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Legal Opinion 2018-011

TO: City Council; Mayor John Engen; Dale Bickell; Leigh Griffing; Steve Johnson; Marty Rehbein; Kirsten Hands; Kelly Elam; Ginny Merriam; John Wilson

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE April 2, 2018

RE: Documents or materials protected by either the attorney-client privilege or attorney work-product privilege are not subject to release or disclosure pursuant to right to know article II, section 9, Montana constitution.

FACTS:

During the Monday evening, March 26, 2018, Missoula City Council meeting, a city council member, during the City Council consent agenda item pertaining to City payment of claims, requested a city attorney legal opinion pertaining to the Montana Constitution Right to Know provision and documents and materials related to outside legal services performed by legal counsel retained by the City of Missoula.

ISSUE(S):

May either attorney client privilege or attorney work product privilege apply to protect legal services performed by legal counsel retained by the City of Missoula from releases or disclosures of information pursuant to Montana's Constitutional right to know provision.

CONCLUSION(S):

Yes. The Montana Supreme Court in Nelson v. City of Billings, 2018 MT 36, 390 Mont. 290, 2018 Mont. LEXIS 48, held that documents protected by the attorney-client or attorney-work-product privileges are not subject to disclosure under Montana's Constitutional Right to Know provision set forth in Article II, section 9.

LEGAL DISCUSSION:

Article II, section 9 of the Montana Constitution is entitled "RIGHT TO KNOW". This Montana Constitutional provision provides:

“Section 9. RIGHT TO KNOW. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The Montana Supreme Court at page 7, paragraph 13 of its decision in Nelson v. City of Billings, *supra*, stated that, like other constitutional rights, the right to know is not absolute.

The Montana Supreme Court, in Nelson v. City of Billings, then went on at page 11, paragraph 19 to note that the Montana Constitutional convention transcript recognized that Montana Constitutional rights had to be balanced with a Montana Constitutional Right of Privacy in Article II, section 10, as well as noted at page 12 in paragraph 20, that the Montana Constitutional convention delegates also noted that in addition to individual privacy concerns there would also be instances “in which the right to know would not apply: when ‘necessary for the integrity of government’”.

Title 26, chapter 1, part 8 Montana Code Annotated is entitled, “PRIVILEGES”. Section 26-1-801, MCA, is entitled, “POLICY TO PROTECT CONFIDENTIALITY IN CERTAIN RELATIONS”. Section 26-1-801 MCA states:

26-1-801. Policy to protect confidentiality in certain relations. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part.

Section 26-1-803 MCA is entitled, “ATTORNEY-CLIENT PRIVILEGE”, Section 26-1-803 MCA states:

26-1-803. Attorney-client privilege. (1) An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or the advice given to the client in the course of professional employment.
(2) A client cannot, except voluntarily, be examined as to any communication made by the client to the client's attorney or the advice given to the client by the attorney in the course of the attorney's professional employment.

In addition, The Montana Supreme Court in Nelson v. City of Billings, *supra*, recognized the attorney-work product privilege as a well-established privilege in Montana, noting that the attorney work-product privilege has a long history in the United States and existed in Montana since long before the current Montana Constitutional Right To Know provision in Article II, section 9 was adopted.

The Montana Supreme Court in Nelson v. City of Billings stated at page 18, in paragraph 25 of its decision that:

“Evidentiary privileges-like the attorney-client and attorney-work-product privileges protect governmental agencies and employees like any other party to civil litigation to ensure ‘broader public interests in the observance of law and administration of justice.’ See *Upjohn Co.* 449 U. S. at 389, 101 S. Ct. at 682; *Jicarilla Apache Nation*, 564 U. S. at 170, 131 S. Ct. at 2321 (‘Governmental agencies and employees enjoy the same privilege as nongovernmental counterparts.’ (quoting 1 Restatement (Third) of the Law Governing Lawyers section 74 cmt. b (1998))). ATTORNEY-CLIENT AND ATTORNEY-WORK-PRODUCT PRIVILEGE ARE INTEGRAL TO THE OPERATION OF OUR LEGAL SYSTEM AND ENCOURAGE AN ATTORNEY’S CANDID ADVICE TO PREVENT OR RESOLVE DISPUTES.” (*Emphasis added*)

At pages 19 and 20 in paragraph 30, the Montana Supreme Court in Nelson v. City of Billings stated:

Given this history, the 1972 Convention proceedings, and the Constitution’s own Transition Schedule, we conclude that the Framers’ intent is manifest that the preexisting attorney-client and work-product privileges would carry forward inviolate as essential components of the preexisting legal system regardless of the broad, clear, and unambiguous language of Article II, Section 9. THEREFORE, WE HOLD THAT DOCUMENTS PROTECTED BY THE ATTORNEY-CLIENT OR ATTORNEY-WORK-PRODUCT PRIVILEGES ARE NOT SUBJECT TO DISCLOSURE UNDER ARTICLE II, SECTION 9.” (*Emphasis added*)

The Montana Supreme Court then concluded, in its final paragraph, paragraph 37, of its decision in Nelson v. City of Billings that:

“. . . The District Court appropriately recognized that Nelson’s position that the government cannot withhold privileged documents would be ‘antithetical to’ the public interests the privileges would serve and would render () the attorney client privilege (and attorney-work-product privilege) meaningless.’ . . . Based on the record before it, THE DISTRICT COURT CORRECTLY DETERMINED THAT DOCUMENTS PROTECTED BY THE ATTORNEY-CLIENT AND ATTORNEY-WORK PRODUCT PRIVILEGES WERE NOT SUBJECT TO RELEASE UNDER ARTICLE II, SECTION 9, OF THE MONTANA CONSTITUTION.” (*Emphasis added*)

CONCLUSION(S):

Yes. The Montana Supreme Court in Nelson v. City of Billings, 2018 MT 36, 390 Mont. 290, 2018 Mont. LEXIS 48, held that documents protected by the attorney-client or attorney-work-product privileges are not subject to disclosure under Montana’s Constitutional Right to Know provision set forth in Article II, section 9.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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