

University of Montana

ScholarWorks at University of Montana

Graduate Student Theses, Dissertations, &
Professional Papers

Graduate School

1988

"Right to know" provision of the Constitution of the State of Montana: Ethical and legal guidelines for the public administrator.

Deborah Elison
The University of Montana

Follow this and additional works at: <https://scholarworks.umt.edu/etd>

Let us know how access to this document benefits you.

Recommended Citation

Elison, Deborah, "'Right to know' provision of the Constitution of the State of Montana: Ethical and legal guidelines for the public administrator." (1988). *Graduate Student Theses, Dissertations, & Professional Papers*. 5223.

<https://scholarworks.umt.edu/etd/5223>

This Thesis is brought to you for free and open access by the Graduate School at ScholarWorks at University of Montana. It has been accepted for inclusion in Graduate Student Theses, Dissertations, & Professional Papers by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

COPYRIGHT ACT OF 1976

THIS IS AN UNPUBLISHED MANUSCRIPT IN WHICH COPYRIGHT
SUBSISTS. ANY FURTHER REPRINTING OF ITS CONTENTS MUST BE
APPROVED BY THE AUTHOR.

MANSFIELD LIBRARY
UNIVERSITY OF MONTANA
DATE: 1988

"RIGHT TO KNOW" PROVISION OF THE CONSTITUTION
OF THE STATE OF MONTANA

ETHICAL AND LEGAL GUIDELINES

for the
PUBLIC ADMINISTRATOR

by

Deborah Elison

B.A., University of Montana, 1983

Presented in partial fulfillment of the requirements

for the degree of

Masters of Public Administration

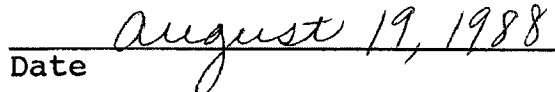
University of Montana

1988

Approved by


Chairman, Board of Examiners


Dean, Graduate School


Date

UMI Number: EP40687

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



UMI EP40687

Published by ProQuest LLC (2014). Copyright in the Dissertation held by the Author.

Microform Edition © ProQuest LLC.

All rights reserved. This work is protected against unauthorized copying under Title 17, United States Code



ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 - 1346

8-23-88

TABLE OF CONTENTS

Chapter	Page
I. INTRODUCTION	1
II. DEMOCRATIC THEORY BASIS OF THE "RIGHT TO KNOW" .	5
Structure of a Democracy	7
Popular Sovereignty	7
Representation	9
Participation	12
Value of a Democracy	16
Individual Dignity	16
Quality of Decisions	18
III. LEGAL BASIS OF THE "RIGHT TO KNOW"	21
Constitutional Status of the "Right to Know"	22
Constitutional Provisions	27
First Amendment	28
Fifth and Fourteenth Amendments	32
Ninth Amendment	32
Freedom of Information Act	34
IV. "RIGHT TO KNOW" IN MONTANA	37
Legislative Implementation	39
Recent Litigation	46
<u>Board of Trustees v. Board of County</u>	
<u>Commissioners</u>	46
<u>Mountain States Telephone & Telegraph</u>	
<u>Co. v. Dept. of Public Service</u>	
<u>Regulation</u>	47
<u>Montana Human Rights Division v. City</u>	
<u>of Billings</u>	50
<u>Jarussi v. Board of Trustees of School</u>	
<u>District No. 28, Lake County</u>	53
<u>Missoulia v. Board of Regents of Higher</u>	
<u>Education</u>	55
<u>Belth v. Bennett</u>	56
V. PUBLIC ADMINISTRATORS AND THE "RIGHT TO KNOW" .	59
Information	61
Disclosure of Information	64
Nondisclosure of Information	68
The Public Administrator's Role	73

VI.	CONCLUSION AND RECOMMENDATIONS	77
	Recommended Guidelines	81
	Guiding Principles Chart	82
	Decisional Steps Chart	83
	Discussion of Guiding Principles	84
	Discussion of Decisional Steps	88
	The Ethical Public Administrator.	92
	Conclusion	95
	 BIBLIOGRAPHY - SOURCES CITED	 97

CHAPTER I

INTRODUCTION

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, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. Constitution of the State of Montana, Article II, Section 9 (1972).

As one advocate of "right to know" provisions argues, "[s]ecrecy in government menaces democracy and sets a pattern that follows the political philosophy of a totalitarian state."¹ Public knowledge of government is essential to the democratic process. Freedom of information is the basis for many other freedoms: freedom of opinion, freedom of assembly, freedom from secret trials, freedom of choice, freedom to protect against discriminating practices -- freedoms largely commensurate with the Bill of Rights in the Constitution of the United States. A threat to the right to know is a threat to many of our most treasured freedoms.

Secrecy in government was brought to America by the original colonists. In England, parliamentary debates were

¹ Frank Thayer, Legal Control of the Press (Brooklyn: Foundation Press, 1962), p. 164.

first closed to the public on the theory that secrecy protected against interference by the Crown and later, debates were closed in order to conceal the member's statements and votes from constituents.² Although common law recognized the right of the public to inspect government-held documents, the right to observe deliberations of governmental bodies did not exist and publication of the proceedings of governmental bodies was prohibited.³

The founding fathers of the United States also maintained secrecy. In 1776 the names of the signers of the Declaration of Independence were withheld for six months due to a fear of prosecution for treason⁴ and both the Continental Congress and the Constitutional Convention proceedings were held in secret or closed sessions.⁵

The founding fathers were divided in their support for the necessity of secrecy in governmental affairs. 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

²Harold L. Cross, The People's Right to Know (Morningside Heights, New York: Columbia University Press, 1953) 180.

³Frank Thayer, Legal Control of the Press, 164.

⁴Ibid.

⁵Closed sessions were continued in the House of Representatives until 1794 and in the Senate until 1812. Ibid.

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."⁶ Advocates of the "right to know" suggest that the framers of the Constitution recognized the existence of such a right and were strongly influenced by it in writing the original Constitution and the Bill of Rights. This conclusion is based upon the fact that the language of the Constitution and the Bill of Rights provided for minimal government and retention of rights by the people.⁷

Others claim that the founding fathers looked upon this right as a conditional right; that the right of the people to know would not be violated if government maintained secrecy in some matters. They suggest that it was assumed that "the people agreed it should not know what could not be told it without damage to the public interest."⁸

⁶David O'Brien, "The First Amendment and the Public's 'Right to Know,'" Hastings Constitutional Law Quarterly, 7, no.3 (Spring 1980), 592 (quoting from The Papers of Thomas Jefferson).

⁷Thomas J. Hennings, "Constitutional Law: The People's Right to Know," American Bar Association Journal 45 (July 1959), 668.

⁸Louis Henkin, "The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers," University of Pennsylvania Law Review 120 (1971), 273.

The debates as to what or how much the people should know about the affairs of government continue today. Montana has given specific constitutional status to the public's right to know. However, this is not the case in any other state or the federal government.

This paper examines the basis for the right to know as founded in democratic theory and in legal theory. The emphasis is on the legal basis for the right to know in Montana and the impact of this right on public administrators. Since the right to know is not absolute and can be outweighed by an individual's right of privacy, difficulties arise for public administrators who are most often called upon to balance these rights.

To date the Montana Legislature has not defined guidelines regarding administrative compliance with the right to know. The decisions as to when to disclose information and when to withhold have been left primarily to administrative discretion resulting in controversial and arbitrary enforcement, a frustrated public, and a sometimes bewildered public administrator. This paper examines these problems and concludes with guidelines for administrative implementation of the "right to know."

CHAPTER II

DEMOCRATIC THEORY BASIS OF THE "RIGHT TO KNOW"

This chapter will explore and explicate the relationship between the "right to know" principle and democratic theory. Democracy as a concept encompasses many apparently disparate political structures and contradictory political values ranging from the "direct democracy" of the ancient Greek city states through the "constitutional democracy" of the United States and Canada and on to the so-called "people's democracy" as divined by Karl Marx and acted upon in Russia and China. The concern of this chapter is the constitutional democracy of the United States, the structural principles and values from which it emanates and to which it is committed. The thesis of this chapter is the essential nature of the "right to know" in a democracy which is founded upon the value of the individual, which seeks justice and truth, and which is committed to popular sovereignty, representative government and participatory politics.

The idea of the "right to know" stems from a substantive body of democratic theory. This democratic theory assumes an informed citizenry and acknowledges that

in principle the public has a "right to know."⁹ 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.¹⁰ Alexis de Tocqueville in his study of democracies observed that "[w]hen the right of every citizen to a share in the government of society is acknowledged, everyone must be presumed to be able to choose between the various opinions of his contemporaries and to appreciate the different facts from which inferences may be drawn."¹¹

The following sections present; first, a discussion of the literature which addresses the structural character of a democracy and second, a discussion of the normative character of a democracy, and the support given to the "right to know" concept by the structural and normative character of democracy.

⁹David O'Brien, "Privacy and the Right of Access: Purposes and Paradoxes of Information Control," Administrative Law Review 30 (1978): 45-60.

¹⁰O'Brien, Hastings Constitutional Law Quarterly, 579-632.

¹¹Alexis de Tocqueville, Alexis de Tocqueville on Democracy, Revolution and Society, eds. J. Stone and S. Mennell (Chicago: University of Chicago Press, 1980), 88.

Structure of a Democracy

The structural character of democracy consists primarily of three basic principles: popular sovereignty, representation and participation. These three aspects demonstrate the necessity of an informed citizenry in order for the individual citizen to be able to function in a democratic society. Each principle has its own rationale for the necessity of making information about government available to the people.

Popular Sovereignty

The idea of popular sovereignty in the context of constitutional democracy is the creation of government by the transfer of defined and limited power from the people to that government. According to Noah Webster, "All power is vested in the people. This is their natural and inalienable right."¹² This idea leads to the concept that citizens in a democracy are the true rulers. According to John Locke, the individual is by nature free and enters into society as a matter of choice. The state thus may exercise authority over individuals only with their consent, a consent that they alone are capable of giving.¹³

¹²Noah Webster, "Plan for the Union of the American States," Old South Leaflets, Vol. VIII (Boston: Old South Meeting House, 1896), 402.

¹³John Locke, The Second Treatise of Government, ed. Thomas P. Peardon (Indianapolis: Bobbs-Merrill Educational Publishing, 1952), 54-55.

The specific political consequences following from this theory are that all power to make laws resides in the citizenry and it is only through delegation of that authority that the state may act.¹⁴ John Stuart Mill expressed agreement with this concept when he stated that "no government may govern without acceptance of its citizens."¹⁵

Thus, the process of self-government requires that although individuals must surrender some of their personal autonomy to the political authority, they do so voluntarily while maintaining the ultimate power to diminish or enlarge the authority granted to the government. In order for the people to function as the ultimate authority, making decisions regarding the power to be delegated and to whom it is to be assigned, freedom of access to information is essential. Accordingly in an 1820 letter, Thomas Jefferson wrote: "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."¹⁶ Madison,

¹⁴Ibid., 81.

¹⁵John Stuart Mill, Considerations on Representative Government, ed. C. Shields (Indianapolis: Bobbs-Merrill, 1958), 6-9.

¹⁶O'Brien, Hastings Constitutional Law Quarterly, 587 (quoting from Writings of Jefferson).

like Jefferson, believed that a "well-instructed people alone can be permanently a free people"¹⁷ and a free people must exist in order for a government based on popular sovereignty to prevail.

Representation

Representation is the second principle of the structural character of democracy being considered. In a representative democracy the citizenry delegates to its representatives the responsibility of making and implementing governmental policy; however, as was explained above, the general authority remains with the people. These elected representatives are merely agents of the popular will and are held to be ultimately accountable to the people. The power to govern having been delegated, the process of democratic government is left largely in the hands of these representatives. If people are to be in a position to judge the conduct of their government, to hold their representatives accountable for what government does, to decide the merits of public policy; if, indeed, they are to preserve the capacity for sound judgment regarding their representatives, they must have facts before them. Information must be made available to citizens not only as the government, elected officials or other governmental agents, would like to have these facts viewed, but also as

¹⁷The Complete Madison, ed. S. Padover (New York: Harper, 1953), 341.

those who disagree with the government may desire to state these facts. And again, as with popular sovereignty, information must be complete and undistorted to make informed debate possible¹⁸ and to make the election process effective. Voters must, at a minimum, have full information as to the character of their representatives, their positions on political issues, and their past record of actions on these issues.

Further, the principle of majority rule requires that state decisions in a representative democracy must be based on the alternative preferred by the greatest number.¹⁹ In accordance with this the state must have a system to ascertain public opinion in order to fashion a public policy in accordance with that opinion. In Robert Dahl's work, attention is given to the fact that all citizens must be able to vote with each vote equally weighted; and there must be a means to ensure that the vote truly expresses voter preference.²⁰ This cannot be accomplished without a fully informed citizenry because a preferential decision cannot be made by each voter unless each individual citizen has adequate information regarding the issues and the candidates.

¹⁸Laurence H. Tribe, American Constitutional Law, 2d ed. (Mineola, N.Y.: The Foundation Press, 1988), 813-14.

¹⁹Locke, The Second Treatise on Government, 73-74.

²⁰Robert Dahl, A Preface to Democratic Theory (Chicago: University of Chicago Press, 1956), 64-70.

According to Alexander Meiklejohn, when free men are voting and thereby selecting those who will represent them, it is not enough that truth is known by someone else, by some scholar or administrator or legislator; every voter must have this "truth."²¹ He suggests that "democratic governance depends on the wisdom of the voters,"²² which can only be advanced by allowing each citizen to discover this "truth" by full disclosure of all available information. Self-government is possible only to the extent that the leaders of the state are responsible and responsive to the will of the people. But if the will of the people is to have validity, if the people are to function as a rational electorate, they must have adequate information. The election process is the means by which the people can control representative government, forcing the accountability of their representatives.

It is difficult to differentiate between the representational aspect of democracy and the participatory aspect of democracy in some instances. For example, voting, as previously discussed, is the means of controlling representational activity. However, it is also a significant part of public participation in the democratic political process.

²¹Alexander Meiklejohn, Free Speech and Its Relationship to Self-Government (New York: Harper, 1948), 68-107.

²²Ibid.

Participation

A democratic government's claim to legitimacy further rests upon the informed consent of all its citizens²³ and mutual agreement of the right to equal political participation.²⁴ "The liberties of a people never were nor ever will be, secure, when the transactions of their rulers may be concealed from them....[T]o cover with a veil of secrecy the common routine of [governmental] business, is an abomination in the eyes of every intelligent man."²⁵ The right to be informed and the freedom to exchange information are essential to participation in government which is indeed the very foundation of democracy. In the words of James Madison, "Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both."²⁶

²³Locke, The Second Treatise of Government.

²⁴John Rawls, A Theory of Justice (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971).

²⁵Hennings, American Bar Association Journal, 770 [quoting from Elliott's Debates, vol. 3 (1787), Patrick Henry speaking during debates prior to the adoption of the Constitution].

²⁶Writings of James Madison, ed. G. Hunt (New York: G.P. Putnam, 1910), 103.

One crucial means of citizen participation in government is freedom of expression which is an empty vessel without access to the information necessary for intelligent debate. Without intelligent debate, decision making is necessarily presumptive and irrational. If democracy is to work, the public must have all available information in order to instruct its servants, the government.

James Madison proposed that the "censorial power is in the people over the government, and not in the government over the people."²⁷ 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.²⁸ John Stuart Mill summed up the point in his essay, On Liberty:

...the opinion which it is attempting to suppress by authority may possibly be true. Those who desire to suppress it, of course, deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume their certainty is the same thing as absolute certainty.... There is the greatest difference between presuming an opinion to be true, because with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose

²⁷Mill, Considerations on Representative Government, 7 (quoting James Madison).

²⁸Melville B. Nimmer, Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment (New York: Matthew Binder, 1984), 1-7.

of not permitting its refutation. Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.²⁹

In a democracy it is the citizen's duty to criticize government as it is the official's duty to administer.³⁰ All evidence bearing on public decisions must be available to the community without any intervening "preselection" by the state on the basis of truth or falsity³¹ since restrictions on information leave the public with an incomplete, and probably inaccurate, perception of the social and political universe. Thus, these restrictions can undermine the search for truth and distort the process by which citizens make critical decisions.

Moreover, it is not just the search for political truth, but the search for all forms of "truth," which is to say the search for all aspects of knowledge and the formulation of enlightened opinion on all subjects, that is dependent upon open channels of communication. Unless one has access to the available data on a given subject, it is not possible to make an informed judgment as to which "facts" and which views deserve to be endorsed. As Wallace

²⁹John Stuart Mill, On Liberty (Chicago: Longmans, Green & Co.), Ch. II.

³⁰New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

³¹Stanley Ingber, "The Market Place of Ideas: A Legitimizing Myth," Duke Law Journal (February 1980): 20-35.

Parks observed, the denial of information at its source disarranges the functioning of our political institutions and processes and the distribution of power.³²

Thus, each of the basic structures of democracy gives support to the concept of the "right to know." However, popular sovereignty, representative government and participatory government are not merely the working principles of democracy, they are reflections of its underlying values. This normative character of democracy which further supports the idea of the "right to know" is discussed in the following section.

³²Wallace Parks, "The Open Government Principle: Applying the Right to Know Under the Constitution," The George Washington Law Review vol. 26, no. 1 (October 1957), 1-22.

Value of a Democracy

The previous section has explained the importance of the "right to know" concept in terms of the ability of citizens to function in a democratic society; whereas, this section discusses the importance of the "right to know" in terms of the values of a democracy to each citizen in that society.

Individual Dignity

A claimed primary value of a democracy arises from the popular sovereignty concept of retention of general authority by the citizens. This reservation of power underscores the ultimate respect accorded each individual in a democratic society, a sense of personal dignity for each citizen. In support of this primary value the "right to know" becomes essential; for without access to information, the sense of self as having authority is lost. It is diminished in direct proportion to the inaccuracy and incompleteness of the information given. Withholding of information leads to a disempowerment of the people, and a subsequent devaluation of individual dignity.

In normative democratic theory, individual self-government in the form of equal political liberty has value for its contribution to the "moral quality of civil life" rather than only as a means to an end. Self-government itself enhances the individual's sense of self-worth and

stabilizes "just institutions."³³ The effect of self-government, where equal political rights have their fair value, is to enhance the self-esteem and the sense of political competence of the average citizen.

Accordingly, the individual's awareness of self-worth developed in the smaller associations of the community is confirmed in the constitution of the whole society. Since each is expected to vote, each is expected to have political opinions. The time and thought that is devoted to forming personal views is not governed only by the likely material return of the individual's political influence. Rather this is an activity enjoyable in itself that leads to a larger conception of society and to the development of intellectual and moral faculties.

Consequently, as stated by Mill, each citizen is called upon to weigh the interests of others and to be guided by some conception of justice and the public good rather than by personal inclinations.³⁴ Having to explain and justify these personal views to others, the individual must appeal to principles that others can accept. Moreover, Mill adds, this education to public spirit is necessary if citizens are to acquire an affirmative sense of political duty and obligation, that is, a sense of duty

³³Rawls, A Theory of Justice, 233-234.

³⁴Mill, Considerations on Representative Government, 13-45.

that goes beyond the mere willingness to submit to law and government.³⁵ Constitutional democracy cannot long survive without citizens who believe, not only in their government, but in themselves.

Quality of Decisions

A second fundamental value of democracy is that it produces the best decisions for the common good. To the extent there is agreement with the idea that constitutional-representative-participatory democracy produces "the best decisions," there is an unequivocal necessity for the "right to know."

A fully informed citizenry maximizes the likelihood that sound decisions will be reached. According to Jefferson, "government should by all means in their power deal out the material information to the public in order that it may be reflected back on themselves in various forms in which public ingenuity may throw it."³⁶

If any governmental body, be it a legislative body, a censorship board, the police department or a court of law, decides that the public should not have access to some of the information on any given topic because the communication of such information will prove injurious in some manner, to that extent the public's ability to make an

³⁵Ibid.

³⁶O'Brien, Hastings Constitutional Law Quarterly, 587 (quoting from Writings of Jefferson).

informed judgment on such topics is crippled by a distortion of the information before it,³⁷ and once again, the principle of individual autonomy is devalued.

Much essential knowledge is in the hands of agencies and officials of government who can thwart the democratic process by keeping relevant material secret. Many public administrators as well as elected officials will be likely to assume the public is not qualified to make the best decisions and take it upon themselves to control information, thereby controlling decisions. Consequently, the uninformed or misinformed public becomes disenchanted with government and is indirectly disenfranchised. While the vote is not prohibited, it does, however, become meaningless. That is why the public's right to know is a vital element of any democratic system, and why the burden of proof for justifying the withholding of information should always be on the shoulders of the would-be withholder.

Hence, secrecy of governmental affairs in the guise of protection of the public good can never promote freedom or enhance the quality of life in a democratic society. In 1783 Pelatiah Webster, recommending openness in governmental affairs, stated:

Truth loves light and is vindicated by it.
Wrong shrouds itself in darkness and is
supported by delusion. An honest, well-

³⁷Nimmer, Freedom of Speech, 1-7.

qualified man loves light, can bear close examination and critical inquiry and is best pleased when he is most thoroughly understood: a man of corrupt design, or a fool of no design, hates close examination and critical inquiry; the knavery of the one and the ignorance of the other, are discovered by it, and they both usually grow uneasy, before the investigation is half done.³⁸

This chapter has discussed the theoretical support for the "right to know" in a democracy from both a structural and a normative perspective. The following chapter discusses the "right to know" concept in more specific terms. The legal basis for this right on the federal government level is outlined, detailing the constitutional implications and the statutory provisions for the "right to know."

³⁸Pelotiah Webster, "The Political Union of the United States," Old South Leaflets, Vol. VIII (Boston: Old South Meeting House, 1896), 198 (first published in Philadelphia in 1783).

CHAPTER III

LEGAL BASIS OF THE "RIGHT TO KNOW"

The government of the United States was founded upon the principles of democratic theory discussed in the previous chapter. The legal system of this democracy is predicated upon a Constitution which describes the powers of governance that are to be entrusted to the Congress and the President. This chapter discusses the basis for the public's "right to know" as a concept found in this legal system. The discussion of the constitutional status of this "right" includes the constitutional provisions defining the power to withhold information entrusted to the Congress and the President as well as the constitutional provisions limiting those withholding powers. Finally, the statutory provisions providing for public access to government-held information are examined along with the statutory provisions that purport to give government the power to conceal.

Constitutional Status of the "Right to Know"

The U.S. Constitution does not include an explicit provision creating a "right to know". Nonetheless, there are constitutional provisions which imply a "right to know," thereby precipitating major disagreement among constitutional theorists. This section focuses on the constitutional status of the right to know, raising questions regarding the framers' intent, the explicit language of the Constitution and what rights might be legitimately implied.

The question is asked: If the framers of the Constitution intended a "right to know," why is there no explicit provision for this right in the Constitution? Some have answered that the "right to know like many other fundamental rights, was taken so much for granted that it was deemed unnecessary to include it."³⁹ Others claim that the lack of a specific provision proves there was no intent to include such a right.⁴⁰ This particular debate is both interminable and unenlightening and will, therefore, not be discussed in detail in this paper.

There are several objections raised to giving the "right to know" the status of a constitutional right. One basic objection to a constitutional "right to know" comes from a narrow, "strict interpretivist" reading of the

³⁹Hennings, American Bar Association Journal, 668.

⁴⁰O'Brien, Hastings Constitutional Law Quarterly, 590.

Constitution. According to John Hart Ely, interpretivism requires that judges "confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."⁴¹ Judge Robert Bork, presenting a straightforward interpretivist position, stated that "the judge must stick close to the text and the history, and their fair implications, and not construct new rights."⁴² Under this view, since neither the text nor the history indicate a specified right of the public to know, this right cannot be given constitutional status. Although adherents to an interpretivist reading of the Constitution do not find the right to know to be a constitutional right, they do concede that it might appropriately be made a statutory right.

In response to the overall interpretivist denial of a constitutionally-based right to know, non-interpretivists claim there is ample precedent for the addition of unenumerated rights, citing as examples, the right of privacy and the right to travel.⁴³ A non-interpretivist

⁴¹John Hart Ely, Democracy and Distrust (Cambridge, Mass.: Harvard University Press, 1980) 1.

⁴²Mary M. Cheh, "Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information," Cornell Law Review 69 (April 1984), 744 (quoting Bork).

⁴³Rights have not only been read into but out of the Constitution as well. For example, notwithstanding the absolutist language of the First Amendment: "Congress shall make no law . . . abridging the freedom of

such as William O. Douglas counters the arguments of interpretivists by advocating that the concern should not be with the rights the framers intended citizens to have but with the rights citizens should have.⁴⁴

Another objection to the concept of a constitutional right to know is based on the problem of defining it and, perhaps more importantly, confining it. As discussed in Chapter II, the right to know is partially grounded in the necessities of democracy. It was averred that a people holding the right and power to govern must have the information upon which to base wise decisions. However, an amorphous concept of the right to know, not carefully defined, could reach beyond information about the conduct of government and invade individual privacy; disrupt criminal investigations and threaten national security. If there is a constitutional right to know, it should be defined and applied it in a principled way, not with an absolutist view.

Some theorists, such as Ely, conclude that the legitimacy of the courts' constitutional protection of values which are not plainly derived from the text must lie

speech....," the Supreme Court has upheld rulings supporting the Espionage Act of 1917 [Schenck v. U.S., 249 U.S. 47 (1919), Abrams v. U.S., 250 U.S. 616 (1919)], the Smith Act [Dennis v. U.S., 341 U.S. 494 (1951)], and the federal obscenity laws [Hamling v. U.S., 418 U.S. 87 (1974)] which restrict free speech.

⁴⁴Roe v. Wade, 410 U.S. 113, 209 (1973) (Douglas, J., concurring opinion).

in the exercise of a court function compatible with representative democracy and appropriate to an institution that is insulated from the political process.⁴⁵ Critics of this view are concerned about the standards by which the courts will determine what secrets must be kept secret and the effect this might have on document classifications by the executive branch, i.e., concern regarding the necessity for classifying documents "top secret" and therefore unavailable to the public in the "interest of national security." The danger in broadly defining national security is that citizens are deprived of information about their own government, making it difficult if not impossible to hold elected officials accountable for their actions. Advocates of the need for maximum secrecy in government most often use the talismanic terminology of national security as a justification for withholding information from the public. There needs to be a careful balancing of the public's interest in the free flow of information and the government's interest in preserving "national security."

This balancing should be done according to the constitutional provisions which specify under what conditions governmental agents may withhold information. These withholding provisions are discussed in the following section along with the constitutional provisions which

⁴⁵Ely, Democracy and Distrust, 75.

limit governmental withholding of information and which implicitly allow for the public's "right to know."

Constitutional Provisions

The President and the Congress have been entrusted with powers of governance by the Constitution and the powers to withhold information are derived from these. Since the general availability of governmental information is the fundamental basis upon which popular sovereignty and the consent of the governed rest and is also essential to representative and participatory government, as discussed in the previous chapter; it can be reasonably assumed that only a limited power to withhold information can be derived from Articles I and II of the Constitution.⁴⁶ There are obvious limitations placed on the powers delegated to the

⁴⁶U.S. Constitution, art. I, sec. 5, cl. 3: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy...."

U.S. Constitution, art. I, sec. 8, cl. 18: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

U.S. Constitution, art. II, sec. 1, cl. 1: "The executive Power shall be vested in a President of the United States of America...."

U.S. Constitution, art. II, sec. 1, cl. 8: "Before he enter on the Execution of the Office, he shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"

President and to Congress in the Bill of Rights,⁴⁷ including limitations on the powers to withhold information from the public. These limitations are found in the first,⁴⁸ fifth,⁴⁹ ninth⁵⁰ and fourteenth⁵¹ amendments.

First Amendment

The first amendment is a restriction on the exercise of legislative power and, thereby, binds the Congress in making laws and the President in executing those laws. The Supreme Court has not held that the right to know is a constitutional right that places the government under a duty to disclose. Nonetheless, the Court has considered the first amendment to contain narrow aspects of the right to know, stating that "a major purpose of (the first

⁴⁷Parks, The George Washington Law Review, 7. (When the Bill of Rights was adopted, many were of the opinion that this was unnecessary since no power had been granted the President or the Congress to do what the first ten amendments forbade.)

⁴⁸U.S. Constitution, amend. I: "Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

⁴⁹U.S. Constitution, amend. V: "No person shall be ... deprived of life, liberty, or property, without due process of law"

⁵⁰U.S. Constitution, amend. IX: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

⁵¹U.S. Constitution, amend. XIV: "...nor shall any State deprive any person of life, liberty, or property, without due process of law...."

amendment) is to protect the free discussion of governmental affairs."⁵²

The Supreme Court has recognized a constitutional right to gather information, as a corollary of the right of freedom of speech and press.⁵³ The press, as an organized representative of the public, performs the critical democratic functions of gathering and publishing news. The guarantee of a free press is "not for the benefit of the press so much as for the benefit of all of us."⁵⁴ Freedom of the press can have no meaning without access to information. This does not imply that the press has any special immunity from the application of general law, but that "[i]n the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy The press was protected so that it could bare the secrets of government and inform the people."⁵⁵

Constitutional scholars have long argued that the first amendment embodies a "right to know," guaranteeing a right of individuals to access information about governmental activities. The idea is that a central

⁵²Mill v. Alabama, 384 U.S. 214, 218 (1966).

⁵³Branzburg v. Hayes, 408 U.S. 665, 681 (1973).

⁵⁴Time, Inc. v. Hill, 385 U.S. 374, 389 (1966).

⁵⁵New York Times v. U.S., 403 U.S. 713, 717 (1971) (Black, J. concurring).

purpose of the first amendment is to protect and sustain the process of representative democracy by maintaining an informed electorate. In this sense, the first amendment right to free speech is actually two rights: Freedom to speak and freedom to hear; i.e., the right of an individual to communicate outwardly an opinion or point of view and the right to receive information which is essential to an individual's decisionmaking and a sense of control over self. The right to receive information makes the "right to know" imperative. Justice Brennan, in discussing the relationship between the first amendment and self-government, concluded that government has an obligation to safeguard the indispensable conditions of democracy, namely the opportunity for individuals to see, to understand, and to criticize the operations of government.⁵⁶ If this argument were followed to its logical conclusion, it would go further than merely limiting the withholding power of governmental agencies, it would place a constitutional duty on the government to enhance communication and public discussion of public affairs.

The first amendment, however, embodies more than "individualistic values" of the right to speak and to hear. It includes the societal interest in maintaining the integrity of the political process and the ability of the

⁵⁶William J. Brennan, "Address by Justice Brennan," Rutgers Law Review 32 (1979) 175-177.

public to assert meaningful control over governmental actions.⁵⁷ Because the government is best able to provide information concerning its own activities, the public has a right of access to information within the government's control in order to maintain and nourish the democratic process.⁵⁸ According to Justice Powell, "public debate must not only be unfettered; it must also be informed."⁵⁹

Most constitutional theorists view free speech as a corollary to democratic theory. Alexander Meiklejohn, for example, perceives freedom of speech as an outgrowth of the American consensus that public issues shall be decided by universal suffrage, arguing that:

(p)ublic discussion of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.⁶⁰

Stressing the importance of this, the Supreme Court stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government."⁶¹

⁵⁷Houchins v. KOED, Inc., 438 U.S. 1, 31 (1978) (Stevens, J. dissenting).

⁵⁸Cheh, Cornell Law Review, 710.

⁵⁹Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J. dissenting).

⁶⁰Ingber, Duke Law Journal, 5 (quoting Meiklejohn).

⁶¹Red Lion Broadcasting Company v. F.C.C., 395 U.S. 367, 390 (1969).

The first amendment also includes the right of assembly and of petition. These rights have been broadly interpreted by the Supreme Court:

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship and as such under the protection of and guaranteed by the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition...."⁶²

These rights can not be asserted if information about governmental affairs is lacking.

Fifth and Fourteenth Amendments

The exercise of presidential as well as congressional power is limited by the liberty concept of the due process clause 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. Based on this analysis, a "right to know" is essential since secret government is presumptively arbitrary.⁶³

Ninth Amendment

The clear intent of the founding fathers was that the federal government was to be a government of limited,

⁶²U.S. v. Cruikshank, 92 U.S. 542, 552 (1876).

⁶³Cheh, Cornell Law Review, 715.

delegated and enumerated powers. All residual powers were to be reserved to the states and the people. Further, all unenumerated rights were to be retained by the people. The ninth amendment clearly implies that the people have rights in addition to those specifically enumerated. Hence, the lack of a specifically enumerated "right to know" does not deny its implicit constitutional recognition.

The constitutional status of the right to know remains in controversy. However, there is an explicit statutory provision for a conditional right to know which is briefly discussed in the following section. Many who are opposed to the concept of a constitutionally-based right to know support a conditional right to know created by legislation rather than by court interpretation.⁶⁴ Advocates of this view, state that the legislatures, not the courts, should make policy about rights which are not specifically enumerated in the Constitution. The reason for a willingness to accept a politically created right while opposing a constitutionally-based right is that legislation can be easily amended or repealed when found to be unwise or unworkable; whereas, a constitutionally-based right can be eliminated, reshaped or contained only with great difficulty.⁶⁵

⁶⁴Loren P. Beth, "The Public Right to Know: The Supreme Court as Pandora?" Michigan Law Review 81 (March 1983): 882-883.

⁶⁵Ibid.

Freedom of Information Act

The Freedom of Information Act, signed into law in 1966 as an amendment to section 3 of the Administrative Procedure Act of 1946, generally establishes the right of the public to obtain information from federal agencies. This law describes a specific procedure through which citizens may obtain access to agency records. In its enactment of this provision, Congress sought to "remedy the mischief of arbitrary and self-serving withholding by agencies which are not directly responsible to the people."⁶⁶ The basic purpose of the Freedom of Information Act is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."⁶⁷

The Freedom of Information Act is a three-part process designed to provide access to the activities of the federal government. The first part of the Act requires agencies of the executive branch to publish statements of general policy, rules governing their procedures, and a description of their central and field organizations.⁶⁸

⁶⁶Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190, 1210 (4th Cir. 1976).

⁶⁷N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

⁶⁸Freedom of Information Act, U.S. Code, vol. 28, sec. 552(a)(1) (1986).

The second part requires agencies to index and make available to the public final opinions, unpublished statements of policy, and staff directives that affect members of the public.⁶⁹ The third part compels the release, on request, of all agency records not covered by one of nine exemptions.⁷⁰ These exemptions have prompted the majority of the litigation under the Act, but the focus of this paper does not include a discussion of these controversies.⁷¹

⁶⁹Ibid., sec. 552 (a) (2).

⁷⁰Ibid., sec. 552 (a) (3).

⁷¹The following nine categories of documents comprise the exemptions of this Act:

(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 either 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) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an

The right to know has been discussed in terms of its basis in democratic theory and in the legal basis upon which it is founded in the federal government of the United States. On the state government level all fifty states have some legislation relative to the right to know. State statutory provisions regularly include open meeting laws and right to access laws. However, only Montana has given the right to know explicit constitutional status. Montana's constitutional provision and its affect on public administrators is the primary focus of this paper. The following chapter will discuss this provision, its history, implementing legislation, and recent litigation.

unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(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. Ibid., sec. 552 (b)(1)-(b)(9).

CHAPTER IV

"RIGHT TO KNOW" IN MONTANA

The Constitution of the State of Montana, ratified in 1972, includes an explicit "right to know" provision. Montana is unique in this respect.⁷² Although all fifty states and the federal government have some form of statutory provision for freedom of information, only Montana has given this right explicit constitutional status. 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, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The framers of the Montana Constitution were intent upon protecting individual freedoms and insuring openness in government. Thus, the only limitation placed on the 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, in

⁷² David Gorman, "Rights in Collision: The Individual Right of Privacy and the Public Right to Know," Montana Law Review, 39, no. 2 (Summer, 1978): 249.

presenting the proposed declaration of rights, 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 government."⁷³ 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."⁷⁴

This fundamental right, the "right to know," and its effect on public administrators is the primary focus of this paper. Compliance with the "right to know" provision can present difficulties for the public administrator. Service to the people of the state must be carried out in an honest, open and forthright manner while preserving the effectiveness and efficiency of the office as well as protecting the individual's right of privacy. The remainder of this chapter details legislative implementation and recent litigation concerning the right to know provision while the following chapter will discuss the overall effect of the right to know on public administrators.

⁷³Montana Constitutional Convention of 1971-1972, Vol. II (Helena, Mt.: Montana Legislature 1979): 619.

⁷⁴ Ibid.

Legislative Implementation

There was substantial sentiment 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 demand of individual privacy clearly exceeds the merits of public disclosure."⁷⁵ The delegates selected the former wording which implicitly relies on the courts to interpret the general constitutional language in the course of resolving individual conflicts on a case by case basis.

The proposed amendment would have directed, or at least would have encouraged, the legislature to consider and pass legislation to define and direct openness in government. In passing such legislation, it would have been necessary to consider various positions and to weigh and balance the competing interests determining which individual privacy interests exceeded the interest of the public's right to know. In fact, it is unlikely that the statutory pattern that would have evolved under the more direct legislative mandate would have been much different

⁷⁵While 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. Montana Constitutional Convention of 1971-1972, Vol. V, 1671-1679.

from the one that now exists. The legislature has felt obligated to formulate guidelines and to reevaluate existing statutes that restricted the public's right to know.

Prior to the constitutional convention, there were a large number of statutes that pertained to the public's right to know and limitations upon that right.⁷⁶ Subsequent to the Convention, the legislature's attempts to repeal the statutory provisions which had accumulated in the codes, restricting the public's right to know, met with only marginal success.⁷⁷ The 1972 Montana Constitution also contains a provision regarding the public's right of participation in governmental activities: "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."⁷⁸ The legislature assumed the responsibility to delineate the concept of a right of the

⁷⁶For example, such diverse activities as bean dealer records, grade of commercial 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.

⁷⁷See proceedings of the Forty-third Legislative Session.

⁷⁸Constitution of the State of Montana, art. II, sec. 8 (1972).

public to participate in the operation of government as well as a right to know about government.⁷⁹

The most important statute effecting the right to know was passed prior to the 1972 Montana Constitutional Convention. This law is primarily concerned with the right to observe the deliberations of governmental bodies and is known as Montana's Open Meeting Law. It states that:

"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,

⁷⁹"The legislature finds and declares pursuant to the mandate of Article II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency." The key provision of this legislation provides that "...each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures shall assure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public." Of perhaps equal importance is the provision specifying the exceptions: "(1) an agency decision that must be made to deal with an emergency situation affecting the public health, welfare, or safety; (2) an agency decision that must be made to maintain or protect the interests of the agency, including but not limited to the filing of a lawsuit in a court of law or becoming a party to an administrative proceeding; or (3) a decision involving no more than a ministerial act. Montana Code Annotated (MCA) 2-3-101 et seq. (1987).

the provisions of the part shall be liberally construed." 80

The principal provision of this legislation which both requires open meetings as well as providing certain exceptions is MCA 2-3-203, which says:

(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) However, a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigating position of the public agency.

(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."

Additional provisions prohibit excluding accredited press representatives from any open meeting⁸¹ and require

⁸⁰MCA 2-3-201 (1987).

⁸¹MCA 2-3-211 (1987).

that minutes of meetings shall be open for inspection by the public.⁸²

This section was originally enacted in 1963 and was patterned after the federal Freedom of Information Act. As originally enacted the section contained additional exceptions which have been deleted since passage of the right to know section in the 1972 Montana Constitution.

Other statutes effecting the right to know are concerned with disclosure or rights to inspect government-held information. For example, MCA 2-6-102 provides that:

(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....

Notwithstanding the relatively strong language of Article II, Sections 8 and 9, in the Montana Constitution and the reasonably clear language of the open meeting and disclosure statutes, there are still many statutory provisions restricting the public's general right to know or to have access to governmental documents. For example, restrictions are placed on records involving various municipal activities,⁸³ adoption proceedings,⁸⁴ child abuse

⁸²MCA 2-3-212 (1987).

⁸³MCA 7-1-4144 (1987). One subdivision of this chapter seems to be an attempt to countermand the express language of the constitution. It states that "[e]xcept as provided by law and as determined by the chief law enforcement administrator, law enforcement records which relate to

and neglect,⁸⁵ and Youth Court proceedings.⁸⁶ In addition, dissemination of criminal justice information is restricted;⁸⁷ confidentiality of medical reports and health care information is required;⁸⁸ the required documentation of all abortions is confidential;⁸⁹ confidentiality of certain required reports from banks and trust companies is mandated;⁹⁰ and insurance company examination reports cannot be revealed.⁹¹

matters in which the right to individual privacy or law enforcement security exceeds the merits of public disclosure shall not be available to the public."

⁸⁴MCA 40-8-126 (1987).

⁸⁵MCA 41-3-205 (1987).

⁸⁶MCA 41-5-601 (1987).

⁸⁷MCA 44-5-214, 44-5-301, 44-5-302, 44-5-303, 44-5-504 and 44-5-515 (1987). There are a number of laws both permitting and restricting the release of criminal justice information and criminal intelligence information. Two sections in the chapter on law enforcement emphasize the concept of individual privacy but fail to specify the need to balance the right of privacy with the public's right to know.

⁸⁸MCA 50-16-203 and 50-16-205 (1987).

⁸⁹MCA 50-20-110 (5) (1987).

⁹⁰MCA 32-1-234 (1987).

⁹¹MCA 33-1-412 (1987). 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. A thorough listing of all Montana statutes that might involve the "citizen's right to know" is beyond the scope of this paper.

With the enormous number of statutes which impinge upon the right to know, some of which have been mentioned, it is surprising that only a few cases have been brought before the courts for judicial interpretation. Some of these are discussed in the following section.

Recent Litigation

Six of the cases which have been brought before the state Supreme Court involving the right to know provision are discussed in this section. Cases which were not included were primarily based on court procedures.⁹² The selected cases were chosen because each has an impact on public administrators either directly or indirectly. The following case discussions include a description of the facts and a statement of the court holding. The difficulties these holdings create for public administrators will be discussed in Chapters V and VI.

Board of Trustees v. Board of County Commissioners⁹³

The Board of County Commissioners of Yellowstone County, after holding public meetings for the purpose of hearing testimony regarding a proposed subdivision, closed the meeting and reached a final decision on the matter during a telephone conference call. (This conversation excluded not only the public, but one of the three commissioners as well.)

⁹²Great Falls Tribune v. District Court, 608 P.2d 116 (Mont. 1980), which dealt with the right to know versus the right to a fair trial; State v. District Court, 649 P.2d 982 (Mont. 1982), which addressed the issue as it affected pretrial proceedings; and Cox v. Lee Enterprises, 723 P.2d 238 (Mont. 1986), which dealt with a question regarding the availability of a qualified privilege as a defense in a defamation case.

⁹³606 P.2d 1069 (Mont. 1980).

The court held that a telephone conference call constituted a meeting; and in this instance, a closed meeting in violation of Montana's open meeting law⁹⁴ and the right to know provision of the constitution.⁹⁵ Due to this violation, the court held that the proceedings were to be nullified.

Mountain States Telephone & Telegraph Co. v. Dept. of Public Service Regulation⁹⁶

Mountain States Telephone and Telegraph Company is a public utility incorporated in Colorado, offering telephone services, and other services in the State of Montana. The Public Service Commission regulates public utilities in the state. The Montana Consumer Counsel appears at public hearings conducted by the Public Service Commission as the representative of the consuming public. The telephone company filed an application with the commission for a rate increase for its regulated services. The consumer counsel appeared before the commission in opposition to this increase. During the process of deciding on this request,

⁹⁴MCA 2-3-201 (1987). It was deemed to be a closed meeting because the public was excluded not because one member of the commission was not included.

⁹⁵COMMENT: This case is important to the citizen's right to know since telephone calls between public servants could be used to purposefully exclude the public from deliberations. This type of "closed meeting" would be difficult for the unsuspecting public to discover or prove. However, this ruling places an increased and uncertain burden on elected officials and public administrators.

⁹⁶634 P.2d 181 (Mont. 1981).

the commission asked the telephone company to submit particular business information to the commission and the consumer counsel. The company offered to make this information available to the commission and the consumer counsel only if the commission would issue a protective order preserving the confidentiality of certain trade secrets claimed by the telephone company to be a valuable property right. The Public Service Commission declined to issue the protective order on the grounds that according to the constitution and statutory provisions⁹⁷ the citizens of Montana have a right to inspect all documents in the possession of the commission with the only exception being a protection of individual privacy and that a corporation is not entitled to the protection of the individual privacy exception under the right to know provision of the state constitution.

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."⁹⁸ The court further held that trade secret information was technically private property entitled to constitutional protection and that the denial of the

⁹⁷Constitution of the State of Montana, art. II, sec 9; MCA 69-3-105 (1987); MCA 2-6-102 (1987).

⁹⁸634 P.2d 181, 188.

request to issue the protective order had the effect of violating the equal protection clause of the Fourteenth Amendment of the federal constitution and the due process clauses of the state and federal constitutions. However, the right of privacy is not absolute and can be infringed when there is a showing of a compelling state interest. Thus, the court decided that forced disclosure of trade secret information from a public utility to the commission and consumer counsel was not a violation of the company's constitutional rights because there was a compelling state interest in the regulation of utilities. Therefore, Mountain Bell was required to furnish the commission and the consumer counsel with all information necessary for regulation, but disclosure to the public in general was not allowed since this could deprive the telephone company of property without due process of law. The Public Service Commission was thereby required to issue a protective order for all trade secret information deemed confidential.⁹⁹

⁹⁹COMMENT: The problem raised by this ruling is that the court seems to ignore the plain language of the constitution and the obvious intent of the framers by declaring that a corporation is entitled to the protection of the individual privacy exception under the right to know. In the debates of the 1787 Constitutional Convention the delegates clearly intended the right of privacy to be reserved for individuals only. 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 Constitutional Convention, Vol. V, 1680.

In most cases, the public right to know has no bearing on corporations. However, publicly regulated industries, such as public utilities, are not typical

Montana Human Rights Division v. City of Billings¹⁰⁰

The Montana Human Rights Act¹⁰¹ provides that the right to be free from discrimination includes the right to obtain and hold employment without discrimination. The Human Rights Commission was established as the administrative watchdog over discriminatory practices and was granted broad investigative powers to allow thorough scrutiny of the circumstances surrounding complaints of discrimination. Discrimination complaints against the City of Billings had been filed with the commission. As a part of the commission's investigation of these complaints, requests were made by the commission for the city to submit personnel files, employee evaluations, disciplinary

corporations. They are state regulated monopolistic enterprises which are given special support and are expressly controlled by state government. There should be no reasonable expectation of privacy by a regulated industry regarding information necessary for determining the granting of a rate increase. Further, the activities of the agencies which are 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 such industries have become subservient to the industry they are supposed to be regulating and too often the so-called public representative in the form of a consumer counsel becomes subservient to the commission. Thus, the necessity for public observation of regulated industries and regulating agencies is obvious and should not be restricted. See Larry M. Elison, "Right of Privacy," Montana Law Review 48, no. 1 (Winter 1987): 1-52.

¹⁰⁰649 P.2d 1283 (Mont. 1982)

¹⁰¹MCA 49-1-102 (1987).

records, test scores and application materials for complainants and certain other employees and applicants for employment with the city. The city refused to comply with this request, stating that it "would not voluntarily turn over to (the commission) the personnel files and test scores for the individuals requested other than the charging parties without consent of the persons that are the subjects of the personnel files unless of course there was a court order directing us to do so."¹⁰² Responding further, the city declared that the information sought by the commission was personal and that releasing it without prior consent of the individuals involved "may constitute an invasion of those persons' privacy and may render the City liable for that invasion."¹⁰³

The court held that the information sought is protected by Montana's constitutional right of privacy¹⁰⁴ and that the City of Billings could assert constitutional rights on behalf of their employees. However, the court found that the circumstances of this case present a compelling state interest to which the right of individual privacy must yield. The court declared that "the scrutiny

¹⁰²649 P.2d 1283, 1285.

¹⁰³Ibid.

¹⁰⁴Constitution of the State of Montana, art. II, sec. 10: "Right of Privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

in the present case must involve comparison of employee records, applications, evaluations, tests, etc. There is simply no other way for (the commission) to determine whether the City...discriminated in the ways alleged by complainants."¹⁰⁵ The court also held that the attempt to obtain consent from the individuals whose records would be released would be prohibitive.

Concluding that it was necessary that the city provide the requested information, the court also found it necessary to establish some protection of the privacy of those individuals whose files were made available to the Commission. Again the court declared a need to balance the public and private interests, stating, "when the public right to know collides with ... the right to protect certain private information, a balancing of rights is necessary."¹⁰⁶ The court concluded that the city must release the "fullest available information" to the commission and that the commission upon releasing the information to the public must conceal the identity of the individuals whose records were a part of the investigation.¹⁰⁷

¹⁰⁵649 P.2d 1283, 1289.

¹⁰⁶Ibid. at 1291.

¹⁰⁷COMMENT: The court's ruling presents problems for the public's right to know especially in its ruling on the issue of whether a governmental agency can assert constitutional rights on behalf of an individual. Since this authority could be easily abused, the consequences of

Jarussi v. Board of Trustees of School District No. 28,
Lake County¹⁰⁸

At a meeting with the Board of Trustees of School District No. 28, Jarussi, a non-tenured full-time principal and teacher, requested an increase in salary for the following school year. The Board closed the meeting to discuss the request. Jarussi claimed he objected to this closure, but his objection was not recorded in the minutes of the meeting. The Board re-opened the session and offered Jarussi a position for the following year with a salary increase that was less than requested. Jarussi claimed he accepted the offer, but this acceptance also failed to be recorded in the minutes. At a subsequent Board meeting, which was again closed, the Board withdrew its offer of employment to Jarussi. Jarussi claimed a violation of his constitutional right to observe the deliberations of the school board under the right to know

this decision could virtually eliminate any access to many government-held documents and thereby significantly truncate the citizen's right to know. The agency in this case, the City of Billings, is the governmental entity against whom complaints of discriminatory employment practices had been filed. The city might therefore have a self-serving interest in concealing the information in their employment records while claiming that the city, by withholding these files, was asserting the constitutional right of privacy on behalf of the individuals whose records were requested. Further, there is a question as to the reasonable expectation of privacy, the test which the court has applied in previous privacy issues. There can be no reasonable expectation of privacy regarding employment information about governmental employees. The citizens, as actual employer, have a right to this information.

¹⁰⁸664 P.2d 316 (Mont. 1983).

provision of the Montana Constitution. The school board argued that the closure was proper under a statutory provision permitting closure "to discuss a strategy to be followed with respect to collective bargaining."¹⁰⁹

The court found that the school board's discussion in the closed meeting did not constitute "collective bargaining"¹¹⁰ and that in closing the meeting, there was no determination that the demand of individual privacy clearly exceeded the merits of public disclosure since the individual whose privacy might have been invaded requested the meeting to be open. The court held that the meeting was improperly closed, that Jarussi had a right to be present at the board's meeting, and that the action taken by the board regarding Jarussi was void.

¹⁰⁹MCA 2-3-203 (4) (1987).

¹¹⁰The court adopted the definition for "collective bargaining" which was used in N.L.R.B. v. Stow Manufacturing Co., 217 F.2d 900 (2nd Cir. 1954): "...Collective bargaining is an activity, presupposing that the employees shall have opportunity in absence of their employer to canvas their grievances, formulate their demands in common, and instruct an advocate who they believe will best press their suit." COMMENT: Since collective bargaining sessions are allowed to be closed under the exemption to the open meeting law, it is important that the court has given a definite meaning to the term. This eliminates the possibility of having regular meetings closed when a mere discussion of salaries is on the agenda. It is important to note that the court did not address the question of whether the "collective bargaining" exemption was constitutional. It assumed the collective bargaining exemption to be constitutional and then commenced the task of defining the term.

Missoulian v. Board of Regents of Higher Education¹¹¹

The Missoulian brought action against the Board of Regents claiming that the board's closure of a job performance evaluation meeting concerning presidents of the six university system units violated Montana's Open Meeting Law and the right to know provision of the state constitution.¹¹²

In balancing the rights in conflict, the court determined that in considering this particular set of facts the demands of individual privacy clearly exceed the merits of public disclosure. The court held that the closure of meetings intended to evaluate the job performance of university presidents' was necessary to protect the individual privacy of the presidents and other university personnel. The court said that there was no public interest in disclosing the subject matter of the meetings¹¹³ and that the effectiveness of the evaluation

¹¹¹675 P.2d 962 (Mont. 1984).

¹¹²MCA 2-3-201 (1987) and Constitution of the State of Montana, art. II, sec. 9.

¹¹³COMMENT: The public interest is an important factor which should have been weighed by the court instead of being dismissed as non-existent. The people have a right to know the quality of work being performed by government employees whose salaries are paid with tax dollars. The necessity of the citizen's right to know is highlighted in this case. Public employees are just that -- public. Information as to their job performance is of primary interest to the public and there can be no reasonable expectation of privacy regarding performance evaluations for public work.

sessions would be destroyed if the meetings were open. Thus, the court found no constitutional or statutory violation in the closure of the board's job evaluation meetings.

Belth v. Bennett¹¹⁴

Belth is an Indiana University professor of economics and editor and publisher of "Insurance Forum," a magazine which provides information to the public regarding the insurance industry. Bennett is the State Auditor and Commissioner of Insurance of the State of Montana. Belth requested certain information from the office of the insurance commissioner. The requested documents, Insurance Regulatory Information System (IRIS) reports, are prepared and distributed by the National Association of Insurance Commissioners (NAIC) to its members. NAIC is an insurance regulator support group whose membership is made up of the insurance regulators from the fifty states, the District of Columbia and U.S. territories. The reports in question contain information regarding the financial solvency of over 5000 participating insurance companies and are prepared and distributed to insurance commissioners so that individual commissioners may take appropriate action against an insurer which has been identified as having potential financial problems. After initially agreeing to

¹¹⁴740 P.2d 638 (Mont. 1986).

Belth's request, the commissioner ultimately refused to release the documents. Belth claimed that the right to know provision of the Montana Constitution allowed him access to the documents while Insurance Commissioner Bennett claimed a right of privacy exception to the right to know on behalf of the insurance companies.

The court held that, as in Mountain States Telephone and Telegraph Co. v. Public Service Commission, corporations, in this case the insurance companies, could assert the privacy exception of the right to know provision of the constitution. The court also held that, as in Montana Human Rights Division v. City of Billings, a governmental agency can assert the privacy interest of another, thus allowing the insurance commissioner to assert the privacy interests of the insurance companies since "the preliminary and subjective quality (of the IRIS reports)...intrudes upon the privacy interest at stake."¹¹⁵ The court therefore instructed the insurance commissioner to withhold information contained in investigative files from the public.¹¹⁶

¹¹⁵Ibid. at 643.

¹¹⁶COMMENT: As previously discussed in regards to public utilities, there should be no reasonable expectation of privacy by companies in any regulated industry. Information regarding the financial stability of each company should be readily available to the public. Presumptively, the primary obligation of the insurance commissioner is to protect the citizens of the state, not the insurance companies who may be in financial difficulty. As stated by Justice Hunt in his dissent:

As has been demonstrated in the case discussions, the balancing of the right to know with the right of privacy can be a difficult task. This is especially true for public administrators being pressured by various conflicting interests. The following chapter discusses the impact of the right to know on public administrators in Montana.

In balancing the right to privacy of a relatively sophisticated insurance company doing business in Montana with the rights of generally less informed consumer-citizens who seek to purchase insurance, I would hold that the expectation of the citizen to know about the company clearly outweighs the need of a state agency to warehouse information in secrecy and deny citizens the right to be informed. Ibid. at 644 (Justice Hunt dissenting).

Allowing regulated industries to convert what should be public records into private records erodes the public's right to know. If such activities are countenanced by the court, "the right to know provision will soon become worthless." Ibid. at 646 (Justice Sheehy dissenting).

CHAPTER V

PUBLIC ADMINISTRATORS AND THE "RIGHT TO KNOW"

Before proceeding to the problem of the public administrator's response to the public's right to know, it is essential to describe in a general way what it is the public may have a right to know. What activities and information might be available? What records do agencies possess? Are there written or oral agency policies, intra-office memos, inter-department memos, unpublished rules of procedure, known and recorded or unrecorded department objectives, i.e., the announced departmental agenda and "the hidden agenda?" And further, who are the "persons" to which we accord the right to know? Does it also include the angry citizen seeking to uncover corruption in government, "the Mr. Belth's" who for profit seek to inform the general public about the state of the insurance industry or about other businesses or governmental entities? Does it include the newspaper person seeking to tell all, but more interested in scandal and corruption than in the regular, ordinary but unspectacular activities of the conscientious public servant? Certainly, these people are included in the term "person." It includes each and every citizen since the constitutional provision says

that "[n]o person shall be deprived...." Therefore, the purpose for requesting the information has no bearing on whether a request for information should be granted. The following section discusses the types of information which are collected by governmental bodies and the collection and storage methods used in handling this material.

Information

What information is collected and by whom? Every imaginable kind of information is collected by government and most of it by administrative agencies. Agencies, commissions, boards and elected officials are either directed or authorized to collect and maintain information from many sources and about a variety of subjects; for example, tax records, medical records, business records, criminal records, and welfare records. This information is collected and stored by the Department of Revenue, the Department of Health and Environmental Sciences, the State Auditor, the State Insurance Commissioner, the Department of Social and Rehabilitative Services, and the Justice Department. This listing of the agencies, boards and commissions and the kinds of information collected barely scratches the surface but is at least indicative. The quantity of the information collected and held by state agencies is enormous.

How is it collected? Some of the information is demanded by state law, for example, income tax returns which reveal a great deal about the financial activities of the people of this state. Some of the information is requested in the process of regulating businesses, for example, information submitted to the Public Service Commission by public utilities or the information submitted by insurance companies that desire to do business in the

state which must be submitted to the insurance commissioner. Some information comes from the medical profession in seeking reimbursement for medical services or in the reporting of abortions performed. Some is obtained in the course of investigations by the criminal justice department and may require the use of search warrants. Some may be the result of investigations by the health department relying on administrative search warrants. Some may be volunteered by surveys. Some may be the result of a variety of citizen contacts with government agencies as consultants, employees, clients, inmates and agency opponents.

The information may be collected on bits of paper or on computer disks. It may be stored in paper files or in computer banks. It may be stored as collected or it may be analyzed, classified and computerized before storage. As a result of the methods of collection, analysis, and storage, it may become completely accessible or virtually inaccessible. It may be accessed to obtain statistical data, to inform the legislature, to advise the public or to prosecute a criminal. It may be analyzed in a fashion that builds in a bias or analyzed and compared in a manner that makes it immediately useful in a practical, problem-solving sense or as a powerful political tool. Regardless of what and by whom it has been collected or the methods used,

possession of information has become a powerful tool in the daily operation of governmental agencies or departments.

Governments have always been driven by information. The phenomenal increase in the information available to governments because of computer technology has created new problems and exacerbated old ones relating to the use and access of information. Information is a critical resource in modern democratic politics and the ascendancy of the bureaucracy in contemporary political life is plainly traceable to superior informational capabilities. The enhancement of information gathering, storing and accessing capabilities leads not only to an increased quantity of data but also to an increased potential for information manipulation and nondisclosure as well as an increase in the potential infringement of individual privacy. Thus, citizens have become ever more concerned about the information which the government obtains and distributes. The following section discusses this distribution of information and the motives for disclosing and withholding.

Disclosure of Information

There are various reasons for which public administrators distribute information to the public as well as reasons information is withheld. Whereas the constitution's right to know provision does not require agencies to disseminate government-held information, it does require that this material be made available to the public. Although the primary concern of this paper is not about information distribution initiated by the agency, this is an important dimension of the right to know. Three reasons public administrators distribute information will be examined. General distribution of information may be made because of legal demands, because of personal or political interests, or because of the administrator's concern for the public's well-being.

First, some information is distributed because the law commands that it shall be distributed. For example, Montana's Administrative Procedure Act¹¹⁷ requires that public notice be published prior to any adoption or change of rules or procedures; the declaratory rulings of any board, agency or department which is not subject to the Montana Administrative Procedure Act are required to be published;¹¹⁸ and records of many local government proceedings and rulings of local governments such as

¹¹⁷MCA 2-4-101 et. seq.

¹¹⁸MCA 2-3-113.

proposed zoning regulations¹¹⁹ are required by law to be published.

Second, information may be disseminated for personal or political reasons to enhance or advance the individual administrator's position or to discredit opposing factions. For example, the large number of abortions reported during a given year may be used to support the "Right To Life" movement and to discourage the legislature from providing abortion-related medical benefits for welfare recipients. The careful and selective development of information indicating the continuing need for the particular agency's services may be an important leverage to obtain more funding for the agency. The release of scandalous information or information about criminal conduct or secret activity may be used to embarrass a department or certain persons in a department or it may be used against other agencies. Although the release of such information may have an altruistic motivation, i.e., "the public ought to know," it may be purely vindictive and self-serving. Nevertheless, it does result in the distribution of information to the public about governmental activity.

While there is a common tendency to identify public administrators as the chief source of secrecy in government, it should be noted that recent American experience suggests that bureaucracy can be a source of

¹¹⁹MCA 76-2-205.

information that political leaders wish to conceal. For example, it apparently was public administrators who provided the first information about both the Watergate scandal and the Iran-Contra affair. In Montana, the Legislative Auditor regularly strikes fear in the heart of administrators as departments are investigated and evaluated and the resulting critique and recommendations are publicly reported.

Third, the public administrator may hold an altruistic view of concern for the needs of a healthy democracy, that is, a simple belief that the public should know what its government is doing. This is most likely to trigger the release and publication of information of a non-controversial nature; for example, the threat to public safety due to the escape of a dangerous felon, health hazards from a contaminated public water supply, and the amount of money contributed to state government by income taxpayers or property taxpayers. The per capita expenditures for state education or the salaries of top state officials might be similarly considered. However, even these less controversial facts may be released solely as criticism, directing public attention to the ineffectiveness of law enforcement, or the carelessness of the water company. It may be an effort to reduce taxes or increase salaries. But it might simply be the response of

responsible public servants who honestly believe in the public's right to know.

It is, however, most unlikely that even these conscientious, committed and altruistic public servants would publish intra-office memos or describe general departmental policy objectives unless there were some strong additional motivation. Dissemination of this type of information would be both expensive and not apparently useful to the general public.

Notwithstanding these reasons for the public administrator's dissemination of material to the public, there seem to be even stronger motives to withhold information. Several of the reasons for the nondisclosure of information will be explored next.

Nondisclosure of Information

One of the most widely supported and often used justifications for withholding information as to government operation is "national security." However, this is generally not a concern of state government. State security is rarely, if ever, a legitimate concern justifying the withholding of information from the public at large. It is imaginable that a criminal terrorist activity being investigated by law enforcement within the state might justify or at least be claimed to justify withholding information from the public.

A second reason for withholding information is to protect the financial stability of businesses operating in the state. Business stability seemed to be the underlying justification for the refusal to release information about the insurance industry in the Belth case.¹²⁰ While there may be a persuasive argument supporting this conclusion, protection of the consumers' need to know the facts about the purchase of a product marketed in the state should take precedence over the protection of business corporations.¹²¹

¹²⁰740 P.2d 638.

¹²¹COMMENT:It should also be noted that the court in the Belth case predicated its decision upholding nondisclosure on "corporate privacy" which is not a part of the privacy exception of the right to know provision of the constitution except by the most unfortunate straining of the clear language and a complete disregard for the intent of the framers as previously discussed. The right of the consumer citizen to product information is particularly important when the purchase is insurance which is supposed

Another justification for withholding information from the public is based on a lack of trust in the public. Many public administrators are honestly convinced that their expertise will produce a decision superior to the decision that may be forced by the general public if the public knows the facts and becomes involved in the decision-making process. In Board of Trustees v. County Commissioners,¹²² for example, the county commissioners may have been advised by administrators as to the "best" course of action pertaining to the proposed subdivision; that the public would interfere with this decision if they were informed about the meeting; and therefore, it was in everyone's best interest that the public be excluded.

Regardless of the stated justification for nondisclosure, often agency errors or failures of agency policy, real or perceived, are the true motivation for withholding information from the public. Requested information may indicate inefficiency, ineffectiveness,

to be a closely regulated industry. The individual consumer, even the most sophisticated, is likely to be unable to evaluate insurance companies except to compare in a most general way the costs and coverages. The insurance commissioner is obligated to evaluate the financial stability of the companies selling insurance in the state and should make all information available to the consuming public before a company is so deeply in trouble that it is difficult if not impossible for it to recover. The recent bankruptcies of Glacier General and Montana Life are excellent examples. In these cases, no information was released by the insurance commissioner to protect the consumer but every effort was made to save the companies.

¹²²606 P.2d 1069.

perverse policies or personal mistakes. When these are the true reasons for nondisclosure, there can be no justification. Obviously, however, these reasons will be vigorously denied and energetically covered up. The release of this information destroys job security, may generate a political disaster, may result in decreased agency funding and elimination of positions, and may subject some individual public administrators to civil or criminal sanctions.

According to the state constitution, the only justifiable reason for withholding information from the public in Montana is the demand of "individual privacy." The problem of invasion of individual privacy has two dimensions. First is the collection and accumulation of information, e.g., tax records, medical records, welfare files, business records, and criminal files and dossiers, and second is the disclosure of information previously obtained and in the agency's possession. It is possible to violate individual privacy in collecting, accumulating, or disclosing information.

Collection and accumulation of data may be ordered by statute or by an administrative decision based on rules and regulations. It is assumed that having the information is necessary if the agency is to function effectively and efficiently. The information may have been obtained by request or by demand. It may have required an

administrative search warrant; or it may have been obtained after a full search and seizure. Some of the particular details of the information obtained from or about individual citizens may constitute an invasion of privacy. In addition, the particular method used to obtain this material may infringe upon an individual's privacy as would public disclosure of personal information.

The guidelines directing the public administrator's hand in making the sometimes difficult decision to release or withhold information are slowly being developed by the courts¹²³ and the legislature.¹²⁴ Since these guidelines are seldom generated until there is a problem, this process will never be complete. In any event, it is too slow to meet the administrator's needs who must deal with the problem in a variety of settings and on a daily basis.

It should be noted that the privacy right being discussed is not the privacy right of the public administrator. By being in government and an agent of the people, the public administrator has largely forfeited the right to privacy while functioning within the scope of public employment. What is done as a public employee is of interest to the public and should be available to public scrutiny. The privacy right of importance is that of the

¹²³See cases in Chapter IV; Mountain States, Montana Human Rights, and Belth in particular.

¹²⁴For example, see MCA 69-3-105.

individual citizen who has been forced to reveal certain personal and often private information that is now in the possession of the public administrator. Insofar as the public administrator as a member of the general public was also forced to reveal such information about private life, that information, unassociated with the role of public administrator, may be protected on the same grounds and to the same extent as any other member of the public.

With the foregoing discussion in mind, this chapter concludes with an examination of the general role of the public administrator as affected by the right to know. The public's right to know will most frequently be tested when a request is made by a member of the public for information and that request is denied. When the public administrator is called upon to disclose government-held information, many questions arise and little functional advice is available.

The Public Administrator's Role

Public administrators in Montana are placed in a most difficult position being charged with the obligation to represent the public while carrying out the daily operation of the government according to the directions of the executive and the legislature. They are expected to be efficient, responsive to public demands, open to the public and protective of individual privacy. They are obligated to heed all constitutional mandates, follow the commands of the legislature as outlined in the statutes, and be responsive to the policies of executive leadership.

The right of the public to access government-held information can often complicate the already precarious position of the public servant. Under Montana's constitution, the basic obligation of the administrator in complying with the right to know provision is to maintain complete openness relative to agency operations, agency records and agency deliberations unless there is a substantial likelihood that someone's individual privacy will be infringed. Thus, the public administrator's position is one of gatherer, keeper, and disbursing or withholder of enormous amounts of information. This means that the public administrator knows what information is being collected, knows how it is being collected and stored, knows how accessible it is and makes the initial decision as to disclosure or concealment of this

information. Often, this decision may be more casual than conscious; more a consequence of traditional operating procedure than the result of thoughtful decision-making.

The primary weakness of this process, however, derives from the necessity of requiring the executive branch to enforce the public's right to know against itself. As previously discussed, governmental interests are generally concerned with concealment of information, and administrative loopholes created by the legislature frequently allow bureaucrats to maintain their aura of governmental inviolability and shield both incompetence and corruption.

The individual act of withholding information from the public is frequently based on fear, uncertainty, and the lack of the time or background sufficient to explore the actual situation and its implications. There may be a fear of discovery of a personal mistake or misconduct or the fear that superiors may view the disclosure itself to be unwise, disloyal, or both. Since many of the concepts involved with the right to know and its judicial interpretation have not been given clear and concise definitions and since there are no guidelines to follow, the public administrator is left with uncertainties and finds it easier to take no action for fear of making the wrong decision. Thus, withholding information is often safer for the public administrator than full disclosure.

Nevertheless, public servants have not only a legal obligation to enforce the public's right to know against themselves, but also have a substantial ethical obligation to protect the public interest. Notwithstanding the pressures from various interests, the public administrator must make decisions in a manner which is responsible and accountable to the public. According to Montana Constitutional Convention Delegate Wilson:

Government needs to be more to its constituents than efficient and economical. It needs to be responsive and responsible to the people it represents. Its responsibilities include not only the matter of protecting the public trust, it includes having the trust of the public. Public trust does not come from just a matter of confidence in the integrity of public officers, but rather it comes from knowing that public affairs are placed in the public eye. This can only occur when the activities of government are visible and when there are ways of checking on what our public officials are doing....This concern should be included in our proposed Constitution in such a way that we give the public the best chance to view critically its public officers, and to avoid open invitation to corruption.¹²⁵

Accountability of public servants is essential to the moral empowerment of a society. Moral empowerment provides a sense of self determination, the basis of democracy. Public administrators must be cautioned against allowing the "ends," whether they be governmental or self interest, to justify the "means," i.e., the withholding of information from the public. If this Machiavellian

¹²⁵Montana Constitutional Convention of 1971-1972,
Vol. IV, 845.

attitude is allowed to permeate governmental bureaucracy, it will lead to the diminution of democracy.

Accepting this ethical responsibility and the constitutional mandate to make all information available to the public except that which would infringe upon individual privacy, how is the public administrator to make practical daily decisions regarding the right to know? The following chapter concludes this paper with a summary of the major points which have been discussed and a brief outline of functional considerations for public administrators when faced with the conflicts raised by the public's right to know.

CHAPTER VI

CONCLUSION AND RECOMMENDATIONS

The vastness of government and its myriad of agencies makes it difficult for the electorate to obtain that "popular information" of which Madison spoke. But it is only when one further considers the hundreds of departments, branches, and agencies which are managed and staffed by government employees who have not been elected and cannot therefore be held directly accountable by the people, that one begins to understand the great importance of having an information policy of full disclosure.

Moreover, there is a natural tendency for secrecy to spread once it is legitimized in any area since government officials have strong incentives for withholding information from the public. Secrecy not only affords an opportunity to cover up mistakes or to conceal misbehavior, it also allows officials to shape policy as they choose without having to consult outside groups. Besides allowing government officials to escape accountability for their actions, secrecy threatens the rationality of government decisions. Some of those excluded from the deliberative process by practices of secrecy may have information or

advice to give that could save policy makers from grievous errors in judgment.

From the standpoint of the principles of democracy, there can be little question that open government should be the general rule and few exceptions should be made. In considering the specifics of administrative "right to know" guidelines for advising public administrators, the following problems arise:

(1) In Montana, the only exception to openness is confidentiality to protect individual privacy,¹²⁶ and this is allowed only if the privacy interest "clearly exceeds the merits of public disclosure." This requires the balancing of two very broad concepts, privacy and the right to know, neither of which is adequately defined. The merits of particular controversies over information availability are often difficult to assess. Frequently, they arise from different values and conflicting interests and from the lack of specificity in defining concepts.

(2) There are a plethora of statutes which address government secrecy and the public right to know. This legislation is erratic and incomplete. It was not passed at one time to effectuate a thoughtful

¹²⁶COMMENT: According to court interpretations, "individual privacy" includes corporate trade secrets and insurance company information held by the insurance commissioner in investigative files.

master design; much of it was written and lobbied by special interest groups without close public scrutiny; and some of it predates the 1972 Montana Constitution.

(3) Administrators have been prone to deal with "right to know" problems only when conflicts arise and not before. In other words, there are few agency rules and regulations which address the public's right to know. It is doubtful that most agencies have even considered "right to know" problems except in the context of a pending law suit.

(4) The extent and variety of information that is collected makes it difficult to classify logically and consistently which material might constitute an invasion of individual privacy if disclosed and which material must be made available to the public.

(5) The state supreme court's interpretations of the constitutional right to know provision, which appear to ignore both the clear language of the constitution as well as the intent of the framers, have increased the difficulties for public administrators in making decisions involving this right. For example, the court's holdings have left the public administrator with uncertainty as to the meaning of "individual privacy."

In attempting to accommodate in rules and regulations all of the above considerations, serious conflicts are certain to arise and decisions, once made and acted upon, will most certainly be challenged. The question then is how can the public administrator best deal with the "right to know" provision after the legislature has created an inconsistent package of laws in its attempt to implement the constitutional provision and when the court has infrequently and inconsistently interpreted the provision. It is essential that agency personnel have clear guidelines for functioning in compliance with Montana's right to know. It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other interest must, of necessity, either be abrogated or substantially subordinated. The goal is to provide a workable formula which protects all interests, yet places emphasis on the fullest responsible disclosure. The following section details specific administrative guidelines to implement the right to know in keeping with the current statutory provisions and court interpretations.

Recommended Guidelines

The following charts outline the guiding principles by which the public administrator should make decisions and the decisional steps which should be taken prior to responding to a request for information. The charts are followed by a substantive discussion including illustrative examples. The procedural suggestions and substantive conclusions are based on logical extensions and interpretations derived from generally accepted definitions of the "right to know" and "privacy." In other words, they are based on the plain meaning of the state constitution. These suggestions and conclusions are supported, to the extent possible, by statutes, court rulings and attorney general opinions.

"RIGHT TO KNOW" ADMINISTRATIVE GUIDING PRINCIPLESEthical Guidelines

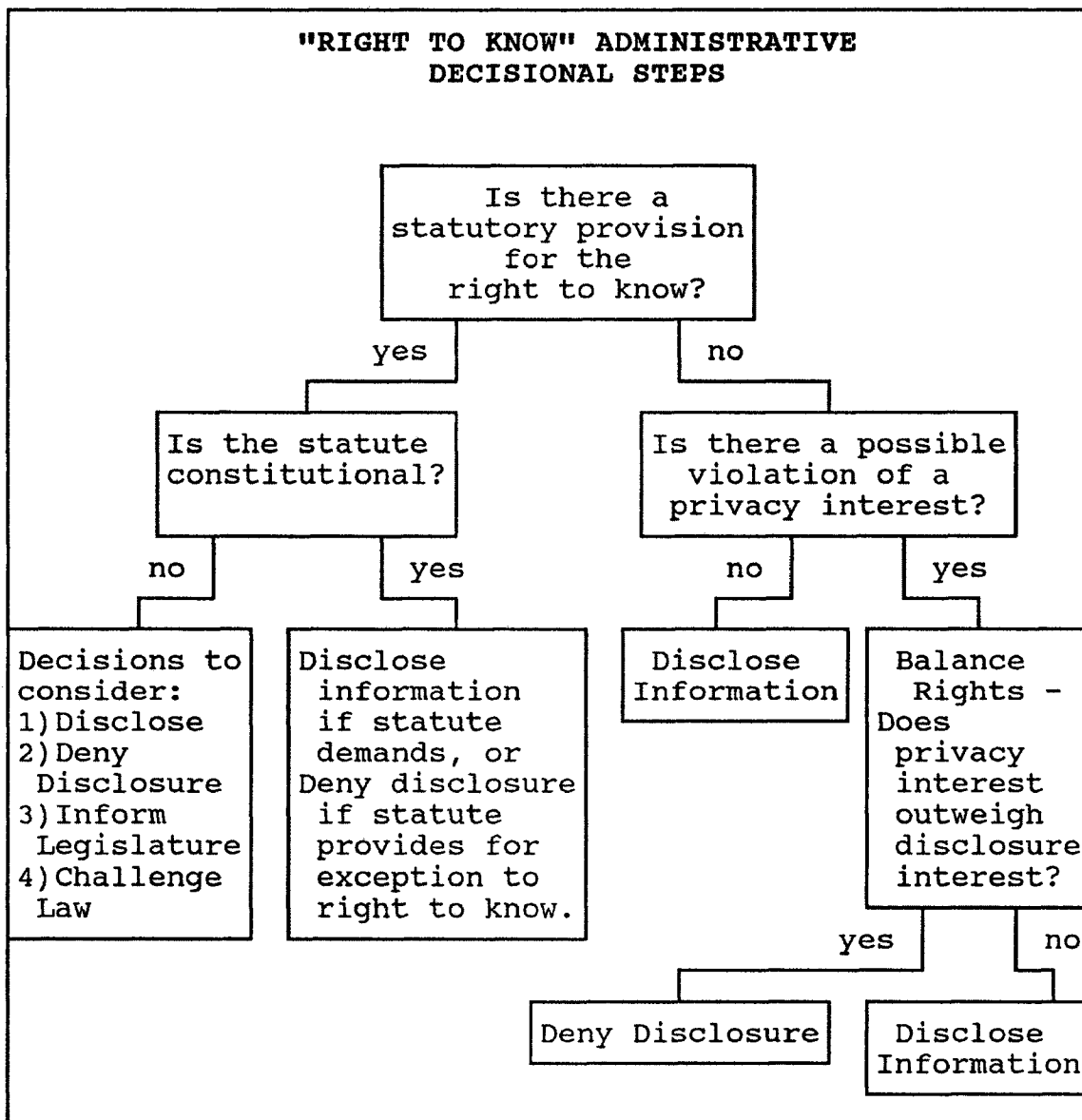
Public administrators must:

1. Maintain a conscious awareness of the fact that their overall purpose is to serve the public;
2. Recognize that the public is their true employer;
3. Treat each citizen with dignity and respect;
4. Be honest, open and fair in performance of all duties; and
5. Maintain primary loyalty to the public and secondary loyalty to elected officials and supervisors.

Practical and Legal Guidelines

Public administrators in balancing the right to know with the right of privacy must:

1. Maintain an open meeting policy, except when the discussion relates to:
 - a. Personnel matters unless the individual being discussed waives the right, or
 - b. Strategy to be followed regarding collective bargaining or litigating position of an agency;
2. Make available to the public without exception:
 - a. The kinds of information being collected,
 - b. Why it is being collected,
 - c. How it is being collected, stored, and accessed,
 - d. For what purpose it is being used, and
 - e. To whom it is being disseminated.
3. Disclose information which:
 - a. Is statistical in nature and does not identify an individual;
 - b. Relates to an agency's operations;
 - c. Relates to an agency's procedures; or
 - d. Relates to agency policy.
4. Not disclose information which:
 - a. Reveals facts about an identifiable individual including the following:
 - 1) age, sex, or race,
 - 2) medical or health records,
 - 3) personal financial data,
 - 4) work records, or
 - 5) criminal records;
 - b. Reveals trade secrets belonging to an individual or a corporation; or
 - c. Is investigative in nature and
 - 1) concerns a regulated private industry, or
 - 2) identifies individual criminal suspects or criminal informants.



Discussion of Guiding Principles

The ethical guidelines will be discussed at the end of this chapter. Before the practical and legal guidelines can be effective in aiding public administrators, their concepts and terms should be defined. Since the courts and the legislature have not done this, only broad and sometimes conflicting interpretations are available to the public administrator. The following definitions rely on generally accepted meanings of the terms. The "right to know" means that government and its agencies and agents can not refuse to allow the public access to any government-held information or to observe the deliberations of these bodies. The only explicit exception to the right to know is "a case in which the demand for individual privacy clearly exceeds the merits of public disclosure." "Privacy" means protection from unreasonable governmental intrusions upon or disclosures about one's person, places or things. "Individual privacy" means the privacy of a singular human being. The clear intent of the framers was to make an exception for individuals only;¹²⁷ however, the court stated in Mountain States that this exception could include the demands of individual privacy of a corporation when the information contained trade secrets¹²⁸ and in

¹²⁷Montana Constitutional Convention of 1971-1972, Vol. V, 1680.

¹²⁸634 P.2d 181, 188.

Belth, that the privacy interests of an insurance company could exceed the merits of public disclosure when the information was investigative in nature.¹²⁹

The following discussion of the practical and legal guidelines includes examples which are found in the statutes, court rulings or attorney general opinions. In maintaining a policy of openness in deliberations, all meetings must remain open to the public except in cases where an individual's privacy must be protected. The court's ruling in Missouliau allows the closing of job evaluation meetings¹³⁰ to protect the employee's (the university presidents) right of privacy. However, job evaluation meetings are to remain open if the individual whose privacy may be violated requests it.¹³¹ In Great Falls Tribune the court held that court hearings may be closed if there is a risk of jeopardizing a fair trial.¹³² According to statute, a meeting may be closed to discuss a collective bargaining strategy or a litigation position of a public agency; however, in Jarussi the court decided that discussions regarding employee salaries does not necessarily constitute a collective bargaining strategy

¹²⁹740 P.2d 638, 643.

¹³⁰Missouliau v. Board of Regents, 675 P.2d 962.

¹³¹Jarussi v. Board of Trustees, 664 P.2d 316.

¹³²Great Falls Tribune v. District Court, 608 P.2d 116.

session.¹³³ Public administrators should keep in mind that according to the court's ruling in Board of Trustees v. County Commissioners that telephone calls constitute a meeting and should not be used to discuss official matters.

The right to know provision demands a policy of full disclosure of government-held information with the only exception being confidentiality to protect individual privacy. However, disclosure of matters of a personal nature may be required when the public interest in the right to know outweighs the public interest in individual privacy. For example, according to an attorney general opinion, certain information about state employees (title, dates and duration of employment, and salary) is of sufficient public interest to outweigh the individual employee's right of privacy.¹³⁴ According to statute, details such as age, sex, or race must not be disclosed if the employee is identifiable;¹³⁵ however, statistical information compiled on age, sex, and race must be made available to the general public.¹³⁶ (For other statutory

¹³³MCA 2-3-203 (4): "However, a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigating position of the public agency." See discussion of Jarussi v. Board of Trustees, 664 P.2d 316, in Chapter IV of this paper.

¹³⁴38 A.G.Op. 109 (1980).

¹³⁵Such information may be released by court order with protective limits. See Montana Human Rights Division v. City of Billings, 649 P.2d 1283.

¹³⁶MCA 49-2-102 (1987).

provisions authorizing the withholding of information, see Chapter IV of this paper where they are discussed in detail.) Further examples of the balancing of these two rights are considered in the following discussion of the decisional steps involving the right to know.

Discussion of Decisional Steps

The first question to consider when faced with a request for government-held information is whether there is an explicit statutory provision which affects the requested material and the public's right to know. If such a provision exists, it should be examined as to its constitutionality. If the statute demands the release of information and the material is obviously not of a personal nature; i.e., does not include, for example, personally identifiable facts regarding age, sex, race, financial or health records; then it should be released. If the statute requires that information should be withheld because of the clearly personal nature of the material, the information should not be disclosed. Each of these cases would be in conformity with the constitutional provision for the right to know.

If, however, it appears that the statute is unconstitutional, i.e., the material is not of a personal nature and the statute authorizes withholding it, the public administrator should seek legal advice from the agency attorney and possibly the attorney general. The public administrator is then faced with several alternative courses of action which are not necessarily exclusive: to release the information risking possible criminal prosecution due to the failure to adhere to the laws of the state; to deny disclosure of information and be challenged

in court by the person seeking the information; to inform the legislature and urge that the statute be repealed; to challenge the constitutionality of the law by declaratory judgment action.¹³⁷ Foremost in the public administrator's mind in making a decision at this juncture must be a consideration of the public's interest. Public administrators should remember that the public has an interest in the protection of individual privacy as well as in the right to know.

The Mountain States case is an example of the aforementioned process. Mountain States Telephone and Telegraph Company asked the Public Service Commission to issue a protective order to prohibit public disclosure of certain information which the company claimed contained trade secrets. The commission refused to withhold this information from the public, basing its refusal on the right to know constitutional provision and on a statute which demanded that all commission-held material had to remain open to the public. The telephone company challenged this decision in court. The court ruled in favor of protecting trade secret information from public disclosure, thus forcing the legislature to amend the statute to provide for this exception.¹³⁸

¹³⁷MCA 27-8-101.

¹³⁸MCA 69-3-105: "(1) Except as provided in subsection (2), the reports, records, accounts, files, papers, and memoranda of every nature in the possession of

If, on the other hand, there is no such statutory provision which applies to the requested material, then the public administrator must determine whether there is a possible infringement of an individual's right of privacy. If there is no individual privacy consideration, i.e., the requested material does not contain personal facts regarding an identifiable individual, then the information should be disclosed. If, however, there is a privacy interest to be considered, then the two rights must be weighed. If the demand of individual privacy clearly exceeds the merits of public disclosure, the information should not be released. In Missouliau, for example, the individual privacy interest of the university presidents was deemed by the court to outweigh the public's need to know about the specific details of the job performances being discussed.

If, however, the public's right to know outweighs the privacy interest, then disclosure of the information is the appropriate action. In Board of Trustees v. County Commissioners, for example, the court said that the

the commission are open to the public at reasonable times, subject to the exception that when the commission considers it necessary, in the interest of the public, it may withhold from the public any facts or information in its possession for a period of not more than 90 days after the acquisition of the facts or information.

(2) The commission may issue a protective order when necessary to preserve trade secrets, as defined in 30-14-402, required to carry out its regulatory functions."
Compiler's Comment: "1987 Amendment: At beginning of (1) inserted exception clause; and inserted (2)."

public's interest in the availability of information outweighs the public official's privacy interest in maintaining secrecy regarding official duties.¹³⁹ In Jarussi the school board was not allowed to protect the privacy interest of an individual who wished to waive this privacy right.¹⁴⁰ And in Montana Human Rights the public's interest outweighed the individual's privacy interest insofar as the personal information was required to be released to the Human Rights Commission; but, dissemination of this information to the general public was limited to statistics which did not identify specific individuals.¹⁴¹

¹³⁹Board of Trustees v. Board of County Commissioners, 606 P.2d 1069.

¹⁴⁰664 P.2d 316.

¹⁴¹Montana Human Rights Division v. City of Billings, 649 P.2d 1283.

The Ethical Public Administrator

According to the constitution, there is to be an overall general policy of openness followed by all governmental agencies of the state. It is the responsibility of the individual public administrator to promote this policy of open government in every aspect of official business. Open government is the ethical obligation of each government employee to the public not merely an agency obligation. Every public administrator should maintain a sense of personal responsibility and accountability to the public. Individual responsibility should not be shielded by illegal or unethical "agency" determinations nor should it be shifted to other persons or agencies.¹⁴²

The ethical public administrator must first and foremost be competent and knowledgeable. Competency and knowledge regarding all aspects of the effect of the "right to know" on one's agency and its particular information is a part of the public administrator's ethical obligation to the public. It is essential to be familiar with the constitution, the statutes and the cases affecting one's particular work and be prepared to deal with problems

¹⁴²COMMENT: The shift of responsibility to the judicial system could be used as an easy way for agencies to avoid making decisions regarding the right to know. This manner of dealing with requests for information is not only unethical, it is inefficient, time consuming and costly.

before they arise. The public administrator should encourage creation of agency rules and regulations to aide agency personnel in functioning under the "right to know."

The public administrator should not try to avoid or circumvent the law to make particular decisions less difficult, but should work to make the "right to know" concept function better by creating a workable formula directed toward protecting all interests. The ethical public administrator must give voice to the democratic values upon which the right to know is based even though this may place the agency in conflict with the court. Recognizing the inconsistencies and errors of the court's interpretations, the public administrator may be able to encourage the court to define more narrowly the occasions where the withholding of information from the public is allowed. Until this occurs, the court opinions extending the exceptions to the right to know should be read as narrowly as possible.

The ethical public administrator should be helpful and caring but not controlling. It is not the public administrator's responsibility to protect the privacy interest of an individual who does not request or want protection. For example, a meeting should never be closed

to protect the privacy of an individual who desires to have the meeting open.¹⁴³

Finally, the ethical public administrator must serve the public. This does not diminish the value of loyalty to one's superior or to the agency. It does not require or even suggest the paternalistic protection of the public from itself. It does mean adherence to not only the law and the constitution but to the spirit of the democratic values upon which they are predicated.

¹⁴³COMMENT: Too often the announced justification is merely subterfuge.

Conclusion

There is obviously a need for each agency of state government to consider "right to know" issues prior to problems arising. Particular decisions of individual public administrators could be made easier if each agency had a set of rules and regulations directly addressing all agency-related statutes and agency-specific information.¹⁴⁴ There is also a need for the creation of an "ombudsman" position to whom public administrators could direct questions and on whom the public could rely for continuing supervision of agency activity and to whom the public could direct complaints relative to the right to know. These adjustments are beyond the scope of the public administrator's authority except as by way of suggestions to the elected officials.

¹⁴⁴It would be a valuable contribution to public administrators as well as to the public in general for the state to commission someone to obtain from each agency of state government, lists of the following information: (1) All the information the agency gathers, stores, analyzes, and disseminates; (2) Reasons for the accumulation or dissemination; (3) Methods of obtaining information; (4) Information storage techniques; (5) Methods of accessing information; (6) To whom it is distributed or who has access to the information; and (7) Authority, if any, which justifies the accumulation, or dissemination of the information, including statutes, rules, regulations and court decisions. Once these facts are accumulated each statute, rule, regulation and court decision should be evaluated. Recommendations for repealing unconstitutional statutes, modifying questionable statutes and enacting needed statutes could then be made. Finally, a complete set of procedural guidelines for each department could then be developed and promulgated.

Few would deny that, at least in principle, the authority of the American State lies with a sovereign citizenry. Yet working against this premise are pleas for elite authority based upon claims of expertise, privilege, power, or national security. All too often, these are the despoilers of open government policies. To the extent that they are successful in justifying secrecy, they are undermining democratic practice as well. Sensitivity to the public's right to know must be heightened and public administrators must be resolute in honestly seeking to maintain openness in government. Failing this, democracy will not vanish, but it will be diminished as governmental duplicity and secrecy generate public anxiety, distrust and cynicism.

SOURCES CITED

- Abrams v. U.S., 250 U.S. 616 (1919).
- Belth v. Bennett, 740 P.2d 638 (Mont. 1986).
- Beth, Loren P. "The Public's Right to Know: The Supreme Court as Pandora?" Michigan Law Review 81 (March 1983): 880-890
- Board of Trustees v. Board of County Commissioners, 606 P.2d 1069 (Mont. 1980).
- Branzburg v. Hayes, 408 U.S. 665 (1973).
- Brennan, William J. "Address by Justice Brennan." Rutgers Law Review 32 (1979): 175-177.
- Cheh, Mary M. "Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information." Cornell Law Review 69 (April 1984): 690-750.
- Constitution of the State of Montana (1972).
- Constitution of the United States of America.
- Cox v. Lee Enterprises, 723 P.2d 238 (Mont. 1986).
- Cross, Harold L. The People's Right to Know. Morningside Heights, New York: Columbia University Press, 1953.
- Dahl, Robert. A Preface to Democratic Theory. Chicago: University of Chicago Press, 1956.
- Dennis v. U.S., 341 U.S. 494 (1951).
- Elison, Larry M. "Right of Privacy." Montana Law Review 48, no. 1 (Winter 1987): 1-52.
- Ely, John Hart. Democracy and Distrust. Cambridge, Mass.: Harvard University Press, 1980.
- Freedom of Information Act. U.S. Code. vol. 5, sec. 552 (1986).

Gorman, David. "Rights in Collision: The Individual Right of Privacy and the Public Right to Know," Montana Law Review 39, no. 2 (Summer, 1978): 249-267.

Great Falls Tribune v. District Court, 608 P.2d 116 (Mont. 1980).

Hamling v. U.S., 418 U.S. 87 (1974).

Henkin, Louis. "The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers." University of Pennsylvania Law Review 120 (1971): 271-280.

Hennings, Thomas J. "Constitutional Law: The People's Right to Know." American Bar Association Journal 45 (July 1959): 667-770.

Houchins v. KOED, Inc., 438 U.S. 1 (1978).

Ingber, Stanley. "The Marketplace of Ideas: A Legitimizing Myth." Duke Law Journal (February 1980): 1-99.

Jarussi v. Board of Trustees of School District No. 28, Lake County, 664 P.2d 316 (Mont. 1983).

Locke, John. The Second Treatise of Government. Edited by Thomas P. Peardon. Indianapolis: Bobbs-Merrill Educational Publishing, 1952.

Madison, James. The Complete Madison. Edited by S. Padover. New York: Harper, 1953.

Madison, James. Writings of James Madison. Edited by G. Hunt. New York: G.P. Putnam, 1910.

Meiklejohn, Alexander. Free Speech and Its Relationship to Self-Government. New York: Harper, 1948.

Mill, John Stuart. Considerations on Representative Government. Edited by C. Shields. Indianapolis: Bobbs-Merrill, 1958.

Mill, John Stuart. On Liberty. Chicago: Longmans, Green & Co., 1921.

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

Missouliau v. Board of Regents of Higher Education, 675 P.2d 962 (Mont. 1984).

- Montana Code Annotated (1987).
- Montana Constitutional Convention of 1971-72. Helena, Mt.: Montana Legislature, 1979.
- Montana Human Rights Division v. City of Billings, 649 P.2d 982 (Mont. 1982).
- Mountain States Telephone & Telegraph Co. v. Dept. of Public Service Regulation, 634 P.2d 181 (Mont. 1981).
- N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).
- N.L.R.B. v. Stow Manufacturing Co., 217 F.2d 900 (2nd Cir. 1954).
- New York Times v. Sullivan, 376 U.S. 254 (1964).
- New York Times v. U.S., 403 U.S. 713 (1971).
- Nimmer, Melville B. Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment. New York: Matthew Binder, 1984.
- O'Brien, David. "The First Amendment and the Public's 'Right to Know.'" Hastings Constitutional Law Quarterly 7, no.3 (Spring 1980): 579-632.
- O'Brien, David. "Privacy and the Right of Access: Purposes and Paradoxes of Information Control." Administrative Law Review 30 (1978): 45-60.
- Parks, Wallace. "The Open Government Principle: Applying the Right to Know Under the Constitution." The George Washington Law Review 26 (October 1957): 1-22.
- Rawls, John. A Theory of Justice. Cambridge, Mass.: Belknap Press of Harvard University Press, 1971.
- Red Lion Broadcasting Company v. F.C.C., 395 U.S. 367 (1969).
- Roe v. Wade, 410 U.S. 113 (1973).
- Saxbe v. Washington Post Co., 417 U.S. 843 (1974).
- Schenck v. U.S., 249 U.S. 47 (1919).
- State v. District Court, 654 P.2d 982 (Mont. 1982).

Thayer, Frank. Legal Control of the Press. Brooklyn: Foundation Press, 1962.

Time, Inc. v. Hill, 385 U.S. 374 (1966).

Tocqueville, Alexis de. Alexis de Tocqueville on Democracy, Revolution and Society. Edited by J. Stone and S. Menell. Chicago: University of Chicago Press, 1980.

Tribe, Laurence H. American Constitutional Law. Mineola, N.Y.: The Foundation Press, 1988.

U.S. v. Cruikshank, 92 U.S. 542 (1876).

Webster, Noah. "Plan for the Union of the American States." Old South Leaflets. Boston: Old South Meeting House, 1896.

Webster, Pelatiah. "The Political Union of the United States." Old South Leaflets. Boston: Old South Meeting House, 1896.

Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976).