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November 2, 2009

William J. Fraser  
City Manager  
39 Main Street  
Montpelier, VT 05602-2950

Re: Potential Release of Documents Retained by the City Under Group 4 Documents  
Addressed by Public Memorandum of the City on October 26, 2009

Dear Bill:

You have requested our opinion as to the contemplated public release of three documents retained by the City on October 26, 2009 as exempt from disclosure pursuant to 1 V.S.A. §317(c)(4), under the protection afforded documents containing attorney-client communications, and as documents which were not included within the scope of the limited waiver of attorney-client privilege made by the City Council at its meeting of October 21, 2009. The documents are identified as follows:

1. Printout of an email correspondence dated September 11, 2009 between John H. Kiesch, Esq. to William Fraser and Steve Stitzel, Esq. which pertains to the City's efforts to recover post-judgment relief from Scott Construction, Inc. and/or other parties, partial disclosure of which was made on October 26, 2009.
2. Printout of an email correspondence dated October 12, 2008 from William Fraser to attorneys Steve Stitzel and John Kiesch pertaining to recovery efforts and potential settlement strategy with respect to the aforementioned post-judgment relief.

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3. Printout of an email correspondence dated October 15, 2009 from William Fraser to attorneys Steven Stitzel and John Kiesch pertaining to supplemental recovery strategy.

I understand the City's concern with the uncontrolled release of these documents is as follows:

- A. Some or all of these documents pertain to or affect certain subrogation rights of the City's insurance carriers. To that extent, the City owes a contractual obligation to those carriers to preserve any rights of subrogation or ultimate recovery held or to be held by the carriers in the event of an insurance payment to the City. Failure to honor those rights could impair the City's potential recovery.
- B. The documents lie outside the scope of the Council's limited waiver of attorney-client privilege, at its meeting on October 21, 2009 and accordingly release has not been authorized by the Council.
- C. The subject matter of the documents contain attorney work product, thoughts, strategies and communication with the client directly related to post-judgment recovery efforts arising out of the Scott litigation. Disclosure of recovery or potential settlement strategies could impair the City's ultimate recovery.
- D. Certain portions not yet released contain forward looking statements of opinion and work product of legal counsel with respect to potential recovery. You voiced concern that their uncontrolled release could trigger an unintended waiver of attorney-client privilege, the scope of which has not yet been defined.

You have asked if release of these documents in the spirit of the access to Public Records law might nevertheless be accomplished in a manner so as to limit any potential impairment of the City's interests in recovery. We believe this may be possible and recommend the following approach.

On October 26, the City Council allowed the release of a substantial body of documents, including some of which contain attorney-client correspondence, pursuant to the specific limitation that its waiver of attorney-client privilege and the protection from public disclosure under 1 V.S.A. §317(c)(4) extended “only to documents concerning the City’s claims against Scott Construction, Inc. and its initial request for insurance coverage from PACIF and [does] not authorize disclosure beyond such limits.”

As an initial observation, we believe the documents in question do in fact lie outside of the above-referenced limited waiver and so were properly withheld on October 26 and thereafter. Moreover, they address recovery and potential settlement strategy on a forward-looking basis, related directly to post-judgment execution and discovery litigation which was foreseeable and which may become necessary in this instance if the City’s continuing efforts to recover its losses are to be successful. Accordingly, we believe a substantive basis for the City’s concern about uncontrolled release was clearly present on October 26 and is present today. The documents were appropriately retained.

A controlled release requires first that, because the City is an insured party as to a claim for which coverage might be found, it must address its obligations to the carrier, which would ripen in the event a claim is determined to be covered. Your stated concern over impairment of the carrier’s subrogation rights is best addressed directly to appropriate representatives of the carrier. We recommend that you share these documents with the carrier and request a written consent for their public release. To the extent that their release will impair the carrier’s rights of recovery, the carrier may feel compelled to decline consent. Accordingly, if consent is given, it should adequately address the City’s first concern.

Second, our review of the documents suggest that uncontrolled release could place certain of the City’s interests in recovery at risk as a result of specific discussions contained therein concerning recovery strategy. If those specificities are redacted, we believe the balance of the documents may be released without harm to the City’s interests in recovery. For instance, the October 12 communication names potential contributors to a settlement, together with sums which might be contributed. Redaction of the identifying data would render the balance of the communication informative, but not harmful to the City’s recovery efforts.

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Similarly, item #4 of the October 15 email contains data which address a recovery strategy. Redaction of the identifying and substantive data in item #4 would allow release of the remainder of the document without disclosure of that potential strategy.

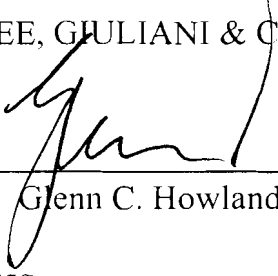
Third, the second half of the September 11 memorandum from legal counsel contains counsel's recommendations on a forward-looking basis. Because the substance of the communication lies outside the scope of the City Council's limited waiver of October 21, uncontrolled release of this information could potentially result in a waiver, the limits of which would be then open to discussion or argument. We believe the best protection for the City in its determination to comply with the intent of the Public Records Act, is for the City Council to authorize a specific, limited release of these three documents only, preserving its assertion of attorney-client protection to all further such communications in a manner consistent with the limited exemption upon disclosure set forth under 1 V.S.A. §317(c)(4).

In this manner we believe substantive disclosure may be accomplished without impairing the City's potential for recovery.

Very truly yours,

McKEE, GIULIANI & CLEVELAND, P.C.

By: \_\_\_\_\_

  
Glenn C. Howland

GCH:sg  
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