

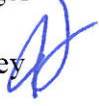


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Memorandum

To: Gregory T. Doyon, City Manager

From: James W. Santoro, City Attorney 

Re: Legal Opinion: Public's Right to Know/Participate in Southern/SME Board Documents/Meetings

Date: April 16, 2010

cc: Mayor Winters
City Commissioners

I am writing in response to your request for an opinion whether the public has the right to know and the right to participate in Southern/SME ("Southern") Board meetings.

As a public entity, the City of Great Falls has a legal duty and responsibility to allow public access to public documents and public records in its possession. Thus, it is paramount to determine what information is open to public access and insure that the public is given such access while protecting a corporation's trade secrets and proprietary interests.

Our Montana's 1972 Constitution has two key right to know sections that are the strongest in the nation guaranteeing citizens' right to inspect public records and attend meetings of government agencies at all levels of state and local government. Article II, Section 8, Mont. Const. (Right of Participation), reads that [t]he public has the right to expect government agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

Article II, Section 9, Mont. Const. (Right to Know), states that [n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of the state government and its subdivisions, except in cases where the demand of individual privacy clearly exceeds the merits of public disclosure. Discretionary disclosure based on "best interests" or "desirable or helpful" fail to withstand constitutional scrutiny. *See, Wordan v. Mt. Board of Pardons and Parole*, 289 Mont. 459, 962 P.2d 1157 (1998); *See also, Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 859 P.2d

435 (1993).¹ Trade secrets are used in one's business to gain advantage over competitors who do not know the secret. They are private property that could be rendered valueless by compelled exposure. *Mountain States Telephone and Telegraph Co. v. Dept. of Pub. Serv. Reg.*, 194 Mont. 277, 634 P.2d 181 (1981).

In effect, Article II, Sections 8 and 9, *supra*, impose an "affirmative" duty on government officials to make all of their records and proceedings available to public scrutiny. Consequently, there is a *constitutional presumption* that all documents of every kind in the hands of public officials are amenable to inspection, regardless of legislation, special exceptions made to accommodate the exercise of constitutional police power, and other competing constitutional interests, such as due process. See, *Great Falls Tribune v. Montana Public Service Comm'n*, 319 Mont. 38, 2003 MT 359, 82 P.3d 876 (2003).

A. Access to Public Documents.

Article II, Section 9 of the Montana Constitution and Sections 2-6-102, 104 and 110, Montana Code Annotated, govern access to public documents.² Specifically, Section 2-6-102, Montana Code Annotated, gives citizens the right to inspect and copy any "public writings" of the state, except as prohibited by statute. The law makes no distinction between "draft" documents and completed documents. Section 2-6-104, Montana Code Annotated, states that public records are available for inspection at all times during office hours and Section 2-6-110, Montana Code Annotated, provides that each person is entitled to a copy of public information in electronic form, upon payment of a fee for the time and materials used to transfer the data.

When in doubt, agencies should favor disclosure over secrecy. Section 2-3-201 Mont. Code Annotated; See also, *Bryan v. Yellowstone County Elementary School District No. 2*, 312 Mont. 257, 60 P.3d 381 (2002), citing *SJL of Mont. v. City of Billings*, 263 Mont. 142, 867 P.2d 1084 (1993).

B. Access to Meetings.

Title 2, Chapter 3 of the Montana Code Annotated defines access to meetings in Montana. Specifically, Section 2-3-201, Montana Code Annotated, declares the Legislature's intent that "public boards, commissions, councils and other public agencies in this state exist to aid in the conduct of the peoples' business." It further declares that provisions of this part of the law "shall be liberally construed" in favor of openness. In Section 2-3-202, Montana Code Annotated, a meeting is defined as the convening of a quorum of a public agency to hear, discuss or act upon a matter over which the agency has control or advisory power. If there is any doubt regarding significant public interest, the matter must be resolved in favor of public participation. *47 Mont. A.G. Op. 13 (1998)*.

¹ Our Montana Supreme Court has held that the public right to know provisions in the Montana Constitution are "...designed to provide the public information to enable citizens to determine the propriety of government action." *Great Falls Tribune v. Public Schools*, 841 P.2d 502, 504 (1992).

² Section 2-6-101, Montana Code Annotated, defines public records as "the written acts or records of the acts of ... public officers, legislative, judicial and executive," or as "public records kept in this state of private writings" (with exceptions).

C. Meetings of a Corporation that Receives Public Funds are Subject to Montana's Right to Know laws.

Any entity, be it **private or public**, that receives or expends public funds is subject to open meeting laws. Section 2-3-203(1), Montana Code Annotated, reads that [a]ll meetings of governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies **supported in whole or in part by public funds or expending public funds, including the supreme court, must be open to the public.** *Id.*³ (Emphasis added).

A presiding officer may close a meeting for discussion of a matter involving individual privacy, but only if the officer determines that the demand of individual privacy clearly exceeds the merits of public disclosure. The right to individual privacy may be waived by the individual about whom the discussion pertains. Meetings may be closed to discuss litigation strategy when an open meeting would have a detrimental effect on the position of the public agency.

The Right of Individual Privacy Does Not Extend to Corporations. After repeatedly upholding this notion, the Montana Supreme Court abandoned this position, ruling that the Montana Constitution never intended to give a privacy right to "non-human entities." The ruling came in a lawsuit filed by news groups seeking access to power-purchase deals that a former utility had filed with the Montana Public Service Commission. The court held that nothing in the state constitution requires disclosure of trade secrets and other confidential proprietary information where the data is protected by statute. *Great Falls Tribune v. Montana Public Service Commission*, 359, 319 Mont. 38, 82 P.3d 876 (2003).

A private, nonprofit corporation that contracted with the state to restore and preserve state-owned property was considered a public body within the meaning of the open meeting laws because the corporation was performing a public function and was receiving funds generated by public property. *See, 42 A.G. Op. 42 (1987)*. In 1996, an Attorney General's Opinion (46 A.G. Op. 24 (1996)) emphasized that Montana's constitutional right to know and open meeting laws are to be liberally construed when a Life and Health Insurance Guaranty Association Board of Directors is recognized as a public body statutorily organized to protect insured members of the public from the extraordinary event of insurance company insolvency. *Id.* The Attorney General's Opinion held that the Association's Board of Directors are subject to the open meeting laws, and that the Association may close a meeting "only when and to the extent that the demands of individual privacy clearly exceed the merits of public disclosure." *Id.*⁴

Here, Southern is a private, nonprofit corporation that has contracted with the City of Great Falls; Southern is supported in whole or in part by public funds as well as expends public

³ The meetings of a chamber of commerce that receives bed tax monies must be open. *44 Mont. A.G. Op. 40 (1992)*.

⁴ The proceedings of the Montana Self-Insurers Guaranty Fund Board of Directors are subject to the Montana Administrative Procedure Act and the Open Meeting Laws. *See, 46 A.G. Op. 1 (1995)*.

funds for its capital ventures. Further, Southern is organized to protect and provide energy to the citizens of the City of Great Falls and to other customers. Southern and the City of Great Falls work with their members to improve the quality of life and the economic and social well-being of the region. See, Attorney General's Opinion (46 A.G. Op. 24 (1996)). The reality in Montana is that the public's right to know follows the money. This is no accident.

D. Exception to Montana's Right to Know Laws.

Trade secrets may be protected under current Montana law. A trade secret is defined as information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. See, Section 30-14-402(4), Montana Code Annotated.

While non-human entities do not enjoy privacy rights under the right of privacy provision of the Montana Constitution, nothing in Article II, Section 9, requires disclosure of trade secrets and other confidential proprietary information where the data is protected from disclosure elsewhere in the federal or state constitutions or by statute. See, 319 Mont. 38, 82 P.3d 876. A non-human corporate entity may enjoy confidentiality of its property interests under Montana statutory law, such as the Uniform Trade Secrets Act, Title 30, Chapter 14, Part 4, or protection against the "taking" of private property for public use without just compensation under the federal and state constitutions. *Id.* Such cases implicate the due process and equal protection clauses of the state and federal constitutions and form the legal grounds through which non-human entities can seek protection of confidential information. *Id.*

However, a non-human entity seeking protective orders or other protective measures for materials filed with a regulating governmental agency, such as the PSC, must support its claim of confidentiality by filing a supporting affidavit making a prima facie showing that the materials constitute property rights which are protected under constitutional due process requirements. *Id.* The claimant's showing must be more than conclusory and must be specific enough for any objecting parties and reviewing authorities to clearly understand the nature and basis of the public utility's claims to the right of confidentiality. *Great Falls Tribune v. Montana Public Service Commission*, 359, 319 Mont. 38, 82 P.3d 876 (2003).

In *Great Falls Tribune*, the court ruled that the governmental agency has the affirmative duty to review at the time of filing of the alleged confidential records of a non-human entity, and the hereinafter required supporting affidavits, and make an independent determination whether the records are in fact property rights which warrant due process protection under the applicable state or federal law. See, *Id.*

As a starting point, when determining whether certain information constitutes a trade secret, the agency will necessarily determine whether private documents filed with a governmental agency are subject to the public's constitutional "right to know," pursuant to Article II, Section 9, Mont. Const. *Id.*

[D]ocuments filed by corporate entities with public agencies...are presumptively available for access by the public under Montana's Constitution. The burden rests with the filing entity to establish prima facie proof that the information is a discernible property right entitled to protection. When the State of Montana obtains access to private property in the form of genuine trade secrets or other confidential proprietary information by compelling its production for filing with a governmental regulatory agency, such as the PSC, the information's status as a trade secret or confidential proprietary information remains unchanged.

See, 319 Mont. 38, 82 P.3d 876.

Southern's Desire to Maintain Company Secrets Must Be Reasonable. In cases where a claimant seeks statutory protection from public disclosure under Montana's Uniform Trade Secrets Act, the claimant's efforts to maintain the information's secrecy must be "reasonable under the circumstances." See, Section 30-14-402(4)(b), Montana Code Annotated.

What is reasonable under the circumstances should be entirely different in the context of a utility filing contracts with an agency, as compared to an exchange of information between private parties. **In other words, one might expect a more encompassing definition of a trade secret in litigation between private parties than would be recognized when a utility files a document with the PSC. Certainly the fact that the contracts, although private, were negotiated for the benefit of the public must be taken into consideration.**

319 Mont. 38, 82 P.3d 876. (Emphasis added).

Now, after considering all of the circumstances, the information is determined by a governmental agency or reviewing authority to qualify as a property right in the form of a "trade secret" which warrants due process protections, secrecy can be preserved by the agency through: "*reasonable means*, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval". *Id.*

Specifically, if Southern is going to claim that a document contains trade secret information, it must support its claim of confidentiality by filing a supporting affidavit making a prima facie showing that the materials constitute property rights that are protected under constitutional due process requirements. See, *Great Falls Tribune*, 319 Mont. 38, 82 P.3d 876. If Southern claims such statutory protection from public disclosure, supported by affidavits justifying the same, and if a review by the City also supports such affidavits and claims, then secrecy may be preserved. *Id.*

E. Southern Must Release Documents.

Southern must comply with Montana law and release or provide for public inspection all documents including, but not limited to, Southern Board minutes (April 2008 to present),

Board packet materials, files, notes and other documents acquired and in the possession of Southern.⁵ There exists no constitutional, statutory or case law grounds to bar public access to Southern's documents, except those documents that contain trade secrets and other confidential proprietary information.

F. Southern Must Open All Board Meetings to the Public, Except for Trade Secret/Proprietary Interest Discussions.

Southern must comply with Montana law and open all Board meetings. Montana laws are to be liberally construed in favor of openness, especially when a corporation receives or expends public funds. See, Section 2-3-203(1), Montana Code Annotated. A decision by the Southern Board to conduct any step in the deliberation process outside of the public forum must weigh the public interest in the right to know against any potential harm that could result from open deliberations.

An Executive Session. Southern may move to an executive session to discuss trade secrets or confidential proprietary information. An executive session is a portion of a public meeting that is conducted in private with only members of the Corporation and any person(s) invited in by the Corporation. All executive sessions must first be convened as a public meeting and a motion must be made, seconded and passed, to recess to executive session. The reason for a formal motion is to identify the basis for executive session and enable members and participants of the open meeting to know the parameters of the subject matter to be discussed in private. Also, it allows the courts to review the propriety of the grounds stated as the basis for the closed session. Once a motion is passed, the meeting's officer may move the meeting to another location away from the public or may ask the public to leave the area, until the executive session ends. At the conclusion of the executive session, the public meeting must be reconvened.⁶ Remember, an executive session discusses only those items that fall into the trade secret/proprietary interest category.

Remedies Available Should a Meeting be Illegally Closed. A decision made in an improperly closed meeting may be voided by an action brought in district court within 30 days of the decision (Section 2-3-13, Montana Code Annotated) and a successful plaintiff can be awarded attorney fees. See, Section 2-3-221, Montana Code Annotated.

Conclusion

It is my opinion that Southern meetings must be open to the public with the exception of trade secrets and proprietary interest discussions. Further, it is my opinion that the public has a right to access any and all documents given to the City of Great Falls from Southern, unless Southern demonstrates a showing of a discernible property right protection. *Great Falls Tribune*.

I hope this adequately addressed your questions. Clearly, there exists a dysfunction and a

⁵ The agreement between Southern and the City to keep information confidential is not enforceable and cannot serve as a basis for withholding access. See, Judge Philip's Order of March 8, 2010.

⁶ Ann Taylor Schwing, *Open Meeting Laws* (1994).

disconnect between Southern and the City of Great Falls on the right to know/participate and the right to protect. The City of Great Falls cannot escape its legal obligations imposed by law of changing titles, positions or organizational makeup.