topic to invoke the executive session exception to the Open Meetings Act.

The court's sole task when conducting its *in camera* review will be to determine whether each communication constitutes a "confidential communication… made for the purpose of facilitating the rendition of professional legal services to the client" between the individuals specified by the Rule.[7] The Alaska Supreme Court construes the Attorney-Client privilege narrowly to effectuate liberal pre-trial discovery: the privilege does not shield from discovery all documents which are generated by an attorney or reference a legal analysis; rather, the attorney-client privilege shields from disclosure "confidences between attorney and client imparted for the purpose of securing legal advice or representation."[8] In short—and especially important here—"the scope of the attorney-client privilege should be strictly construed in accordance with its purpose."[9]

Perhaps most perplexing is the Board's insistence that *In camera* review is an unusual or extreme remedy. To the contrary, courts are required to conduct in camera review to resolve disputes regarding individuals' right to discovery and the

[7] Alaska R. Evid. 503.

[8] *Downie v. Superior Ct.,* 888 P.2d 1306, 1308 (Alaska Ct. App. 1995).

[9] *Am. Nat. Watermattress Corp. v. Manville*, 642 P.2d 1330, 1333 (Alaska 1982).

requirement that confidential communications be permitted from intrusions.[10] The Alaska court uses *in camera* review as a tool to assist the judiciary with determining when a remedy is due. It is not a remedy in and of itself.

While the judge's use of *in camera* review is valid for both private and public parties and does not rely upon the public entity status of the Board, the Board's repeated attempt to undermine its status as a public entity and its obligations to the public as a result also ignores this Court's precedent as well as the legislative acts that guide it. The Alaska Supreme Court has been unequivocal that ""[t]he legislature has expressed a bias in favor of public disclosure,"[11] and, in 1990, the legislature explained, in the context of the Public Records Act, that "public access to government information is a fundamental right that operates to check and balance the actions of elected and appointed officials and to maintain citizen control of government."[12]

Consistent with this preference for *in camera* review as a mechanism to resolve disputes over the scope and application of the attorney-client privilege, the Alaska

[10] See *Windel v. Matanuska-Susitna Borough,* 496 P.3d 392 (Alaska 2021) (stating that "[a] court considering whether the privilege applies to public records should conduct an in camera review and invite arguments from the holder of the privilege as to why portions of the material should be considered privileged.") (citing *Griswold v. Homer City Council,* 428 P.3d 180, 188 (Alaska 2018)).

[11] *City of Kenai v. Kenai Peninsula Newspapers, Inc.,* 642 P.2d 1316, 1322 (Alaska 1982).

[12] *Capital Info. Grp. v. State, Office of the Governor*, 923 P.2d 29, 33 (Alaska 1996) (quoting ch. 200, § 1, SLA 1990).

Supreme Court has been explicit about the procedure courts should follow in conducting such review:

> The trial judge should redact the attorney's mental impressions, conclusions, opinions or legal theories as well as any privileged attorney-client communications which are unrelated to the subject matter of the litigation. The court should then give the attorney the opportunity to examine the redacted records and make any arguments as to why any of the unredacted material is subject to the absolute privilege discussed in Rule 26(b)(3). Only at this point should the relevant, unprivileged information be produced.[13]

Judge Matthews properly recognized the importance of the privilege as applied to the Board and, through his order, took meaningful steps to comply with the Alaska Supreme Court's directive. If, after conducting its *in camera* review, the trial court determines that some or all of the documents withheld by the Board on claims of attorney-client privilege are not subject to any applicable privilege, the production of these erroneously-withheld documents to the plaintiffs will be the remedy. To the extent plaintiffs believe any further remedy is warranted under the law, the plaintiffs will have an obligation to assert their request via motion. Here, the East Anchorage Plaintiffs did not file a motion seeking a violation, it purposefully requested a rule of law to get the information the East Anchorage Plaintiffs believed it needed, and had a

[13] *Matter of Mendel*, 897 P.2d 68, 75 (Alaska 1995). In this case, there may also be additional procedural safeguards available to minimize any prejudice claimed by the Board as a result of the in camera review, including appointing a discovery master to conduct the in camera review. The Board does not contemplate or suggest any such measures be implemented in this case, calling into question the emergency nature of its petition for review.

legal right to access as quickly as possible. The goal of the motion was merely to aid the East Anchorage Plaintiffs in presenting and preparing their case, which goes to trial this Friday, January 21, 2022. Similarly, the joinder motions filed by the other plaintiffs were also narrowly focused on accessing non-privileged information as soon as possible in preparation for trial and did not seek declarations of violation or remedies for any such violations.

Thus, although the East Anchorage Plaintiffs have asserted a violation of the Open Meetings Act in its Application, this discovery motion is separate and distinct from that claim. Appropriately, the trial court has not yet declared—or even considered—whether the Board violated the Open Meetings Act. The trial court has only acknowledged that: 1) it applies; and 2) legal advice regarding general principles of law is not an appropriate topic for executive session.

Additionally, even if the Court had found a violation of the Open Meetings Act, the Board's insistence that the only way the court is permitted to address such a violation is by voiding the action is not only inaccurate, it ignores the legislative purpose and express language of the Open Meetings Act, which encourages bodies to "cure" violations and even provides bodies with a statutory defense to the Act when such efforts to cure are undertaken. Therefore, it is entirely permissible—and, indeed, desirable—for the Court to attempt to facilitate a reasonable, efficient, and timely

remedy to any purported Open Meetings Act violation via disclosure of wrongfully-withheld documents to interested parties.[14]

In conclusion, any harm to future Boards arises not from the judge's well-reasoned findings, but rather the Board's attempt to evade the Open Meetings Act and the Public Records Act and obfuscate the rationale employed by the Board from public review. These efforts will undoubtedly degrade the public's trust in Redistricting boards and the meaningful work that this and future Boards undertake on behalf of all Alaskans.

DATED this 19th day of January, 2022.

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[14] *Id.*

CERTIFICATE OF SERVICE AND TYPEFACE

The undersigned hereby certifies that on the 19th day of January, 2022, a true and correct copy of the foregoing document was served electronically on the following. I further certify that pursuant to Appellate Rule 513.5(c)(2), the typeface used in this pleading is Arial 12.5 point proportionally spaced.

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