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Montana Supreme Court Holds Documents Protected by Attorney-Client Privilege or Work Product Not Subject to Disclosure Under State Constitution

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Article II, Section 9 of the Montana state constitution protects the right to examine documents of public agencies. In [Nelson v. City of Billings](#), the Montana Supreme Court held the state constitution did not require disclosure of attorney-client communications or attorney work product.

Article II, Section 9 provides, "No person shall be deprived of the right to examine documents of all public bodies or agencies . . . except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Kevin Nelson claimed that because the only express exemption to this constitutional provision was "individual privacy," attorney-client and work product documents were not exempt from disclosure.

The Court disagreed, looking to the legislative history from the 1972 constitutional convention to conclude the framers of the state constitution believed documents protected by attorney-client privilege and work product would be exempt from disclosure. The Court's opinion acknowledges that this conclusion was contrary to the "unambiguous" language of the state constitution, concluding 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."

The concurring justice, Justice Laurie McKinnon, criticized the majority for "unconditionally subjugat[ing] an express constitutional right to a statutory privilege, thus excepting from judicial scrutiny any consideration of the public's right to know[.]" Justice McKinnon would have concluded the documents at issue were privileged, but would have ruled that in some circumstances, the public's right to know outweighs the interests in protecting privileged communications. The concurrence cited current events involving Stormy Daniels as a situation where the public interest might be "sufficiently weighty or compelling."

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