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Legal Opinion 2015-022

TO: Mayor John Engen; City Council; Marty Rehbein
CC: Legal Department Staff
FROM: Jim Nugent, City Attorney
DATE: July 22, 2015
RE: Statutory authority for public bodies to close some meeting discussions pertaining to litigation. Minutes of closed meeting must be kept.

FACTS:

The District Court judge in the City of Missoula's eminent domain lawsuit to acquire the Mountain Water Company Missoula community water system has thus far indicated that the parties are not to publicly provide perceived water system valuation monetary amounts. However, pursuant to Montana state eminent domain law statutory process and procedure, the City of Missoula desires to respond to a purported valuation monetary amount submitted under seal to the district court by the Mountain Water Company water system owners and employees to the district court. The City of Missoula is not currently allowed to publicly disclose the monetary amount identified pursuant to the sealed submittal to district court.

ISSUE:

May the Missoula City Council close a city council meeting to discuss the monetary amount being requested for the acquisition of the Mountain Water Company water system?

CONCLUSION:

Pursuant to subsection 2-3-203(4) MCA the Montana State Legislature has authorized a public body to close a meeting to discuss litigation strategy as long as the only parties in the litigation are not all public bodies.

LEGAL DISCUSSION:

Title 2 MCA is entitled "GOVERNMENT STRUCTURE AND ADMINISTRATION". Title 2, chapter 3 MCA is entitled "PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS". Title 2, chapter 3, part 2 MCA is entitled "OPEN MEETINGS". Section 2-3-

203 MCA pertains to the meetings of public bodies that must be open to the public. Section 2-3-203 MCA provides:

- 2-3-203. Meetings of public agencies and certain associations of public agencies to be open to public -- exceptions.** (1) All meetings of public or 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.
- (2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public.
- (3) The presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.
- (4) (a) Except as provided in subsection (4)(b), a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency.
- (b) A meeting may not be closed to discuss strategy to be followed in litigation in which the only parties are public bodies or associations described in subsections (1) and (2).
- (5) The Supreme Court may close a meeting that involves judicial deliberations in an adversarial proceeding.
- (6) Any committee or subcommittee appointed by a public body or an association described in subsection (2) for the purpose of conducting business that is within the jurisdiction of that agency is subject to the requirements of this section. (emphasis added)

Mountain Water Company is not a public governmental body; so the City of Missoula's eminent domain litigation is not litigation involving only public bodies. Thus, subsection 2-3-203(4)(a) MCA is the applicable statutory provision.

Minutes must be kept of the closed meeting; but the meeting minutes will not be public record minutes unless a court rules that they are to be made public. Section 2-3-212 MCA sets forth what information must be included in the keeping of the minutes of a meeting of a public body.

- 2-3-212. Minutes of meetings -- public inspection.** (1) Appropriate minutes of all meetings required by 2-3-203 to be open must be kept and must be available for inspection by the public. If an audio recording of a meeting is made and designated as official, the recording constitutes the official record of the meeting. If an official recording is made, a written record of the meeting must also be made and must include the information specified in subsection (2).
- (2) Minutes must include without limitation:
- (a) the date, time, and place of the meeting;
- (b) a list of the individual members of the public body, agency, or organization who were in attendance;

- (c) the substance of all matters proposed, discussed, or decided; and
 - (d) at the request of any member, a record of votes by individual members for any votes taken.
- (3) If the minutes are recorded and designated as the official record, a log or time stamp for each main agenda item is required for the purpose of providing assistance to the public in accessing that portion of the meeting.

CONCLUSION:

Pursuant to subsection 2-3-203(4) MCA the Montana State Legislature has authorized a public body to close a meeting to discuss litigation strategy as long as the only parties in the litigation are not all public bodies.

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/s/ _____
Jim Nugent, City Attorney
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