DA 23-0555

IN THE SUPREME COURT OF THE STATE OF MONTANA

2025 MT 2

JAYSON O'NEILL,

Plaintiff and Appellee,

v.

GREG GIANFORTE, in his official capacity as GOVERNOR OF MONTANA,

Defendant and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. CDV-2021-951
Honorable Kathy Seeley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Dale Schowengerdt (argued), Landmark Law, PLLC, Helena, Montana,

John M. Semmens, Attorney at Law, Helena, Montana

For Appellee:

Raph Graybill, Graybill Law Firm, PC, Great Falls, Montana

Rylee Sommers-Flanagan, Constance Van Kley (argued), Upper Seven Law, Helena, Montana

Argued: September 13, 2024
Submitted: September 24, 2024
Decided: January 2, 2025

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Greg Gianforte, in his official capacity as Governor of Montana, appeals from the First Judicial District Court, Lewis & Clark County's December 14, 2022 Order on Cross Motions for Summary Judgment declining to recognize an executive privilege under Montana law.

¶2 We address the following issue:

> *Whether Montana law recognizes a privilege exception to Article II, Section 9, of the Montana Constitution that shields from public disclosure information the Governor receives during pre-decisional deliberations.*

¶3 We reverse in part, affirm in part, and remand for proceedings consistent with this Opinion.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 On May 13, 2021, Jayson O'Neill sent a request pursuant to "§ 2-6-1001, MCA, *et seq.*" to the Office of the Governor, requesting to examine "any 2021 Agency Bill Monitoring Form(s) [("ABMs")] and/or emails referring to [said ABMs] sent to or from (1) any member of the Governor's legal staff or (2) Lieutenant Governor Juras." On July 9, 2021, the Governor's General Counsel, Anita Milanovich, sent a letter denying O'Neill's request, citing "the attorney-client privilege." O'Neill replied, arguing that in order to assert such a privilege, the Office of the Governor was required to "produce the documents while redacting only the information within them for which the privilege is asserted" and "[f]or all redactions . . . describe their contents, the author of the information, and the basis asserted for withholding in a detailed privilege log." Milanovich replied, stating that the

requested ABMs were "privileged in their entirety," and that even partial disclosure would have "the effect of chilling candid legal communication among agency counsel." Milanovich stated, however, that "[t]he Governor's Office [would] provide a privilege log and documents to a court for in camera review if directed."

¶5 On September 21, 2021, O'Neill filed a complaint naming as the defendant Governor Greg Gianforte in his official capacity. O'Neill sought "[a]n order requiring the Governor to produce the requested documents" pursuant to his right to know under Article II, Section 9, of the Montana Constitution. The Governor filed an answer on November 23, 2021, asserting, among other things, that the ABMs were shielded from disclosure by "executive privilege" and "deliberative process privilege." O'Neill and the Governor both moved for summary judgment.

¶6 The District Court issued its Order on Cross Motions for Summary Judgment on December 14, 2022. It partially granted O'Neill's motion, holding that Montana law did not allow for an executive or deliberative process privilege and that an *in camera* review was necessary to determine to what extent the attorney-client privilege and privacy exception applied.

¶7 On June 6, 2023, the Governor filed a Motion for Relief from Judgment pursuant to M. R. Civ. P. 60(b), requesting that the District Court reconsider its December 14, 2022 ruling. The basis for the Governor's motion was an affidavit from Cort Jensen, a state employee since 2001 with "personal knowledge dating to 2001 of how past Montana Governors have used forms like the ABMs." The District Court did not rule on the 60(b)

Motion, and it was deemed denied on August 5, 2023, pursuant to M. R. Civ. P. 60(c)(1). On August 31, 2023, pursuant to M. R. Civ. P. 54(b) the District Court granted the Governor's unopposed motion to certify as final that portion of its Order on Cross Motions for Summary Judgment holding that "no form of executive privilege [is] recognized in Montana."

STANDARDS OF REVIEW

¶8 This Court exercises plenary review over matters of constitutional interpretation. *Nelson v. City of Billings*, 2018 MT 36, ¶ 8, 390 Mont. 290, 412 P.3d 1058.

DISCUSSION

¶9 *Whether Montana law recognizes a privilege exception to Article II, Section 9, of the Montana Constitution that shields from public disclosure information the Governor receives during pre-decisional deliberations.*

¶10 Article II, Section 9, of the Montana Constitution provides:

> 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.

¶11 "As a right expressly enumerated in the Montana Constitution, the right to know is a fundamental right subject to the highest degree of protection." *Nelson*, ¶ 13. But the right is not absolute. *Nelson*, ¶ 13 (collecting citations). The language of Article II, Section 9, itself provides for an exception for "cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." The Framers also recognized that they were "defining a constitutional right and not drafting a statute." *Nelson*, ¶ 18. Toward that

end, the Chair of the Bill of Rights Committee explained to the other delegates that Article II, Section 9:

> [Is] the type of constitutional right that must necessarily be expressed in general terms; the specific guidelines that perhaps some of the critics would like cannot be stated within that particular section if it's to fall within the framework of a true constitutional principle. It's a principle that must endure for the decades and the ages . . . . *[T]he court shall interpret within this particular doctrine*.

Nelson, ¶ 18 (quoting Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, p. 2489) (emphasis added).

¶12 We have long held that when considering the application of Article II, Section 9, in a right to know dispute, we apply a three-step process:

> First, we consider whether the provision applies to the particular political subdivision against whom enforcement is sought. Second, we determine whether the documents in question are "documents of public bodies" subject to public inspection. Finally, if the first two requirements are satisfied, we decide whether a privacy interest is present, and if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure.

Becky v. Butte-Silver Bow Sch. Dist. No. 1, 274 Mont. 131, 136, 906 P.2d 193, 196 (1995).

¶13 In *Nelson*, we observed that the constitutional convention deliberations "clearly indicate[d] that the Framers did not intend for Article II, Section 9, to abolish, supersede, or alter preexisting legal privileges applicable to government proceedings and documents." *Nelson*, ¶ 20. With that in mind, we identified a second exception to Article II, Section 9, that evinces an alternative consideration in the final step of the process: when there is a "preexisting legal privilege" that was "protected by statute or common law at the time of [the Constitution's] adoption" that is "necessary for the integrity of government." *Nelson*,

¶¶ 15, 20. Based on the unique nature of Montana's right to know, any privilege we identify as an exception to the right to know must be grounded in Montana law at the time of the Constitution's adoption, rather than the law of other states or the federal government. *See Nelson*, ¶ 22.

¶14 The Governor argues a preexisting privilege applies to the ABMs at issue in this case: executive privilege.[1] Because there was no statutory protection for that privilege at the time of the Constitution's adoption, and we have never explicitly recognized the privilege under Montana law, we must determine whether it was protected by common law at the time of adoption and remains necessary for the integrity of government.

Privilege

¶15 The Governor asserts that there is a Montana executive privilege grounded in (1) the historical, practical need for a Governor to receive candid advice in order to carry out his constitutional duties and (2) the separation of powers outlined in Article III, Section 1, of the Montana Constitution. The Governor cites the United States Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090 (1974), in support of that assertion. In *Nixon*, the Court held that the federal executive privilege was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708, 94 S. Ct. at 3107. The Governor's reliance on *Nixon* is understandable, but misplaced. "The intent of the Framers controls the Court's

[1] The Governor also relied on deliberative process privilege at the briefing stage of this appeal, but his counsel expressly disclaimed reliance on that privilege at oral argument, so we do not address it.

interpretation of a constitutional provision," not federal precedent. *Nelson*, ¶ 14; *see also State v. Johnson*, 221 Mont. 503, 512, 719 P.2d 1248, 1254 (1986) ("[W]e refuse to 'march lock-step' with the United States Supreme Court where constitutional issues are concerned."), *overruled on other grounds*, *State v. Buck*, 2006 MT 81, ¶ 48, 331 Mont. 517, 134 P.3d 53.

¶16 The difference between the federal and Montana conceptions of the separation of powers highlights why our analysis of privilege cannot be based on federal precedent. The Court in *Nixon* grounded its separation of powers analysis in the concern that where presidential records concerned "military or diplomatic secrets" or other "areas of Art. II duties the courts have traditionally shown the utmost deference to," the courts were barred from intruding by ordering disclosure. *Nixon*, 418 U.S. at 710, 94 S. Ct. at 3108. Montana's separation of powers is explicitly delineated in Article III, Section 1, of the Montana Constitution, whereas the federal conception of separation of powers is a common-law principle. We have consistently held for over a century that the Montana conception of separation of powers "is designed to prevent a single branch from claiming or receiving inordinate power, not to bar cooperative action among the branches of government." *Powder River Cnty. v. State*, 2002 MT 259, ¶ 114, 312 Mont. 198, 60 P.3d 357; *see also Coate v. Omholt*, 203 Mont. 488, 492, 662 P.2d 591, 594 (1983) ("By this provision, each branch of government is made equal, coordinate, and independent. By this we do not mean absolute independence because 'absolute independence' cannot exist in our form of government."); *State v. Johnson*, 75 Mont. 240, 249, 243 P. 1073, 1077 (1926)

("In theory, this section . . . effects an absolute separation of the three departments of our government, but, while such is the theory of American constitutional government, it is no longer an accepted canon among political scientists; it has never been entirely true in practice." (quotation omitted)); *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 330, 137 P. 392, 395 (1913) ("[Separation of powers] is not to be sought in extravagant pretensions to power, but rather in a firm maintenance of . . . clear authority coupled with a frank and cheerful concession of the rights of the co-ordinate departments." (quotation omitted)).

¶17 Recognizing this distinction, and in the immediate wake of the *Nixon* decision, in 1975 the Montana Legislature repealed the Governor's ability to close meetings of public agencies to the public on the basis that the meetings concerned "national or state security." 1975 Mont. Laws ch. 474, § 1. The Legislature did so "to conform existing open meeting laws to the new Constitution." H.R. Judiciary Comm., *Minutes of Feb. 12, 1975 Committee Meeting*, at 1 (Mont. 1975). Because Montana's conception of separation of powers does not bar the courts or the public from inquiring into the Governor's exercise of his constitutional duties, or the actions of any coordinate branch, it is clear that any privilege under the Montana Constitution cannot rest on the separation of powers or any federal conception of privilege.

¶18 In *Nelson*, we recognized that the attorney-client privilege "has deep roots in the American legal system," based, in part, on the historical and practical need "to ensure attorneys freely give accurate and candid advice to their clients without the fear that it will later be used against the client." *Nelson*, ¶ 23 (quotation omitted). We noted further that

the attorney-work-product privilege was essential to ensuring that attorneys prepared candid information "without fear that their work product will be used against their clients." *Nelson*, ¶ 23 (quotation omitted). The Chairman of the Bill of Rights Committee of the Montana Constitutional Convention noted other "confidential relationships . . . that are zealously guarded" such as "priest and penitent, doctor and patient." Montana Constitutional Convention, Verbatim Transcript, March 5, 1972, Vol. V, pp. 1673-74. In a later exchange, the Chairman noted the privileged status of "any traditional rule of procedure with respect to anything within the judiciary." Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, Vol. VII, pp. 2499-500. In the same exchange, the Chairman also made clear that the term "public bodies" in Article II, Section 9, did not apply to courts, juries, or other judicial entities. The phrase was meant to encompass agencies, "city councils, perhaps some bureaucratic groups or some bureau that may have been established perhaps for some particular special public purpose that may not fall within the term of 'agencies.'" Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, Vol. VII, pp. 2499-500. These "candor privileges" (attorney-client, attorney-work-product, judicial, doctor-patient, clergy-penitent) all have deep roots in the historical and practical need of society for candor between individuals and those from whom they are seeking counsel. *Nelson* confirmed that the candor 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." *Nelson*, ¶ 25. Montana's gubernatorial privilege fits within this category.

¶19 The gubernatorial privilege is rooted in Montana constitutional law dating back to the 1889 Constitution. Article VII, Section 10, of the 1889 Montana Constitution permitted the Governor to "require information in writing from the officers of the Executive department upon *any* subject relating to the duties of their respective offices." (Emphasis added.) The Framers of the 1972 Constitution adopted this language nearly verbatim in Article VI, Section 15, granting the Governor the power to "require information in writing, under oath when required, from the officers of the executive branch upon *any* subject relating to the duties of their respective offices." (Emphasis added.) The Framers also removed language that was present in Article VII, Section 10, of the 1889 Montana Constitution that suggested the power to request information was tied to the Governor's responsibility to report state expenditures to the legislature, clarifying the power's scope. Notable in the 1972 Constitution was the distillation of executive authority within the office of the Governor itself, instead of the existing "diffusion in Constitutional boards" under the 1889 Constitution. Montana Constitutional Convention, Exec. Committee Proposal, Feb. 17, 1972, Vol. I, p. 448. The delegates found "inherent contradiction" in the 1889 Constitution by the delegation of executive power to the Governor that had been "whittled to insignificance by creation of more than 160 state agencies with little executive or legislative supervision." Montana Constitutional Convention, Exec. Committee Proposal, Feb. 17, 1972, Vol. I, pp. 448-450. They sought to reestablish the executive power in the Governor, along with the "right to appoint and remove heads of the principal departments"

subject to legislative confirmation. Montana Constitutional Convention, Exec. Committee Proposal, Feb. 17, 1972, Vol. I, p. 450.

¶20 As we observed in *Nelson*, "we must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Nelson*, ¶ 14 (citations omitted). The historical roots of the Governor's right to require information in the execution of his constitutional duties, and the Framers' decision to reaffirm and strengthen that right, manifest their intent to preserve the Governor's unique, constitutional privilege to receive candid advice from officers of the executive branch in writing.

¶21 But we have also recognized that candor privileges "cease to exist when they no longer serve their underlying purposes." *Nelson*, ¶ 35. The attorney-client privilege may be waived where the client voluntarily discloses privileged communications with a third party. *Am. Zurich Ins. Co. v. Mont. Thirteenth Jud. Dist. Ct.*, 2012 MT 61, ¶ 20, 364 Mont. 299, 280 P.3d 240. The attorney-client privilege ceases to exist after the death of a client where the privileged communication is probative of the client's intended distribution of their property. *Herrig v. Herrig*, 199 Mont. 174, 181, 648 P.2d 758, 762 (1982). Attorney work-product is discoverable upon a showing that the party seeking discovery "has substantial need for the materials" and cannot "without undue hardship, obtain their substantial equivalent by other means." M. R. Civ. P. 26(b)(3). Judicial privilege is cabined by the public disclosure of the record upon which a judicial ruling is based and the

publication of the ruling, which discloses the factual basis and legal authorities upon which the court relied.[2]

¶22 Because the gubernatorial privilege is grounded solely on the Governor's Article VI, Section 15, right to require information necessary to carry out his constitutional duties, and not in the separation of powers, its scope is also constrained by its "underlying purposes." *Nelson*, ¶ 35. Just as the right to seek disclosure is not absolute, neither is the privilege. In the case before us, the Governor asserts that he relies on the candor of the advice he receives in ABMs to carry out his Article VI, Section 10, duty to sign or veto legislation. An ABM might contain an executive officer's candid assessment of a particular piece of legislation or the motivations of its sponsor, which an officer may be less likely to provide were the advice subject to immediate disclosure. Once the legislative process has run its course, though, the need for confidentiality is diminished. The need for

[2] The Governor draws a comparison between judicial privilege and his assertion of executive privilege to bolster his claim. He notes that like a judicial ruling discloses a court's reasoning and factual basis for its decision, Article VI, Section 10, requires the Governor to provide "a statement of his reasons" for vetoing a bill. Setting aside the fact that the Framers did not intend Article II, Section 9, to apply to the judiciary, the Governor's comparison highlights the reasons why Montana law cannot support the absolutist executive privilege he claims. A court must issue a ruling explaining its reasoning for its decision no matter what the outcome of the case is; the Governor is only required to explain his reasoning if he decides to veto a bill. A court must publicly disclose the record it relied upon when making its decision, subject to very narrow exceptions. *See* M. R. Civ. P. 5.2 (prescribing when a court may seal the record in a civil proceeding); 46-11-701(3), MCA (prescribing when a court may seal the record in a criminal proceeding). Courts may only hear evidence in proceedings open to the public except in extraordinary circumstances. *See* M. R. Civ. P. 43 (prescribing when a court may take testimony in a civil proceeding); *State v. Hatfield*, 2018 MT 229, ¶ 57, 392 Mont. 509, 426 P.3d 569 ("The right to an open public trial is a shared right of the accused and the public."). The Governor's assertion that he is privileged to withhold from the public the facts his counselors relied on in their advice to him for any reason at all does not parallel the significantly cabined confidentiality of judicial deliberations.

confidentiality is diminished even further once the legislative session is over, and entirely once the Governor has left office or is preparing to do so. Toward that end, Article II, Section 9, necessarily compels the preservation of public documents, even those that may have enjoyed some degree of privilege at one time, because that privilege may very well diminish to the point of total abrogation depending on the circumstances as they evolve.[3] *See Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 45, 333 Mont. 331, 142 P.3d 864 ("By its terms, the right to know is not constrained by time . . . .").

¶23 The risk will also be more inherent in the disclosure of *opinions* expressed in ABMs as opposed to the facts the agency relied on in forming those opinions. Redaction of opinion information should allow less-sensitive fact information to be disclosed even at the early stages. When assessing an invocation of Montana's gubernatorial privilege, courts should consider whether the circumstances surrounding the information at issue are such that disclosure would chill future candor or whether that risk has been diminished by the passage of time or can be contained by selective redaction.

¶24 We conclude that recognition of a gubernatorial privilege, rooted in the 1889 Constitution and reaffirmed in Article VI, Section 15, of the 1972 Constitution at the time of adoption, is also "necessary for the integrity of government." *Nelson*, ¶ 20 (quoting Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1678). The

[3] The preservation of executive documents, including gubernatorial documents, pursuant to Article II, Section 9 is governed by §§ 2-6-1101 through -1114, MCA. Whether, and to what extent, these provisions or their application comply with Article II, Section 9 is, not before us, so we do not decide whether Article II, Section 9, compels the governor to do more than those provisions require.

Montana Constitution tasks the Governor with the execution of many duties—such as deciding whether to veto or sign bills, issuing pardons, and commanding the state militia—which require candid advice from executive officials. Mont. Const. art. VI, §§ 10, 12-13. It is axiomatic that the Governor's ability to faithfully execute his constitutional duties is necessary to the integrity of government. To the extent that the execution of those duties requires candid advice from those within the executive branch, the right of the Governor to invoke gubernatorial privilege exists to that same extent.

Procedure for Assessment of Gubernatorial Privilege

¶25 In *Nelson*, we laid out the process for determining whether a document otherwise subject to Article II, Section 9, may be shielded from disclosure by a claim of privilege. Having concluded that Montana's gubernatorial privilege falls within the ambit of candor privileges such as those we discussed in *Nelson*, we conclude the process followed for assessing that privilege should likewise be consonant.[4]

¶26 First, "the government entity asserting the . . . privilege has the burden of proving the application and the scope of the asserted privilege to the court upon *in camera* inspection." *Nelson*, ¶ 36. The government entity—in the case of gubernatorial privilege the Governor—may do so via a privilege log. To meet this burden, the Governor must

[4] The Dissent expresses the concern that "[w]ithout the public disclosure championed by plaintiffs in this case, the influences affecting the Governor's veto decision can too readily return to secrecy, which is antithetical to our modern Constitution." Dissent, ¶ 46. To be clear, neither Article II, Section 9, nor its interpretation within this Opinion allows for any such return to secrecy, as the Dissent suggests. This Opinion merely recognizes the existence of a gubernatorial privilege within our constitutional framework and establishes the very stringent parameters within which it may be invoked.

demonstrate the constitutional duty the advice is essential to carrying out and detail the nature of the advice provided that might pose a risk of chill to candor if it was disclosed. If the Governor does not meet the high bar of demonstrating that the information is essential to carrying out a constitutional duty and that its disclosure would chill future candor, it is not privileged under the gubernatorial privilege doctrine.

¶27 Second, "[u]pon finding privileged material, the reviewing court must—as possible based on the nature and substance of the documents—give effect to both the subject privilege and the public's right to know by ordering appropriate redaction of the privileged information and disclosure of the unprivileged balance of the document, if any." *Nelson*, ¶ 36. For instance, a court may find that the opinions expressed in a document would chill further advice if disclosed, but that the underlying facts or sources consulted in forming the advice given are subject to disclosure upon redaction of the opinions.

¶28 This examination process, common to all privilege exceptions to Article II, Section 9, not only ensures that the Governor is invoking privileges correctly and in good faith, but also promotes judicial efficiency. It may well be the case that information that is sought pursuant to Article II, Section 9, is subject to an assertion of multiple privileges. Information that may not be covered by the gubernatorial privilege may be covered by attorney-client privilege, or may implicate concerns of individual privacy. Rather than siloing the process of determining whether information should be disclosed into separate analyses, the district court may consider each argument against disclosure at once *in camera*. In this case the Governor has asserted that the ABMs are also protected by

attorney-client privilege. We conclude that the Governor's claims of privilege in the ABMs are not precluded as a matter of law but must be evaluated by the District Court upon *in camera* review of the documents for which the privilege is claimed. On remand, the District Court may consider in tandem which, if any, privileges apply to which portions of each document.

CONCLUSION

¶29 The District Court erred when it found that Montana law does not recognize any form of gubernatorial privilege but correctly determined that that the Governor's assertions of privilege were subject to *in camera* review. The District Court's December 14, 2022 Order is reversed in part, affirmed in part, and remanded for further proceedings consistent with this Opinion.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

Justice Laurie McKinnon, dissenting.

¶30 This case presents a novel issue of Montana law arising from a policy position that strays significantly from the narrow matter before the District Court. Whatever constitutional guidelines exist, and whatever privilege is now being extrapolated, there is no question that the Governor must turn over the ABMs for *in camera* review. Presented

with the policy question of whether some amorphous form of executive privilege has historically existed under Montana law, the Court endeavors to carve a narrow gubernatorial privilege, hopeful that it will not be used to erode Montanans' enduringly powerful right to know. But the recognition of any such privilege is unnecessary; the plain language of the Constitution provides a framework that accounts for the day-to-day workplace functions of government without opening the door to the near-certain abuse and deterrent consequences of a formalized privilege.

¶31 This issue starts and ends with the plain text of the Constitution. It provides, "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. art. II, § 9. There is linguistic "play in the joints" throughout: "documents"; "public bodies"; "individual privacy"; "merits of public disclosure"; "clearly exceeds." From these guideposts, intended to be interpreted and developed by the courts, *see* Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1672 ("[T]he courts would have to strike the balance between the merits of public disclosure and the merits of privacy, and our committee had faith in our courts to strike this balance. . . . [W]e did not feel that this particular provision should be left to the Legislature to interpret."), it is possible to conceive of the right to know in a way that allows for functional evidentiary exclusions—including, sometimes, for the Governor—without explicitly carving *separate* exceptions to the right.

¶32 And for nearly 50 years, this language alone was enough. This Court duly interpreted the open-ended pieces of this provision, always bearing in mind the fundamental nature of the right to know and its peer provision, the right to privacy found in Article II, Section 10. *See, e.g.*, *Missoulian v. Bd. of Regents*, 207 Mont. 513, 528-33, 675 P.2d 962, 970-73 (1984) (setting out framework for the weighing of individual privacy interests in the right to know context); *Citizens to Recall Whitlock v. Whitlock*, 255 Mont. 517, 523, 844 P.2d 74, 78 (1992) (finding high merits of public disclosure because "the public [is] entitled to be informed of the actions and conduct of their elected officials" and public funds were used to settle the dispute); *Common Cause v. Statutory Comm. to Nominate Candidates for Comm'r of Pol. Pracs.*, 263 Mont. 324, 330, 868 P.2d 604, 608 (1994) (defining public or governmental body to include "a group of individuals organized for a governmental or public purpose"); *Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 274 Mont. 131, 136-37, 906 P.2d 193, 196-97 (1995) (defining documents of public bodies). Of course, the Court developed rules as necessary to guide interpretation of these ambiguities, but any result under these rules must still be consistent with the right to know.

¶33 *Nelson v. City of Billings*, 2018 MT 36, 390 Mont. 290, 412 P.3d 1058, should have been no different. In *Nelson*, this Court was tasked with finding a way to square the attorney-client privilege with the right to know. There, the pro se appellant, an unrelated party to the underlying dispute, sought an expansive array of documents related to litigation and a settlement agreement between the City of Billings and the Montana Municipal Interlocal Authority. The appellees noted, in a singular paragraph, that the attorney-client

privilege had to exist despite not being included in the text of the Montana Constitution because it was so firmly entrenched in American law. Among the appellees' many other arguments as to why the right to know potentially did not apply in the case—for example, because the information sought was not qualifying "documents of public bodies" or because the merits of public disclosure were exceeded by individual privacy concerns—this Court seized on the notion of pre-Constitution privileges surviving the advent of the right to know. The parties' briefing was entirely focused on other aspects of the argument and did not include even the slightest discussion of the paramount importance of the right to know, the constitutional convention proceedings, or the Framers' ascertainable intent. Nonetheless, the Court concluded that information protected by the attorney-client and/or work product privilege was not subject to the right to know because these privileges are necessary to the functioning of government and have deep roots in both the American and Montanan legal system.[1] *Nelson*, ¶¶ 20, 23, 27.

¶34 *Nelson* is not an inherently problematic opinion. But as opponents of the right to know increasingly seek legal mechanisms to close our open government, *Nelson*'s historical grounding/constitutional necessity framework has become superlative to the plain text and clearly ascertainable intent of the Constitution's Framers. *Nelson* intended to account for this constitutional superiority; its foundational premise is that the

[1] The Governor incorrectly characterizes *Nelson*'s exceptions as a disjunctive test: a privilege is recognized when it has deep roots in American legal tradition *or* is necessary for the integrity of government. The majority recognizes the correct conjunctive construction; *Nelson* likewise acknowledges that to establish the kind of interest strong enough to constitute a privilege it must be both necessary and historically supported.

Constitution's Transition Schedule allowed for the continuation of attorney-client/work product privilege only *because* they were "not contrary to or inconsistent with the Constitution." *Nelson*, ¶ 22 (quoting *State ex rel. Woodahl v. Mont. Second Jud. Dist. Ct.*, 162 Mont. 283, 294, 511 P.2d 318, 324 (1973)). This is a fundamental compatibility test that must occur before a court determines whether a privilege exists—would the suggested privilege offend the purpose and history of the right to know? If so, it did not survive the Constitution's enactment, nor should it be created afterwards.

¶35 The attorney-client privilege and other so-called "candor privileges" do not offend the right to know, because they are examples of times where the individual privacy interest necessarily involved will outweigh the merits of public disclosure as a rule, not as an exception. The need for confidentiality in these relationships derives from the individual right to privacy. In essence, the "candor privileges" protect the right of "each individual to make decisions in matters generally considered private." *Armstrong v. State*, 1999 MT 261, ¶ 33, 296 Mont. 361, 989 P.2d 364. The doctor-patient privilege enables "a patient to secure medical aid" and protects the interests of "the patient and not of the physician." *Hier v. Farmers Mut. Fire Ins. Co*., 104 Mont. 471, 486, 67 P.2d 831, 837 (1937) (citation omitted). Judicial privilege protects an individual's intimate and private details from public disclosure when "the right of the public to know the underlying business of the Court clashes . . . with the right of our citizens to a fair and effective justice system[.]" *In re Goldman*, 179 Mont. 526, 557, 588 P.2d 964, 981 (1978). The attorney-client and work product privileges, respectively, provide a veil of privacy for the client to receive

information, and another for the attorney to work through their mental processes, "without fear it will later be used against the client." *Nelson,* ¶ 23 (citing *Am. Zurich Ins. Co.,*¶¶ 9, 24). The clergy-penitent privilege prohibits a clergyman from being examined as to any confession made, "without the consent of the person making the confession." Section 26-1-804, MCA. These candor privileges protect the veil of privacy for individuals against government and public intrusion, allowing the right of rational self-determination and decision making in various contexts, e.g., when speaking to an attorney, a court, or a doctor.

¶36 However, the same scope of individual privacy protection does not exist for state agents who take actions on behalf of the public. The "goal of Article II, Section 9 is government transparency and accountability." *Shockley v. Cascade Cnty*., 2014 MT 281, ¶ 20, 376 Mont. 493, 336 P.3d 375. Thus, the starting point of this provision is to "constitutionally presume the openness of government documents and operations." Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1670. This is intended to be a strong presumption, as shown by the deliberate inclusion of the word "clearly", Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1670 ("And further to clarify this point, we added the word 'clearly', with the intention of tipping the balance in the favor of the right to know"), and the driving purpose "that the deliberations and resolution of all public matters *must* be subject to public scrutiny." Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1670 (emphasis added). As is often cited, the Framers intended "that the right to know not be absolute." Montana Constitutional Convention, Verbatim Transcript,

March 7, 1972, Vol. V, p. 1670. But too often, the rest of that discussion is omitted. Indeed, the right is not absolute, but it should not yield easily; rather, intrusions on the right to know must be grounded in some individual privacy interest. The very next sentences read, "The right of individual privacy is to be fully respected in any statutory embellishment of the provision, as well as in the court decisions that will interpret it. To the extent that a violation of individual privacy outweighs the public right to know, the right to know does not apply." Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1670. But the right to know can still prevail even when faced with a strong individual privacy interest—Delegate Eck continued on to clarify that personnel decisions, while generally private, might be subject to the right to know when, for example, an agency head is dismissed for cause. Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, pp. 1670-71.

¶37 A high regard for individual privacy is integral to understanding the Declaration of Rights and "reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives." *Gryczan v. State*, 283 Mont. 433, 455, 942 P.2d 112, 125 (1997). The candor privileges necessarily implicate matters with high individual privacy concerns—personal medical decisions; religious advisement; effective representation in the justice system. And because these discussions and the resulting decisions are fundamentally personal, even if they have some tangential public consequence, the merits of public disclosure are generally low. The Court and the legislature have continued to develop limited exceptions in this vein. *See, e.g.*, *Belth v.*

Bennett, 227 Mont. 341, 344, 740 P.2d 638, 640 (1987) (concluding § 33-1-412(5), MCA, which allows the insurance commissioner to withhold information where the release of information could cause unwarranted injury to insurance companies, constitutional because "the statutory language is simply an alternative expression of the constitutional privacy exception" that protects information when, in the words of Article II, Section 9, "the demand of individual privacy clearly exceeds the merits of public disclosure").

¶38 Also specifically contemplated with the right to know was that judicial branch deliberations would not be made public, including jury deliberations. First and most distinguishable, courts are not intended to fall within the scope of public bodies. Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, Vol. VII, pp. 2499-500. Second, as Delegate Harper pointed out with the grand jury context as example, "merits of public disclosure" is again intended to serve as limiting language. Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, Vol. VII, p. 2499. The merits of public disclosure remain low in this area compared to the individual privacy concerns implicated by effective, private representation and reputational concerns for victims, jury members, lawyers, and judges. Further, the judicial branch is unique in that its decisions serve as record of its deliberations. And, as addressed elsewhere in the Constitution, open proceedings are the default. Mont. Const. art. II, § 16; *Great Falls Tribune v. Mont. Eighth Jud. Dist. Ct.*, 186 Mont. 433, 438, 608 P.2d 116, 119 (1980). To take this Court as an example, all the information that it uses to decide a case, including oral argument, briefing, and the district court record, is publicly available except in limited circumstances where

privacy concerns require redactions. In these ways, the citizenry enjoys the benefit of public disclosure while still protecting individual privacy and allowing for efficient administration of justice.

¶39 It is likewise outstandingly clear that agency deliberations and decisions, in all forms, were intended to be accessible to the public. The provision is premised on "the increasing concern of citizens and commentators alike that the government's sheer bigness threatens the effective exercise of citizenship," and applies "to state government and its subdivisions." Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1670. Agencies are specifically named in the text of the provision and are central to the idea of being able to supervise "big government" in light of "a democratic society wherein the resolution of increasingly complex questions leads to the establishment of a complex and bureaucratic system of administrative agencies." Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1670. As Delegate Berg stated,

> Now I want to see all agencies, in particular, opened up to the public. I want their documents examined; I want their deliberations open. I am particularly interested in the operations of the city councils and boards of county commissioners, as well as all other agencies and commissions and forms of government. I want their deliberations open; I want their documents available for inspection.

Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, Vol. VII, p. 2499. The Governor's position that public disclosure of the advice he receives from his executive officers will have a "chilling" effect on candor is contrary to the Framers' clear intent. Article II, Section 9, is meant to require *more* transparency between executive

agencies and the governor so he may better manage their efficiency for the benefit of Montanans. It necessarily follows that any executive privilege which immunizes documents by administrative agencies from the purview of Article II, Section 9, would be "contrary to, or inconsistent with," the Montana Constitution, and thus cannot be adopted under Montana law as an exception to Article II, Section 9. *Nelson,* ¶ 22.

¶40 Relevant to this scenario is the consideration that the Governor is taking an essentially legislative function. The "Executive branch is ultimately the responsibility of the Governor," whose constitutional duty is "to see that the laws passed by the Legislature are properly executed" with history in mind. *MEA-MFT v. McCulloch*, 2012 MT 211, ¶¶ 28-29, 366 Mont. 266, 291 P.3d 1075. The Governor's decision whether to sign or veto a law is taken in his official capacity, and thus must be made solely "for the benefit of the people." Section 2-2-103(1), MCA. At its core, the veto power of the Governor is a legislative function, as many state courts have recognized. *Riley v. Joint Fiscal Comm. of the Ala. Legislature*, 26 So. 3d 1150, 1154 (Ala. 2009) (describing the veto power as a "traditionally legislative function"); *Legislative Council v. Knowles*, 988 P.2d 604, 609 (Alaska 1999) (describing the veto power as a "purely legislative act"); *Hallin v. Trent*, 619 P.2d 357, 360 (Wash. 1980) ("In approving or disapproving legislation, the Governor acts in a legislative capacity and as part of the legislative branch of government."); *St. John's Well Child & Family Ctr. v. Schwarzenegger*, 239 P.3d 651, 659 (Cal. 2010) ("In vetoing legislation, the Governor acts in a legislative capacity, and . . . in order to preserve the system of checks and balances upon which our government is founded, he may exercise

legislative power only in the manner expressly authorized by the Constitution.") (internal quotation and citation omitted). Indeed, the Supreme Court of the United States similarly notes "the legislative character" of "approving or disapproving bills[.]" *Edwards v. United States*, 286 U.S. 482, 490, 52 S. Ct. 627, 630 (1932) (citing *Smiley v. Holm*, 285 U.S. 355, 372-73, 52 S. Ct. 397, 401 (1932) (discussing a governor's actions in signing or vetoing a bill as part of the legislative process)).

¶41 When legislatures enact law, they must follow certain rules to ensure transparency and public participation. *See, e.g.*, Mont. Const. art. V, § 10 ("all hearings shall be open to the public"). Lawmaking functions are of immense interest to the public. Open meeting requirements provide the public opportunity to understand legislatures' reasoning for their actions in drafting bills, similar to the requirement that courts provide reasoning for their decisions. There can be no doubt that the Framers of the Montana Constitution intended a similar public disclosure requirement for the Executive branch when it performs legislative functions. Indeed, upon vetoing a bill, the Governor is required to provide the Legislature "a statement of his reasons therefore." Mont. Const. art. VI, § 10. If the ABMs provide information the Governor relied upon in forming his statement of reasoning or coming to his decision, then such information concerns the peoples' business.

¶42 The Governor argues here that the information received from agencies in the ABMs, which advise his decision whether or not to veto a bill, must be shielded from public disclosure because the ABMs might contain an executive officer's candid assessment of a particular piece of legislation or its sponsor, and disclosure could compromise the strategic

effort to advance or block the legislation. Such reasoning is out of harmony with this Court's holding in *Associated Press v. Board of Public Education*, 246 Mont. 386, 804 P.2d 376 (1991). That case involved "a dispute over rulemaking authority between the Governor and the Board of Public Education." *Associated Press,* 246 Mont. at 392, 804 P.2d at 380. The Board sought to close its meetings to the public to discuss "litigation strategy," which it asserted could be thwarted if the Governor understood the Board's strategies. *Associated Press,* 246 Mont. at 390-92, 804 P.2d at 378-79. We denied the Board's argument, noting that the Constitution was designed "to protect the people from governmental abuses," not "to protect the government from the people." *Associated Press*, 246 Mont. at 390, 804 P.2d at 379 (citation omitted). We described the dispute between governmental entities as "a turf battle which should be given public scrutiny in all its particulars. In short, it is the public's business." *Associated Press*, 246 Mont. at 392, 804 P.2d at 380.

¶43 Similarly, here, the Governor's argument that he needs protection from public disclosure so as to provide himself a strategic advantage against another branch is illogical given the context. The Governor's decision to veto a bill must be made for the benefit of Montanans, not for the benefit of himself or his branch. It strains credulity to suggest that the Governor should be afforded the right to remain free from public intrusion in making determinations which have unequivocally been determined "the public's business." Moreover, to allow a broad executive privilege under Montana law on the same logical

bases as the candor privileges, which protect individual privacy interests, would encourage individualistic motivations for government actions.

¶44 Since the facts in this case involve a legislative function which calls for public transparency under the Montana Constitution and information provided by executive agencies, i.e. public bodies subject to the right to know, the Governor's request for executive privilege necessarily fails. We need not look further into *Nelson*'s framework to determine if the Governor's suggested privilege is otherwise consonant, because it cannot pass this threshold matter of compatibility.

¶45 But even if it could, the historical grounding in Article VI, Section 15, adopted by the majority, does not fit *Nelson*'s requirements; the fact that a governor can request information does not mean that there is an accompanying privilege. In fact, the broader historical context of this provision suggests the opposite. Under Article VI, Section 15, the Governor has the power to "require information in writing, under oath when required, from the officers of the executive branch upon any subject relating to the duties of their respective offices." Mont. Const. art. VI, § 15. Like the right to know, this provision is contextualized by Montanans' historical distrust of government, including executive agencies. Particularly around the time of the 1972 Constitution, citizens feared agencies to be unaccountable, unmanageable, and quickly eclipsing government. *See Miske v. Mont. Dep't of Nat. Res. & Conservation*, 2023 MT 241, ¶ 20, 414 Mont. 242, 539 P.3d 1133 (citing Exec. Reorganization: Rep. to the Mont. Leg. Assemb., 12-1970, Mont. Comm'n on Exec. Reorganization at 41 (1970)). Vital to the 1972 Constitutional Convention was a

desire to reorganize the executive power, which the delegates believed "had been whittled to insignificance by creation of more than 160 state agencies with little executive or legislative supervision" and thus, required the reestablishment of "checks and balances[.]" Montana Constitutional Convention, Committee Proposals, February 17, 1972, Vol. I, pp. 449-50. Under the 1889 Montana Constitution, the Governor's ability to hold agencies accountable was restricted "due to diffusion in Constitutional boards[.]" Montana Constitutional Convention, Committee Proposals, February 17, 1972, Vol. I, p. 448. The 1972 Constitution was tailored to allow the Governor more power to regulate and manage his executive agencies. Although this specific provision is a carryover, the ability to obtain "information in writing, under oath when required, from the officers of the executive branch upon any subject relating to the duties of their respective offices[]" and "appoint a committee to investigate and report to him upon the condition of any executive office or state institution[]" are consistent with the aim of better executive and public oversight of agencies. Mont. Const. art. VI, § 15.

¶46 It made sense for this provision to carry over because it directly serves the ideal of open government. It does not make sense to now interpret this provision to mean the Framers intended agency heads to have immense and private influence on the Governor's veto power, a legislative function entrusted to the Governor, when the historical record reflects the pervasive distrust of agencies. The Governor is elected by the people, whereas agency heads are appointed and insulated from electoral accountability. Montanans have been wary of this disconnection dating back to the 1800s. When territorial Montanans

sought statehood, they did so primarily to redress "the policy which has so long prevailed of sending strangers to rule over us and fill our offices." Mont. Const. of 1884, Memorial. Indeed, Montana's long history of political corruption, overreach by the branches of government, and control of its institutions by outside influences left Montanans skeptical of government actors who were not elected or monitored by the people. *See W. Trad. P'ship v. Attorney General*, 2011 MT 328, ¶¶ 23-29, 363 Mont. 220, 271 P.3d 1 (describing Montana's history of corporate corruption of government in the early-mid twentieth century). The Framers' distrust of agencies was further demonstrated by explicitly requiring any information provided to be given "under oath." Without the public disclosure championed by plaintiffs in this case, the influences affecting the Governor's veto decision can too readily return to secrecy, which is antithetical to our modern Constitution.

¶47 The ability to request information under the Montana Constitution is not one only provided to the Governor, but also provided to the public. The provision that gives the Governor and the people the right to request information parallel one another and support the comprehensive policy of transparency over secrecy as a means of ensuring government integrity. We have previously observed that absent evidence suggesting otherwise, the Framers of the Constitution did not intend to ascribe "different meanings for the same word . . . ." *State ex rel. Racicot v. Mont. First Jud. Dist. Ct.*, 243 Mont. 379, 389, 794 P.2d 1180, 1186 (1990). By reading confidentiality into Article VI, Section 15, a section textually and functionally about requesting information, the Court interprets the gubernatorial power to request information to have a meaning different from the public's

ability to request information. The Governor suggests that his power includes the right to seek *advice* and the right to have such information kept confidential. Such interpretation provides more strength to the Governor then that which is provided to the people. Certainly, such a holding runs afoul of the Constitution's underpinnings. Contrary to the Governor's position that this section is meant to shield from the public advice he receives from his agencies, the historical record plainly shows that this section is meant to require *more* transparency between executive agencies and the Governor so he may better manage their efficiency for the benefit of Montanans.

¶48 This is not to say that the Governor or other executive branch officials can never protect sensitive information from disclosure. The Court is in agreement that there are certain matters not suitable for public knowledge on either a time-limited basis or, in exceptionally rare circumstances, indefinitely. The Framers contemplated this as well, pointing to the example that information about the State's bidding to secure property would remain confidential during the bidding process. Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1678. But these matters are so fact-dependent, so rare, and so constitutionally dissonant that they must be subject to *in camera* judicial review as a default. The kind of interest necessary to overcome the constitutional presumption of disclosure must be enormous—individual privacy, public safety, and so on. And of course, the other critical balancing piece, though less developed than privacy in the courts thus far, is the merits of public disclosure. There are occasions where the merits of public disclosure will be low, especially when disclosure would

endanger citizens or completely impede the functioning of government. But generally, and especially with public officials, the merits of public disclosure are high because a fully informed electorate is paramount to democracy and open government.

¶49 The default must be open government. But the more formalized privileges we entertain, the less openness is the default. Recognizing even a narrow gubernatorial privilege is an affront to the Constitution; it cannot coexist with the societal role our government is meant to play. The words of Delegate Dahood are prescient to a conflict like this:

> [W]e've got to have faith in the people that are representing us in [a] governmental capacity. We've got to have faith in the people that are going to know about this particular section and know that they have a certain obligation and a certain responsibility to disclose these things. We've got to have faith in these people in cases where there is, without any doubt, the right of privacy to restrain that particular disclosure. I think when we make the comment that has been made and the critique, I think we're assuming these people are not going to act responsibly. Nobody is going to act perfectly. Nobody is so completely perfect, that they're going to act in a manner where they're not going to make any mistakes, but we're going to reduce the chance for error in this connection. There may be a requirement for a court case or two or three to set a proper guideline, but isn't that the history of freedom? Isn't that why we have a Judiciary that's so supreme and that's so final, because there comes a time with all of our rights where a court test is required so that that particular right can be outlined and delineated with respect to the time within which that particular question has been raised. I submit to you there is no way to draft a perfect constitutional provision, but this provision does provide the practical guideline and the practical right and the practical obligation that we want here to accomplish the purpose that's intended.

Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, pp. 1674-75. Now is the time to "outline[] and delineate[]" this right for its intended purpose.

¶50 I would affirm the District Court's conclusion that there is no executive or gubernatorial privilege that shields the Governor from the right to know. In my opinion, the plain language of the Constitution provides a framework that accounts for the functions of government with which the Governor is allegedly concerned. If the Governor were to maintain that the requested ABMs should not be disclosed due to some extraordinary reason that overcomes the constitutional presumption of disclosure, the District Court would conduct an *in camera* review to determine whether confidentiality is warranted under the specific circumstances.

/S/ LAURIE McKINNON

Justice Ingrid Gustafson and District Court Judge Leslie Halligan join in the dissenting Opinion of Justice Laurie McKinnon.

/S/ INGRID GUSTAFSON
/S/ LESLIE HALLIGAN
District Court Judge Leslie Halligan
Sitting for Chief Justice Mike McGrath