Stacey C. Stone, Esq.
sstone@hwb-law.com
Gregory Stein, Esq.
gstein@hwb-law.com

Attorneys for Plaintiffs Matanuska-Susitna Borough and Michael Brown

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.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

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

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

[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.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

[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

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

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.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

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

HOLMES WEDDLE & BARCOTT, P.C.
Attorneys for Plaintiffs Matanuska-Susitna Borough and Michael Brown

By: */s/ Stacey C. Stone*
Stacey C. Stone
Alaska Bar No. 1005030
Gregory Stein
Alaska Bar No. 1011095

CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of January, 2022, a true and correct copy of the foregoing document was served via Email to:

SCHWABE WILLIAMSON & WYATT
Matthew Singer, Esq.
Lee C. Baxter, Esq.
Kayla J. F. Tanner, Esq.
msinger@schwabe.com
aginter@schwabe.com
lbaxter@schwabe.com
ktanner@schwabe.com
jhuston@schwabe.com

ASHBURN & MASON, P.C.
Eva R. Gardner, Esq.
Michael S. Schechter, Esq.
Benjamin J. Farkash, Esq.
erg@anchorlaw.com
mike@anchorlaw.com
ben@anchorlaw.com
sarah@anchorlaw.com
heidi@anchorlaw.com
karina@anchorlaw.com

BRENA, BELL & WALKER, P.C.
Robin O. Brena, Esq.
Jake W. Staser, Esq.
Laura S. Gould, Esq.
Jon S. Wakeland, Esq.
rbrena@brenalaw.com
lgould@brenalaw.com
jwakeland@brenalaw.com
jstaser@brenalaw.com
mhodsdon@brenalaw.com
mnardin@brenalaw.com

BIRCH HORTON BITTNER & CHEROT
Holly Wells, Esq.
William D. Falsey, Esq.
Zoe A. Danner, Esq.
Mara Michaletz, Esq.
hwells@bhb.com
wfalsey@bhb.com
zdanner@bhb.com
mmichaletz@bhb.com
tevans@bhb.com
pcrowe@bhb.com
tmarshall@bhb.com

SONOSKY, CHAMBERS, SACHSE, MILLER & MONKMAN, LLP
Nathaniel Amdur-Clark, Esq.
Whitney A. Leonard, Esq.
Nathaniel@sonosky.net
Whitney@sonosky.net

STATE OF ALASKA – ATTORNEY GENERAL'S OFFICE
Thomas Flynn, Esq.
thomas.flynn@alaska.gov
cheryl.burghart@alaska.gov
anc.law.ecf@alaska.gov

/s/ Shaunalee Nichols
Legal Assistant - Holmes Weddle & Barcott, P.C.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657