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COMMENTS ON GOVERNMENT CENSORSHIP AND SECRECY

Larry M. Elison*
Deborah E. Elison**

I. INTRODUCTION

The original identifiable principles of the United States Constitution were several. What they were and what they now are is the subject of unending debate. One principle, the principle of limited government, is not questioned. Spokespersons of the most diverse schools of constitutional jurisprudence would agree that the federal government is no longer a government of limited, delegated, and enumerated power.[1] Today the federal government has exclusive and unlimited power in foreign affairs[2] and plenary and unlimited power in domestic affairs. An expansive interpretation of the interstate commerce clause coupled with the power to tax and spend have obliterated the principle of a limited government.

With the elimination of the principle of a limited federal government, an admitted central tenet of the founder's original intent, it is difficult to comprehend the attachment of some constitutional scholars and some current members of the United States Supreme Court to "original intent jurisprudence" and their demand for specific detailed language to support expanding concepts of individual liberty.[3] To eliminate, by expansive interpretation and judicial deference, the principle of limited government and contemporaneously insist upon a narrow and detailed construction of individual liberties accentuates a growing disequilibrium. A comparison of the expansive interpretations in such cases as *Wickard v. Filburn*[4] (ag-

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** Former student in Joint Program in Law and Public Administration at University of Montana. Portions of this article stem from Mrs. Elison's MPA degree professional paper entitled "Right to Know Provision of the Constitution of the State of Montana: Ethical and Legal Guidelines for the Public Administrator" (1983) (located in the Mansfield Library, University of Montana).

1. The breach of the principle of limited government commenced no later than McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), with Justice Marshall's reading of the Necessary and Proper Clause.

2. This unlimited executive power may even allow the President to modify individual constitutional rights to accomplish international objectives. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981) (modifying the right of access to courts of law).

3. RONALD DWORKIN, LIFE'S DOMINION ch. 5 (1993).

4. 317 U.S. 111 (1942) (holding that the Interstate Commerce Clause of Article I, Sec-

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ricultural control), *Perez v. United States*[5] (criminal law control), and *Katzenbach v. McClung*[6] (discrimination control) with the narrow rigidity of the opinions in *Bowers v. Hardwick*[7] (sexual orientation), *Employment Division, Department of Human Resources v. Smith*[8] (religious freedom and drugs), and *Harmelin v. Michigan*[9] (cruel and unusual punishment and sentencing proportionality) highlights the disequilibrium.[10]

Acknowledging that constitutional interpretations eliminated all presumptions against the power of government, the only remaining limitations against plenary government power are specific constitutional prohibitions designed to protect individual liberty. The following discussion is in support of the broadest possible interpretation of individual liberty. The focus of the discussion is on the freedoms to know and to speak and against the power of government to censor and conceal. Beyond that general proposition, the authors attempt to evaluate the Montana Constitution's right to know provision[11] and its case interpretations.[12] The right to know would seem to be an example of a right too obvious to deny,

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tion 8, Clause 3 of the Constitution empowered Congress to enact the Agricultural Adjustment Act of 1938, controlling home consumption of home-grown wheat).

5. 402 U.S. 146 (1971) (holding that the Interstate Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, empowered Congress to enact the Consumer Credit Protection Act, 18 U.S.C.A. § 891 et seq., making small, local intrastate loan-sharking activities subject to federal criminal law).

6. 379 U.S. 294 (1964) (holding that the Interstate Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, empowered Congress to enact the Civil Rights Act of 1964 prohibiting racial discrimination in a restaurant not frequented by interstate travelers).

7. 478 U.S. 186 (1986) (holding that the constitutional right of privacy did not protect homosexual sodomy between consenting adults in private from the reach of state criminal law).

8. 494 U.S. 872 (1990) (holding that the Free Exercise Clause of the First Amendment did not exempt the sacramental use of peyote by members of the Native American Church from state criminal law).

9. 111 S. Ct. 2680 (1991) (holding that conviction of cocaine possession and sentencing to mandatory life imprisonment were not cruel and unusual punishment within the meaning of the Eighth Amendment, and that the trial court's failure to consider mitigating factors was inconsequential). According to the Court, severe, mandatory penalties may be cruel, but they are not unusual. Further, the Court held that the Eighth Amendment contains no proportionality guarantee. *Id.* at 2686.

10. The problem is complicated by the demise of federalism as a principle of import in judicial decisions. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). An appeal to the federal judiciary to broadly interpret the Bill of Rights or to give meaning to the Ninth Amendment for the protection of unspecified individual rights, such as the right to know, as against government infringement, could be viewed as an appeal for increasingly intrusive federal government action rather than a balancing of the scales between government powers and individual liberties.

11. MONT. CONST. art. II, § 9.

12. *See infra* notes 89-147 and accompanying text.

like the rights of travel[13] and association,[14] although none of these rights are specifically mentioned in the United States Constitution. The Montana Constitution provides for a right to know but fails to mention either the right to travel or the right of association.

In large measure the right to know is a corollary of the freedom of speech, particularly of political speech. To participate effectively and knowledgeably in the political process of a democracy one must be permitted the fullest imaginable freedom of speech and one must be fully apprised of what government is doing, has done, and is proposing to do. The United States Constitution explicitly protects freedom of speech,[15] but provides no explicit protection for the right to know.

II. Freedom of Speech and the Right to Know in the U.S. Constitution

A. *History*

"Congress shall make no law . . . abridging the freedom of speech, or the press . . . ."[16] No significant constitutional history amplifies what the members of the Constitutional Convention of 1776 intended with the language they chose to protect the freedoms of speech and press. At the time the First Amendment was ratified in 1791 and later in 1868 when the Fourteenth Amendment was ratified, many states had laws inhibiting the freedoms of speech and press, including laws against defamation, misrepresentation, perjury, obscenity, false advertising, solicitation of crime, conspiracy, criminal syndicalism, and sedition. Insufficient evidence exists to conclude unequivocally what the framers had in mind or whether they even knew what they had in mind.[17] "[T]he only reliable evidence of what 'the ratifiers' thought they were ratifying is the language of the provision they approved."[18]

Whatever the founding fathers meant, freedom of speech and freedom of the press in the abstract have become highly regarded and stand as preferred rights today. However, freedom of expression is not so vigorously supported when the message is personally abhorrent as in obscenity directed against women, hate speech directed against racial and religious minorities, or radical political positions directed against paranoid governments.

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13. Shapiro v. Thompson, 394 U.S. 618 (1969).
14. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
15. U.S. Const. amend. I.
16. U.S. Const. amend. I.
17. Leonard W. Levy, Original Intent and the Framers' Constitution 209 (1988).
18. John H. Ely, Democracy and Distrust 17 (1980).

The Sedition Act of 1798[19] is an example of governmental intolerance of political speech. The Act, which in retrospect seems abominable, represented an eighteenth century libertarian position.[20] The Act made it a crime to write, print, utter, or publish any false, scandalous, or malicious writing against the government of the United States, either house of Congress, or the President with intent to defame or to bring them into contempt or disrepute.[21] In accordance with English common law, the Act imposed no prior restraints on expression but provided subsequent punishment for the seditious libel.[22] The Act required proof of criminal intent, allowed truth as a defense, and gave the jury the power to determine both fact and law.[23] This procedural design moved beyond the English common law to comport with eighteenth century libertarianism in the United States. Nonetheless, the Act was a powerful tool of repression.[24] Enforcement of the Act was not subtle, targeting the opposing political party and the press that supported it.[25]

Judicial development of free speech and freedom of the press was largely delayed, perhaps fortunately so. Many free speech cases reached the courts during the first 125 years following ratification of the First Amendment; however:

> The overwhelming weight of judicial opinion in all jurisdictions offered little recognition and even less protection of free speech interests . . . . A general hostility to the value of free expression permeated the judicial system. This pervasive hostility had few doctrinal underpinnings, nor was it openly expressed. Judges often emphasized the sanctity of free speech in the very process of reaching adverse decisions in concrete cases.[26]

In the past 75 years, a multitude of cases and accompanying scholarly opinions have poured forth. During that period the primary

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19. Sedition Act of 1798, ch. 74, 1 Stat. 596-97 (expired 1801).

20. LEVY, *supra* note 17, at 249-60.

21. LEVY, *supra* note 17, at 249-60.

22. The English position permitted a person to be jailed or perhaps executed for seditious libel as long as the person was not restrained from speaking or writing in the first instance. LEVY, *supra* note 17, at 215.

23. LEVY, *supra* note 17, at 259.

24. While no case came before the United States Supreme Court, 15 indictments were handed down, 10 convictions were obtained, three prestigious editors were convicted, and three newspapers were forced to discontinue publication. *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 515 n.343 (1983) (citing J. SMITH, FREEDOM'S FETTERS 176-87 (1956)).

25. *Id.* at 515.

26. David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 557 (1981).

focus has been on subversive speech,[27] defamatory speech,[28] obscene speech,[29] and offensive speech.[30] Limitations on freedom of expression continue to be important concerns; however, another villain of monstrous proportions lurks in the wings. That villain is government control of information and official secrecy.

Secrecy in government is ancient, traditional, venerated, and insidious.[31] In England, parliamentary debates were originally closed to the public on the theory that secrecy protected against interference by the Crown and later debates were closed to conceal the members' statements and votes from constituents.[32] Although

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27. Subversive speech cases have reviewed criminal syndicalism, union activity, and communism. The early language relied on the "bad tendency" test leaving unions, left-wing activists, and theoretical Marxists at high risk. The current test is much more sensitive to the importance of a free press and asks whether the speech is a purposeful incitement to imminent lawless action against the established government and likely to produce such lawless action. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969).

28. Defamatory speech has run the gamut from the Sedition Act of 1798 to *New York Times v. Sullivan*, which provided open season on government and agents of government. New York Times v. Sullivan, 376 U.S. 254 (1964). Prosecution for criminal defamation is almost non-existent today, and civil defamation is based on state law as modified by United States Supreme Court interpretations. Currently, for public officials to recover damages for defamation, there must be a showing of reckless disregard or knowing falsity proved by clear and convincing evidence. *Id.* at 285.

29. Prohibiting obscene speech has been a governmental concern predating the Constitution. The current legal test is long, obtuse, and satisfies no one. The general outline described in *Miller v. California*, as amplified in a number of subsequent cases, is still the law. The *Miller* test asks:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest (citation omitted); . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. 15, 24 (1973).

30. Offensive speech is an increasing concern and is often caught between inept proposals to regulate conduct and the stigma of politically correct speech. Constitutionally acceptable prohibitions include speech directed toward a specific person intended to incite to violence, *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969), and speech that creates a "hostile environment" in the work place, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). Intentional intimidation endangering civil or human rights is an area currently under intense debate without a final definitive answer, but note statutes such as 42 PA. CONS. STAT. ANN. § 8309 (Supp. 1993), and CAL. CIV. CODE § 52(b) (West Supp. 1993). *See also* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

31. Secrecy and intrigue are associated with monarchies, kings, and empresses, from Cleopatra to the Ayatollah Khomeni and from the Inquisition to the Shah of Iran. Recall the agencies of secrecy that have carried out intrigue from the Shah's SAVAK and the Soviet KGB to the secret death squads in Central America. The most notable evil chamber in our own common-law history (the well-known Star Chamber) charged, convicted, tortured, and killed in secrecy.

32. HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW 180 (1953).

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common law recognized a limited right of the public to inspect government-held documents, the right to observe deliberations of governmental bodies did not exist. Further, publication of the proceedings of governmental bodies was prohibited.[33]

The founding fathers, mostly aristocrats, schooled in the history of secrecy and somewhat fearful of the commoner, responded with secrecy. In 1776, the names of the signers of the Declaration of Independence were withheld for six months,[34] and both the Continental Congress and the Constitutional Convention excluded the public from all deliberations.[35]

The framers of the Constitution apparently failed to recognize the existence of any public right to access government information, although the historical position is in dispute.[36] Thomas Jefferson cautioned against the secrecy of the Constitutional Convention in a letter to John Adams, written during the summer of 1787: "I am sorry they began their deliberations by so abominable a precedent as that of tying up the tongues of their members. Nothing can justify this example but the innocence of their intentions, and ignorance of the value of public discussions."[37]

Both classical and contemporary theories of democracy not only require freedom of access to information, but also justify, as an inherent public right, demands for information about what government is doing and under what circumstances.[38] "Secrecy in government menaces democracy and sets a pattern that follows the political philosophy of a totalitarian state."[39] Public knowledge of government is essential to the democratic process.

James Madison said, "A popular [g]overnment without popular information, or the means of acquiring it, is but a [p]rologue to a [f]arce or a [t]ragedy; or, perhaps both."[40] If people are to judge the operation of government, they must have the facts about gov-

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33. FRANK THAYER, LEGAL CONTROL OF THE PRESS §§ 10, 29 (1962).

34. *Id.* § 10. The secrecy was rationalized as a reasonable response to possible prosecution for treason.

35. This was continued in the House of Representatives until 1794 and in the Senate until 1812. Present-day rules of both houses of Congress continue to allow for proceedings to be held in secret. *Id.*

36. *See* Thomas C. Hennings, Jr., *Constitutional Law: The People's Right to Know*, 45 A.B.A. J. 667, 668 (1959); Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273 (1971).

37. David M. O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579, 592 (1980) (quoting from 12 THE PAPERS OF THOMAS JEFFERSON 69 (J. Boyd ed., 1955)).

38. *Id.*

39. THAYER, *supra* note 33, § 29.

40. 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

ernment. The information must be complete and undistorted to make informed debate possible[41] and to make the election process effective. Voters must have full information as to the character of their agents, the actions taken by their agents, and the actions their agents intend to take.

The legitimacy of democratic governance depends on the wisdom of the voters, which can only be advanced by allowing each citizen to discover "truth" by full disclosure of all available information.[42] No governmental body is so infallible as to permit the substitution of its judgment for that of each individual person in the determination of issues of truth or falsity.[43] Evidence bearing on public decisions must be available to the community without any intervening "preselection" by the state. Restrictions undermine the search for truth and distort the process by which citizens make decisions. The goal is not just the search for political truth, but the search for all forms of "truth." The denial of information at its source disarranges the functioning of our political institutions and processes, and the distribution of power.[44] A fully informed citizenry maximizes the likelihood that sound decisions will be reached.

The question remains: Does a constitutional right to access government information exist? The language of the United States Constitution does not include an explicit provision creating a public right to access government information, although certain constitutional provisions do imply such a right of access, including the First Amendment rights to freedom of speech and freedom of the press. The Supreme Court has suggested that the First Amendment may contain narrow aspects of a right to know, stating that "a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs."[45] The Supreme Court has recognized a constitutional right to gather information as a corollary of the rights of freedom of speech and press.[46] However, these suggestions have not matured into any formal Court commitment to a constitutional right to know.

One simple conclusion would seem to follow inevitably from

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41. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-4, at 813-14 (2d ed. 1987).

42. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

43. MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.01 (1984).

44. Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957).

45. Mill v. Alabama, 384 U.S. 214, 218 (1966).

46. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

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the proposition that "We the People" are in control, that "We the People" are the rulers. "We the People" must be fully informed about our government and our government agents. In 1820, Thomas Jefferson, in a moment of truth and arrogance, said, "I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."[47]

The exercise of presidential as well as legislative power is limited by the liberty concept of the Due Process Clauses of the Fifth and Fourteenth Amendments. The Due Process Clause directly embodies the fundamental idea that government may not exercise coercive power over individuals in an arbitrary, capricious, or unreasonable manner. Secret government is by definition arbitrary.[48] All branches of the federal government and all agencies of government should be required to justify every exercise of power, and the courts should continuously posit a presumption against the exercise of government power. The inalienable right to know, to be informed, is possessed by a sovereign people in a democratic government as contrasted with a police state in which people are treated like pawns in a chess game or like blips on a computer screen. Yet the right to access government information has not been recognized.

B. How Important Is Government Information?

Government has become the principal collector of information and perhaps the principal generator of information. Modern communication technology and government access to nearly every facet of corporate and private life guarantee a maximum accumulation of information in the hands of government. Government generates and accumulates information with taxpayer dollars and presumptively for the benefit of the citizenry. Agencies and officials of government hold essential knowledge that can thwart the democratic process if kept secret. Many public administrators as well as elected officials assume the public is not qualified to make the best decisions and take it upon themselves to control information, thereby controlling decisions. Given the hundreds of departments,

47. O'Brien, *supra* note 37, at 587 n.45 (quoting a letter from Thomas Jefferson to William C. Jarvis).

48. *See* Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690 (1984).

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branches, and agencies that are managed and staffed by unelected government employees, often unresponsive to the people, an information policy of full disclosure becomes ever more essential.

Hundreds of thousands of government agents with computers acquire, retrieve, manipulate, and disseminate immense quantities of information.[49] Distribution of information is often by selective leaks, intentional misinformation ("plausible deniability"), and disinformation. Government acts are undertaken in the name of the people of the United States without their consent or even their knowledge.[50] Many of the actions are highly secret, morally dubious, and sometimes disastrous.[51] The government rarely ever fully informs the public but conveniently packages selected material to be released through the media. With such packages of information the citizenry cannot accurately evaluate the actions of government officials. Without full disclosure, self-governance becomes a farce.

Once legitimized, secrecy tends to spread as government officials succumb to strong personal incentives for withholding information from the public. Secrecy not only affords an opportunity to cover up mistakes or to conceal misbehavior, it allows officials to shape policy as they choose without consulting or informing the public. Most significantly, secrecy allows officials to escape accountability for their actions. Secrecy threatens the rationality of government decisions. Some of those excluded from the deliberative process by secretive practices may have information or advice that could save policy makers from grievous errors in judgment. Open government should be the general rule with few exceptions.

The struggle between open government and the paranoia of government secrecy culminated in the Freedom of Information Act (FOIA).[52] Congress passed the FOIA to ensure an informed citizenry, to serve as a check against corruption, and to hold those who govern accountable to the governed. The FOIA succeeded in none of these laudable goals. The basic difficulty with the FOIA is that Congress purported to pass a freedom of information act but

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49. For example, the National Security Agency alone is free, under the law, to "target, record, transcribe, and disseminate" all telecommunications of U.S. citizens abroad and "every telephone call and message entering, leaving, or transiting the country as long as it is done by microwave interception." JAMES BAMFORD, THE PUZZLE PALACE 372 (1982); *see also* Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811 (1988).

50. Examples include: the Bay of Pigs; the bombing of neutral Cambodia; the assassination of Chile's democratically elected president; military activities in Guatemala, Vietnam, Grenada, Nicaragua, and El Salvador; and the Watergate and Iran-Contra fiascoes. The list seems unending.

51. *See* examples *supra* at note 50.

52. Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (current version at 5 U.S.C. § 552 (1988)).

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succeeded in passing what Judge Gordon Bennett[53] has so astutely labelled the "Official Secrecy in Government Act."[54] The FOIA is really a statement of what the government may keep secret. Some government information warrants a measure of confidentiality; for example, a private individual's medical or personnel records.[55] However, the FOIA exemptions swallow the law.[56]

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53. Judge Gordon Bennett is a retired state district court judge living in Helena, Montana, who continues to be a tireless and vigorous advocate of openness in government.

54. The following nine categories of documents comprise the exemptions of the FOIA:

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular type of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b)(1)-(9) (1988).

55. An individual's right of privacy should not be confused with the government's power to conceal.

56. Two of the exemptions are extraordinarily broad. Exemption 1 exempts material in the interest of national security and by executive order. There seems to be no substantive limit on the executive order. Exemption 3 exempts anything that is specifically exempted from disclosure by other statutes. Again, there seems to be no substantive limit on what other statutes might exempt. *See supra* note 54.

Government seems to give citizens the "right to know" only when it is convenient for government. Where is the source of government power to maintain secrecy? Have "We the People" granted that power to our agents of government? Our revolutionary forefathers had a vision of limited government possessed only of enumerated and delegated powers. The people were to control the government. The people were not to be subservient to the government. Neither Congress nor the Supreme Court has given character to that vision. Rather, the Supreme Court has announced that "neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[57] The principle of a right to know seems implicitly a part of First Amendment free speech.

As a necessity of representational democracy, the right to know should be derived from the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[58] As the law now stands, no federal constitutional right to know exists. The Court has not derived the right to know from the Ninth Amendment; nor has the Court found that the right to know emanates from the penumbras of the Bill of Rights; nor has the Court determined that the right to know is an essential part of the core principle of representational democracy. The Court simply denies that the right exists. Congress has demeaned, diminished, and ridiculed the ideal of a right to know by codifying government concealment in nine separate categories of the FOIA, including such amorphous and broad ranging classifications as executive orders authorizing concealment in the interest of national defense or foreign policy and concealment specifically provided by statute.[59]

C. Some Examples—U.S. Supreme Court Cases

Some examples of judicial application and interpretation of the FOIA furnish stark illustrations of how the FOIA protects federal government secrecy. In *Environmental Protection Agency v. Mink*, members of Congress sought to compel disclosure of classified documents concerning a scheduled underground nuclear test.[60] The United States Supreme Court held that the FOIA does not permit compelled disclosure of the classified documents, in-camera

57. Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978).
58. U.S. CONST. amend. IX.
59. 5 U.S.C. § 552(b)(1)(A), (b)(3) (1988).
60. 410 U.S. 73 (1973).

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inspection to sift out non-secret components, nor in-camera inspections to determine the legitimacy of the classification. The Supreme Court further noted that the FOIA does not require that confidential documents be made available for a district court's in-camera inspection regardless of how little, if any, purely factual material they contain. The FOIA does not compel disclosure of classified documents. In interpreting the FOIA, no means exist to question an executive decision to stamp a document secret whether done cynically, myopically, or corruptly. The law requires blind acceptance of executive fiat. Justice Douglas noted in the *Mink* dissent that the President could "make even the time of day 'Top Secret.' "[61]

Court theories of standing further restrict ordinary citizens from accessing government information. The Supreme Court in *United States v. Richardson*[62] denied a taxpayer standing to contest the right of the Central Intelligence Agency (CIA) to account for its expenditures, solely on certification by its director.[63] The taxpayer alleged that without detailed information on CIA expenditures he could not properly follow legislative or executive action and fulfill his obligations as a voter. The Supreme Court denied the taxpayer's request.

Even a court's attempt to balance the concerns of national security with the public's legitimate interest in environmental protection and personal safety failed to escape FOIA exceptions. In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, the United States Supreme Court overturned a court of appeals order to the Navy that it prepare and release to the public a "hypothetical Environmental Impact Statement" relative to the construction of a new ammunition and weapons storage facility capable of storing nuclear weapons.[64] The basis for the Supreme Court reversal was FOIA exemption number one that exempts from disclosure classified material dealing with national security.

In some instances government information has been withheld even where private property and personal health were at risk.[65] In *United States v. Stanley*, the Supreme Court considered experiments designed to test the effects of lysergic acid diethylamide

61. *Mink*, 410 U.S. at 110.

62. 418 U.S. 166 (1974).

63. *Richardson*, 418 U.S. at 175. *But see* U.S. CONST. art. I, § 9, cl. 7 (requiring a regular statement and accounting of public funds).

64. 454 U.S. 139, 140-41 (1981).

65. Some examples are the testing of nerve gas in southern Utah, nuclear testing in the Nevada desert, and nuclear waste storage in the state of Washington.

(LSD).[66] The federal government had treated thousands of its citizens as though they were laboratory animals, dosing them with LSD without their knowledge or consent. The Supreme Court held that such secret action was acceptable, determining that the Constitution does not provide victim-citizens with a remedy for the atrocious injuries inflicted upon them by their own government.

In a variety of more subtle ways, the government attempts to exclude, manipulate, and otherwise control information disseminated in this country and abroad. For example, in *Snepp v. United States*, prior censorship of a public employee was upheld by the Supreme Court.[67] In *Meese v. Keene*, the Supreme Court upheld the government's labelling of three short docudramas filmed in Canada as "political propaganda."[68] Fear as to lost profits and professional reputation in showing films labeled as "political propaganda" reduced their potential dissemination. Nonetheless, the Supreme Court determined "political propaganda" to be a neutral phrase that does not burden speech.[69]

Government certification of domestic films as "educational, scientific, and cultural" permits duty-free export.[70] Commercially marginal documentaries often require exemption from export charges to make export economically feasible. Films that opposed administrative points of view, such as *Save the Planet*, which focused on dangers of nuclear weapons, and *In Our Own Backyard*, a negative report on nuclear energy, failed to receive certification.[71] Films that supported current administrative points of view, such as *Radiation . . . Naturally* and *To Catch a Cloud: A Thoughtful Look at Acid Rain* produced by Edison Electrical Institute, received certification.[72]

Federal law gives the United States State Department enormous discretion in granting and denying visas to foreign visitors. This power has been used to keep a variety of people from entering

66. 483 U.S. 669 (1987).

67. 444 U.S. 507 (1980). Lifetime censorship agreements have been imposed on more than 290,000 government employees. FREEDOM AT RISK: SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980's (Richard O. Curry ed., 1988).

68. 481 U.S. 465 (1987). The three films were: ACID FROM HEAVEN and ACID RAIN: REQUIEM OR RECOVERY, each discussing industrial pollution, and IF YOU LOVE THIS PLANET, an Academy Award-winning film on the dangers of nuclear war. *Meese*, 481 U.S. at 468 n.3.

69. *Id.* at 484-85.

70. *See* Bullfrog Films, Inc. v. Wick, 847 F.2d 502 (9th Cir. 1988) (discussing the Beirut Agreement under which qualifying audio-visual materials receive various benefits, including exemption from import duties); *see also* ELIZABETH HULL, TAKING LIBERTIES 109-22 (1990) (also discussing the Beirut Agreement).

71. *Bullfrog*, 847 F.2d at 504, 509-10 n.11; *see also* HULL, *supra* note 70, at 112-14.

72. *See Bullfrog*, 847 F.2d at 509-10 n.11; HULL, *supra* note 70, at 113-14.

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the United States, solely because their political views were not acceptable to the administration.[73] In *Kleindienst v. Mandel*, the Supreme Court held that although citizens have a First Amendment right to receive information:

> [W]hen the Executive exercises [the delegated power to exclude aliens] . . . on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.[74]

The other side of the same issue is equally troubling. The State Department controls passports for ordinary United States citizens who may want to find out for themselves what is going on abroad only to be told that entire countries may not be visited, such as Cuba, because of foreign policy considerations.[75] Secrecy of governmental affairs in the guise of protecting the public is paternalistic, deceitful, and ultimately tyrannical.

> Every attempt to censor is an attempt to kill an idea. Sometimes the idea seems trivial in one age and vital in another . . . . Sometimes the censors speak for national security, sometimes for public morals. But always they speak for fear. Fear that their opponents' ideas will persuade. Fear that their own arguments, values, and beliefs will be found wanting. Fear that free people, left to their own devices will fall into evil ways. Americans have come to accept such fears, to readily grant exceptions to free speech. And that is reason to be afraid.[76]

III. Right to Know in the Montana Constitution

A. *History*

Federal constitutional and statutory law defining openness in government seems relatively fixed and unlikely to change dramati-

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73. *See generally* Hull, *supra* note 70, at 13-52. Notable exclusions by visa denial include: Canadian writer Farley Mowat, Nobel Prize-winning Columbian author Gabriel Garcia Marguez, and former Canadian Prime Minister Pierre Trudeau. Hull, *supra* note 70, at 13. Tomas Borge, Nicaragua's interior minister, was denied a visa because he intended to make speeches critical of President Reagan's Central American policy. Hull, *supra* note 70, at 19. Olgay Finlay, an authority on family law, was denied a visa because her speaking engagements would have allowed her to propagate Cuban policies. Hull, *supra* note 70, at 44 n.96.

74. 408 U.S. 753, 770 (1972).

75. *See, e.g.*, Regan v. Wald, 468 U.S. 222 (1984).

76. Virginia I. Postrel, *Free Minds and Free Markets. Quiet Crusade: Seize a Church School, Ban a Prayer Meeting, Close Down a Synagogue, Zealous Bureaucrats are Struggling with Religious Liberty*, Reason Magazine Vol. 19, 20-26 (Dec. 1987).

cally in the immediate future. However, rejection of a federal constitutional right to know does not foreclose the possibility of individual states providing citizens within their boundaries the right to know. All fifty states have some form of statutory provision for freedom of information. Montana, Louisiana, North Dakota, and New Hampshire have explicit constitutional provisions.[77] Most state constitutions with right to know provisions include potentially eviscerating exceptions: Louisiana excepts "cases established by law"; North Dakota excepts anything "otherwise provided by law"; and New Hampshire excepts any reasonable restriction. Only Montana has stated a precise and narrowly drawn exception.[78] Article II, Section 9, of the Montana Constitution, reads:

> Right to know. 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, ex-

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77. States having no constitutional right-to-know/open meetings provisions: Alaska, Arizona, Hawaii (however, having a statutory open meeting provision at HAW. REV. STAT. § 92-10 (1993)), Kansas, Kentucky, Maine, Massachusetts, New Jersey, North Carolina, Oklahoma, Rhode Island, Virginia, and West Virginia.

State constitutions guaranteeing open legislative sessions: IDAHO CONST. art. 3, § 12; MONT. CONST. art. V, § 10 (The Montana guarantee of open legislative sessions and open legislative committee meetings is in addition to the generalized guarantee of a public right to know. Presumptively, the art. V, § 10 guarantee is absolute and could not be overcome by a showing that the demand of individual privacy clearly exceeded the merits of public disclosure.); N.M. CONST. art. IV, § 12; N.D. CONST. art. IV, § 14; OR. CONST. art. IV, § 14.

State constitutions with qualified guarantees of open legislative sessions:

(a) Except in circumstances requiring secrecy: ALA. CONST. art. IV, § 57; COLO. CONST. art. V, § 14; CONN. CONST. art. III, § 16; DEL. CONST. art. II, § 11; IND. CONST. art. IV, § 13; MD. CONST. art. III, § 21; MICH. CONST. art. IV, § 20; MINN. CONST. art. IV, § 14; MISS. CONST. art. IV, § 58; MO. CONST. art. III, § 20; NEB. CONST. art. III, § 11; N.H. CONST. Part 2, art. VIII; N.Y. CONST. art. III, § 10; OHIO CONST. art. II, § 13; S.C. CONST. art. III, § 23; S.D. CONST. art. III, § 15; TENN. CONST. art. II, § 22; VT. CONST. ch. II, § 8; WASH. CONST. art. II, § 11; WIS. CONST. art. IV, § 10; WYO. CONST. art. III, § 14.

(b) Except when Senate meeting in executive session: NEV. CONST. art. IV, § 15; TEX. CONST. art. III, § 16; UTAH CONST. art. VI, § 15.

(c) Except upon vote of members to close: CAL. CONST. art. IV, § 7(c); GA. CONST. art. III, § 4, para. 11; ILL. CONST. art. IV, § 5(c).

Miscellaneous state constitutional provisions: CAL. CONST. art. IX, para. 9(g) (meetings of Board of Regents open except as provided by statute); FLA. CONST. art. V, § 11(d) (meetings of Judicial Nominating Commission open except for deliberations of commission); and MICH. CONST. art. VIII, § 4 (formal sessions of university governing boards open).

States having broad constitutional right-to-know/open meetings provisions: LA. CONST. art. XII, § 3 (all meetings open "except in cases established by law"); MONT. CONST. art. II, § 9 (right to know and all meetings open "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure"); N.H. CONST. part I, art. 8 (right to know "shall not be unreasonably restricted"); N.D. CONST. art. XI, § 5 (all meetings open "[u]nless otherwise provided by law"). Brief of Plaintiffs and Respondents app. A, Associated Press v. Board of Pub. Educ., 246 Mont. 386, 804 P.2d 376 (1991) (No. 89-589).

78. A special thank you is extended to Constitutional Convention Delegate Dorothy Eck for her introduction and support of the right-to-know provision.

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cept in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

While state right to know constitutional provisions and state freedom of information laws do not have any real impact on federal government secrecy, they could serve as experimental illustrations of open government. State models of open government can not address the problem of external security, and necessarily provide a limited experimental illustration.

In considering state government arrangements for public access to government information, Montana seems to be an ideal model. Montana is one of only four states that have explicit constitutional right to know provisions. And Montana is the only state that does not destroy the right with open-ended exceptions. The only limitation placed on the Montana right to know is the right of the individual to personal privacy. Wade J. Dahood, Chairman of the Bill of Rights Committee of the Montana Constitutional Convention, urged the convention to take note that "the guidelines and protections for the exercise of liberty in a free society come not from government but from the people who create that government."[79] He added that it was in that spirit that the committee attempted to insure "a more responsible government that is Constitutionally commanded never to forget that government is created solely for the welfare of the people."[80]

Substantial sentiment was present within the Constitutional Convention to amend the "right to know" provision by deleting the final phrase "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure" and substituting the phrase "*except as may be provided by law* in cases in which the demands of individual privacy clearly exceeds the merits of public disclosure."[81] The delegates selected the former wording that implicitly favors judicial interpretation of general constitutional language on a case specific basis over legislatively crafted exceptions in response to special interest requests.[82]

Prior to the 1972 Constitutional Convention, Montana law included a large number of statutes that pertained to the public's right to know and limitations upon that right.[83] Probably the most

79. 2 MONTANA CONSTITUTIONAL CONVENTION OF 1971-1972, at 619 (1979).

80. *Id.*

81. 5 MONTANA CONSTITUTIONAL CONVENTION OF 1971-1972, at 1671-79 (1979) (emphasis added) (while the vote was relatively close, 56 to 30, the proposed amendment was defeated as the convention delegates favored the provision without any direction to the legislature that it should implement the provision).

82. *Id.*

83. For example, such diverse activities as bean dealer records, grade of commercial

significant statutory right to know precursor to the constitutional right to know was the Montana Open Meeting Act of 1963. The legislature has amended the original act in an attempt to accommodate the Montana constitutional right to know language and subsequent judicial interpretations.[84] Patterned somewhat after the federal Freedom of Information Act, the act provides for the

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fertilizer, bank reports, insurer notices of noncompliance, hard rock mining information, records concerning air contaminant sources, information relating to occupational health, water pollution information, welfare information records, and pre-sentence investigative reports were previously afforded some degree of statutory confidentiality.

84. Section 2-3-201 of the Montana Code states:

> The legislature finds and declares that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.

MONT. CODE ANN. § 2-3-201 (1993).

The principal provision of this legislation, which both requires open meetings and provides certain exceptions, is MONT. CODE ANN. § 2-3-203 (1993). This section states that:

> (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 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) Provided, however, 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 shall be open.
>
> (4)(a) However, 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) Any committee or subcommittee appointed by a public body or an association described in subsection (2) for the purpose of conducting business which is within the jurisdiction of that agency shall be subject to the requirements of this section.

MONT. CODE ANN. § 2-3-203 (1993). As originally enacted, the law contained many exceptions that have been deleted since ratification of the 1972 Montana Constitution.

Another statute directly effecting the right to know is MONT. CODE ANN. § 2-6-102 (1993). That statute provides:

> (1) Every citizen has a right to inspect and take a copy of any public writings of this state, except as . . . expressly provided by statute.
>
> (2) Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him on demand a certified copy of it . . . .

MONT. CODE ANN. § 2-6-102 (1993).

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right to observe the deliberations of governmental bodies,[85] prohibits its exclusion of accredited press representatives from any open meeting,[86] and requires that minutes of meetings be open for inspection by the public.[87] Notwithstanding the mandatory right to know language of the Montana Constitution, many statutory provisions remain that purport to restrict the public's general right to know.[88]

B. Case Interpretation of Montana's Right to Know

A growing body of Montana case law interprets the constitutional right to know. The Montana Supreme Court has reviewed some of the statutory restrictions and held them unconstitutional.[89] Several of the recent decisions have begun to develop a more consistent approach to open government.[90]

On the other hand, many of the decisions have failed to give due consideration to the historical justification for a right to know, have failed to analyze the application of the law in a consistent fashion, or have made perplexing policy choices. An analysis and evaluation of all of the right to know decisions and supporting opinions does not provide an articulable jurisprudential overview of the meaning and purpose of a right to know. Predicting the outcome of cases before they have been decided continues to be difficult.

A number of potential ways exist in which to classify and analyze the decisions and opinions interpreting the right to know provision in the Montana Constitution. One way is to divide the cases between those that seem to contract the right to know and those

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85. MONT. CODE ANN. § 2-3-203 (1993).

86. MONT. CODE ANN. § 2-3-211 (1993).

87. MONT. CODE ANN. § 2-3-212 (1993).

88. *See, e.g.*, MONT. CODE ANN. § 7-1-4144(3) (local government records); § 32-1-234 (bank and trust company reports); § 40-8-126 (adoption proceedings); § 41-3-205 (child abuse and neglect proceedings); § 41-5-601 to -603 (Youth Court proceedings); §§ 44-5-214, -301 to -303, -504, -515 (criminal justice information); §§ 50-16-203, -205 (medical reports and health care information); § 50-20-110(5) (1993) (documentation of abortions).

The above-mentioned statutes do not purport to be a complete or comprehensive explanation or even a complete listing of all relevant right-to-know statutes or exemptions from the provision.

89. *See, e.g.*, Great Falls Tribune Co. v. Great Falls Pub. Schs., 255 Mont. 125, 841 P.2d 502 (1992); Associated Press v. State, 250 Mont. 299, 820 P.2d 421 (1991); Associated Press v. Board of Pub. Educ., 246 Mont. 386, 804 P.2d 376 (1991).

90. Bozeman Daily Chronicle v. Bozeman Police Dep't, ___ Mont. ___, 859 P.2d 435 (1993); Allstate Ins. Co. v. City of Billings, 239 Mont. 321, 780 P.2d 186 (1989); *see also* Great Falls Tribune Co. v. Great Falls Pub. Schs., 255 Mont. 125, 841 P.2d 502 (1992); Associated Press v. Board of Pub. Educ., 246 Mont. 386, 804 P.2d 376 (1991). *But see* SJL of Montana v. City of Billings, ___ Mont. ___, ___ P.2d ___, 50 St. Rep. 1726 (1993).

that tend to expand the right to know.[91] A second way to classify might be according to whether the information sought involves a risk of invasion of the privacy of a group of persons or an individual.[92] A third classification would divide the cases on the basis of whether the right to know claim was based on some special partic-

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91. *Contracting*: State v. Burns, 253 Mont. 37, 830 P.2d 1318 (1992); Flesh v. Board of Trustees, 241 Mont. 158, 786 P.2d 4 (1990); Engrav v. Cragun, 236 Mont. 260, 769 P.2d 1224 (1989); State *ex rel.* Great Falls Tribune Co. v. District Court, 238 Mont. 310, 777 P.2d 345 (1989); Belth v. Bennett, 227 Mont. 341, 740 P.2d 638 (1987); Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962 (1984); Montana Human Rights Div. v. City of Billings, 199 Mont. 434, 649 P.2d 1283 (1982); Mountain States Tel. & Tel. Co. v. Department of Pub. Serv. Regulation, 194 Mont. 277, 634 P.2d 181 (1981).

Expanding: Montana Health Care Ass'n v. State Compensation Mut. Ins. Fund, 256 Mont. 146, 845 P.2d 113 (1993); Citizens to Recall Mayor Whitlock v. Whitlock, 255 Mont. 517, 844 P.2d 74 (1992); Great Falls Tribune Co. v. Great Falls Pub. Sch., 255 Mont. 125, 841 P.2d 502 (1992); PacifiCorp v. Department of Revenue, 254 Mont. 387, 838 P.2d 914 (1992); Associated Press v. State, 250 Mont. 299, 820 P.2d 421 (1991); Associated Press v. Board of Pub. Educ., 246 Mont. 386, 804 P.2d 376 (1991); Allstate Ins. Co. v. City of Billings, 239 Mont. 321, 780 P.2d 186 (1989); Great Falls Tribune Co. v. Cascade County Sheriff, 238 Mont. 103, 775 P.2d 1267 (1989); Jarussi v. Board of Trustees, 204 Mont. 131, 664 P.2d 316 (1983); Board of Trustees v. Board of County Comm'rs, 186 Mont. 148, 606 P.2d 1069 (1980).

92. *Groups or corporations*: Montana Health Care Ass'n v. State Compensation Mut. Ins. Fund, 256 Mont. 146, 845 P.2d 113 (1993) (permitting public access to employee-employer information involving a large number of people and records); Great Falls Tribune Co. v. Cascade County Sheriff, 238 Mont. 103, 775 P.2d 1267 (1989) (allowing public access to information concerning four police officers who were suspended or terminated, while refusing to protect the privacy of the individual public employee police officers); Engrav v. Cragun, 236 Mont. 260, 769 P.2d 1224 (1989) (protecting the privacy rights of a large number of individuals and perhaps the privacy of the general operation of the sheriff's office against the public's right to know); Belth v. Bennett, 227 Mont. 341, 740 P.2d 638 (1987) (protecting the privacy of insurance companies licensed to conduct business in the state against the public's right to know); Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962 (1984) (protecting the privacy of a small but identified group of public employees); Montana Human Rights Div. v. City of Billings, 199 Mont. 434, 649 P.2d 1283 (1982) (releasing personnel information about a large group of public employees without obtaining prior consent stating that obtaining consent would be prohibitive without explaining whether in terms or time or money; but requiring that the government agency must conceal the identity of the individuals whose records were a part of the investigation); Mountain States Tel. & Tel. Co. v. Department of Pub. Serv. Regulation, 194 Mont. 277, 634 P.2d 181 (1981) (providing privacy protection for a public utility against the public's right to know).

Individuals: Citizens to Recall Mayor Whitlock v. Whitlock, 255 Mont. 517, 844 P.2d 74 (1992) (declining to protect the privacy of an individual public employee); State v. Burns, 253 Mont. 37, 830 P.2d 1318 (1992) (denying government access to single individual's personnel files in the possession of private employer); Flesh v. Board of Trustees, 241 Mont. 158, 786 P.2d 4 (1990) (protecting the privacy of an individual public employee against the public's right to know); Allstate Ins. Co. v. City of Billings, 239 Mont. 321, 780 P.2d 186 (1989) (permitting release of an individual's criminal justice records for the benefit of a corporate defendant in a collateral civil action); State *ex rel.* Great Falls Tribune Co. v. District Court, 238 Mont. 310, 777 P.2d 345 (1989) (protecting the individual privacy of a single unidentified person); Jarussi v. Board of Trustees, 204 Mont. 131, 664 P.2d 316 (1983) (nearly protecting the right of privacy of an individual public employee, but recognizing the waiver of privacy by the individual and requiring the meeting in question to be opened).

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ularized need to know or on a general request for information held by an agency of government.[93]

The Montana Supreme Court seems to consider the established position, power, and good name of the person, agency, institution, or corporation claiming privacy whenever a privacy claim is asserted to block public access to information. For example, the court denied privacy claims and permitted the release of information regarding: a discredited mayor charged with sexual harassment;[94] police officers reprimanded, disciplined, or discharged;[95] and an individual charged with a crime.[96] The court upheld privacy claims and denied public access to information regarding: public employees who were university presidents;[97] corporations with valuable property or reputational interests at stake;[98] and a police department with its public operation under scrutiny.[99]

Further, the Montana Supreme Court seems to consider the power of the person or organization requesting the release of information. In *Engrav v. Cragun*, the person requesting the information was a student at Montana State University and the court denied him access to police records, files, and information.[100] In *Allstate Insurance Co. v. City of Billings*, an insurance company sought and obtained specific criminal justice information.[101] How-

93. *See* Montana Health Care Ass'n v. State Compensation Mut. Ins. Fund, 256 Mont. at 150-52, 845 P.2d at 116-17 (holding that an employee challenging workers' compensation right was entitled to employer-specific payroll information relied upon in setting rates); *PacifiCorp*, 254 Mont. at 393-95, 838 P.2d at 918-19 (holding that a special tax audit was available to the taxpayer); *Burns*, 253 Mont. at 40-43, 830 P.2d at 1320-22 (prosecution needed the requested information to counter a criminal defendant's list of character witnesses; an in-camera inspection of the requested files convinced the trial court judge that the files were not necessary to the prosecution and that the individual's privacy clearly exceeded the merits of public disclosure); *Allstate*, 239 Mont. at 325, 780 P.2d at 188 (permitting release of criminal justice records of the investigation of insured's death); Montana Human Rights Div. v. City of Billings, 199 Mont. at 446-50, 649 P.2d at 1287-88 (permitting the Human Rights Commission's request for specific information needed to investigate claims of discrimination); Mountain States Tel. & Tel. Co. v. Department of Pub. Serv. Regulation, 194 Mont. at 287-89, 634 P.2d at 186-89 (the public service commission needed specific information necessary to establish rates and the taxpaying public should have been entitled to this information; however, the court upheld the corporation's request for secrecy to protect its financial-property interest under the guise of a right of privacy).

94. *Citizens to Recall Mayor Whitlock*, 255 Mont. at 522-23, 844 P.2d at 77-78.

95. Great Falls Tribune Co. v. Cascade County Sheriff, 238 Mont. at 107, 775 P.2d at 1269.

96. Associated Press v. State, 250 Mont. at 302, 820 P.2d at 422.

97. Missoulian v. Board of Regents, 207 Mont. at 531-36, 675 P.2d at 972-74.

98. *Belth*, 227 Mont. at 345-49, 740 P.2d at 640-43; Mountain States Tel. & Tel. Co. v. Department of Pub. Serv. Regulation, 194 Mont. at 287-89, 634 P.2d at 188-89.

99. *Engrav*, 236 Mont. at 267-68, 769 P.2d at 1229.

100. 236 Mont. 260, 769 P.2d 1224.

101. 239 Mont. 321, 780 P.2d 186.

ever, *Engrav* and *Allstate* differed in additional ways. *Allstate* concerned a specific need to know; whereas *Engrav* concerned the generalized right to know. Further, the requested information in *Allstate* was easier to access and sanitize, the request being for information about one individual; whereas, the *Engrav* request was for extensive departmental records.

C. *Suggestions for Future Interpretations*

Perhaps it is impossible to fairly and pragmatically respond to all requests for public information in a consistent and logical fashion. If it is possible to interpret the constitutional right to know provision in a manner that is compatible with the language, history, and intent of the provision and consistent with the philosophical justification for having a public right to know in a representational democracy, a number of questions should be raised.

The first question is whether individual privacy is at risk, not corporate privacy, not institutional privacy, and not government enterprise privacy. If individual privacy is at risk, legitimate expectations of privacy should be defined. Individual privacy is limited by whatever one makes public. Individual privacy is limited to what one subjectively seeks to maintain as private. Individual privacy is limited to that which society is prepared to recognize as legitimate.[102] If the privacy claimed is that of a private individual in a non-public activity, and if the privacy claimed is subjectively expected and legitimately accepted, it must be weighed against the public's right to know.

The business of government is not, in any case or under any circumstance, a legitimate dimension of individual privacy. An individual working for and employed by the government necessarily relinquishes a measure of privacy. The privacy relinquished is coterminous with the scope of the employment. In two recent decisions, the Montana Supreme Court has taken an important first step in this direction. In *Great Falls Tribune Co. v. Great Falls Public Schools*, the court found the collective bargaining strategy

102. The various cases that elucidate the concept of "legitimate expectation of privacy" have primarily focused on criminal investigations. The test most frequently employed, and to which reference is made in several of the Montana cases, is derived from the concurring opinion of Mr. Justice Harlan in *Katz v. United States*. "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. 347, 361 (1967) (involving FBI electronic listening and recording devices used to obtain evidence of a crime). Outside of the application of criminal law, the demands of individual privacy will usually be held to clearly exceed the merits of public disclosure when a private individual seeks to shield private, non-criminal information.

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exception to the open meeting law unconstitutional.[103] In *Associated Press v. Board of Public Education*, the court found the statutory litigation exception to the right to know unconstitutional.[104] These decisions were met with doom and foreboding by government attorneys, public administrators, and unions. The tradition of secret strategy in conducting the government's business is deeply entrenched making it difficult for many government employees to imagine that the Montana Constitution means what it says or that government business could possibly be conducted in accordance with the public's right to know. Many have difficulty perceiving that government business can be conducted openly or in a manner different from the manner in which government business has been conducted for centuries, that is, without allowing the public to know what government is doing.

When, as in *Associated Press v. Board of Public Education*,[105] a public agency is discussing litigation strategy in a lawsuit to be asserted against another public agency, the necessity to close the meeting and exclude the public is obviously unconstitutional and patently absurd. The statute found to be unconstitutional in *Associated Press v. Board of Public Education* stated that "a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency."[106] Nothing in the statute mentioned the constitutional justification for an exception to the public's right to know. Article II, section 9, of the Montana Constitution specifically allows only one exception: "cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."[107] Exceptions based on the speculative detrimental effect on the bargaining or litigating position of a public agency are plainly not compatible

103. 255 Mont. 125, 131, 841 P.2d 502, 505 (1992); *see also* MONT. CODE ANN. § 2-3-203(4) (1991) (amended 1993). The 1993 legislature responded to the decision by eliminating the exception for collective bargaining strategy sessions.

104. 246 Mont. 386, 392, 804 P.2d 376, 379-380 (1991); *see also* MONT. CODE ANN. § 2-3-203(4) (1991) (amended 1993). Reading the decision as narrowly as possible, the 1993 Legislature eliminated the exception for litigation strategy sessions only insofar as all parties to the litigation are public agencies. *See* MONT. CODE ANN. § 2-3-203(4)(b) (1993). Otherwise, the statute as amended in 1993 states: "a meeting may be closed to discuss a [litigation] strategy . . . when an open meeting would have a detrimental effect on the litigating position of the public agency." MONT. CODE ANN. § 2-3-203(4)(a) (1993). The above-quoted language is a statutory attempt to modify the language of Montana's constitutional right-to-know provision.

105. 246 Mont. 386, 804 P.2d 376.

106. *Associated Press*, 246 Mont. at 390, 804 P.2d at 378 (citing MONT. CODE ANN. § 2-3-203(4) (1991) (amended 1993)).

107. MONT. CONST. art. II, § 9.

with the language or intent of the constitutional provision.

Litigation and collective bargaining strategies involving parties who are not agencies of government will have to be considered separately. To maintain a level playing field it may be essential to advise private individuals or groups that find themselves in a dispute with a government agency that different rules apply as to litigation or collective bargaining strategy than might otherwise apply if a government agency were not involved.

If a private person asserts a claim of privacy, the court must weigh the claim against the public's right to know, and in most circumstances, the privacy claim will prevail. If a government agency asserts a vicarious claim of privacy, the agency should be required to notify any individual at risk, advising the individual of the request for information and allowing waiver or objection. If the individual waives the right of privacy, the information should be released. If the individual objects to the release of information, the court should weigh the privacy claim against the public's right to know. If notification is not possible, for example, if the individual cannot be located or the number of individuals involved would make notification pragmatically impossible, the trial court should not defer to the agency's vicarious assertion of privacy but should make an independent decision. The court should make an initial in-camera inspection of the requested information and determine whether the right of privacy clearly exceeds the public's right to know. If the court's initial decision is that the right of privacy clearly exceeds the right to know, the court should take a second action. The court should provide maximum access to the information while protecting the individual's right to privacy.[108] The court should confer with the persons requesting the information and en-

108. In *Mountain States Telephone & Telegraph Co. v. Department of Public Service Regulation*, the court issued a protective order that supposedly gave the Public Service Commission access to information needed to perform its regulatory duties. Information was also made available to other parties participating in the rate hearings subject to provisions protecting the confidentiality of the Mountain States Telephone & Telegraph Company's trade secret information. *Mountain States Tel. & Tel. Co.*, 194 Mont. at 290-93, 634 P.2d at 190-92. In *Allstate Insurance Co. v. City of Billings*, the court ordered the district court to conduct an in-camera inspection of the documents at issue to determine what material could be released. The court further suggested that the district court could limit the release of information by a protective order, but did not specify the terms of the protective order. *Allstate Ins. Co.*, 239 Mont. at 326, 780 P.2d at 189. In *Montana Health Care Association v. State Compensation Mutual Insurance Fund*, the court held that employees' and employers' rights to withhold specific payroll information did not clearly exceed the merits of public disclosure. In ordering the release of the information held by the State Compensation Mutual Insurance Fund, the court stated without detailing the specifics that a protective order could be fashioned to protect individual privacy and at the same time disclose the needed information. *Montana Health Care Ass'n*, 256 Mont. at 152, 845 P.2d at 117.

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courage them to propose arrangements that would permit the release of the information while protecting legitimate claims of privacy. The concern, commitment, and ingenuity of the requesting parties could be determinative of whether the information should be released.

What would be the outcome in the several cases discussed if the proposed analysis and suggested policy choices controlled the decisions and opinions of the court? All cases involving the public aspect of public employees' activities are easy to resolve. The public has a right to know.[109]

Cases that involve corporations are equally easy to decide. In the debates of the 1972 Constitutional Convention, the delegates clearly intended the right of privacy to be available to individuals only.[110] Corporate individual privacy is an oxymoron, a contradiction in terms. Public utility corporations and to a lesser extent, such heavily regulated corporations as insurance companies, are without a scintilla of justification to support a claim of individual privacy. An insurance company is subject to extensive state regulation and must submit information to the state Commissioner of Insurance for evaluation of its financial stability as a means of protecting consumers. Withholding such information from the public is nothing short of incredible.[111] A public utility's request for increased rates is a public dimension of its corporate operation.[112]

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109. *See, e.g., Citizens to Recall Mayor Whitlock*, 255 Mont. 517, 844 P.2d 74; Great Falls Tribune Co. v. Great Falls Pub. Sch., 255 Mont. 125, 841 P.2d 502; Associated Press v. Board of Pub. Educ., 246 Mont. 386, 804 P.2d 376; *Flesh*, 241 Mont. 158, 786 P.2d 4; Great Falls Tribune Co. v. Cascade County Sheriff, 238 Mont. 103, 775 P.2d 1267; Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962; *Jarussi*, 204 Mont. 131, 664 P.2d 316.

110. Answering a question concerning the privacy of a corporation, a member of the Bill of Rights committee responded that a corporation would not be considered to be an individual. *See* 5 MONTANA CONSTITUTIONAL CONVENTION OF 1971-1972, at 1680 (1981).

111. The information requested in *Belth* was compiled at taxpayer expense and then denied to the public to protect the individual privacy of the insurance companies that sell insurance to citizens of the state of Montana (the taxpayers). 227 Mont. at 354, 740 P.2d at 646 (Sheehy, J., dissenting). As noted by Justice Sheehy, "It approaches inanity to hold that Montana insureds shall not be allowed to know which troubled companies are doing business in Montana or that they are troubled companies." *Id.*

112. In *Mountain States Telephone & Telegraph Co.*, the court held that "the demands of individual privacy of a corporation as well as of a person might clearly exceed the merits of public disclosure, and thus come within the exception of the right to know provision." *Mountain States Tel. & Tel. Co.*, 194 Mont. at 287, 634 P.2d at 188. The court further held that trade secret information was technically private property entitled to constitutional protection and that a denial to issue the protective order had the effect of violating the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, the Due Process Clauses of the U.S. Constitution, and the Constitution of the state of Montana. *Id.* at 283, 634 P.2d at 185. The court required Mountain States to furnish the commission and the consumer council with information necessary for regulation, subject to a protective order. The court did not require disclosure to the general public, claiming that such disclo-

Publicly regulated industries, such as public utilities, are not typical corporations. They are state regulated monopolistic enterprises that are given special support and are expressly controlled by government. There can be no reasonable expectation of privacy by a regulated industry regarding information necessary to determine rate increases. Further, the activities of the agencies charged with regulating public utilities are precisely the activities the citizenry should be allowed to observe. The kind of information generated by public utility commissions is information which should be made available to the public. Too often, commissions formed to regulate industries become subservient to the industry they regulate and the so-called public representative in the form of a consumer counsel becomes subservient to both the commission and the industry. The necessity for public observation of regulated industries and regulating agencies is obvious and should not be restricted.

More difficult cases involve the potential invasion of individual privacy of a large number of persons where the names of persons and information about each has been accumulated by an agency of government and the government agency in possession of the information has asserted vicariously, the theoretical[113] right of privacy of unidentified and unnotified individuals.[114] In *Montana Human Rights Division v. City of Billings*, the court considered the need to know critical.[115] Without the information requested, including identification detail associated with the information, the Human Rights Commission could not carry out its legal responsibility to investigate and prosecute discrimination.[116] In *Engrav v. Cragun*, the court said that no identified or particularized need to access the information existed.[117] The requesting party was a private researcher, not a state agency. Nonetheless, public knowledge about government operations in general and the need to know if

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sure of trade secrets would deprive the telephone company of property without due process of law. *Id.* at 286, 634 P.2d at 187. While the decision is bothersome, the real problem is that the court opinion ignores the obvious intent of the framers of the constitution and the plain language of the constitution, by declaring that a corporation has a constitutional right of individual privacy.

113. Theoretical is used because the agency asserting the constitutional claim of privacy has no legitimate claim of personal privacy. The government agents are alleging the privacy of others who have not been identified or notified and who have not been given the opportunity to waive any claim of privacy they might have.

114. *See, e.g.*, *Engrav*, 236 Mont. 260, 769 P.2d 1224; Montana Human Rights Div. v. Billings, 199 Mont. 434, 649 P.2d 1283 (1982).

115. 199 Mont. 434, 649 P.2d 1283.

116. It should be noted that the requested information was public employees' employment records.

117. 236 Mont. at 267-68, 769 P.2d at 1228-29.

agents of government have violated statutory or constitutional rights should be considered matters of utmost importance. Whether the request for information comes from a private citizen or an agency of government should not affect the court's decision. If the court must give any consideration as to who is making the request for information, the court should show heightened concern for the private request. The private party ordinarily has less power and fewer alternative means by which to obtain the requested information. In such cases the court should never summarily deny the public's right to know based on a public agency's vicarious privacy assertion. If the court assumes that notification is not possible because of the large number of individuals whose privacy might be at risk, the court should decide if the individual privacy at stake is substantially more important than the public's right to know. No deference should be given to the separate conclusion of the government agency in possession of the information. Also, no basis exists for the court to refer to a security interest and determine that the protection of an undefined security risk is a compelling state interest. Even a compelling government interest is not a basis for denying public access to government-held information.[118] Again, if the court's initial decision is that the right of privacy clearly exceeds the right to know, the court should attempt to design a method to provide maximum access to the information while protecting the right to privacy.

The court, in *State ex rel. Smith v. District Court*, recommended such an action:

> Based upon the Right to Know provision of the Montana Constitution and the right of access recognized under the First and Fourteenth Amendments to the United States Constitution, we hold that the public and press may be excluded from a pretrial suppression hearing only if dissemination of information acquired at the hearing would create a clear and present danger to the fairness of defendant's trial and no reasonable alternative means can be utilized to avoid the prejudicial effect of such information.[119]

The court continued by noting that "[i]f the evidence adduced supports a finding that there is a clear and present danger to trial fairness, the court should then hear evidence and argument as to whether less restrictive alternatives would suffice to ensure a fair trial."[120]

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118. *See* MONT. CONST. art. II, § 9.
119. 201 Mont. 376, 385, 654 P.2d 982, 987 (1982).
120. *State ex rel. Smith*, 201 Mont. at 386, 654 P.2d at 988.

The court in *Smith* was concerned not only about privacy but the right to a fair trial. No less should be demanded of the court in protecting the public's right to know when raised in other contexts. The court should design the best arrangement possible to protect individual privacy while accommodating the public's right to know. For example, the court might issue protective orders, as in *Montana Human Rights*[121] and *Mountain States Telephone and Telegraph*.[122] Other possibilities include release of information to the extent the person requesting information obtains waivers from individuals whose privacy is at risk. If cost is a limiting factor in giving notification, the requesting party might be required to pay the cost. Requests for generalized information, in which identity needs to be protected, could be accommodated by blanking out names. In *Missoulian v. Board of Regents*, the court discussed alternative means that might be used to open the meetings while protecting individual privacy.[123] These included "protecting the identity of those discussed, 'agenda scheduling'. . . , and objections and side bar conferences."[124] However, the court found these alternatives to be impractical and inadequate to protect privacy, concluding that "closure of the job performance evaluations was necessary to protect the individual privacy of the university presidents and other university personnel."[125]

A final group of cases that pose unique problems are cases involving criminal information.[126] Although the legislature has responded to the problem of collecting and disseminating criminal justice information, the statutory response, while comprehensive, is not without constitutional defect. The need to protect individual privacy is greatest in criminal law cases because of the irreparable damage caused by false charges and the constitutional requirement of fair trial. On the other hand, the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution require public trials. The right of access to criminal trials, i.e., the Sixth Amendment right to public trial, is essen-

121. 199 Mont. 434, 649 P.2d 1283.

122. 194 Mont. 277, 634 P.2d 181.

123. 207 Mont. 513, 675 P.2d 962.

124. Missoulian v. Board of Regents, 207 Mont. at 533, 675 P.2d at 973.

125. *Id.* at 535, 675 P.2d at 974. As public employees being evaluated as to a public aspect of their public employment, the answer should have been easy. The meetings should have been open to the public because the public interest clearly outweighs the individuals' privacy interests.

126. *See* Associated Press v. State, 250 Mont. 299, 820 P.2d 421; *Allstate*, 239 Mont. 321, 780 P.2d 186; State *ex rel.* Great Falls Tribune Co. v. District Court, 238 Mont. 310, 777 P.2d 345; Great Falls Tribune Co. v. Cascade County Sheriff, 238 Mont. 103, 775 P.2d 1267; *State ex rel. Smith*, 201 Mont. 376, 654 P.2d 982.

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tially a subset of the broader right to know principle.

In the area of criminal law, the court is required to consider federal constitutional requirements, such as fair trial, even though such requirements are not mentioned as part of the exception stated in Montana's right to know provision. In *State ex rel. Smith v. District Court*, the Montana Supreme Court followed the suggested approach.[127] First, the court considered both federal and state constitutional demands for fair trial as a limitation on the right to know.[128] The court emphasized the importance of public trials.[129] In the *Smith* opinion, which addressed the propriety of closing a suppression hearing, the court weighed the right of fair trial and privacy against the right to a public trial. The opinion concluded that the trial court should "consider the efficacy of entering . . . protective order[s]" that would eliminate material that might impinge on a fair trial.[130]

Occasionally, court analysis seems to skirt issues of fair trial and privacy, treating traditional criminal justice procedures as sacrosanct. In *Associated Press v. State* the Montana Supreme Court gave minimal concern to individual privacy or fair trial, holding that Section 46-11-701(6) of the Montana Code was unconstitutional.[131] The challenged statute provided: ". . . [a]n affidavit filed in support of a motion for leave to file a charge or warrant must be sealed unless the judge determines that disclosure of the informa-

127. 201 Mont. 376, 654 P.2d 982.

128. *Smith*, 201 Mont. at 380-85, 654 P.2d at 985-87. The right-to-know provision makes no exception for fair trial. This would seem to indicate an intent on the part of the constitutional convention delegates to accord the "public right to know" a superior position in the hierarchy of rights. The right to know is subject to a single stated limitation—the right to individual privacy. However, a fair trial is not only required by the Montana Constitution, but also by the United States Constitution. The minimum demands of federal constitutional fair trial must be observed regardless of the language or interpretation of the Montana Constitution.

129. In *Smith*, the court cited *Great Falls Tribune v. District Court* as holding that "a trial court cannot restrict the right of any person to observe such [criminal] proceedings unless exclusion of the public be a 'strict and irreparable necessity to ensure defendant's right to a fair trial.' " *Smith*, 201 Mont. at 381, 654 P.2d at 985 (quoting Great Falls Tribune v. District Court, 186 Mont. 433, 441, 608 P.2d 116, 121 (1980)). Additionally, the court in *Smith* cited Justice Brennan's majority opinion in *Globe Newspaper Co. v. Superior Court*: "[U]nder the First and Fourteenth Amendments 'the press and general public have a constitutional right of access to criminal trials, . . . the denial [of which must be] necessitated by a compelling governmental interest, and [be] narrowly tailored to serve that interest.' " 201 Mont. at 382, 654 P.2d at 986 (quoting from Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982) (referring to Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980))) (brackets original).

130. 201 Mont. at 386-87, 654 P.2d at 988. Similarly, individual privacy could often be protected by eliminating material rather than by closing meetings or refusing to release any information.

131. 250 Mont. 299, 303, 820 P.2d 421, 423 (1991).

tion in the affidavit is required to protect the health, safety, or welfare of the public."[132] Individual privacy was at risk; neither a corporation nor public employees were involved. The court should have decided whether the demands of individual privacy clearly exceeded the merits of public disclosure, but failed to do so. The court stated that the legislature gave no indication of having ". . . considered whether, individual privacy requires that the affidavits . . . must be sealed"[133] and concluded that because the statute failed to consider privacy, it was unconstitutional. If the court had weighed the demands of individual privacy against the merits of public disclosure, privacy should have prevailed and the statute held to be constitutional.[134]

The primary support for the conclusion reached by the court in *Associated Press v. State* was that the statute was a "reversal of a long-standing policy of allowing public access to such affidavits."[135] The court made the unsupported statement that release of the affidavits created the perception of fairness and helped the accused to defend himself.[136] The statute is inherently a protective order in that it does not conceal the information indefinitely. The public's "need" to know could be satisfied by reporting only the

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132. MONT. CODE ANN. § 46-11-701(6) (1991) (repealed 1993). Affidavits in support of motions for warrants or leave to file charges are statements made by police and prosecutors listing accumulated evidence that is believed to show probable cause to believe either that incriminating evidence of a specified kind will be found at a designated location or a listing of accumulated evidence that is believed to show probable cause to believe a named person has committed a specified crime. This information is not subject to any opposing statement by the accused, is not subject to any examination or right of refutation by the accused, and is offered prior to proof of guilt before a judge or a jury. By its very nature, the release of such information is an enormous invasion of individual privacy.

133. Associated Press v. State, 250 Mont. at 302, 820 P.2d at 423.

134. Perhaps the decision of the court was well taken, solely on the ground that the stated legislative justification for disclosure of the information in the affidavits was " 'to protect the health, safety, or welfare of the public.' " *Id.* at 302, 820 P.2d at 423. As the opinion states, "[this standard] . . . is in fact the antithesis of the standard required under the Montana Constitution." *Id.* The precise meaning of this statement is difficult to ascertain; however, the court has, in a slightly different context, relied on the need to protect personal security to justify closing a public hearing. *See* State *ex rel.* Great Falls Tribune Co. v. District Court, 238 Mont. 310, 777 P.2d 345 (1989) (determining that protection from physical harm arising from participation in the criminal proceeding created a subjective expectation of privacy that a reasonable person would recognize).

135. Associated Press v. State, 250 Mont. at 302, 820 P.2d at 423.

136. *Id.* at 303, 820 P.2d at 423. Both conclusions are contradicted by the pragmatics of what affidavits in support of motions for warrants and leave to file charges accomplish. Right to counsel, confrontation, and notice are significant examples of requirements that help the accused. Affidavits provide notice, and, to that extent, help the accused. Making the notice public is of no help to the accused. Releasing unsubstantiated, uncontested, often speculative, accusatorial information neither helps the accused nor creates the perception of fairness.

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fact of arrest and the charge. The details would be made known in the course of a public trial, unless dismissed as insupportable, thereby avoiding an inappropriate invasion of privacy.

In at least one instance in the criminal law arena, the court created an additional exception to the right to know. The additional exception is personal security classified as a subset of privacy. In *State ex rel. Great Falls Tribune Co. v. District Court*, the court directed the attorneys to brief the case on the assumption that closing the hearing protected an unidentified person from harm.[137] After considering the briefs, the court concluded that closure of the hearing was proper. The court considered the risk of physical harm as a subset of the right to privacy, concluding that privacy expectations are most reasonable when release of the information might lead to physical harm.[138] Consideration of personal security as a limit on the public's right to know could close many hearings.[139] The court did not divulge enough facts to allow an independent evaluation of whether individual privacy exceeded the merits of public disclosure, and the court did not attempt to fashion a protective order to limit possible harm.

Engrav v. Cragun is an example of the court's solicitude for the protection of agency activity and impatience with a powerless but curious researcher.[140] In *Engrav*, the court should have weighed the right to know against the right of individual privacy in the first instance. If the demand of individual privacy clearly exceeded the merits of public disclosure, the information requested should have been made available subject to a protective order, such as the deletion of names or notification to named individuals and requests for waivers. The court failed to do either. Rather than analyzing the request in constitutional terms as required by law, the court relied on a compelling state interest test and the statute, not considering whether the statutory language was constitutional.[141]

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137. 238 Mont. at 317, 777 P.2d at 349.

138. State *ex rel.* Great Falls Tribune v. District Court, 238 Mont. at 318-19, 777 P.2d at 350.

139. Personal security is not mentioned as a limit on the Montana constitutional right to know. If personal security were to justify closure of criminal proceedings, many would be closed. Victims, witnesses, and even defendants are often at risk by the facts that are presented in criminal court proceedings.

140. 236 Mont. 260, 769 P.2d 1224.

141. The court said that before it would:

> invade the individual privacy of the persons involved, a compelling state interest to do so must be found. There is no compelling state interest here which allows the dissemination of the requested information. Appellant wishes to do a study for a school research project; this is not a sufficient state interest.

In some cases, the court seems to forget completely that the privacy claim is made by a public employee and that the requested information concerns activities within the scope of that public employment. In *Great Falls Tribune Co. v. Cascade County Sheriff*, the court weighed the expectation of privacy of law enforcement officers against the merits of public disclosure and supported the trial court order directing disclosure of the identity of officers subjected to internal discipline.[142] The discipline occurred relative to and within the scope of their employment. The court, however, determined that individual privacy was at risk, and weighed privacy against the public's right to know, concluding that "it is not good public policy to recognize an expectation of privacy in protecting the identity of a law enforcement officer whose conduct is sufficiently reprehensible to merit discipline."[143]

In two notable criminal justice information cases, the court conducted a careful analysis, balancing the right of individual privacy against the public's right to know and suggested use of protective orders if needed and to the extent possible. First, in *Allstate Insurance Co. v. City of Billings*, the court evaluated the request for information as this article suggests.[144] The plaintiff insurance company sought criminal justice records relating to its insured. The court determined that a privacy right existed, weighed the right of individual privacy against the merits of public disclosure, and ordered the trial court to hold an in-camera inspection of the requested documents, stating:

> In making this examination, the court shall take into account and shall balance the competing interests of those involved.
>
> Allstate should be accorded the widest breadth of information possible. However, its request should be reviewed with defer-

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Engrav, 236 Mont. at 267, 769 P.2d at 1229. Relying on the language of section 44-5-303 of the Montana Code, the court said that "dissemination of confidential criminal justice information is restricted to criminal justice agencies or to those authorized by law to receive it. Appellant is neither part of a criminal justice agency nor authorized to receive the information." *Id.* The court applied the statute to the facts before the court without questioning the constitutionality of the statute.

By contrast, in *Allstate Insurance Co. v. City of Billings* the court stated:

> The legislature does not have the power to provide through the passage of statute who can exercise this right [to know] unless it finds that such curtailment is necessary to protect the right of individual privacy . . . . [A]ny interpretation of § 44-5-303, MCA, which requires specific legislative authorization to review criminal justice information would render the statute unconstitutional.

239 Mont. 321, 325, 780 P.2d 186, 189 (1989).

142. 238 Mont. 103, 107, 775 P.2d 1267, 1269 (1989).

143. Great Falls Tribune Co. v. Cascade County Sheriff, 238 Mont. at 107, 775 P.2d at 1269 (quoting the trial court's decision).

144. 239 Mont. 321, 780 P.2d 186.

> ence towards the privacy rights of those named in the police records. Any release of information, of course, can be conditioned upon limits contained within a protective order.[145]

The court's commendable analysis in *Allstate* was followed in *Bozeman Daily Chronicle v. Bozeman Police Department* to reach a similar conclusion.[146]

A startling recent Montana decision on the right to know apparently has overruled, sub silentio, both *Great Falls Tribune v. Great Falls Public Schools* and *Associated Press v. Board of Education*. In *SJL of Montana Associates v. City of Billings*, the Montana Supreme Court held that the constitutional right to know does not include actions or deliberations of employees, agents, or members of a public agency when negotiating with other public officials and private persons doing business with the government.[147] In addition to narrowing the right to know, the decision relied on selective language from the constitutional convention debates to interpret article II, Section 9.[148] In previous cases[149] the court had held that the language of article II, Section 9 "speaks for itself" and the intent of the delegates to the convention should be interpreted from the plain language of the constitution.[150] The majority made no public policy argument. Nothing suggests that this restrictive reading of article II, Section 9 better serves the public interest. If government is so inclined, it may now shield most government actions from direct public scrutiny. Generalized directions could be given by government boards and government agencies to individual members and employees who in turn can work out all the details, do all the negotiations, make most deliberations, and all but formalize most actions, in private.

Analyzing and evaluating Montana's endeavor to implement and interpret a constitutional right to know may not provide much insight into the overall problem of government secrecy. Montana is a peculiar state with a small population. The Montana experiment in open government is nonetheless interesting and the lessons learned should be carefully considered.[151]

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145. *Allstate*, 239 Mont. at 326, 780 P.2d at 189.

146. Bozeman Daily Chronicle v. Bozeman Police Dep't, ___ Mont. ___, 859 P.2d 435 (1993).

147. SJL of Montana v. City of Billings, ___ Mont. ___, ___ P.2d ___, 50 St. Rep. 1726 (1993).

148. *Id.* at ___, ___ P.2d ___, 50 St. Rep. at 1728-29.

149. Great Falls Tribune v. Great Falls Pub. Schs., 255 Mont. 125, 841 P.2d 502 and Associated Press v. Board of Education, 246 Mont. 386, 804 P.2d 376.

150. Associated Press v. Board of Education, 246 Mont. at 389, 804 P.2d at 379.

151. The Montana experiment in open government is not a perfect illustration of what

Amid growing federal government paranoia and increasing federal government secrecy, it is unlikely a right to know will be found in emanations from the penumbras of the United States Constitution's Bill of Rights, nor in the Ninth Amendment, nor from any central principle of constitutional democracy. An increasing awareness that information is the real power source is not likely to lead to greater openness in government.

IV. CONCLUSION

The world is no longer run by weapons, energy, or money. It is run by ones and zeroes, little bits of data. The question is not about who has the most bullets, it is about who controls the information. Real power comes from control of what we see and hear, what we think, and how we work. That information is increasingly held in the hands of government, local, state, and federal. And, much of it is non-accessible to ordinary citizens.

The two legal propositions that dominate the constitutional dimension of the struggle are "individual privacy" and the "right to know." Individual privacy and the public's right to know are not mutually exclusive. In most cases they are not in conflict. Individual privacy is not threatened by the public's right to know what government is doing. Individual privacy is being lost in a fear-driven scramble to install a security state. The public now tolerates government activities clearly described in George Orwell's novel, 1984.[152] In *Florida v. Riley*,[153] Justice Brennan remonstrated his colleagues, urging them to recall the frightening parallel between the action of government agents in *Riley*, aerial surveillance of a private residence, and the action of government agents as described forty years ago in Orwell's dread vision of life in the 1980s:

> 'The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.'[154]

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might be accomplished. The constitutional right to know is too often sacrificed to corporate claims and the false assertions of government agencies pleading vicarious privacy.

152. GEORGE ORWELL, 1984 (1949).

153. 488 U.S. 445 (1989).

154. *Riley*, 488 U.S. at 466 (Brennan, J., dissenting) (quoting GEORGE ORWELL, 1984 (1949)).

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A strange anomaly occurs. While individual privacy shrivels, government secrecy blossoms.