

Melissa Henshaw

From: Brian Hanson
Sent: Wednesday, March 08, 2017 11:59 AM
To: Melissa Henshaw
Subject: Marko Dapceвич public record request (PRR) appeal - Municipal Attorney submission for March 14, 2017, Assembly meeting
Attachments: Alaska Court Rules Privilege.pdf; CBS Code Open Meetings.pdf; CBS Email Reconsideration of Dapceвич PRR.pdf; CBS Response Letter 1-4-17.pdf; CBS Results from Reconsideration of Dapceвич PRR.pdf; Dapceвич 12-17-16 PRR (2 pages).pdf; Dapceвич Email Responding to CBS Provided Material.pdf; Dapceвич Formal PRR Appeal.pdf

Madam Clerk,

The following is my submission for the appeal by Marko Dapceвич of my February 8, 2017, decision regarding his PRR initiated on December 17, 2016. If accepted by you, please forward this submission to Mr. Dapceвич.

Introduction

Without first seeing Mr. Dapceвич's submission for this appeal, I can only assume he is appealing my decision not to produce email communications between myself and Assembly members individually and the Assembly as a body and the Municipal Administrator and Municipal staff. In addition, I can only assume he is appealing my decision not to produce a document circulated amongst the Assembly and staff in Executive Session on December 13, 2016. I believe all other communications/documents requested by Mr. Dapceвич were produced to Mr. Dapceвич.

Procedural and Factual Background

Mr. Dapceвич made a PRR request (copy attached) to the City and Borough of Sitka, Alaska (CBS) which was received on December 19, 2016. CBS, through its Municipal Clerk, responded to Mr. Dapceвич's PRR by letter dated January 4, 2017 (copy attached). Mr. Dapceвич objected to CBS's response by email sent January 14, 2016 (copy attached). I agreed to "reconsider in full" Mr. Dapceвич's PRR by email sent January 24, 2016 (copy attached). I made my decision on reconsideration by email sent February 8, 2017 (copy attached), which upheld CBS's initial response to Mr. Dapceвич's PRR. Mr. Dapceвич appealed my decision by email sent February 18, 2017.

Argument

At the outset it should be noted that there is a presumption by Alaska courts in favor of disclosure and that Alaska courts are required to narrowly construe exceptions in favor of disclosure. *See Fuller v. City of Homer*, 73 P.3d 1039, 1061-62 (Alaska 2003). I followed that presumption when making my decision and narrowly construed the exception I applied in making my decision. The Assembly, when considering Mr. Dapceвич's appeal, when substituting its judgment for me should follow the presumption and narrowly construe the exception I applied.

In addition, it should be noted at the outset that the burden is on me, on behalf of CBS, to justify withholding the communications/documents. *See Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 593 (Alaska 1990). I accept that burden.

The communications which Mr. Dapceвич seeks, which are emails between myself (CBS's Municipal Attorney) and Assembly members individually and the Assembly as a body and the Municipal Administrator and Municipal staff, are

protected as confidential communications between a lawyer and his client under Alaska Evidence Rule 503 (copy attached). As support for my decision not to produce the communications, I repeat the related research and analysis provided to Mr. Dapceвич in my decisional email of February 8, 2017, which follows.

“SGC 1.25.040.A.3 states: “Every person has a right to inspect a public record except...[r]ecords required to be kept confidential ... by state law[.]” The state law applicable here is Evidence Rule 503 which states: “A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal service, to the client... between himself... and his lawyer.” Here, my “client” is the Assembly, as a body. My client has not instructed me to waive the privilege. In *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248, 1262 (Alaska 1993), the Alaska Supreme Court held: “The privilege thus 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.” The purpose in keeping my emails confidential is to protect the CBS from financial injury and prevent disclosure of legal discussion and advice on potential related legal liability. The initial allegations presented in an email from an Assembly member to me, which you’ve probably already seen, and your threat of court action have borne out my concerns and realized the purpose which supports my decision.

In my research, I discovered another privilege which may apply, i.e., the deliberative process privilege. If a communication is “pre-decisional” and “deliberative in nature”, it is protected. See *Capital Information Group v. State of Alaska, Office of the Governor*, 923 P.2d 29, 36 (Alaska 1996). See also *Gwich’in Steering Committee v. State of Alaska, Office of the Governor*, 10 P.3d 512, 578 (Alaska 2000). Here, I believe the email communications and the discussion during the executive session were deliberative in nature and, of course, all pre-decisional.”

The Assembly should note that it may instruct me to waive the privilege and produce the requested communications to Mr. Dapceвич. I cannot waive the privilege on my own. If the Assembly desires to consider waiver, I recommend they first view the protected communications (emails) in Executive Session. I have copies of those emails available for review in Executive Session.

The document which Mr. Dapceвич seeks, which is a copy of relevant Charter and code sections circulated amongst the Assembly and staff at the Executive Session held on December 13, 2016, are protected by SGC 2.04.020.D.4 (copy attached) and the lawyer-client privilege discussed above.

Conclusion

For those reasons stated above and those reasons provided at the hearing held on Mr. Dapceвич’s appeal on March 14, 2017, the Assembly should uphold my decision not to produce confidential communications to Mr. Dapceвич which are protected by the lawyer-client privilege and local and state law.



Brian E. Hanson
Municipal Attorney
City and Borough of Sitka, Alaska
100 Lincoln Street, Sitka, Alaska, 99835
(907)747-1879

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PUBLIC RECORDS REQUEST FORM

Name: <u>Marko Dapcevic</u>	Address: <u>104 Remington Way</u>
City: <u>Sitka</u>	State: <u>AK</u> Zip: <u>99835</u>
Phone No.:	Cell No.: <u>503-956-6240</u>
E-Mail: <u>markodap@hotmail.com</u>	

The employee having custody of public records shall give, on request and pre-payment of the fee established under 1.25.010 or Section 1.25.030 unless pre-payment is waived a copy of the public record. The employee having custody of the public records shall respond within ten (10) working days of the request (do not count day request received, or Saturday, Sunday or CBS holidays). This time frame may be extended by written notification of the need for additional time before expiration of the response period. If the request is denied in whole or in part, you will be notified in writing. You may appeal the denial to the CBS Assembly, if written appeal is filed within ten working days. Your appeal will be heard at the next regular scheduled Assembly meeting. Any appeal from the Assembly's final decision is to Sitka Superior Court as an administrative agency appeal.

Title of Record(s): <u>see attached</u>
Date of Record(s): <u>10-18-16 to present</u>
Description of Record(s): Please provide any additional information that will assist us in locating the record(s) for you as quickly as possible: <u>See Attached</u>
Requestor's Signature: <u>[Signature]</u>
Date: <u>12-17-16</u>

Please Note: This form must be completed and returned to the Municipal Clerk's Office for processing.

FOR OFFICE USE ONLY

• Photocopies	\$.25 per page + tax	\$ _____
• Assembly Packets	\$ 10.00 each packet + tax	\$ _____
• Audio Copy	\$ 10.00 each + tax	\$ _____
• Video Copy	\$ 25.00 each + tax	\$ _____
• Mylar Copies of Plats	\$ 20.00 per mylar copy + tax	\$ _____
• Certified Copies	\$ 1.25 1 st page .25 each additional page	\$ _____
• Copy of Budget	\$ 25.00 each + tax	\$ _____
• Other <u>Flashdrive</u>	Price to be determined	\$ <u>5.95</u>
• The salary of an employee(s)	\$ <u>36.09</u> labor x 1.5 hours + tax	\$ <u>200.54</u>
(hourly rate plus benefits) filling a request, when retrieval and duplication of the documents requested generate labor in excess of one hour.		
		Sub total <u>206.49</u>
<i>The municipality may reduce or waive a fee when the municipality determines that the reduction or waiver is in the public interest. Fee reductions and waivers shall be uniformly applied among persons who are similarly situated. The municipality may waive a fee of five dollars or less if the fee is less than the cost would be to the municipality to arrange for payment.</i>		
		TAX \$ <u>10.32</u>
		TOTAL CHARGES \$ <u>216.81</u>

Date Request Received: 12-19-16 Completed By or Referred to (check a box below) Name: _____

Request for Record(s) Copy(ies) total \$ _____ was received on 1/4/17 and provided or mailed/mailed on _____

Record(s) or Information is exempt from disclosure and public access is denied and the requestor was notified on _____

Record(s) or Information cannot be located and the requestor was notified on _____

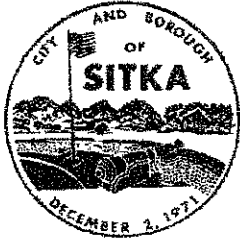
Record(s) or Information available online at www.cityofsitka.com

The departments that have a check mark have been copied to assist in filling this records request.

<input type="checkbox"/> Administration	<input type="checkbox"/> Finance	<input type="checkbox"/> IS - Email	<input type="checkbox"/> Planning Department
<input type="checkbox"/> Assessing	<input type="checkbox"/> Fire Department	<input type="checkbox"/> Library	<input type="checkbox"/> Police Department
<input type="checkbox"/> Courthouse Building	<input type="checkbox"/> Harbor Department	<input checked="" type="checkbox"/> Legal Department	<input type="checkbox"/> Public Works
<input type="checkbox"/> Electric Department	<input type="checkbox"/> Human Resources	<input type="checkbox"/> Municipal Clerk	<input type="checkbox"/> Other: _____

This request is for copies of the following related to the GPIIP Dock project:

1. Any correspondence between the Municipal Attorney and the Assembly or any individual Assembly members.
2. Any correspondence between the City Administrator and the Assembly or any individual Assembly members.
3. Any correspondence between the Municipal Attorney and the City Administrator.
4. Any correspondence between the City Administrator and the GPIIP board or individual board members.
5. Any correspondence between the Municipal Attorney and the GPIIP board or individual board members.
6. Any correspondence between the above mentioned parties and Turnigan Marine Construction.
7. Any documents signed between CBS and Turnigan Marine Construction. This is to include contracts, letters of intent.
8. Any documents circulated amongst the Assembly and Staff at the 12-13-2016 Assembly meeting (including executive session). This does not include the Assembly packet.



City and Borough of Sitka

100 Lincoln Street
Sitka, Alaska 99835

Coast Guard City, USA

January 4, 2017

PRIORITY MAIL

Marko Dapceвич
104 Remington Way
Sitka, Alaska 99835

Re: Your Public Records Request of December 17, 2016

Dear Mr. Dapceвич,

We received your Public Records Request form on December 17, 2016. You included an attachment with your request in which you specify the following:

1. Any correspondence between the Municipal Attorney and the Assembly or any individual Assembly members.
2. Any correspondence between the City Administrator and the Assembly or any individual Assembly members.
3. Any correspondence between the Municipal Attorney and the City Administrator.
4. Any correspondence between the City Administrator and the GPIIP board or individual board members.
5. Any correspondence between the Municipal Attorney and the GPIIP board or individual board members.
6. Any correspondence between the above mentioned parties and Turnigan Marine Construction.
7. Any documents signed between CBS and Turnigan Marine Construction. This is to include contracts, letters of intent.
8. Any documents circulated amongst the Assembly and Staff at the 12-13-2016 Assembly meeting (including executive session). This does not include the Assembly packet.

So as to maximize specificity, I will address each of these requests by corresponding number.


1. None provided because they are privileged attorney-client communications.
2. See enclosed flash drive.
3. None provided because they are privileged attorney-client communications.
4. See enclosed flash drive.
5. None provided because they are privileged attorney-client communications.
6. None provided because none exist.

Dapceovich
January 4, 2017
Page 2 of 2

7. The contract and other documents are enclosed on the flash drive.
8. All documents circulated during executive session are protected and, therefore, not provided. The proposed motion to go into executive session, which was circulated prior to the regular meeting, is enclosed on the flash drive.

Any appeal from this response must be in accordance with the appeal procedure set out in SGC 1.25.080, entitled "Appeals," which would be to the Assembly and then to the Sitka Superior Court.

Sincerely,



Sara Peterson
Municipal Clerk

Enclosures

cc. Mark Gorman, Municipal Administrator

Melissa Henshaw

From: Marko Dapceвич <mdapceвич@interstaterestoration.com>
Sent: Saturday, January 14, 2017 4:28 PM
To: Melissa Henshaw
Subject: RE: Receipt

Melissa,

I received the information today. I took a cursory look at it this morning and it is incomplete.

There are emails that refer to attachments with no attachments.
There are email chains that seem to be incomplete.
There is no correspondence to or from the attorney.
There is no correspondence to or from Assembly member Bean.
There is nothing from the executive session.

Please refer to the original request.

If you have time, I would appreciate a call to discuss further.

Thank you,

MARKO DAPCEVICH
Project Manager

INTERSTATE

503-956-6240 Cell Phone
888-399-1802 Fax
800 622-6433 24 Hour Emergency Service

mdapceвич@interstaterestoration.com
www.interstaterestoration.com

Complete Restoration, Construction & Service



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From: Melissa Henshaw [mailto:melissa.henshaw@cityofsitka.org]
Sent: Thursday, January 5, 2017 1:47 PM
To: Marko Dapceвич <mdapceвич@interstaterestoration.com>
Subject: Receipt

The public records request is on its way to you. Attached is your receipt.

Have a great rest of your day,

Melissa Henshaw, CMC

Deputy Clerk/Records Specialist

City and Borough of Sitka

100 Lincoln Street * Sitka, AK 99835

Ph 907-747-1826 * FAX 907-747-7403

Messages to and from this email address may be available to the public under Alaska Public Records Law.

From: noreply

Sent: Thursday, January 05, 2017 7:20 AM

To: Melissa Henshaw <melissa.henshaw@cityofsitka.org>

Subject: Scanned Images from Admin Savin 9080

Brian Hanson

From: Brian Hanson
Sent: Tuesday, January 24, 2017 2:55 PM
To: 'mdapcevich@interstaterestoration.com'
Cc: Melissa Henshaw; Sara Peterson
Subject: Your Public Records Request

Marko,

This will respond to your emails to Deputy Clerk Melissa Henshaw, dated January 14, 2017, and January 16, 2017. In those emails you complain that CBS's response, dated January 4, 2017, to your Public Records Request (PRR), dated December 17, 2016, is incomplete and wrongly relies on the attorney-client privilege to exclude production of certain requested communications.

Please be advised that I will reconsider your PRR in full. This reconsideration will require additional investigation, legal research, and analysis. However, my busy schedule does not permit immediate attention to this matter.

I expect to complete the reconsideration of your PRR and respond to you by next Wednesday, February 1, 2017. I would appreciate your patience until then. In the meantime, please don't hesitate to contact me if you have any questions or concerns.

Sincerely,

Brian

Brian E. Hanson
Municipal Attorney
City and Borough of Sitka, Alaska
(907)747-1879

Brian Hanson

From: Brian Hanson
Sent: Wednesday, February 08, 2017 5:09 PM
To: 'markodap@hotmail.com'; 'mdapceвич@interstaterestoration.com'
Cc: Melissa Henshaw; Sara Peterson; Mark Gorman; Reuben Yerkes; Matthew Hunter (Assembly); Steven Eisenbeisz (Assembly); Tristan Guevin (Assembly); Aaron Swanson (Assembly); Bob Potrzuski (Assembly); Kevin Knox (Assembly); Aaron Bean (Assembly)
Subject: Reconsideration of your public record request (PRR)
Attachments: Attachment (pages 1-6).pdf; Attachment (pages 7-13).pdf; Attachment (pages 14-16).pdf; Attachment (page 17).pdf; Legal Department Memo to Dapceвич (December 11, 2001) (2 pages).pdf

Mr. Dapceвич,

This will follow-up on my email to you, dated January 24, 2017, in which I promised to "reconsider your PRR in full." This will also respond to your various emails to Deputy Clerk Melissa Henshaw and myself in which you questioned the completeness and integrity of our responses to your PRR.

I have reconsidered your PRR in full and have come to the conclusion that the CBS was initially entirely responsive. I will address below each of your specific requests ("related to the GPIIP Dock project") by corresponding number.

1. There exists email correspondence between the Municipal Attorney and the Assembly as a body and Assembly members individually which are public records. However, those emails are protected by the "attorney-client privilege"; and, therefore, have not been produced to you. The applicability of the privilege is discussed below.
2. There exists email correspondence between the Administrator and the Assembly as a body and Assembly members individually which are public records. Those emails have already been produced to you. I am reproducing those emails to you(see attached) with numbered pages 1 through 6.
3. There exists email correspondence between the Municipal Attorney and the City Administrator which are public records. However, those emails are protected by the "attorney-client privilege"; and, therefore, have not been produced to you. The applicability of the privilege is discussed below.
4. No such correspondence exists. In our original response, CBS produced emails between Garry White and the City Administrator. Mr. White is the Executive Director of SEDA. He is not a GPIIP board member. Therefore, CBS was not required to produce that correspondence. Regardless, we did so. I am reproducing those emails to you (see attached) with numbered pages 7 through 13.
5. No such correspondence exists. If there were such correspondence, it would be protected by the attorney-client privilege and not produced.
6. No such correspondence exists.
7. There exists documents signed between CBS and Turnagain which are public records. Those documents have already been produced to you. I am reproducing those documents to you (see attached), except the contract, with numbered pages 14 through 16.
8. There exists one document circulated amongst the Assembly and Staff which is a public record. That document has already been produced to you. I am reproducing that document to you (see attached) with numbered page 17. There exists another document, a copy of relevant charter and code provisions, circulated amongst the Assembly and Staff in the Executive Session which is a public record. However, that document is protected by the attorney-client privilege; and, therefore, has not been produced to you. The applicability of the privilege is discussed below.

In your email dated January 27, 2017, you state there is "known correspondence that was not included as well as references to attachments and emails strings that appeared to be incomplete." If you are referring to any correspondence that has not been deemed by me to be protected by the attorney-client privilege, please enlighten me so I may investigate and respond. CBS had its IT Director, along with my Paralegal, search specifically for the requested correspondence. A diligent and good faith search was made which came up with what was produced. I also reviewed my saved emails to confirm CBS's response to your PRR. I found my saved emails to be consistent with CBS's initial response. Again, if you have information to the contrary, please share it with me so I may investigate and respond.

Now, I'll address the attorney-client privilege relied upon. Initially, when I first reviewed your PRR, I relied upon my private practice experience, the past experience of the CBS Legal Department as related to me by my Paralegal, and a CBS Legal Department memo, dated December 11, 2001 (coincidentally from a past Municipal Attorney, Clifford J. Groh II, to you – copy attached), all of which supported my decision to deem the correspondence you requested between me and others as privileged; and, therefore, protected from production to you. Once you objected, I determined it prudent to reconsider my decision. Accordingly, I have performed the additional investigation, legal research and analysis I promised to you which I summarize as follows.

SGC 1.25.040.A.3 states: "Every person has a right to inspect a public record except...[r]ecords required to be kept confidential ... by state law[.]" The state law applicable here is Evidence Rule 503 which states: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal service, to the client... between himself... and his lawyer." Here, my "client" is the Assembly, as a body. My client has not instructed me to waive the privilege. In *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248, 1262 (Alaska 1993), the Alaska Supreme Court held: "The privilege thus 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." The purpose in keeping my emails confidential is to protect the CBS from financial injury and prevent disclosure of legal discussion and advice on potential related legal liability. The initial allegations presented in an email from an Assembly member to me, which you've probably already seen, and your threat of court action have borne out my concerns and realized the purpose which supports my decision.

In my research, I discovered another privilege which may apply, i.e., the deliberative process privilege. If a communication is "pre-decisional" and "deliberative in nature", it is protected. See *Capital Information Group v. State of Alaska, Office of the Governor*, 923 P.2d 29, 36 (Alaska 1996). See also *Gwich'in Steering Committee v. State of Alaska, Office of the Governor*, 10 P.3d 512, 578 (Alaska 2000). Here, I believe the email communications and the discussion during the executive session were deliberative in nature and, of course, all pre-decisional.

Under SGC 1.25.080.A, you have the right to appeal my decision to the Assembly.

Thank you for your patience. Please don't hesitate to contact me if you have any questions or concerns.

Sincerely,

Brian E. Hanson



Brian E. Hanson
Municipal Attorney
City and Borough of Sitka, Alaska
100 Lincoln Street, Sitka, Alaska, 99835
(907)747-1879

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Sara Peterson

From: Marko Dapceвич <markodap@hotmail.com>
Sent: Saturday, February 18, 2017 1:31 PM
To: Sara Peterson
Cc: Aaron Bean (Assembly)

Sarah,

This e-mail is to serve as notice that I wish to appeal Mr. Hanson's response to my Public Records Request to the Assembly.

It's my understanding that the Assembly will be short, and maybe not even have a quorum on the 2-28 meeting. For that reason I wish to have this appeal heard at the 3-14 meeting.

Please advise me of when the deadline for submission of materials will be for that meeting.

Please let this email serve as notice of my desire to appear telephonically. I do not know my work schedule that far in advance and do not know if I will be able to appear in person. If it is possible to appear in person I will let you know as soon as I know.

Thank you,

Marko Dapceвич
503-956-6240

1. By call given at a regular or special meeting;
2. By service either orally or in writing of the call by any municipal officials or employee upon the mayor and each member of the assembly, provided:
 - a. That no such service need be made upon the officials, either mayor or assemblymen, who issue such call; and
 - b. Delivery of the call to any person residing or working therein, who is over the age of fourteen years, at the home or usual place of business of any assemblyman shall be equivalent to personal service or call upon the person so to be served.

D. All meetings shall be open to the public except that the following may be discussed in closed executive session:

1. Matters, the immediate knowledge of which would adversely affect the finances of the municipality;
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 ordinances are required to be confidential;
4. Communications with the municipal attorney or other legal advisors concerning legal matters affecting the municipality or legal consequences of past, present or future municipal actions.

E. Meetings will adjourn at ten-thirty p.m. unless extended by a unanimous vote of the members present. However, if seven members are present, meetings can be extended by a vote of at least six members, but the meeting will adjourn at eleven p.m. unless extended by a unanimous vote of all seven members.

F. The municipal administrator (or his/her designee) serving as chief administrative officer for the assembly; the municipal attorney to assure compliance with Alaska's Open Meetings Act and to advise on legal issues; and the municipal clerk as parliamentary advisor will attend executive sessions of the assembly, unless otherwise excluded in the motion to enter into executive session. Other persons may be invited into the executive session by an approved motion of the assembly and must be named in said motion.

(Ord. 14-41 § 4, 2015; Ord. 09-50 § 4, 2009; Ord. 01-1604 § 4, 2001; Ord. 87-747 § 4, 1987; Ord. 83-550 § 3, 1983; Ord. 83-531 § 3 (part), 1983; Ord. 72-4 (part), 1972.)

2.04.035 Introduction of ordinances and resolutions.

A. Introduction of Ordinances and Resolutions by the Assembly. Each ordinance and resolution introduced by an assembly member shall have the sponsorship of two assembly members before introduction of the ordinance and resolution. The supporters of the introduction of the ordinance and resolution shall be listed as sponsor and co-sponsor, and their names shall appear as such on the ordinance or resolution.