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**REYNOLDS, MOTL &
SHERWOOD**

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

No. CDV-07-614

**MONTANA ENVIRONMENTAL
INFORMATION CENTER,**)

Judge E. Wayne Phillips

Plaintiff,)

vs.)

**CITY OF GREAT FALLS and
SOUTHERN MONTANA ELECTRIC
GENERATION AND TRANSMISSION
COOPERATIVE, INC.,**)

**ORDER ON
MOTION FOR SUMMARY JUDGMENT -
RELEASE OF DOCUMENTS**

Defendants,)

**MONTANA NEWSPAPER
ASSOCIATION,**)

Intervenor.)

Plaintiff Montana Environmental Information Center ("MEIC") sought through summary judgment release of "the entire file" possessed by the City of Great Falls with regard to the City's relationship with Southern Montana Electric Generation and Transmission Cooperative, Inc. ("SME") and their proposed partnership in an electric generating plant. The city had refused to disclose documents to MEIC for a number of reasons, including attorney-client privilege trade secret protection.

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2 By Order dated July 28, 2009, this Court ordered SME to submit the following
3 documents: 1) the relevant engagement letter or other evidence of attorney-client
4 relationship; 2) each document for which it claims the privilege; 3) for each
5 document for which it claims this privilege, specific identification of the language
6 thus privileged; and 4) a specific articulation of the grounds for privilege and
7 specific identification of whether SME is claiming privilege on its own behalf or on
8 Great Falls' behalf. July 28, 2009 Order, p. 16.
9

10 SME was also to provide "[A] specific list of which portion of which document
11 it claims is protected from disclosure by the statute, with a specific rationale for
12 each alleged secret including the relevant documents." Order, p. 18. What was
13 submitted were two Banker's Boxes of 16 separate, rubber-banded stacks of
14 documents. In total, the documents created a stack 22" tall. The material in the two
15 boxes was not cross-referenced by a master list. The Court has spent twelve and
16 one-quarter hours reviewing what amounted to approximately one-third of the
17 documents. Its exasperation quotient, as described more fully below, having been
18 reached, the Court stopped there.
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22 First, the Court notes that it requested some assistance from MEIC and
23 Intervenor Montana Newspaper Association ("MNA"). The Court's request was an
24 impossible task under the circumstances, but the Court compliments and commends
25 MEIC and MNA for their effort and their assistance, as articulated in their September
26 25, 2009 filing. In essence, they recognized what the Court hoped would not be true

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2 - that the matter would require a slow slog through a myriad of documents: "The
3 task of identifying a privileged document in this case is like asking a book critic to
4 perform a critical review of a new novel by reading the jacket description."

5 Response, p. 4.

6
7 Given that the burden is on SME to overcome a presumption of public access
8 to the documents claimed as privileged or confidential, *Great Falls Trib. v. PSC*, 2003
9 MT 359, 319 Mont. 38, ¶ 57. 82 P.3d 876, it is equitable that the Court adopt, with
10 appropriate modifications, the roadmap analysis of that slow slog by MEIC/MNA.

11 The Court does so:

12
13 First, the Court has already mostly resolved claims of attorney-
14 client privilege. The Defendants have failed to produce any
15 evidence of a retainer agreement between the City and the
16 attorneys for SME and as requested by the Court. Therefore,
17 provision of documents to the City which might otherwise contain
18 communications between SME and its attorneys constitutes an
19 express waiver of the privilege and cannot serve as a basis for
20 denying access. *Id.*

21
22 Second, as noted in the Affidavit of Anne Hedges, it is apparent that
23 at least some documents to which SME now claims the privilege
24 applies were already provided to MEIC and the public. *Id.*, p. 6.

25
26 Third, this Court expressly ruled that the existence of an
agreement between SME and the City to keep information
confidential is not enforceable and cannot serve as a basis for
withholding access. Moreover, the existence of a confidentiality
agreement between SME and third parties cannot serve as a basis
for denying access to documents covered by such agreements but
provided voluntarily to the City by SME. "Great Falls may not,
therefore, bar public access to documents based on a claim of
confidentiality entered into by Great Falls or by SME regarding
documents in Great Falls' possession." (July 28th Order, p. 15, ¶¶
24-26.) *Id.*, p. 7.

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2 Fourth, the only documents, then, which are yet unresolved are
3 those containing information which might contain legitimate
4 trades secrets. In the first privilege log, a 'legend' prefaced the log
5 parsing the various documents and assigning the basis for the
6 privilege among the Bates numbered documents. In the second,
7 most recent, log, SME extended the "trade secret" assertion to all
8 documents. The Court agrees with MEIC/MNA that any documents
9 not originally designated a "trade secret" should be released.
10 Those documents include Documents numbered 40 through 44 in
11 the original privilege log. *Id.*, p. 9.

12 Fifth, the remaining categories of claims – that opponents to HGP
13 could use the information, and a litigation position might be
14 affected ("Documents Regarding Yellowstone Valley Litigation",
15 and "Southern Board Meeting Minutes") – simply do not rise to the
16 level of a trade secret as defined in UTSA. Indeed, giving SME all
17 benefits of doubt, the only documents which might contain trade
18 secret information are SME usage and capital information. Even
19 granting that, SME has not given the Court any basis for
20 determining whether this outdated information has any present
21 economic value and if so, whether the disclosure of the
22 information would cause SME any economic harm.

23 This Court will first address the framework of public access to public records
24 and the public's right to know under Montana law which provides the legal
25 foundation for utilizing the roadmap principles articulated above.

26 Public Records and the Public's Right to Know

Section 2-6-102(1) MCA provides that "[e]very citizen has a right to inspect
and take a copy of any public writings of this state, except as provided in 22-1-1103,
22-3-807, or subsection (3) of this section and as otherwise expressly provided by
statute." "[P]ublic writings" are "the written acts or records of the acts of the
sovereign authority, of official bodies and tribunals, and of public officers,

1 legislative, judicial,” including, “public records, kept in this state, of private writings,
2 including electronic mail, except as provided in § 22-1-1103 and § 22-3-807.”

3 Excepted are “records that are constitutionally protected from disclosure.” § 2-6-
4 101 (a)-(b) MCA. Emphasis added. Neither § 22-1-1103 nor § 22-3-807 apply here.
5

6 Article II, Section 9 of the Montana Constitution expresses the public’s right to
7 know: “no person shall be deprived of the right to examine documents or to observe
8 the deliberations of all public bodies or agencies of state government and its
9 subdivisions, except in cases in which the demand of individual privacy clearly
10 exceeds the merits of public disclosure.” In its previous order on Summary
11 Judgment, this Court recognized the legal principle that corporations, as non-human
12 entities, do not have individual privacy rights. Consequently, this Constitutional
13 provision is inapplicable. *Great Falls*, ¶ 39.
14
15

16 No constitutional grounds exist to bar public access to SME’s documents.
17 Great Falls may not, therefore, bar public access to documents based on a claim of a
18 confidentiality entered into either by Great Falls or by SME regarding documents in
19 Great Falls’ possession.
20

21 Attorney Client Privilege and Attorney Work Product

22 Under Montana law, the principle of attorney-client privilege prevents the
23 unwilling examination of a client regarding any communication made to or received
24 from counsel while employed by that client. § 26-1-803, MCA. The case that SME
25 cites in defense of its right to assert attorney client privilege, *Inter Fluve*, more
26

1 strongly supports Plaintiff's position than SME's. In that case, a former corporate
2 board member sought discovery documents generated by corporate counsel during
3 the director's tenure. Though SME did not so represent, this Court finds that the
4 Supreme Court's decision established that both the directors and the corporation
5 were co-clients of corporate counsel, that the privilege could be waived by the
6 director on behalf of the corporation, and that neither of them, once their interests
7 were adverse, could assert the privilege against the other. *Id.* at ¶ 35.

8
9
10 SME hasn't submitted an engagement letter reflecting the identity of client or
11 counsel in this case. Mere possession of SME-attorney communication by Great
12 Falls relating to a joint project does not establish an attorney client relationship
13 between the City and counsel.

14 Trade Secrets

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16
17 The parties agree that *Great Falls* is controlling precedent. In that case, a
18 newspaper sought access to documents a private corporation had been required to
19 file with the Public Service Commission and for which the corporation had sought a
20 protective order from the PSC at filing. The Supreme Court noted that trade secrets
21 and other confidential proprietary information might qualify for protection from
22 disclosure to the public under a takings theory but that documents filed with a
23 public entity were presumptively subject to the public's right to know. *Id.* at ¶ 60.
24 The Court also held that an entity seeking protection for those documents "must
25 support its claim of confidentiality by filing a supporting affidavit making a prima
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1
2 facie showing that the materials constitute property rights which are protected. .
3 .[which] must be more than conclusory.” *Id.* at ¶ 56. Finally, where a claimant seeks
4 statutory protection from public disclosure under Montana’s Uniform Trade Secrets
5 Act, the claimant’s efforts must be reasonable under the circumstances,” in
6 accordance with that Act. *Id.* at ¶ 61.
7

8 Before the Court turns to the documents it reviewed, it is important to note at
9 the outset that there is an interplay here of two separate business entities: SMEGTC
10 and SME-EGT&C. The latter was formed after the partnership represented in the
11 former fractured and resulted in separate litigation in Yellowstone County.
12 *Yellowstone Valley Elec. Co-Op, Inc. v. Southern MT Elect. Co-Op, Inc. et al.* Cause No.
13 DV-08-1797 (13th Jud. Dist. Ct.). Of relevance to this matter is that SME’s claims of
14 privilege/confidentiality arise, in part, from that litigation.
15
16

17 Outlined below is a summary of the documents reviewed and brief
18 commentary. This section is deemed by the Court to represent Findings of Fact with
19 regard to the documents identified.
20

21 **Document # 007263.**

22 This states *in toto* “Hi Coleen. I finalized the draft you sent back to me on
23 Friday. Everything looked fine to me. I’m going to forward it on to Onkar and
24 Sandip. I’ll copy you.” That, according to Defendant, is a document which contains a
25 trade secret, or, as Defendant specifically stated:
26

This document discusses negotiations between Southern and the
named business, which was a potential customer of Southern.

1
2 Given the competitive nature of the electric utility business and the
3 economic value inherent in negotiations with potential customers,
4 these negotiations and this business relationship derive their
5 economic value from not being generally known to others in the
6 industry. In addition, the parties' Confidentiality Agreement,
7 although not determinative here, provides additional evidence of
8 the high importance and economic value associated with keeping
9 the information confidential.

10 **Document # 006789-790.**

11 For this document, the Privilege Log stated: "The named electric cooperative
12 is a competitor of Southern . . . the business information and strategies contained in
13 the e-mail, which concern this highly competitive relationship, derive their
14 economic value from not being generally known to others in the industry . . ."

15 Privilege Log.

16 The Court prints this document's contents in full:

17 Team: I reviewed a publication by the Environmental Integrity
18 Project, an environmental organization based in DC, on the dirtiest
19 400 coal-fired plants in the country that was circulated by Jeff last
20 week and Basin's Leland Olds Plant in ND tops the list. It had the
21 35th highest Sox, 19th highest CO₂, 24th highest NO_x and 37th
22 highest mercury emissions. In addition, its Antelope Valley plant
23 in ND ws (sic) 45th on the overall list, including being the 45th
24 highest mercury emitter (410 lbs). Further, its Laramie River
25 Station in WHY was 23rd on the list of CO₂ emitters, 37th on the list
26 of NO_x emitters and 31st on the list of mercury emitters (660 lbs).
Colstrip ranked 259th for SO₂, 55th for NO_x, 57th for CO₂ and 62nd
for mercury. Assuming the correctness of these rankings, we can
safely say to MEIC and others that they're barking up the wrong
tree by trying to block our clean coal project from being permitted
rather than going after Colstrip, Basin Electric and other dirty
plants. Ken Reich.

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Document # 15048.

This is the same as the previous Document # 006789-790.

Document # 008222.

Here negotiation strategy is claimed as well. However, it does not explain who the recipient Dave Swanson is. Its primary intent is to address the politics of electricity sale "to a business in another city that is competing with us for economic development." The Court's perplexity is: Where are the trade secrets? The broad general discussions in Documents # 008222, # 008222-224, # 088250 do not reveal information that would harm or reveal anything.

Document # 201341.

This is communication to City Commissioner Bronson.

Documents # 007599, # 007600 and # 007824.

Straightforward commentary on little that could be deemed privileged.

Document # 201418.

This alleges competitor information as a trade secret. It is entitled "Questions from Cascade Co." It is political commentary and hyperbole, even asserting that the County might as well "put up 'This County is Closed for Business' signs." (emphasis original).

Document # 007623.

This is written to Lawton and Balzarini (ID'd in Log as "City").

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Document # 008356.

This alleges proprietary discussions. It is actually part of the dispute between YVEC and SME.

Document # 008357.

This is a communication from YVEC to Montana Hydro Electric – how can Southern claim confidentiality on this communication between two other parties?

Document # 201363-4.

This is weighted average price of electricity traded in Mid-Columbia. As noted on the document, it is a copy of a “Dow Jones U.S. Daily Electricity Price Indexes.” This Court accessed this information via <http://www.djindexes.com/mdsidx/?event=energyUSDaily>. It is described in the Privilege Log as “Confidential pricing information from supplier.”

Document # 201507.

This is a communication from Lawton (City of Great Falls) to Gregori and Balzarini.

Document # 100031.

This refers to Bonneville Power Administration and a U.S. Department of Energy Agency called the West Area Power Administration. All agencies subject to the Federal Freedom of Information Act.

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Document # 107393 - # 107395.

This is a "Workplace Profile for John Lawton." This document is about "INTP: Life's Conceptualizers" who, apparently, "are free-spirited idea mills and absent-minded professors, which makes them fun to be around." While this pop-Psychology Today take on individual typologies goes on at some length, it has no more trade secrets in it than an issue of that magazine would.

Document # 107387.

This is a Vision and Mission Statement so generic in its content that a business school student could submit it as a class assignment.

Document # 107824.

This is a memo from the City Manager.

Document # 107645.

This is a power plant tour memo detailing extraordinarily privileged and trade secret material such as phone numbers for making room reservations, dinner plans, and flight itinerary.

Document # 107831, et seq.

This details rate calculations, cost of power, and member system consumption but are all projections from December 2003. If the rapid changes in the U.S. energy market over 6 months is not sufficient to make this information totally irrelevant, surely the passage of 6 years is.

1 **Privilege Log containing Documents # 007609-610, # 008250, #008371-372,**
2
3 **# 008252-53, # 008256-58, # 007313-14, # 201452, # 007726, # 007728,**
4 **# 008232-35, # 008236-37, # 008247-49, # 008377-81, # 201379.**

5 This contains one document that should be, and hereby is, sealed (# 008378).

6 Nearly all the rest are "Can we meet?" memos.

7
8 **Privilege Log containing documents # 100531-548, # 100568-569, #100675-**
9 **676, # 101057-062, # 101818-837, # 101948-949, # 101725, #101951-952,**
10 **#102103-105, # 102259-261, # 102358-359, # 102415-416, # 102568-570,**
11 **# 102773-774, # 102933-949, # 103054, # 105086, 103070-071, # 105102-**
12 **104, # 103220-230, # 103412-419, # 103546-547, # 103637-641, # 103715-**
13 **720, # 103768-770, # 103809-811, # 103846-847, # 103903-907, # 103845,**
14 **# 103992, # 104009, # 104030, # 104078-083, # 104138, # 104252-255,**
15 **# 104384-385, # 104608-615, # 104774-778, # 104924-925, # 104966-972,**
16 **# 105221-222, # 105237-239, # 105264-267, # 105288, # 105427-428,**
17 **# 105444-446, # 105542-543, # 105578-580, # 105591, # 105606-608,**
18 **# 105619, # 105709-710, # 105731-737, # 105761, # 105782-783, # 105874-**
19 **876, # 105906, # 105929, # 106051-052, # 106099-100, # 106197, # 106241,**
20 **# 106242-243, # 106263-264, # 106428, # 106542-549, # 106572, # 106687,**
21 **# 106699, # 106887-888, # 106962-967, # 107023-025, # 107143-144.**

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25 This log has documents the vast majority of which are communications to a
26 government entity (City). Just when the Court might believe there is a basis for the

1
2 claimed attorney-client privilege in these documents, there is a document like #
3 103070-71 which is merely a copy of a newspaper article. Is that privileged even if
4 from attorney to client?

5 **Document number 008261.**

6
7 This presents the same, exact negotiations language as indicated for
8 Document # 008222 but does discuss specific prices and offer. It is sealed. The
9 same is true regarding Documents # 008254, # 008255, # 201344-45. They are
10 sealed as well.

11 **Document # 010492.**

12
13 This document is typical of so many in that it is addressed to a government
14 entity yet clearly can be deemed to be within the attorney-client privilege and is
15 sealed.

16
17 The Court specifically notes, in case it was not made evident in the
18 introduction of this Order, that it reviewed at least one-third of the documents
19 submitted by Defendant. While the document listing contained above does not
20 discuss each and every document reviewed, it is only because the ones chosen were
21 representative of what the Court found.

22
23 As noted earlier, Defendants have the burden of demonstrating that the
24 presumption of public access to the documents submitted is overcome. *Tribune @ ¶*
25 57, 82 P.3d 876, ¶ 57. Furthermore, this Court ordered Defendants to specifically
26 articulate the grounds for exercise of the privilege identified.

1
2 The documents specified above clearly and convincingly demonstrate that
3 Defendants did not review their documents thoroughly but, in this Court's opinion,
4 literally and figuratively dumped two boxes of documents on the Court's desk and
5 expected the Court to do the work.

6
7 The document reviews previously outlined are filled with nonsense
8 documents that could never be construed as privileged in any way, As stated, these
9 were just samples of more of the same.

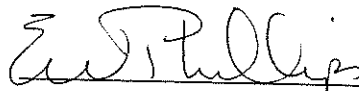
10 It is unquestionable that the Court found several documents that should be
11 sealed and which, as indicated, it did. However, the Defendants have not even begun
12 to meet their burden and the Court will not spend the 24 some odd hours needed to
13 wade through the remaining documents just to find those few which meet the
14 privilege. Having had an opportunity to carefully scrutinize their documents and
15 seek this Court's decision on sealing, they have completely exasperated the Court's
16 patience by utter failure of review. The quality of that review was so abysmal they
17 shall not have a second bite at the apple. Therefore, given their inability to sustain
18 their constitutional burden, given their failure to comply with this Court's Order on
19 submission, given their previous release of documents to the Plaintiff which they
20 then claimed before this Court as privileged, given the patent absurdity of claiming
21 privilege for many of the documents, given the analysis and conclusions in this
22 Court's July 28, 2009 Order, and given the clear constitutional right of Montana
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2 citizens to view documents of their governmental entities, the Plaintiff's Motion for
3 Summary Judgment is **Granted**.

4 Except for those specific documents identified in this Order, all other
5 documents shall be released to Plaintiff. Defendants have ten (10) days from the
6 date of this Order to locate the documents identified as privileged and have them
7 marked as sealed by the Clerk of Court. Failure to do so in that time frame shall
8 result in those documents being released to Plaintiff as well.

9
10 The Clerk of Court is directed to file this Order On Motion For Summary
11 Judgment - Release of Documents and provide copies to counsel of record.

12 DATED this 8 day of March 2010.

13
14 

15 **DISTRICT COURT JUDGE**

16 Hon. E. Wayne Phillips

17 P. O. Box 1124

18 Lewistown, Montana 59457

19 Telephone: (406) 535-8028

20 Facsimile: (406) 535-6076

21 c: David K. W. Wilson, Jr., Esq.
22 c: Peter Michael Meloy, Esq.
23 c: Chad G. Parker, Esq.
24 c: Mary Jaraczeski, Esq.
25 c: Robert Griffin, Esq.

26 CDV-07-614.J