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 RE MOTION FOR RULE OF LAW – ATTORNEY CLIENT PRIVILEGE

I. INTRODUCTION

Before this Court are five consolidated challenges to the final redistricting plan adopted by the Alaska Redistricting Board ("ARB" or "Board") on November 10, 2021. All of the challengers[1] ("Plaintiffs") brought claims that the Board violated Article VI, Section 6 of the Alaska Constitution by failing to properly constitute certain house or senate districts. In addition, the Plaintiffs also claim Due Process and Equal Protection problems in violation of Article I. Finally, various Plaintiffs also claim the Board violated the Open Meetings Act.[2]

Several Plaintiffs have moved for a Rule of Law determination regarding the applicable scope of the attorney-client privilege for the Board. They assert the Board has unduly restricted document production and deposition testimony in this case through an overly broad claim of privilege. They also argue the Board has improperly utilized executive sessions to conduct what should have been public deliberations. Plaintiffs further ask the Court to conduct an *in camera* review all of the documents the Board has withheld for privilege. In part, these allegations are based on the Open Meetings Act. The Board counters that it is not subject to the Open Meetings Act as an independent constitutionally created "fourth branch of government."[3] But even if the OMA does apply, says the Board, it is still entitled to assert the attorney-client privilege - "the oldest privilege

[1] The challengers involved in this litigation are Felisa Wilson, George Martinez, and Yarrow Silvers ("East Anchorage"); the City of Valdez and Mark Detter ("Valdez"); Matanuska-Susitna Borough and Michael Brown ("Mat-Su"); Municipality of Skagway Borough and Brad Ryan ("Skagway"); and Calista Corporation, William Naneng, and Harley Sundown ("Calista").
[2] AS 44.62.310-320. The Act is referred to herein as the Open Meetings Act, or "OMA."
[3] ARB Opposition at p14.

known in law."[4] Because the Court concludes the Board is subject to the OMA, the Board's assertion of privilege should be construed narrowly. However, the Court declines to order immediate review of *all documents* claimed to be privileged, and instead will order review of a subset as addressed in this order.

II. THE MOTIONS

This matter is before the Court on East Anchorage Plaintiff's *Motion for Rule of Law Regarding Scope of Attorney-Client Privileged Communications with Government Entities*. Plaintiffs Matanuska-Susitna Borough and Michael Brown filed a *Joinder in Motion for Rule of Law Regarding Scope of Attorney-Client Privilege*, and Plaintiffs City of Valdez and Mark Detter filed their own *Joinder in Motion for Rule of Law Regarding Scope of Attorney-Client Privilege*.

Defendants filed an *Opposition to East Anchorage Plaintiffs' Motion for Rule of Law* on January 13, 2021. On January 14, 2021, all three plaintiffs filed Reply briefs. Oral Argument was held on the motions January 16, 2021. The motions are ripe for decision.

III. BACKGROUND FACTS

Plaintiffs argue the Board is claiming privilege regarding considerable documents and discussions relating to the Alaska's 2021 redistricting which are not subject to attorney-client privilege. The Plaintiffs make several allegations related to unlawful use of executive sessions and attorney-client privilege as it applies to discussions held during executive session, documents relative to those executive sessions, and emails between board members.

A. Executive Sessions

East Anchorage Plaintiffs argue that the Alaska Redistricting Board (Board) "repeatedly" entered long executive sessions where it discussed matters that should have been discussed in public session. They argue the Board has improperly asserted the

[4] ARB Opposition at p10.

attorney-client privilege to shield those discussions from public view. The specific instances identified by the Plaintiffs are outlined below.

- **November 5, 2021 – Morning Executive Session**

During the Board's November 5, 2021, meeting, the Board entered executive session. The transcript of that exchange reflects as follows:

> **Board Member Simpson**: If it's an appropriate time, at the end of the day yesterday, we asked legal counsel to look into a Voting Rights issue, and I'd like to have an Executive Session to receive that advice and kind of see where we are with that.
>
> ...
>
> **Board Member Simpson**: So, Mr. Chair, for the purpose of receiving legal advice, I would like to move that the Board go into Executive Session under AS 44.62.310, involving matters which by law or ordinance are required to be confidential, and matters involving consideration of government records that by law are not subject to public disclosure.[5]

The Board then moved into Executive Session. The Board meeting minutes reflect that the Board entered executive session at 9:05 a.m. and exited executive session and entered into a mapping work session at 10:40 a.m.[6]

Upon exiting the Executive Session and entering the mapping session, Board Member Marcum presented an alternative pairing for the City of Valdez. Board Member Marcum explained that Valdez was clear that it wanted to be in same district as the Richardson Highway communities, but stated that option "was taken off the table yesterday." She explained that the remaining options were including Valdez either with the Mat-Su Borough or Anchorage:

> "[B]ased on some of the parameters that we now understand from our legal counsel, I was not able to find a reasonable solution for putting Valdez with Anchorage. Knowing that, I also, then, realize – we realized those same legal parameters affected the previous version of the map that I presented

[5] Filename ARB007742 at 007744; Certified Transcript, Video Conference Meeting of the Alaska Redistricting Board, November 5, 2021 at 2.
[6] Filename ARB000201 at 000202; Alaska Redistricting Board Meeting Minutes, November 5, 2021 at 2.

for Anchorage, which is "Version 3 Best," I think is what it was being called; right? So – so I took those legal – legally discovered – legal – legally understood legal parameters and applied them to the – the map that I presented a couple of days ago."[7]

- **November 5, 2021 – Evening Executive Session**

Later in the day on November 5, 2021, the Board entered a second executive session. Board Member Bahnke requested the executive session in order to "have the benefit of legal counsel advice in Executive Session before we consider the final map." Board Member Bahnke highlighted that on November 5, 2021, the Board "looked at a while new version of Anchorage, and I think it would be beneficial to obtain counsel for legal advice on Anchorage."[8] After some discussion, Board member Borromeo moved the Board, stating "If it doesn't have to be the exact language, I'd like to move, Mr. Chairman, that the Board enter Executive Session under Alaska Statute 44.62.310(c), subsection three and four, respectively involving matters which by law, municipal charter, or ordinance are required to eb confidential and matters involving consideration of government records that by law are not subject to public disclosure."[9]

- **November 8, 2021 – Executive Session**

On November 8, 2021, the Board entered into executive session, stating:

> **Chairman Binkley**: "[w]e have had out Voting Rights Act Consultant online since 10:30. And so we're going into executive session. I would propose that. If members want to make a motion to such so that we can speak with out legal counsel and voting rights consultant on some of the issues that are before is with this process. So with that, I'd look for a motion to move into executive session. Anybody have a motion to make?
>
> **Board Member Borromeo**: Mr. Chairman, I move that we head into executive session for legal and other (indiscernible) purposes related to receiving legal counsel for the redistricting Board.[10]

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[7] Filename ARB007742 at 007744-5; Transcript November 5, 2021 5:2-25; 6:1-10.
[8] Tr. 171:19-25; 172:1-3.
[9] Tr. 184:25; 185:1-8.
[10] Filename ARB006189 at 006224; Transcript November 8, 2021 p. 137:1-2.

The Board entered executive session at 11:00 a.m. and exited executive session at 12:00 p.m.

The Board then entered a work session on Senate parings at 1:21 p.m.[11] The Board then exited the work session and began debating the Senate pairings at length. During this debate surrounding Senate pairings proposed by Board Member Marcum the Voting Rights Act was implicated, as the subject of race was raised as an issue by both Board Members Borromeo and Bahnke.[12] In response to Board Member Marcum proposing to discuss this issue with counsel, Mr. Singer stated "I think in the context of this discussion, questions to counsel would best be done in executive session."[13] After more discussion, the Board entered executive session, as Mr. Singer explained "for legal advice with regard to the ... proposed Senate pairings in Anchorage."[14] This executive session lasted until the close of the evening, when Chairman Binkley explained that there existed "some challenging legal issues" that the Board was continuing to struggle with,[15] and that the Board would adjourn for the evening and then begin in executive session the following morning at 9:00 a.m.[16]

- **November 9, 2021**

On November 9, 2021, the Board exited executive session and quite immediately, Board Member Marcum began moving the Board to adopt Senate parings.[17]

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[11] Filename ARB006189 at 006240; Transcript November 8, 2021 p. 200:19-25; 201:1
[12] Filename ARB006189 at 006240; Transcript November 8, 2021 p. 200:19-25; 201:1
(Board Member Marcum:
"19· · · · · · · Both Nicole and Melanie raised race as an
20· ·issue.· And I wanted to ask the counselor if that's
21· ·something that we can or should discuss.· I'm happy
22· ·to do so if we think that's appropriate since it was
23· ·raised by both Melanie and Nicole.").
[13] Filename ARB006189 at 006240; Transcript November 8, 2021 p. 200:24-25; 201:1
[14] Filename ARB006189 at 006244; Transcript, November 8, 2021 p. 215: 25; 216:1-13.
[15] Filename ARB006189 at 006245; Transcript November 8, 2021 p. 217:7-8.
[16] Filename ARB006189 at 006245; Transcript November 8, 2021 p. 218:7-12.
[17] Filename ARB 006968 at 006970; Transcript November 9, 2021 p. 2:1-25.

B. Email Correspondence

On January 7, 2022, the Board produced a privilege log which documents items the Board is withholding as subject to attorney-client privilege. Mat-Su then identified items which it believes are possibly not subject to attorney-client privilege. Mat-Su and the other Plaintiffs now ask that all of those documents be disclosed to the court for *in camera* review.

IV. APPLICABLE LAW

A. The Open Meetings Act

The Open Meetings Act states that "[a]ll 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."[18] The OMA applies to every "governmental body" of a "public entity." "Public entity" is defined to include entities of the state, the University of Alaska, and all political subdivisions, including boards, commissions, agencies, municipalities, school districts, "public authorities" and corporations, and "other governmental units of the state and political subdivisions of the state."[19]

One exception to the Open Meetings Act is an executive session. Alaska Statute section 44.62.310 provides clear parameters that describe when an executive session is appropriate and what topics may be discussed in an executive session.

Under AS 44.62.310(b), the Board was required to "clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private." Further, "[s]ubjects may not be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question." Indeed, "[a]ction may not be taken at an executive

[18] AS 44.62.310(a) (emphasis added).
[19] AS 44.62.310(h)(3).

session, except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations."[20]

B. The Public Records Act

Alaska's Public Records Act ("PRA") is contained in AS 40.25.120. It provides in relevant part, "Every person has a right to inspect a public record in the state, including public records in recorders' offices, except ... records required to be kept confidential by a federal law or regulation or by state law."[21] The PRA, and its relation to the attorney-client privilege were addressed by the Alaska Supreme Court in *Griswold:*[22]

> The Public Records Act applies to all public records in the state . . ..The Act codified the common law rule that "every interested person [is] entitled to the inspection of public records ... with the added intent, perhaps, of eliminating the requirement that the person seeking inspection have an interest." We have explained that "[t]he legislature has expressed a bias in favor of public disclosure," and in 1990 the legislature added findings 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.*"[23]

After recognizing the public policy underlying the PRA, the Court turned to how the attorney-client privilege[24] interacts with the PRA. Noting "it is clearly in the public interest for a governmental agency to be able to receive confidential advice from its attorneys," the Court held the attorney-client privilege is considered an exception to the Public Records Act.[25]

C. Attorney-Client Privilege

Alaska Rule of Evidence 503 provides that a client has a privilege to refuse to disclose confidential communications made between lawyer and client for the purpose of

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[20] AS § 44.62.310(b).
[21] AS 40.25.120(a)(4).
[22] *Griswold v Homer City Council*, 428 P.3d 180, 186-188 (Alaska 2018).
[23] *Griswold*, 428 P.3d at 186 (emphasis added).
[24] The Court in *Griswold* also addressed the attorney work-product doctrine and the deliberative process privilege. The Court specifically held that an attorney's work-product is excepted from the PRA. 428 P.3d at 188.
[25] *Griswold*, 428 P.3d at 188.

facilitating the rendition of professional legal services to the client.[26] "The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice ... as well as an attorney's advice in response to such disclosures."[27] Alaska has long recognized the privilege, both as part of the common law, and in the Rules of Evidence.[28] Generally, the attorney-client privilege for private litigants under state law is nearly absolute, assuming the limited number of exceptions are not applicable.[29] Still, concerned about possible abuse of the privilege, the Alaska Supreme Court has held "that the scope of the attorney-client privilege should be strictly construed in accordance with its purpose."[30] Because it may impede discovery of the truth, the attorney-client privilege is strictly construed.[31]

Not all communications by a lawyer to a client, or vice versa are protected by the privilege. The communication must be made for the purpose of facilitating legal advice.[32] "When an attorney is merely acting as a conduit for information, i.e., as a messenger, the privilege is inapplicable."[33] Further, an attorney is no more entitled to withhold information than any other potential witness, and may be required to testify at a deposition or trial as to material, non-privileged matters.[34] Finally, the party asserting the privilege bears the burden of proving its application.[35]

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[26] Alaska R. Evid. 503(b).
[27] *United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009); *see* also *Upjohn Co. v United States,* 449 US 383, 389 (1981).
[28] *See Griswold v Homer City council*, 428 P3d 180, 187 (Alaska 2018).
[29] *Am. Nat. Watermattress Corp. v. Manville*, 642 P.2d 1330, 1332 (Alaska 1982).
[30] *Langdon v Champion*, 752 P2d 999, 1004 (Alaska 1988).
[31] Ruehle, 583 F.3d at 607; *USAA v Werley*, 526 P.2d 28, 31 (Alaska 1974); *See* also *Cool Homes, Inc. v Fairbanks North Star Borough*, 860 P.2d 1248, 1261-1262 (Alaska 1993)("The privilege should not be applied blindly" - applying attorney-client privilege narrowly in the context of a public body.)
[32] Alaska Rule of Evidence 503(b).
[33] *Downie v Superior Court*, 888 P.2d. 1306, 1308 (Alaska App. 1995)(holding that attorney's act of communicating trial date to client is not protected communication; quoting Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, Federal Rules of Evidence Manual (6th ed. 1994), Vol. 2, p. 595.)
[34] *Munn v Bristol Bay housing Authority,* 777 P.2d 188, 196 (Alaska 1989).
[35] *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010) (quoting Ruehle, 583 F.3d at 607).

D. Waiver

Both attorney-client and work product privileges may be waived. Such waiver may be either explicit or implicit; implicit waiver is determined by operation of the *Hearn* test.[36] A party may waive attorney-client privilege to certain subject matter without fully waiving privilege for his representation as a whole.[37] "A party may not selectively disclose privileged communications that it considers helpful while claiming privilege on damaging communications relating to the same subject."[38]

E. *In Camera* Review

An *in camera* review is a private consideration of evidence by the Court.[39] When conducting an *in camera* review of discovery documents, the Court reviews contested documents to determine whether the documents are privileged.[40] When an opposing party makes a facially valid assertion of privilege to withhold discovery documents, a party seeking an *in camera* review of those documents must make a factual showing sufficient to support a reasonable, good faith belief that an *in camera* inspection may indicate the information or material is not privileged.[41] That is, the moving party must establish a specific basis for challenging the asserted privilege.[42] When the moving party's belief

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[36] *Gefre v Davis Wright Tremaine, LLP*, 306 P.3d 1264, 1280 (Alaska 2013); *Hearn v Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975).
[37] *Hernandez v Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010).
[38] *Handguards, Inc. v Johnson & Johnson*, 413 F.Supp. 926, 929 (N.D. Cal 1976).
[39] In Camera Inspection, Black's Law Dictionary (11th ed. 2019).
[40] *See Fed. Sav. & Loan Ins. Corp. v. Ferm*, 909 F.2d 372, 374 (9th Cir. 1990) (explaining that *in camera* review of contested communications is designed to determine whether the communications are privileged under the attorney-client privilege and work product protection).
[41] *See Christensen v. NCH Corp.*, 956 P.2d 468 (Alaska 1998) (holding that the trial court was not required to conduct *in camera* review of discovery documents withheld by defendant on ground of work product and attorney-client privilege, where assertion of privilege was facially valid, and plaintiff did not establish any specific basis for challenging the privilege or any specific need for disclosure); *In re Grand Jury Investigation*, 974 F.2d 1068, 1072 (9th Cir. 1992) (explaining that, before engaging in *in camera* review to determine, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the information is not privileged).
[42] *Christensen*, 956 P.2d at 475 (holding that the superior court did not abuse its discretion in declining to conduct a more extensive in camera review when the moving party did not show a specific basis for challenging the other party's grounds of privilege).

that the documents are not privileged appears to be based on little more than unfounded suspicion, an *in camera* review is not justified.[43]

IV. DISCUSSION

A. The Board is Subject to the Open Meetings Act

As a board of the State of Alaska, the Alaska Redistricting Board falls within the plain language of the OMA. It is a "governmental body" because it is a "board . . . or other similar body of a public entity with the authority to stablish polices or make decisions for the public entity."[44] Similarly, it is a "public entity" within the very broad definition provided in the statute. It is an "entity of the state", including a "board," or "other governmental unit" of the state. Further, even if the definition of "public entity" applicable to the OMA did not specifically include state boards, the Alaska Redistricting Board would still fall within the "catch-all" provision at the end of this definition—the Board is a governmental unit of the state and/or a political subdivision of the state.

It is also worth noting that this interpretation is consistent with the stated intent of the Act itself. AS 44.62.312(a) explains that it is the policy of the State of Alaska that governmental bodies "exist to aid in the conduct of the people's business," and it is the policy of the State that "the people's right to remain informed shall be protected so that they may retain control over the instruments they have created." The Board exists to group people together to ensure that their right to vote, to effective representation, and to participate in the political process is fully and fairly realized under the framework established by both state and federal law for a ten-year period. If the policies underlying the Open Meetings Act are meaningfully implicated in the actions of a typical state entity, they are certainly implicated here. The Board is fundamentally entrusted with an essential

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[43] *See Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 353 (9th Cir. 2014) (holding that lower court correctly concluded that moving party did not make the requisite showing to justify an *in camera* review).
[44] AS 44.62.310(h)(1).

task – to ensure the people of the State may "retain control over the instruments" of their representation in state government.

In addition, the OMA has been around since shortly after statehood. At the time when the Board was created in 1998, the legislature was well aware of the laws governing meetings of Alaska governmental entities, including Boards. If the legislature had wanted to exempt the Board from the requirements of the Open Meetings Act, it could have done so. It did not.

In both the 2001 and 2011 redistricting litigation, there were allegations that the Board violated the Open Meetings Act. In the 2001 litigation, the Plaintiffs alleged OMA violations, in part, because the Board met with representatives from a local consulting group and legal counsel in meetings closed to the public. They also alleged improper use of email communications.[45] In addressing the OMA issues and determining that a violation of the Act occurred, Judge Rindner relied on the Alaska Supreme Court's decision in *Hickel:* "[t]he Alaska Supreme Court has ruled that the Board must comply with the Open Meetings Act."[46] While Hicklel pre-dates the 1998 constitutional amendment establishing the Board, there is no indication that Judge Ridner was troubled by that distinction. Judge Rindner determined that some, but not all of the Board's challenged actions violated the OMA.[47] On appeal, the Alaska Supreme Court noted that the public interest required the Board to comply with the Open Meetings Act, despite finding that no remedy was appropriate for the Board's violations of the Act.[48]

In the 2011 litigation, the plaintiffs also alleged the Board violated the Open Meetings Act, this time by going off the record to confer with the former head of the Alaska Republican Party and by conducting communications outside of the public process.[49] T he superior court once again decided the claim under the contours of the Open Meetings

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[45] *In re 2001 Redistricting Cases*, No. 3AN-01-8914CI, 2002 WL 34119573 (Alaska Super. Feb. 01, 2002).
[46] *Id., citing Hickel v. Southeast Conf.,* 846 P.2d 38, 57 (Alaska 1992), as modified on reh'g (Mar. 12, 1993).
[47] *In re 2001 Redistricting Cases*, 2002 WL 34119573 at *23.
[48] *In re 2001 Redistricting Cases,* 44 P.3d 141, 147 (Alaska 2002).
[49] *In re: 2011 Redistricting Cases*, No. 4FA-11-2209CI, 2013 WL 6074059, at *30 (Alaska Super. Nov. 18, 2013).

Act, stating plainly that "[u]nder the Open Meetings Act the Board's work is, with limited exceptions, to be conducted in open session."[50] No party appealed the superior court's determination that the OMA applies to the Board.

Finally, as noted by the Board in its Opposition Brief[51], it has adopted a "public Meeting and Notice Requirement." At oral argument, the Court requested the Board file a copy of the notice as an exhibit, and it has done so.[52] Notably, the Board's own policy indicates its intention to comply with the Alaska Open Meetings Act: "It is the policy of the Alaska Redistricting Board that ***the board comply with the Alaska Open Meetings act*** and seek to provide 72 hours of public notice prior to board meetings . . .."[53]

In sum, the Court concludes the Board is subject to the Open Meetings Act. As such, the Board's claims of attorney-client privilege must be reviewed under that standard.

B. The Board's Assertion of Privilege

The attorney-client privilege should be applied in the face of the Open Meetings Act only where "the revelation of the communication will injure the public interest or there is some other recognized purpose in keeping the communication confidential."[54] In a situation previously contemplated by the Alaska Supreme Court, where the Board members were actually threatened with personal liability with reference to ongoing litigation, the Court found "a very specific exception to the Open Meetings Act" which entitled the Board in *Cool Homes* to enter executive session for the purpose of receiving legal advice relative to how it and its members could avoid legal liability.[55] However, it is established that the Board cannot enter executive sessions in order to receive general legal advice.[56]

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[50] *Id.* at *31.
[51] ARB *Opposition* at 17.
[52] ARB *Notice of Filing Policy Requested at Oral Argument* (January 16, 2022).
[53] *Id.*; ARB-000422-ARB000423
[54] *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248, 1262 (Alaska 1993)
[55] *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248, 1262 (Alaska 1993).
[56] *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248, 1262 (Alaska 1993).

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.*

The Alaska Supreme Court addressed the scope of the attorney-client privilege in an OMA case in *Cool Homes.*[57] There, the Court began by describing the question as "whether the Open Meetings Act and the lawyer-client privilege can coexist."[58] The Court noted the attorney-client privilege exists for an entity subject to the OMA and "operates concurrently with the Open Meetings Act."[59] But the Court also noted the principles of confidentiality in the lawyer-public body relationship should not prevail over the principles of open meetings unless there is some recognized purpose in keeping the meeting confidential. Accordingly, in this context, the applicability of the attorney-client relationship must be narrow, and the privilege should not be applied blindly.[60] "Rather, the rationale for the confidentiality of the specific communication at issue must be one which the confidentiality doctrine seeks to protect: candid discussion of the facts and litigation strategies."[61] "[O]nly when the revelation of the communication will injure the public interest or there is some other recognized purpose in keeping the communication confidential" should the privilege apply.[62] Against this backdrop, the Court will review the requested relief.

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[57] *Cool Homes, Inc. v Fairbanks North Star Borough*, 860 P.2d 1248, 1260 (Alaska 1993).
[58] *Id.*
[59] *Id.*
[60] *Cool Homes*, 860 P.2d at 1261-1262.
[61] *Cool Homes*, 860 P.2d at 1262.
[62] *Id.*

C. Witness Questioning

As a preliminary matter, the Plaintiffs have outlined much in their briefs to argue the Board has improperly utilized executive sessions. The motions before the Court and this Order do not address that issue specifically. That is an issue for the trial in this case.

East Anchorage asks the Court to make two specific orders relating to interpretation of the attorney-client privilege: 1) General principles of law applying to the redistricting process are not privileged; and 2) Discussions or legal advice received by the Board regarding potential senate pairings before these pairings have been presented to the public are not privileged.[63]

The answer to question one comes directly from *Cool Homes*: "The Board was entitled to legal advice as to how it and its members could avoid legal liability, *although not general legal advice*."[64] Thus, discussions of general principles of law applying to the redistricting process are not privileged.

The answer to the East Anchorage Plaintiffs' second question is more fact specific. Moreover, the briefing makes clear there is a factual dispute between the parties about whether the complained about senate pairings were in fact presented to the public before or after the executive sessions on November 8-9. In light of that factual dispute, the Plaintiffs' requested "rule of law" is more than a simple rule of law. If the Board received "general legal advice" about the process for senate pairings, that general advice would not be privileged under *Cool Homes.* On the other hand, if the Board received specific legal advice relating to threatened litigation over specific senate pairings, such advice might be privileged. Here, the parties sharply dispute whether the specific senate pairings that are challenged by the East Anchorage were disclosed in public before the executive sessions on November 8-9. Accordingly, whether legal advice, if any, given by the Board's legal counsel about specific senate pairings is protected by attorney-client privilege is an

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[63] East Anchorage Motion for Rule of Law at p.10 (January 7, 2022); Reply re Motion for Rule of Law at 15 (January 14, 2022).
[64] *Cool Homes*, 860 P.2d at 1262 (emphasis added).

issue that should be addressed on a fully developed record.[65] Accordingly, the Court denies the East Anchorage request regarding its question number two.

D. Waiver

Plaintiffs also argue the Board may have waived any valid assertion of privilege by disclosing counsel's advice in public sessions. Waiver is a fact intensive argument, and cannot be determined in a general rule of law motion. While the argument is certainly plausible, it must be considered in context. Accordingly, the Court will address any questions about whether a privilege was waived at trial.

E. Potentially Privileged Documents

As part of this Rule of Law motion, the Plaintiffs have asked the Court to undertake a review of all of the documents the Board has identified as privileged. The Board initially identified 2425 emails for which it asserted privilege. The Board produced an initial privilege log on January 7, 2022, and a revised privilege log on January 16, 2022. The Plaintiffs assert various reasons for why the Court should immediately engage in an *in camera* review of all of the documents, not least of which is the extraordinary timeline of this litigation.

The Court is sensitive to Plaintiff's request, but it must be viewed against the backdrop of what has already been ordered, and produced. From the outset, the Court ordered production of all email communications, but noted the Board could withhold privileged communications.[66] In addition, the request must relate to the ultimate issues to be decided.

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[65] Plaintiffs rely upon the recent decision by the Michigan Supreme Court in *Detroit News, Inc. v Indep. Citizens Redistricting Comm'n*, No. 163823, 2021 WL 6058031 (December 20, 2021). While the Michigan Court's statements of policy underlying the public's right to be informed about the redistricting process are persuasive, the Court's decision is grounded in its constitution. As a result, the present Motion for Rule of Law is not the place for this Court to make a sweeping determination that legal advice to the Alaska Redistricting Board is part of the core business of the board subject to public review.

[66] This case began less than a month ago. Questions about the scope of discovery that would be allowed were first addressed by the Court at the initial Discovery Conference on December 22, 2021. At that time, the Court ordered the Board to produce all email communications sent to or received by the Board relating

The Supreme Court in *Griswold* noted the public interest in allowing a public entity such as the Board to receive confidential advice from its attorneys.[67] 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.[68] Notably, however, the Court did not decide whether the *Cool Homes* analysis should apply to the PRA.[69] Instead, the Court instructed that *In re Mendel*[70] should be followed in determining whether the requested records (in that case attorney billing records) should be turned over.

In this case, the Board argues that production of all of its potentially privileged emails for the Court to review *in camera* places the proverbial cart before the horse. It argues instead that the Plaintiffs need to make some showing that the Board's assertion of privilege for the emails deserves further scrutiny. From a review of the privilege log, it appears that most the emails at issue involve communications between counsel and the Board or its staff. But, the Court questions whether all of the emails are really germane to the disputes at hand.

From the Court's review of the privilege log, there are a substantial number (493) which appear to post-date the Proclamation. In addition, a significant number (471) of the emails appear to pre-date the Board's receipt of the census on August 12, 2021. There are also a significant number (680) which have no identified date, at least on the log.

As noted above, Alaska law does not require the Court to review all claims of privilege. When an opposing party makes a facially valid assertion of privilege to withhold discovery documents, a party seeking an *in camera* review of those documents must make a factual showing sufficient to support a reasonable, good faith belief that an *in*

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to the redistricting process. While the Board disagreed with the Court's order, it nonetheless agreed to produce the documents the next week. Beginning on December 31, 2021, the Board produced approximately 100,000 emails.

[67] *Griswold*, 428 P.3d at 188.

[68] *Griswold*, 428 P.3d at 188, n33 and cases cited therein.

[69] *Griswold*, 428 P.3d at 188, n35.

[70] *In Re Mendel*, 897 P.2d 68, 75 (Alaska 1995).

camera inspection may indicate the information or material is not privileged. Mere suspicion that the documents are not privileged does not justify *in camera* review.[71]

Ultimately, the Court has discretion to order *in camera* review, and there are expedient reasons to do so in this case. On the other hand, this is not a situation where a handful of specific documents have been identified. For example, in the *Detroit News* case relied upon by the Plaintiffs, the Court was asked to consider ten (10) specific memoranda that were prepared by counsel and reviewed at certain meetings. The Michigan court ultimately concluded that seven of the ten should be disclosed.

Here, due to the emergent nature of this litigation, the Plaintiffs' request is a more practical one. But just because the case is moving at lightning speed does not mean the Court abandons the legal review process altogether. What the Plaintiffs essentially request is the Court to look at *all* of the potentially privileged documents in the hope that *some* number of relevant, non-privileged documents will be identified and produced. That request is too broad. Simply because the Board is a public entity subject to the Open Meetings Act and the Public Records Act does not mean it has no right to engage in confidential communications with its counsel.

The record suggests there is a critical time period in this case that should be subject to scrutiny. Emails before the census data was received, or after the Proclamation was announced are unlikely to contain non-privileged information specifically germane to the redistricting decision of the Board. Emails before the census data likely contain general legal advice. While general legal advice provided to the Board in the context of a *meeting* might not be privileged under *Cool Homes*, that does not necessarily mean that such general legal advice contained in emails to or from counsel and provided in the run-up to the 90-day redistricting process is not subject to privilege. Emails generated after

[71] *See Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 353 (9th Cir. 2014) (holding that lower court correctly concluded that moving party did not make the requisite showing to justify an *in camera* review).

the Proclamation was issued may have some tangential relevance, but are much more likely directed at anticipated litigation.

On the other hand, emails addressed to specific executive sessions and meetings conducted between November 2-9, 2021 would very likely be relevant. Whether they are privileged or should be disclosed is a different question. But, emails in this time period, or which are addressed to the November meetings, or which were discussed at the executive sessions in November should be reviewed *in camera*.

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.

In addition, the Board shall continue to revised and update its privilege log to ensure that it accurately reflects attorney-client communications. For the undated documents, the Board shall provide a best estimate of the date.

V. CONCLUSION

For the reasons stated in this Order, the Plaintiffs' Motion for Rule of Law is GRANTED in Part. The request for *in camera* review contained within the Motions is also GRANTED in Part.

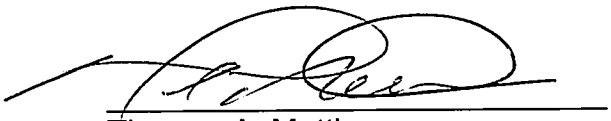
1) General principles of law applying to the redistricting process are not privileged;

2) The Board shall submit emails which were addressed to the November 2021 meetings, or the executive sessions, or which were discussed during executive sessions for *in camera* review;

3) 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.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 18th day of January, 2022.



Thomas A. Matthews
Superior Court Judge

I certify that 1/18/22 a copy of this Order
was sent to the following:

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