

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-21-08869CI

**ORDER FOLLOWING *IN CAMERA* REVIEW AND FOR PRODUCTION OF
ADDITIONAL PRIVILEGED DOCUMENTS FOR *IN CAMERA* REVIEW**

Following the Supreme Court's denial of the Board's Petition, the stay on this Court's *Order re Motion for Rule of Law – Attorney Client Privilege* was lifted. In accordance with the court's previous order, the Board produced a series of emails (and related documents which appear to be attachments) from the documents it claims as privileged. Those documents are referenced in the attached portion of the Board's spreadsheet. The Court has reviewed the documents *in camera*. As detailed below, some of the documents are considered non-privileged and should be produced. Other documents appear to be privileged, but require further explanation. Finally, in accordance with the oral motion made on record by Valdez, the court also orders additional documents to be submitted for *in camera* review.

Before addressing the documents, the Court returns to the original issue of attorney-client privilege in order to put this order in context.

East Anchorage originally sought a rule of law order addressing the attorney-client privilege. In part, East Anchorage's motion was grounded in their Open Meetings Act claim. Other plaintiffs, notably Mat-su and Valdez, joined the motion, but also expanded the relief requested. Both Mat-Su and Valdez requested the Court conduct an *in camera* review of the documents the Board withheld from production based on assertions of privilege. The court noted that distinction in the Order:

The issue of privilege is raised in different ways. First, Plaintiffs claim the Board's counsel has been overzealous and unduly restrictive at depositions in refusing to allow board members to answer about what transpired at executive sessions. Plaintiffs claim these questions fall outside the applicable scope of the attorney-client privilege. Second, Plaintiffs challenge the Board's assertion of privilege over various email

communications that were withheld by the Board from production in this case. As a result, they ask the Court to review the documents *in camera*.¹

The Court granted the *Motion for Rule of Law*, stating: “General principles of law applying to the redistricting process are not privileged.”² This conclusion was grounded in the Open Meetings Act³, and the Supreme Court’s decision in *Cool Homes*.⁴ This Court’s ruling of law was made in the section of the order addressing “witness questioning;” it was not made in the section of the order addressing “potentially privileged documents.” This distinction is important because some Plaintiff’s counsel have suggested in hearings after that order that they expect a significant tranche of documents to be produced. This Court did not say that all documents providing general legal advice should be produced, or would be reviewed in camera. Instead, the Court’s order was more limited.

The *Griswold* Court also relied upon earlier Alaska cases, as well as cases from other states to support its conclusion that a public entity should be entitled to the benefit of confidential advice from its attorneys protected from the prying eyes of either litigants or the general public. Notably, however, the Court did not decide whether the *Cool Homes* analysis should apply to the PRA.⁵

With this background in mind, it bears emphasis that the Board has asserted privilege (attorney-client and work product) over 2,425 documents. In response to the Court’s order, the Board has produced 76 documents, containing 298 pages for *in camera* review.

The Court has reviewed the documents, and most of the documents appear to fall within the scope of the attorney-client privilege or the attorney-work product doctrine. If the Court were simply concerned with a Public Records Act⁶ analysis, that might end the inquiry. But, the claims here relate to alleged violations of the Open Meetings Act. For that reason, the Court ordered the Board to “submit emails which were addressed to the

¹ Order re Motion for Rule of Law re Attorney Client Privilege at p12 (January 18, 2022).

² Id at p.18.

³ AS 44.62.310-320.

⁴ Order re Motion for Rule of Law re Attorney Client Privilege at p14 (citing *Cool Homes, Inc. v Fairbanks North Star Borough*, 860 P.2d 1248, 1262 (Alaska 1993)).

⁵ Id. at p16 (citing *Griswold v Homer City Council*, 428 P.3d 180, 188, n35 (Alaska 1980)).

⁶ AS 40.25.120

November 2021 meetings, or the executive sessions, or which were discussed during executive sessions for in camera review."⁷ While many of the emails were generated at or near the time of the November 2021 meetings, the Court cannot determine from the documents whether they were the subject of discussion at the executive sessions.

Because one of the Plaintiffs' claims is violation of the Open Meetings Act through overly broad or improperly noticed use of executive sessions, *Cool Homes* compels the court to determine whether the documents were actually available, discussed or addressed at the executive sessions.

Based on the foregoing analysis, and the prior Order on attorney- client privilege, the Court now orders as follows.

A. Documents Determined to be Non-privileged

The following documents are determined not to be privileged, and should be produced to the Plaintiffs.

335.1
580.1-580.2
612.1
1019.1
1135.1-1135.51
1245.1-1245.34
10361.1
10500.1
10540.1
11000.1
11009.1
11290.1-11290.3
11306.1-11306.7
11317.1-11317.15
11326.1-11326.2
11333.1-11333.6
11337.1-11337.17
11340.1-11340.13
11340.14
113455.1
113550.1

⁷ *Id.* at p18.

13745.1-13745.34
16297.1
16320.1
16462.1
16475.1
21811.1-21811.2
24340.1
26221.1
26724.1
26905.1-26905.2
27681.1-27681.2
27921.1-27921.3
27937.1
28305.1
28933.1-28933.4
28942.1-28942.2
29059.1-29059.3
29246.1
44593.1
44594.1-44594.2

B. Privileged documents Which Require Further Clarification

For the following documents⁸, the Board shall advise whether the document was available, referenced, or discussed at the Executive Sessions:

411.1-411.2
612.1
821.1-821.3
1191.1-1191.3
10090.1
10117.1
10166.1-10205.1
10266.1
10344.1-10344.2
10395.1-10395.2
10398.1-10398.2
10645.1-10645.2
10658.1
10840.1-10840.3

⁸ There are several instances in the documents identified in this section where there are multiple copies of the same document, as in where a memo was forwarded as an attachment several times. There are other instances where an email string is repeated with one or more additional messages added on as the discussion continues.

13549.1
21963.1-21963.2
22001.1-2201.3
22119.1
22395.1-22395.2
23083.1-23083.3
23213.1
22238.1
23247.1
23367.1
24091.1-24091.3
24098.1-24098.3
27581.1-27581.2
28037.1
28858.1
29155.1-29155.3
29250.1-29250.3
29368.1-29368.3
29462.1-29462.3
30052.1-30052.4
30350.1-30350.2
30565.1-30565.3

C. Valdez Request for *In Camera* Review of Additional Documents

Lastly, Valdez made an oral Motion during the discovery hearing on January 19, 2022 that the list of documents ordered for in camera review be expanded to include all documents on the privilege log dated between August and November, 2022. That blanket request is too broad. As the Court noted in its previous order,⁹ Plaintiffs may request additional *in camera* review of specifically identified emails on the 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.”⁹

However, Valdez’ oral request is consistent with paragraph 2 of the Court’s prior order to the Board to “submit emails which were addressed to . . . executive sessions, or

⁹ Order re Motion for Rule of Law re Attorney Client Privilege at p18. Valdez may renew its request by complying with the Court’s previous order to identify specifically identified emails on the privilege log.

which were discussed during executive sessions . . .”¹⁰ Because several Plaintiffs, including Valdez, have argued the Board’s use of executive sessions did not comply with the Open Meetings Act, the Board shall produce the requested documents for all executive sessions conducted in the August and September meetings for further *in camera review*.


D. Order for Further Action by the Board

For the foregoing reasons, the Court orders as follows:

- 1) The Board shall produce the documents identified in this order as non-privileged to the Plaintiffs by 4pm today, January 22, 2022.
- 2) The Board shall submit the clarification requested in this order and the additional documents by 10am on Sunday, January 23, 2022;¹¹

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 22nd day of January, 2022.



Thomas A. Matthews
Superior Court Judge

¹⁰ *Id.*

¹¹ Board Counsel shall include contact information for the staff member who will make the delivery so that arrangements can be made to have court staff available to receive the documents.

I certify that 1/22/22 a copy of this Order
was sent to the following:

A Murfitt	amurfitt@brenalaw.com	Mara Michaletz	mmichaletz@BHB.com
B Fontaine	bfontaine@hwb-law.com	Matthew Singer	msinger@schwabe.com
B Taylor	btaylor@schwabe.com	Michael Schechter	mike@anchorlaw.com
Ben Farkash	ben@anchorlaw.com	Nathaniel Amdur-Clark	NCLARK@SONOSKY.COM
E Houchen	ehouchen@brenalaw.com	P Crowe	pcrowe@bhb.com
Eva Gardner	Eva@anchorlaw.com	Robin Brena	rbrena@brenalaw.com
Gregory Stein	greg@baldwinandbutler.com	S Nichols	snichols@hwb-law.com
Heidi Wyckoff	heidi@anchorlaw.com	Sarah Clinton	sarah@anchorlaw.com
Holly Wells	hwells@bhb.com	Stacey Stone	sstone@hwb-law.com
J Huston	jhuston@schwabe.com	T Hardwick	thardwick@hwb-law.com
Jake Staser	jstaser@brenalaw.com	T Marshall	tmarshall@bhb.com
Kayla Tanner	ktanner@schwabe.com	Thomas Flynn	thomas.flynn@alaska.gov
Laura Gould	lgould@brenalaw.com	Whitney Leonard	whitney@sonosky.net
Lee Baxter	lbaxter@Schwabe.com	William Falsey	wfalsey@bhb.com
M Hodsdon	mhodsdon@brenalaw.com		
M Nardin	<u>mnardin@brenalaw.com</u>		

Judicial Assistant

<u>Control</u>	<u># Pgs</u>	<u>Type</u>	<u>Privilege</u>	<u>Date</u>
335.1	1	Email	Attorney-Client	11/7/2021 16:58
580.1	2	Document	Attorney-Client	11/7/2021 16:47
411.1	2	Email	Attorney-Client Work Produ	11/4/2021 18:30
612.1	1	Email	Attorney-Client	11/3/2021 17:33
1135.1	51	PDF	Attorney-Client	11/3/2021 17:14
821.1	3	Email	Attorney-Client Work Produ	11/7/2021 12:24
1191.1	3	PDF	Attorney-Client Work Produ	10/11/2021 16:26
1019.1	1	Email	Attorney-Client Mat-Su Priv	11/3/2021 17:30
1245.1	34	PDF	Attorney-Client	11/3/2021 17:24
10090.1	1	Email	Attorney-Client	11/9/2021 11:31
10117.1	1	Email	Attorney-Client	11/6/2021 18:19
10166.1	1	Email	Attorney-Client	11/6/2021 12:45
10205.1	1	Email	Attorney-Client	11/9/2021 10:50
10266.1	1	Email	Attorney-Client	11/6/2021 12:47
10344.1	2	Email	Attorney-Client	11/6/2021 21:45
10361.1	1	Email	Attorney-Client	11/10/2021 10:51
10395.1	2	Email	Attorney-Client	11/4/2021 18:30
10398.1	2	Email	Attorney-Client	11/6/2021 18:55
10500.1	1	Email	Attorney-Client	11/5/2021 19:12
10540.1	1	Email	Attorney-Client	11/10/2021 10:04
10645.1	2	Email	Attorney-Client	11/7/2021 12:24
10840.1	3	PDF	Attorney-Client	10/11/2021 16:26
10658.1	1	Email	Attorney-Client	11/6/2021 16:26
11000.1	1	Email	Attorney-Client Work Produ	11/9/2021 20:06
11290.1	3	Document	Attorney-Client Work Produ	11/9/2021 18:46
11306.1	7	Document	Attorney-Client Work Produ	11/9/2021 19:51
11317.1	15	Document	Attorney-Client Work Produ	11/9/2021 19:57
11326.1	2	PDF	Attorney-Client Work Produ	11/9/2021 20:02
11337.1	17	PDF	Attorney-Client Work Produ	8/9/2011 9:45
11009.1	1	Email	Attorney-Client	11/2/2021 13:22
11340.1	14	PDF	Attorney-Client	11/2/2021 12:59
13455.1	1	Email	Attorney-Client Work Produ	11/9/2021 8:32
13549.1	1	Email	Attorney-Client	11/2/2021 15:26
13550.1	1	Email	Attorney-Client	11/3/2021 17:30
13754.1	34	PDF	Attorney-Client	11/3/2021 17:24
16297.1	1	Email	Attorney-Client	11/10/2021 18:49
16320.1	1	Email	Attorney-Client	11/1/2021 9:55
16462.1	1	Email	Attorney-Client	11/7/2021 16:55
16475.1	1	Email	Attorney-Client	11/7/2021 16:48
21811.1	2	Email	Attorney-Client	11/7/2021 10:29
21963.1	2	Email	Attorney-Client Work Produ	11/1/2021 14:58
22001.1	3	Email	Attorney-Client Work Produ	11/2/2021 12:11
22119.1	1	Document	Attorney-Client Work Produ	11/2/2021 12:05
22395.1	2	Email	Attorney-Client Work Produ	11/1/2021 14:58
23083.1	3	Email	Attorney-Client Work Produ	11/4/2021 18:52
23213.1	1	Image	Attorney-Client Work Product	

23238.1	1	Image	Attorney-Client Work Product	
23247.1	1	Image	Attorney-Client Work Product	
23367.1	1	Image	Attorney-Client Work Product	
24091.1	3	Email	Attorney-Client	11/1/2021 15:24
24098.1	3	Email	Attorney-Client	11/2/2021 11:35
24340.1	1	Email	Attorney-Client	11/9/2021 8:14
26221.1	1	Email	Attorney-Client	11/5/2021 12:45
26724.1	1	Email	Attorney-Client	11/7/2021 16:58
26905.1	2	Document	Attorney-Client	11/7/2021 16:47
27581.1	2	Email	Attorney-Client Work Product	11/4/2021 18:17
27681.1	2	Email	Attorney-Client	11/7/2021 11:01
27921.1	3	Email	Attorney-Client	11/2/2021 13:40
27937.1	1	Email	Attorney-Client	11/9/2021 8:18
28037.1	1	Email	Attorney-Client	11/7/2021 9:34
28305.1	1	Email	Attorney-Client	11/2/2021 10:27
28858.1	1	Email	Attorney-Client Work Product	11/4/2021 18:05
28933.1	4	Email	Attorney-Client Work Product	11/1/2021 14:14
28942.1	2	Email	Attorney-Client	11/7/2021 9:57
29155.1	3	PDF	Attorney-Client	10/11/2021 16:26
29059.1	3	Email	Attorney-Client Work Product	11/1/2021 13:24
29246.1	1	Image	Attorney-Client Work Product	
29250.1	3	Email	Attorney-Client	11/7/2021 11:00
29368.1	3	Email	Attorney-Client Work Product	11/1/2021 15:00
29462.1	3	Email	Attorney-Client	11/7/2021 10:34
30052.1	4	Email	Attorney-Client Work Product	11/4/2021 19:25
30350.1	2	Email	Attorney-Client	11/7/2021 9:40
30565.1	3	PDF	Attorney-Client	10/11/2021 16:26
44593.1	1	Email	Attorney-Client Work Product	11/8/2021 8:22
44594.1	2	Document	Attorney-Client Work Product	11/8/2021 8:21