Rights in Collision: The Individual Right of Privacy and the Public Right To Know

David Gorman
III. RIGHTS IN COLLISION: THE INDIVIDUAL RIGHT OF PRIVACY AND THE PUBLIC RIGHT TO KNOW

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A. Introduction

The focus of this article is different from the two which precede it. It is not a full exposition of a single guarantee, but takes the form of a dialectic exposition on the inherent tension between the individual right of privacy and the public right to know. Each right is examined independently in terms of its convention history in Montana, and its implementation in Montana by the courts or legislature. The development of each right in states which have accorded it explicit constitutional status is mentioned where illustrative, and for each right a course of further development in Montana is suggested. The article then comes to its focus, the judicial weighing of the two rights where they collide. For the purposes of this part of the discussion, the article will examine the experience of other state supreme courts in dealing with privacy challenges to public official financial disclosure laws. Finally, there are some suggestions about how the problem, should it arise in Montana, may be resolved.

B. The Right of Privacy

Article II, section 10 of the Montana Constitution provides:

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.

Among the rights given explicit constitutional status in the Montana Constitution's Bill of Rights, the right of privacy, like the right to a clean and healthful environment and the right of equality among the sexes, has been generated by the pressures of our advanced technological society. It is interesting to note that the need for individual privacy was not questioned by the delegates to the Montana Constitutional Convention, while the need seems never to have occurred to the drafters of the federal constitution. Montana is not alone among the states in amending its constitution to reflect the growing public concern for the preservation of the right of privacy.

This portion of the article will examine the deliberations of the Constitutional Convention regarding the right, the recognition and

2. MONT. CONST., art. II, § 9.
development of the right by the decisions of the Montana supreme court, the weight and scope accorded to the right by the supreme courts of those other states with explicit constitutional rights of privacy, and will conclude with some suggestions for further action by the practitioners and courts to bring the right to full flower in Montana.

1. The Constitutional Convention

The proceedings of the Constitutional Convention leave no doubt that it was the consensus of the delegates that the right of privacy deserved explicit recognition. A preliminary study and the Bill of Rights Committee comments to the proposed provision acknowledge the judicial recognition of the right of privacy. The explanation of the Committee for elevating the right to explicit constitutional status leans heavily on the dangers imposed by our information-oriented technological society.

Unfortunately, the cases cited by the Committee and the reasoning of the Committee in its explanation have no common factual ground. They are from the scattered fields of family planning, search and seizure law, and data gathering and processing. Clearly the Committee did not intend to define the scope of the right of privacy by such diverse citations, and the delegates did not discuss the scope of the right on the convention floor. Rather, the Committee must have intended them to be illustrative of the spectrum of areas in which there may be a legitimate expectation of privacy. Evidence of the concern of the delegates as a whole for the scope of the right of privacy may be found in the action of the convention on the proposed search and seizure provision. The reference to "invasions of privacy" was deleted on the convention floor when it was suggested that the right of privacy was being diluted for warrant purposes, and that a deletion would absolutely preclude interception of communications. Definition of the scope of the right was, by

6. Committee Comment at 24.
7. The original Bill of Rights Committee Proposal for Mont. Const., art. II, § 11 read: The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures and invasions of privacy. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing. (emphasis added).
default, left to the courts with the implicit direction to extend rather than retract the right as our society grows more complex and demanding.

The scope of the right of privacy may have been left undefined, but the convention gave the courts clear directions as to the weight to be accorded the right to privacy. The intent of the Bill of Rights Committee was clear: "The Committee believes that the Constitution should specify that the only circumstances in which the right of privacy may be infringed is following the showing of a compelling state interest." However, upon motion, the "without a showing of a compelling state interest" was struck from the provision without significant opposition.

When the amended provision was reported out of the Style and Drafting Committee the delegate who had offered the deleting amendment moved for reconsideration, supporting his motion by saying that his general intent, to strengthen the protection of the individual, was not served by his amendment. The debate on the motion to reconsider (which passed) and the subsequent motion to reintroduce the "compelling state interest" test was lively. Various delegates took the positions that the standard was implicit, that the right of privacy had been rendered absolute, that the amended provision was meaningless to a court, and that in default of any explicit standard the courts could choose to apply a mere "reasonableness" test to defeat privacy rights. It was this last argument which apparently swayed the convention as a whole, and the "compelling state interest" test was restored.

This explicit statement of the weight to be accorded to the right guaranteed by the provision places a heavy burden on the state. It has even been suggested that the task faced by the state of showing a compelling interest is, in most situations, an impossible one. Clearly the delegates placed a very high value on the right of privacy, and they forcefully indicated that the courts were to accord it every protection available under this most stringent standard of judicial review.

10. Committee Comment at 24.
13. Proceedings at 5714.
15. Proceedings at 5715.
2. Privacy and the Montana Supreme Court

As noted by the Bill of Rights Committee, historically the development of the right of privacy has been carried out by the courts. The Montana supreme court has found a right of privacy to exist in Montana, but has gone little further delineating the scope which the right will be given. In essence the court has carried the right no further than it had before the right was raised to explicit constitutional status.

In *State v. Coburn*, the first case discussing privacy after the passage of the Constitution in 1972, the court certainly mentions that Montana has a constitutional right of privacy independent of the federal right, but does nothing more. The decision is simply a reaffirmance of the decision in *State v. Brecht*, which had recognized the right of privacy to exclude evidence of a phone conversation overheard by a private person. The mention, without more, of the privacy right leaves the impression that the right of privacy is used as a strawman to allow the court to sidestep the more challenging task of directly contradicting the United States Supreme Court’s contrary interpretation of the federal search and seizure provision.

The application of the right of privacy is equally questionable in the recent decision of *State v. Sawyer*. In that case the court quoted both the right of privacy and the search and seizure provisions stating that an inventory search was “a significant invasion of individual privacy.” The court went on to say that the invasion would be measured against the reasonableness and the compelling state interest standards, but carried its analysis only to the point of adopting a bit of South Dakota decisional law “that reasonably balances the needs of the police ... with the rights of privacy and freedom from unreasonable searches and seizures held by individuals in Montana.” The South Dakota decision relies squarely on the South Dakota search and seizure provision. South Dakota has no express constitutional right of privacy. The Montana supreme court engaged in no compelling state interest analysis. Again it appears that the court has used the right of privacy to shield a disagreement

19. Id. at 495, 530 P.2d at 446 (1972).
22. Id. at ___, 571 P.2d at 1133.
23. Id. at ___, 571 P.2d at 1133-34.
with the United States Supreme Court on fourth amendment law.\textsuperscript{27}

More recently, in \textit{State v. Charvat},\textsuperscript{28} the court spoke of privacy, but again in a search and seizure context. The court applied the “open fields” doctrine of the United States Supreme Court to the seizure of marijuana plants drying in the sun behind a building on an abandoned farm. In upholding the conviction of Charvat for possession and sale of dangerous drugs, the court quoted language which interprets the “open fields” doctrine to be an expression of the fact that a person has no reasonable expectation of privacy in objects left in open view.\textsuperscript{29} The court followed the suggested mode of analysis—that an actual subjective expectation of privacy must be supported by objective reasonability of the expectation,\textsuperscript{30} but applied the model in a purely fourth amendment context.\textsuperscript{31}

These cases show that the court, either from an unexpressed unwillingness or, more likely, from the failure of counsel to properly raise the privacy guarantee, has not extended the scope of the right of privacy beyond the context of search and seizure law in the five years since the adoption of the new constitution. The privacy and search and seizure provisions address independent rights. The Constitutional Convention Proceedings manifest the intent of the people that the right of privacy be broader than, and undiluted by, fourth amendment rights. The failure of the courts to seek to extend the scope of the protections offered by the right of privacy has rendered the right a virtual nullity. Practitioners and courts remain without essential guidance as to what interests are actually protected by the right of privacy in Montana.

3. Privacy and Other State Courts

Lacking Montana decisions giving any definition to the scope of the interests protected by the right of privacy, it is natural to turn to the decisions of the courts of other states which have an explicit constitutional right of privacy.\textsuperscript{32} These decisions not only offer guidance to the courts in how to approach problems of scope, but should spark the ingenuity of Montana practitioners in using the right of privacy to defend their clients’ interests.

\textsuperscript{28} \textit{State v. Charvat}, 573 P.2d 660 (Mont. 1978).
\textsuperscript{29} \textit{United States v. Freie}, 545 F.2d 1217, 1223 (9th Cir. 1976) cert. denied sub nom., Gangadean v. United States, 430 U.S. 966 (1977).
\textsuperscript{30} \textit{State v. Charvat}, 573 P.2d 660, 663 (Mont. 1978).
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} For the texts and commentary to the various state constitutional privacy provisions, see Thomas Towe’s excellent primer on the right of privacy, \textit{A Growing Awareness of Privacy in America}, 37 \textit{Mont. L. Rev.} 39, 43-45 (1976).
The court and bar of Alaska have been the most active in developing the right of privacy expressed in their state constitution. When the Alaska supreme court was first confronted with an asserted privacy interest, it immediately adopted a standard for determining whether a legitimate privacy interest was involved. Since the constitutional provision provided no standard for review, the court was quick to adopt the compelling state interest test and explain what burden this places on the state. The Alaska court has set a reach for the absolute protections of the right of privacy, as well as giving fair notice of the areas in which a compelling state interest is likely to be found. As an example of principled and responsive implementation of a state constitutional standard, the Alaska supreme court has much to commend its decisions. Of particular interest to the Montana courts are the scope decisions, which should have persuasive weight when the Montana courts begin to interpret the right of privacy provision.

For additional guidance, the Montana courts should notice the constitutional adjudication of other state courts based on readings of the legislative history of the right to privacy provision. An excellent example was set by the Hawaii supreme court in State v. Roy, where the court made use of the debates and the amendments made by the delegates in the language of the privacy provision in construing the scope which the constitutional convention intended the provision to have. The Illinois supreme court undertook the same process in Illinois State Employees Association v. Walker, where the division of the court was a clear reflection of the differing views of the construction to be placed on the actions and recommendations of the constitutional convention. The California supreme court, lacking a convention history for its right to privacy provision, used the referendum campaign brochure to aid it in determining the


34. Gray v. State, 525 P.2d 524, 527 (Alaska 1974). This standard has since been replaced by a more flexible one devised by the Alaska supreme court. See Ravin v. State, 537 P.2d 494, 498 (Alaska 1975). Adoption of such a standard is, of course, not open to the Montana supreme court by the explicit terms of the right of privacy provision.


37. See notes 33 and 35, supra.


39. Id. at 517, 510 P.2d at 1068-69.


41. Id. at 522-24, 531-37, 315 N.E.2d at 15, 20-21.
intent of the people. Two states have pursued the avenue of unique local conditions in helping them to define the expectation of privacy present in a particular situation. All of these indicate the freedom of the court to seek guidance in determining the scope of the right of privacy from the utterances of the people themselves.

Even those states with an express right of privacy in their constitutions have had recourse to the federal case law for guidance, despite the lack of an express right of privacy in the federal constitution. Of particular influence have been the definition of privacy as "the right to be let alone" formulated by Justice Brandeis in his Olmstead dissent and the test for the existence of a protected privacy interest stated by Justice Brennan in his concurrence in Katz. It is clear, however, that the lack of an express right of privacy makes the position of the United States Supreme Court on the scope of the right weak precedent. The majority of the court refuses to expand the scope of the judicially recognized privacy right beyond a narrow range of fundamental interests generally limited to family matters such as procreation. Outside this narrow field the court has shown an unfortunate tendency to denigrate assertions of personal privacy interests, even in cases where the issue has not been thoroughly briefed or argued.

The Montana courts are not without aid in seeking to determine the scope of the right of privacy provision of the Montana Constitution. Materials such as legislative history, tests for a privacy interest adopted in other state court decisions, and the reasoning (if not the self-imposed limits) of the large body of federal privacy law are all available to guide our judges to a principled exposition of the right of privacy in Montana.

4. Some Directions

The scope of the right of privacy in Montana is sorely in need of development. We have had no indication from the Montana supreme court since the passage of the new Constitution that the right is broader than the guarantees of freedom from unreasonable searches and seizures and the warrant requirement. Giving scope to the right of privacy is, in the first instance, the duty of counsel. It is imperative that the bar recognize denials of the constitutional

\[\text{\textit{White v. Davis, 13 Cal.3d 757, 533 P.2d 222, 120 Cal. Rptr. 1 (1975).}}\]
\[\text{\textit{Olmstead v. United States, 277 U.S. 438, 478 (1928).}}\]
\[\text{\textit{Katz v. United States, 389 U.S. 347, 361 (1967).}}\]
\[\text{\textit{Paul v. Davis, 424 U.S. 693, 713 (1976).}}\]
\[\text{\textit{Id. at 715-16, (Brennan, J., dissenting).}}\]
right of privacy when they arise. It is equally important that the court devote itself to analysis of what a privacy right is when confronted by a properly raised privacy argument.

Assertion of the right of privacy in its present inchoate state is limited only by the ingenuity of counsel. Where the state supreme court has shown a willingness to implement the right, counsel have placed the right in issue in a broad variety of contexts. One of the areas where privacy has been asserted with some success has been in the area of victimless crimes. Certainly the best known state court decision based on the right of privacy is Ravin v. State,48 where the Alaska supreme court construed the right to protect the possession and consumption of marijuana in the home. Other state privacy rights have spurred similar litigation on the use and possession of marijuana,49 including a challenge now pending in Montana.50 Other victimless crime challenges have been made in cases of nude sunbathing,51 sexual relations between consenting adults,52 state regulation of wayward youths,53 and possession of cocaine.54 Clearly, challenges in Montana in this area are encouraged by the difficulty of the state in showing a compelling state interest in imposing moral standards upon its citizens.

Other areas of state action that have been tested under state constitutions for infringement of protected privacy interests are expungement of arrest records,55 consent to treatment of the mentally ill,56 and state conflict of interest laws.57 Some efforts have been made to apply the right of privacy to expand common law and statutory notions of privilege against testimony,58 though no court has yet been convinced by such an argument.

The success of privacy arguments in Montana should be enhanced by the express requirement that a valid privacy interest can be overcome only by the showing of a compelling state interest. Such a standard has not been incorporated in any other explicit right of privacy provision, and the determinations of some of the cases from other states, which gave victory to the state on the show-

50. State v. Zander, District Court of the Fourth Judicial District No. 5169.
57. These cases are discussed in subpart IV of this section, infra.
ing of a rational basis for its action, could not be repeated here.

If we assume that the court adopted a form of analysis in State v. Charvat,\(^59\) (a subjective expectation of privacy that is objectively reasonable\(^60\)) the process for adjudicating privacy cases in Montana should follow this format. Counsel would introduce evidence that his client had an expectation of privacy in a particular action, place, or document. The court or jury would determine the objective reasonableness of his expectation. If objectively reasonable, the privacy right could be overcome only by a showing of the part of the state that it had a compelling interest in abridging the right. It remains the task of counsel and courts to follow this, or any, thorough method of analysis to give proper scope to the right of privacy in Montana.

C. The Right To Know

Article II, section 9 of the Montana Constitution provides:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The second right with which this article is concerned is the right to know. It was elevated to explicit constitutional status in 1972, long after being recognized in the common law\(^61\) and the Montana statutes.\(^62\) As a right of constitutional status it is unique, though nearly all the states and the federal government have statutory enactments.\(^63\) Since its elevation the right to know has generated a flurry of legislative action designed to implement the right at the executive and agency levels. This portion of the article will review the intent of the Constitutional Convention, the legislature’s reactions to the constitutional right, and will offer some suggestions for further legislative and judicial development to bring the right to full effectiveness in Montana.

1. The Constitutional Convention

The right to know provision and its effect on agency discretion was the focus of much controversy during the Constitutional Con-
vention. The preliminary study prepared for the Bill of Rights Committee noted that “[t]here is little opportunity at the constitutional level for resolution of these detailed problems of agency discretion and executive and judicial construction of explicit disclosure exemptions.” The Bill of Rights Committee explained its decision to recommend constitutional status for the right to know through a committee member:

The committee approvingly cites section 82-3401 [Open Meetings Law] . . . but we think that probably it is not enough and that this provision does go farther and as our government continues to grow, will provide a better basis than one that is purely statutory. The Proceedings indicate that the Montana Press Association was particularly concerned that the right be accorded explicit constitutional status. Representatives of the Association testified before the Bill of Rights Committee and lobbied heavily, both on the floor and in the press. Their position was that any exception, and specifically the built in exception for the right of privacy, rendered the provision a right to conceal in the hands of the agencies and other public bodies. The pressure focused on the delegates resulted in motions to amend the Committee proposal to subject the scope of the privacy exception to legislative determination, or legislative and judicial determination to narrow the breadth of interpretation left open to the agency or public body. The frustration of the delegates with these motions reached its peak when a motion was made on the floor to delete the provision entirely.

The profound distrust of agency discretion expressed by the Press Association was echoed in the influential comments of Convention President Graybill. His comments favored the original Committee proposal, and led, without further debate, to the adoption of the original proposal by the Convention. He stated:

[W]e should not force on the legislature the duty of determining what the rights of the people are in this state. . . . We're giving up the right of the people to have us determine this matter right here.

[T]he more language you give the agency to work with, the less

64. Applegate, Montana Constitutional Convention Study No. 10, Bill of Rights (1972).
65. Id. at 116.
67. Proceedings at 5157.
68. Id. See also Proceedings at 7586, 7592, and 7602.
69. Proceedings at 5157.
70. Proceedings at 5170.
71. Proceedings at 7574.
72. Proceedings at 7579.
there's going to be left, because they'll be able to interpret it right out of the window.

But the way the committee originally drew it, at least the little guy got something to say to that agency man when he goes to the door. He's got the Constitution. But he hasn't got anything when we get done amending it.73

The provision stayed in the Constitution, but so did the built-in privacy exception. Whether it will be a tool of concealment remains to be seen.

2. Legislative Action

The right to know provision did not take the absolute form desired by the press, but the legislature has been very responsive to the constitutional mandate, and has implicitly recognized the press as vindicator of the rights. Section 82-3401 et seq., cited with approval by the Bill of Rights Committee, were amended in both 1975 and 1977. The original enactment, though in many respects merely a streamlined federal Freedom of Information Act, was progressive for 1963, and stated a legislative purpose that the meetings of all public bodies were assumed to be open. To the general rule there were, however, a plethora of exceptions, a general one for statutes which required closed meetings and several specific exceptions for meetings relating to: (1) national or state security; (2) disciplining of public officers; (3) employment, promotion, dismissal, etc. of public officials; (4) purchase of public property or investment of public funds; (5) revocation of licenses; and (6) law enforcement, crime prevention, probation and parole.75 This statute did not conform to the constitutional right to know, which allows an exception only "where the demand of individual privacy clearly exceeds the merits of public disclosure."

The 1975 amendments reached the most obvious repugnancies by deleting the general exception and exceptions (1) and (4). The other exceptions were at least arguably related to individual privacy, but the format did not reflect the constitutional language or intent with any clarity.

The 1977 enactment, on the other hand, generally reflects the constitutional language. The general rule remains that all meetings are presumed to be open, and provision is made for closing a meeting:

73. Proceedings at 7614-16.
74. 5 U.S.C. § 552(b) (1976).
during the time the discussion relates to 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.\textsuperscript{76}

Sections were added in 1977 to define meetings broadly to include conference calls\textsuperscript{77} and provide free access for the press to photograph, record, and televise meetings.\textsuperscript{78} This enactment also includes a severability clause,\textsuperscript{79} and a provision which allows suit in the district court to void an agency decision opening or closing a meeting only if filed within thirty days of the decision.\textsuperscript{80}

Other legislation in the right to know area has been influenced by the right to know provision. The Management of Official Records Act\textsuperscript{81} places the records made or received by constitutional executive officers in the keeping of the Montana Historical Society. Access to these records may be restricted only when “the demand of individual privacy clearly exceeds the merit of public disclosure.”\textsuperscript{82} The decision of the applicability of the privacy exception is made by the state records committee, not the official.\textsuperscript{83} The Public Records Management Act\textsuperscript{84} creates a system for the efficient management and preservation of state records in a centralized location. It may also be assumed that the right to know provision has a greater reach than the privilege of viewing and copying public documents,\textsuperscript{85} as suggested by the Bill of Rights Committee,\textsuperscript{86} but the legislature has not yet acted in this area.

3. \textit{Some Suggestions}

Though the Montana supreme court is cognizant of the right to know provision,\textsuperscript{87} it has not yet been called upon to decide a case based directly upon an infringement of that right. Two Montana Attorney General’s Opinions have construed the right to know so as to reconcile confidential records statutes with the constitutional provision. The Attorney General held that the demands of individual privacy exceed the merit of public disclosure in the case of

\textsuperscript{76} R.C.M. 1947, § 82-3402 (Supp. 1977).
\textsuperscript{77} R.C.M. 1947, § 82-3404 (Supp. 1977).
\textsuperscript{78} R.C.M. 1947, § 82-3405 (Supp. 1977).
\textsuperscript{79} Ch. 567, § 6, Laws of Montana 1977.
\textsuperscript{80} R.C.M. 1947, § 82-3406 (Supp. 1977).
\textsuperscript{81} R.C.M. 1947, §§ 59-530 to 59-530.4 (Supp. 1977).
\textsuperscript{84} R.C.M. 1947, §§ 82-3332 to 3341 (Supp. 1947).
\textsuperscript{86} Committee Comment at 22.
\textsuperscript{87} State \textit{ex rel.} Judge \textit{v.} Legislative Finance Comm., 168 Mont. 470, 480, 543 P.2d 1317, 1322 (1975).
corporate reports required to be made under the hard rock mining statutes to the Department of Lands,\(^8\) and in the case of records submitted by banks to the Department of Revenue as part of the levy of special assessments on the banks by the Department.\(^9\) In both cases the Attorney General found support for invoking the privacy exception in statutes which made disclosure of the records a felony. If the legislature has indeed made such a judgment, it is unlikely that the courts would disagree with them on how well the constitutional intent is served. However, the legislature would do well to examine these statutory exceptions to determine if the privacy needs of such "individuals" are indeed compelling.

Another area in which the legislature or the courts could further the constitutional intent is that of remedies. The lack of procedural safeguards to obviate or repair violations of the right to know or of the demands of individual privacy has led to widespread criticism of many of the public disclosure statutory enactments.\(^90\) A major focus of the criticism has been the lack of a speedy remedy. Clearly, when newsworthy information is withheld or material that an individual deems private is to be released, time is of the essence to the party aggrieved. An appeal from agency action that violates the constitutional right to know should be more immediate than one afforded under the Montana Administrative Procedure Act.\(^91\) No general statute to accelerate agency or court review of such controversies exists, and it is very questionable whether R.C.M. 1947, § 82-3406 does more than establish a statute of limitations under the open meetings statutes. Either the courts or the legislature could act to fill this remedial gap.

A likely judicial remedy is through the injunction statutes.\(^92\) They are designed to afford swift resolution of disputes in which irreparable injury is threatened. Certainly deprivation of either the constitutional right to know or the constitutional right of privacy incorporated in the right to know should be sufficient injury to trigger the injunction process. The injunction process is swift, as judicial remedies go, and the agency could be restrained from objectionable action throughout the ensuing litigation.

Should the legislature turn its attention to the problem of swift resolution of conflicts arising under the right to know provision, federal experience with litigation arising under its Freedom of Infor-

\(^91\) R.C.M. 1947, §§ 82-4201 to 4229 (Supp. 1977).
\(^92\) R.C.M. 1947, §§ 93-4201 to 4216.
mation Act furnishes a valuable model. To resolve disputes involving the exemptions from disclosure under the act, including that for disclosure that would be a "clearly unwarranted invasion of personal privacy," the federal courts developed a workable and accelerated procedure for review. The Congress has sanctioned the procedure by enacting it into law. The history of the procedure and its congressional approval is examined by the United States Supreme Court in *Department of Air Force v. Rose*. The procedure, as now embodied in legislation, places jurisdiction of appeals from agency action in regard to disclosure of records in the district courts. Complaints must be answered by the agency in an abbreviated period of time. When answered, such appeals are expedited in every way and accorded preference on the docket. The court hears the question *de novo*, and the records sought and for which an exemption is claimed are made available to the court for an *in camera* inspection. Should the court find in favor of the private claimant, it is authorized to award reasonable costs and attorney's fees against the United States. At the heart of this process is the *in camera* review of the disputed material. The federal courts have found that they can successfully balance competing interests and serve the full disclosure intentions of the act through *in camera* review. The means adopted by the federal courts and Congress could be easily adapted to Montana, and could bring the benefits of swift and impartial resolution to such matters of agency discretion, and public and private rights.

D. Rights in Collision

The discussion to this point of the right of privacy and the right to know have intimated that there is, even in the abstract, tension between the two guarantees. This abstract tension has been recognized and, perhaps, exacerbated by elevating both rights to constitutional status in Montana, and by making them textually interdependent. This section of the article will discuss a focal point of this tension in other states with an express right of privacy by detailing the approaches taken by the states' supreme courts in balancing the

conflicting rights of individuals and of society. It also offers a rudimentary procedure for reaching a principled resolution of conflicts as they arise in Montana.

1. When Rights Collide

To date, the prime arena for the collision of the right of privacy and the right to know is public officials' conflicts of interest laws. The right of privacy and standards for the quality of service performed by elected representatives have come to the forefront of public attention at about the same time, partly in response to grave abuses of each in the last decade. The reactions of legislatures in various states to public concern for whether elected officials are truly serving the public interest has characteristically taken the form of laws requiring the elected officials, or candidates for office, to disclose their financial holdings and dealings. The controversy about these laws has revolved around the limits the right of privacy places on the legislatively imposed duty to reveal.

The fountainhead of this litigation is the decision of the Supreme Court of California in City of Carmel-by-the-Sea v. Young. The court recognized that the public's right to know about possible conflicts of interest "is a laudable and proper legislative concern and interest." But, it reasoned that public employment does not waive the employee's constitutional rights. The court extended this reasoning, stating that:

[In the present case there must be a balancing of interests between the government's need to expose or minimize possible conflicts on one hand and the right to maintain privacy in one's personal financial affairs while seeking or holding public office on the other.]

Employing this balancing test, the court found the enactment unconstitutional because it indiscriminately failed to relate the disclosure provisions to the areas of possible conflicts of interest. The court found that the means chosen by the legislature in attempting to achieve its proper purpose, because they entailed the stifling of a fundamental interest, must be narrowly drawn to serve the purpose, absent a showing of overriding necessity. Justice Mosk dissented. He considered the invasion of privacy under the statute an

105. Id., 466 P.2d at 226-27.
106. Id., 466 P.2d at 232.
107. Id.
108. Id.
insignificantly greater intrusion into the privacy of personal finances than zoning regulations and income taxes, both of which are unquestionably constitutional. Alternatively, he felt that the right of privacy was properly overridden by the right to know when an individual assumed public office.

The California legislature responded by narrowing the disclosure requirements to those directly related to the office, and when the revised law was challenged in County of Nevada v. MacMillen, it was upheld. The court reaffirmed the need for balancing of interests, stating "neither the right to privacy, nor the right to seek and hold public office, must inevitably prevail over the right of the public to an honest and impartial government."

When the Illinois supreme court faced the same issue in Stein v. Howlett, it recognized the right of privacy, but decided that the state had a compelling interest in eliminating conflicts of interest and instilling public trust in elected officials paramount to the right of the individual, and held that the legislative means selected was not an overbroad invasion of the constitutional privacy right. The court distinguished Carmel on the basis of an Illinois constitutional provision requiring a statement of economic interests of officeholders at the state level. When Illinois public employees challenged an executive order requiring them to make financial disclosures the court found occasion to take a long, if unsympathetic, look at the state constitutional right of privacy. Referring to the legislative history of the constitutional provision, the court found, by implication, that the convention had rejected the contention that financial disclosure violated the right of privacy, and stated that "[n]ot all members of this court are convinced that this provision should be interpreted as asserting anything beyond protection from invasions of privacy by eavesdropping or other means of interception." Accordingly, the court rejected the challenge to the executive order. Justice Ryan dissented, emphasizing a contrary interpretation of the convention's intent with regard to the protection afforded by the right of privacy to personal financial affairs. His approach and conclusion mirror those of the majority in Carmel.

109. Id., 466 P.2d at 241-42.
110. Id., 466 P.2d at 243.
111. 11 Cal.3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974).
112. Id. at 672, 522 P.2d at 1351, 114 Cal. Rptr. at 351.
114. Id. at 578, 289 N.E.2d at 413.
116. Id. at 524, 315 N.E.2d at 15.
117. Id.
118. Id. at 531-37, 315 N.E.2d at 20-21.
The Washington supreme court has also ruled on a privacy challenge to a state conflict of interest law.\textsuperscript{119} Its initial finding was that the state had a compelling interest in guaranteeing that public officials would not be influenced by conflicts of interest.\textsuperscript{120} The phrasing of its constitutional privacy standard in terms of "private affairs" buttressed its conclusion that those who choose public service have minimal expectations of such privacy. Also, the court found that the statutory approach, requiring only general categories of holdings rather than specific interests and amounts, was suited to the legislative ends. In upholding the statute, the court noted that the disclosure requirements were burdensome, but asserted that the public's right to know clearly exceeded the weight of all asserted invasions of private rights.\textsuperscript{121}

\textit{Falcon v. Alaska Public Offices Commission}\textsuperscript{122} challenged the financial disclosure portions of the statute not as an invasion of the privacy of the official, but as an invasion of the privacy rights of his patients. The official was a physician a part of whose practice was legal abortions. The court recognized that he was the only person in a position to assert the privacy rights of his patients, whose names and transactions with him would be revealed.\textsuperscript{123} Finding that the requisite level of governmental justification for impinging on the individual right of privacy, particularly in the doctor-patient relationship, was necessarily very high,\textsuperscript{124} the court warned that the means chosen by the legislature could constitute a very serious invasion, despite the proper purpose. The court avoided invalidating the law, and instructed the commission, which had authority under the legislation to develop guidelines for implementation, to promulgate regulations to protect the suggested privacy interests.\textsuperscript{125} The court enjoined enforcement of the law until the commission carried out this task.

These courts generally balanced the competing rights involved in favor of the public right to know. The right of privacy could be characterized as being of relatively little weight in such cases, while the right to know is comparatively greater, generally being characterized as a compelling state interest, despite its lack of constitutional status. Where the rights have collided, it has been the individual who has been forced to yield to society's greater need. The

\begin{thebibliography}{99}
\bibitem{120} Id. at 294, 517 P.2d at 923.
\bibitem{121} Id. at 301, 517 P.2d at 925.
\bibitem{122} 570 P.2d 469 (Alaska 1977).
\bibitem{123} Id. at 475.
\bibitem{124} Id. at 476.
\bibitem{125} Id. at 480.
\end{thebibliography}
inquiry remains whether such a result could or should obtain in Montana.

2. If Rights Collide—Montana's Balance

As noted, the Montana supreme court has yet to construe the constitutional right of privacy outside the fourth amendment area. Nor has the court directly construed the right to know. Though the two rights are in natural and daily conflict at the agency level, there is no legislative history outside the language of the provisions themselves to aid in clarifying where the balance between the rights is to be struck. The key problem involved in balancing the rights is effectuating the beneficial policy of open government without unnecessarily denigrating the individual right of privacy.

Much of the current uncertainty stems from the general lack of guidance as to the scope of a legitimate privacy interest. The weight of the privacy right is clear from the terms of the constitutional provision—it is paramount to all but compelling interests of the state. The right to know textually incorporates the right of privacy. This suggests that where the interest of the public in disclosure is less than compelling, the right of privacy is to be accorded a greater weight. The right to know presents no problems of scope. It clearly embraces all documents and deliberations of state government at all levels. The variable which remains is the scope of the right of privacy.

In seeking to reconcile the right of privacy and the right to know, the starting point for analysis should be whether there is a valid privacy right involved. That is, what is protected? The Montana supreme court has intimated in State v. Charvat126 that it approves of the test enunciated by Justice Harlan in his concurrence in Katz v. United States.127 General application of this two step inquiry, whether there was a subjective expectation of privacy and whether society recognizes the expectation as objectively reasonable, would be very conducive to eliminating the scope problems inherent in our right of privacy. A court faced with reconciling the right of privacy and the right to know could follow much the same method suggested for principled adjudication of privacy interests in the subpart on the right of privacy, supra. After determining that a valid privacy interest exists, the court would determine whether the public's right to know constitutes a compelling state interest within the context of the case. Should the court find that it does, the court would then determine whether that compelling interest is clearly

exceeded by the demands of individual privacy involved.

No matter what the result, the court would, at the very least, be making a useful initial determination of the scope of the right of privacy. Each successive step necessary to the court’s determination would further illuminate the ways and instances in which the rights balance each other. By employing such a method, the court could uphold a public right to know in a manner that does not avoid, and thus denigrate, the scope and weight to be accorded the right of privacy.

E. Conclusion

It is now perceivable that this article focuses on a task of great importance which lies before the courts. It shows that the Constitutional Convention left the development of the scope of the right of privacy to the courts. It shows how a competing right, the right to know, is textually dependent on the determination of the scope of the privacy right. And it shows that, lacking the efforts of court and counsel, the lack of an effective method for defining the scope of the privacy right and balancing it against an asserted public right to know could result in the crippling of the right of privacy when the rights collide. Above all, it points out a method, and a need to take these new constitutional rights, public and private, seriously.