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Billings Gazette v. City of Billings: Examining Montana's New Exception to the Public's Right to Know

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BILLINGS GAZETTE V. CITY OF BILLINGS: EXAMINING MONTANA'S NEW EXCEPTION TO THE PUBLIC'S RIGHT TO KNOW

Adam Wade*

I. INTRODUCTION

Montana's Constitution contains a Declaration of Rights that includes two competing fundamental protections: the right to know and the right of privacy.[1] Montana citizens possess a fundamental right to know about their government.[2] At the same time, the right of privacy protects citizens from unwanted government intrusion.[3]

When these two rights conflict, a legal balancing test must be applied to determine the prevailing right.[4] Montanans have the right to examine all documents and deliberations of public agencies, except when "the demand of individual privacy clearly exceeds the merits of public disclosure."[5] Historically, the Montana Supreme Court "has been particularly vigilant and uncompromising" in defending the public's right to know.[6] However, in the 2013 decision of *Billings Gazette v. City of Billings*,[7] the Court deviated from established precedent and created a public trust exception to Montana's right to know. *Billings Gazette* undermines the public's right to know and confuses a previously well-defined area of Montana law. This decision is likely to cause unpredictable results in future cases and should be revisited and overruled at the first opportunity.

This note analyzes *Billings Gazette* from a historical perspective and assesses the future implications of the decision. Section II provides the legal

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1. Mont. Const. art. II, §§ 9–10.

2. Mont. Const. art. II, § 9.

3. *1971–1972 Montana Constitutional Convention Verbatim Transcript* vol. V, 1681 (1981) (Convention delegate transcripts leading to the creation of Mont. Const. art. II, § 10).

4. *Billings Gaz. v. City of Billings*, 313 P.3d 129, 133 (Mont. 2013) (citing *Havre Daily News v. Havre*, 142 P.3d 864, 869 (Mont. 2006)).

5. Mont. Const. art. II, § 9.

6. Fritz Snyder, *The Right to Participate and the Right to Know in Montana*, 66. Mont. L. Rev. 297, 311 (2005) (citing *Goldstein v. Comm'n on Practice of the Sup. Ct. of Mont.*, 995 P.2d 923, 946 (Mont. 2000) (Nelson, J., dissenting)).

7. 313 P.3d 129.

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background and overview of the tension between Montana's constitutional right to know and the right of privacy. Section III describes the background, arguments, and opinions in *Billings Gazette*. Section IV analyzes *Billings Gazette*; it first examines the key factors overlooked by the majority, next explores the faulty public trust factor, and finally, discusses the problems *Billings Gazette* will create for future case law. Section V concludes the note.

II. Legal Background

The right to know is firmly ingrained in the history of the United States. In our nation's infancy, Patrick Henry captured the essence of the public's right to know when he stated, "the liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them."[8] The right to know is a truly American concept that stems from Colonial America's distrust of expansive government power.[9] Today, nearly every state and the federal government have statutory provisions that protect the public's right to know.[10] However, the express declaration of the right to know found in the Montana Constitution gives the right more prominence than it has in most other states.[11]

Montana is one of only five states to expressly establish the right to know in its constitution.[12] This right to know expanded the implied right provided under the U.S. Constitution and created a more robust right for Montana citizens.[13] Montana's right to know states, "[n]o 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."[14] Intended to promote public awareness and protect individual citizens, the right to know protects citizens' "efforts to scrutinize governmental operations."[15] Additionally, the right to know provides a reminder to public employees that their jobs exist to "serve the needs of the public and no other."[16]

8. Rick Applegate, *Bill of Rights* 111 (Const. Conv. Study No. 10, 1972).

9. *Id.* at 2.

10. David Gorman, *Rights in Collision: The Individual Right of Privacy and the Public Right to Know*, 39 Mont. L. Rev. 249, 257 (1978).

11. Snyder, *supra* n. 6, at 298 (citing N.H. Const. pt. 1, art. 8; Fla. Const. art. I, § 24).

12. *Id.*

13. Patricia A. Cain, *The Right to Privacy under the Montana Constitution: Sex and Intimacy*, 64 Mont. L. Rev. 99, 102 (2003) (citing *State v. Hyem*, 630 P.2d 202, 208 (Mont. 1981); *Mont. Human Rights Div. v. City of Billings*, 649 P.2d 1283, 1286 (Mont. 1982)).

14. Mont. Const. art. II, § 9.

15. Applegate, *supra* n. 8, at 5.

16. *1971–1972 Montana Constitutional Convention*, *supra* n. 3, at 1657.

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When courts balance conflicting interests between the right to know and the right of privacy, the public's right to know has often been given more weight than the right of privacy. The delegates to the 1972 Montana Constitution Convention anticipated conflicts between these competing rights and added the word "clearly" to the right-to-know provision in a deliberate effort to tip the balance in "favor of the right to know."[17] Overall, the delegates intended the right to know to serve as a tool to open the "doors and desks of government to the eyes and ears of the governed."[18]

The delegates to the 1972 Montana Constitution Convention intended to place a thumb on the scale favoring the public's right to know, but they did not intend to create an absolute right.[19] The counterpart to the right to know is Montana's constitutionally protected right of privacy, which states that "[i]ndividual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[20] Montana provides the "strongest protection for privacy rights of any state in this country"[21] and the judiciary "jealously guard[s]"[22] this constitutional right under the "most stringent standard of judicial review."[23]

While Montana staunchly protects the right of privacy, the right is not without limit. In *State v. Long*[24] the Montana Supreme Court held the right of privacy "contemplates privacy invasion by *state* action only;" it does not protect citizens from privacy invasions by private citizens.[25] In *Great Falls Tribune v. Montana Public Service Commission*,[26] the Court explained right of privacy protections apply only to "natural human beings and not to non-human entities."[27] In sum, ordinary citizens are given the right of privacy, but government agencies are not.

At its root, the right of privacy is a precautionary measure put in place to create a "semipermeable wall of separation between individual and state," which means the state may intrude in certain aspects of our private lives, but it must have a good reason for its actions.[28] The Montana Consti-

17. *Id.* at 1670.

18. Fritz Snyder, *Montana's Top Document: Its Transition into the 21st Century*, 34 Mont. Law. 8, 9 (2009) (quoting Delegate James Garlington in *1971–1972 Montana Constitutional Convention Verbatim Transcript* vol. VII, 3027 (1981)).

19. *1971–1972 Montana Constitutional Convention*, *supra* n. 3, at 1670.

20. Mont. Const. art. II, § 10.

21. Cain, *supra* n. 13, at 101.

22. *State v. Hubbel*, 951 P.2d 971, 980 (Mont. 1997).

23. *Mont. Human Rights*, 649 P.2d at 1286 (citing Gorman, *supra* n. 10, at 251).

24. 700 P.2d 153 (Mont. 1985).

25. *Id.* at 157 (emphasis added).

26. 82 P.3d 876 (Mont. 2003).

27. *Id.* at 883.

28. *Long*, 700 P.2d at 157 (quoting *1971–1972 Montana Constitutional Convention*, *supra* n. 3, at 1681).

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tutional Convention delegates understood the tendency of government agencies to encroach on the lives of private citizens. As a result, the delegates concluded when "government functions and controls expand, it is necessary to expand the rights of the individual."[29]

However, the right of privacy is not absolute and at times must compete with other fundamental rights, such as the public's right to know.[30] Further, the Montana Constitutional Convention delegates "made a clear and unequivocal decision that government operates most effectively, most reliably, and is most accountable when it is subject to public scrutiny."[31] To achieve this goal, the delegates drafted Montana's right to know as "a response to the penchant for secrecy in government by state and local officials."[32] The delegates concluded that in the long term, the privacy concerns of individual public employees were "outweighed by the dangers of a government beyond public scrutiny."[33] As the Ninth Circuit Court of Appeals eloquently stated, "[d]emocracy functions ill in shadow, yet government bureaucracies are notoriously reluctant to reveal their internal processes."[34] The Montana Supreme Court understood this unfortunate reality, and remained "particularly vigilant and uncompromising in protecting Montanans' constitutional 'right to know.'"[35] In its efforts to protect the public's right to know, the Montana Supreme Court frequently "reject[s] other governmental bodies' attempts to limit or subvert this right."[36]

The conflict between the public's right to know and the individual privacy rights of public employees creates a frequent source of tension, and the battle for supremacy continues to this day.[37] When a conflict between the public's right to know and a public employees' right of privacy arises, a court must first determine whether the public employee has a constitutionally protected right of privacy.[38] That question requires a two-part analysis: (1) whether the person has a subjective or actual expectation of privacy, and (2) whether society is willing to recognize that expectation as reasonable.[39] Applying this framework in cases involving public employees' privacy rights, there are two distinct categories of Montana Supreme Court deci-

29. *1971–1972 Montana Constitutional Convention*, *supra* n. 3, at 1681.

30. *Long*, 700 P.2d at 167.

31. Snyder, *supra* n. 6, at 311.

32. *Id.* at 297.

33. *Id.* at 311 (citing *Great Falls Trib. v. Day*, 959 P.2d 508, 516 (Mont. 1998)).

34. *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130 (9th Cir. 2014).

35. Snyder, *supra* n. 6, at 311 (quoting *Goldstein v. Comm'n on Prac. of the Sup. Ct. of Mont.*, 995 P.2d 923, 946 (Mont. 2000) (Nelson, J., dissenting)).

36. *Id.*

37. *See e.g. Billings Gaz.*, 313 P.3d 129.

38. *Yellowstone Co. v. Billings Gaz.*, 143 P.3d 135, 140 (Mont. 2006).

39. *Mont. Human Rights*, 649 P.2d 1283, 1287 (1982) (adopting the privacy test set forth in *Katz v.U.S.*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

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sions: (1) cases in which the public's request for information is related to the official duties of the public employee,[40] and (2) cases in which the public employee received express assurances of confidentiality that fostered a reasonable expectation of privacy.[41] While the Court never expressly stated its reliance on these underlying factual categories, the pattern in the Court's treatment cannot be denied. In the first category, the Court favors the public's right to know over the individual's right of privacy.[42] In the second category, the Court favors public employee privacy rights.[43] Keeping these general principles in mind, the following section presents a brief history of key Montana right-to-know cases.

A. Information Related to the Official Duties of Public Employees

Each of the following cases involves right-to-know requests that were directly related to a public employee's position and official duties. In these cases, the Montana Supreme Court tipped the scales in favor of the public's right to know.

In *Great Falls Tribune Co. v. Cascade County Sheriff*,[44] a law enforcement officer drove his patrol car onto the sidewalk while attempting to stop a fleeing suspect and struck the suspect.[45] An investigation ensued, which resulted in one termination, one suspension, and two resignations for the officers involved.[46] The city allowed the local newspaper access to the investigative report, but redacted the names of the disciplined officers, citing the officers' rights of privacy.[47] The Tribune sued, seeking an order from the court directing the city to release the names of the officers.[48] The district court ordered disclosure of the officers' names and the Montana Supreme Court affirmed.[49] The Court acknowledged the sensitive nature of the officers' situation, but held the officers' privacy interests did not clearly exceed the merits of public disclosure because the misconduct occurred in

40. *See e.g. Billings Gaz. v. City of Billings (Anthony)*, 267 P.3d 11 (Mont. 2011); *Yellowstone Co.*, 143 P.3d 135; *Svaldi v. Anaconda-Deer Lodge Co.*, 106 P.3d 548 (Mont. 2005); *Jefferson Co. v. Mont. Std.*, 79 P.3d 805 (Mont. 2003); *Bozeman Daily Chron. v. City of Bozeman Police Dept.*, 859 P.2d 435 (Mont. 1993); *Citizens to Recall Whitlock v. Whitlock*, 844 P.2d 74 (Mont. 1992); *Great Falls Trib. v. Cascade Co. Sheriff*, 775 P.2d 1267 (Mont. 1989).

41. *See e.g. Missoulian v. Bd. of Regents*, 675 P.2d 962 (Mont. 1984).

42. *See e.g. Billings Gaz. (Anthony)*, 267 P.3d 11; *Yellowstone Co.*, 143 P.3d 135; *Svaldi*, 106 P.3d 548; *Jefferson Co.*, 79 P.3d 805; *Bozeman Daily Chron.*, 859 P.2d 435; *Whitlock*, 844 P.2d 74; *Cascade Co. Sheriff*, 775 P.2d 1267.

43. *Missoulian*, 675 P.2d 962.

44. 775 P.2d 1267 (Mont. 1989).

45. *Id.*

46. *Id.*

47. *Id.* at 1267–1268.

48. *Id.* at 1267.

49. *Id.*

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the line of the officers' official duties. The Court ruled in favor of the newspaper's request and ordered the city to release the officers' names.[50]

In *Citizens to Recall Whitlock v. Whitlock*,[51] a citizens' group sought the release of an investigatory report resulting from sexual harassment and discrimination accusations against Whitlock, the mayor of Hamilton.[52] The district court authorized the release of the investigator's report and the Mayor appealed.[53] The Montana Supreme Court ruled in favor of the citizens' group and noted two important reasons why Mayor Whitlock's privacy rights did not outweigh the public's right to know. First, elected officials must be subject to public scrutiny because the public is responsible for "hiring, disciplinary action, and supervision";[54] and second, the "nature of the information" at issue "was the result of an investigation into misconduct related to the performance of [the Mayor's] official duties, rather than general performance evaluations or a discussion of Whitlock's character, integrity, honesty, or personality."[55]

In *Bozeman Daily Chronicle v. City of Bozeman Police Department*,[56] a police officer resigned after a Montana Law Enforcement Academy cadet accused him of sexual intercourse without consent.[57] Citing the public's right to know, a local newspaper attempted to obtain the accused police officer's name and the resulting investigative documents.[58] The district court ordered that the newspaper be provided a copy of the initial offense report but denied the newspaper's request for disclosure of the resulting investigative documents.[59] On appeal, the Court tipped the scale in favor of the public's right to know and remanded the case with instructions to conduct an *in camera* inspection of the investigative documents to determine what information should be released to the newspaper.[60] To reach its decision, the Court relied on *Whitlock* and concluded public officials must be "subject to public scrutiny in the performance of [their] duties."[61]

In *Jefferson County v. Montana Standard*,[62] a newspaper sought information pertaining to a county commissioner's arrest for driving under the

50. *Cascade Co. Sheriff*, 775 P.2d at 1269.
51. 844 P.2d 74 (Mont. 1992).
52. *Id.* at 76.
53. *Id.* at 75.
54. *Id.* at 77.
55. *Billings Gaz.*, 313 P.3d at 136 (citing *Whitlock*, 844 P.2d at 78).
56. 859 P.2d 435 (Mont. 1993).
57. *Id.* at 436–437.
58. *Id.* at 437.
59. *Id.* at 436.
60. *Id.* at 442.
61. *Bozeman Daily Chron.*, 859 P.2d at 440 (citing *Whitlock*, 844 P.2d. at 77).
62. 79 P.3d 805 (Mont. 2003).

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influence of alcohol.[63] The district court ordered disclosure and the county commissioner appealed.[64] The Court ruled in favor of the newspaper. The Court held the nature of the county commissioner's public position rendered "her decision to violate the law directly relate[d] to her ability to effectively perform her job duties."[65] The Court concluded that "information relating to an official's ability to perform public duties should not be withheld from public scrutiny."[66]

In *Svaldi v. Anaconda-Deer Lodge County*,[67] various parents accused a public school teacher of assaulting and/or verbally abusing their children and filed a complaint with the county attorney's office.[68] When contacted by a reporter about the incident, the district attorney informed the reporter that his office was considering deferring the prosecution in exchange for the teacher's promise of immediate retirement.[69] The teacher alleged the disclosure violated her right of privacy and sued the county and the school district.[70] The district court granted the county's motion for summary judgment and the teacher appealed.[71] The Court held the assault allegations were directly related to the teacher's official duties.[72] The Court further explained that the county attorney was not required to withhold the information from public scrutiny even though criminal charges were never filed.[73]

In *Yellowstone County v. Billings Gazette*,[74] a newspaper sought un-redacted deposition transcripts from a discrimination case brought against an Interim Chief Public Defender.[75] The newspaper moved the court to release the un-redacted transcripts when the County refused to comply with the newspaper's request.[76] The district court ordered disclosure of the documents but allowed certain portions of the Interim Chief's deposition to be redacted.[77] The Gazette appealed and the Montana Supreme Court reversed the district court and remanded the case.[78] The Court upheld the public's

63. *Id.* at 807.
64. *Id.* at 806.
65. *Id.* at 809.
66. *Jefferson Co.*, 79 P.3d at 809 (citing *Bozeman Daily Chron.*, 859 P.2d at 440; *Whitlock*, 844 P.2d at 78).
67. 106 P.3d 548 (Mont. 2005).
68. *Id.* at 549.
69. *Id.* at 550.
70. *Id.*
71. *Id.* at 549.
72. *Id.* at 553.
73. *Svaldi*, 106 P.3d at 553.
74. 143 P.3d 135 (Mont. 2006).
75. *Id.* at 137–138.
76. *Id.* at 138.
77. *Id.* at 137.
78. *Id.*

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right to know because the redacted information was directly related to the Interim Chief's official conduct and there was no evidence to suggest the Interim Chief asserted a privacy interest in the deposition transcript.[79]

In *Billings Gazette v. City of Billings*,[80] a newspaper sought access to the official investigative documents resulting from an administrative employee's unauthorized use of a police department credit card.[81] The City declined to disclose the investigative documents because the employee was potentially facing criminal charges.[82] The Gazette sued and the district court ordered the City to provide the documents to the newspaper.[83] On appeal, the Court again upheld the public's right to know, and held the administrator did not possess a reasonable expectation of privacy because society would not be willing to recognize a privacy interest as reasonable "when the information sought bears on that individual's ability to perform public duties."[84]

B. Express Assurances of Confidentiality

When a public employee receives express assurances of confidentiality, Montana precedent favors the employee's right to privacy over the public's right to know certain information. In *Missoulian v. Board of Regents*,[85] a newspaper sought performance evaluations for six university presidents who were previously promised evaluation confidentiality.[86] The district court found for the Board of Regents and the Montana Supreme Court affirmed the district court.[87] The Court determined the public's right to know did not outweigh the presidents' privacy rights and sealed the evaluations from public disclosure.[88] The Court attached significant weight to the express assurances of confidentiality previously given to the presidents.[89] The Court also weighed the subjective nature of the presidents' evaluations and noted the possible "vindictive" uses of the evaluations against disliked employees.[90] The Court held the "mere status" of the individual does not control the right-to-know analysis and determined the university presidents "[did] not waive their constitutional protections by taking office."[91]

79. *Id.* at 140.
80. *Billings Gaz. (Anthony)*, 267 P.3d 11 (Mont. 2011).
81. *Id.* at 13.
82. *Id.*
83. *Id.*
84. *Id.* at 17–18 (quoting *Yellowstone Co.*, 143 P.3d at 140).
85. 675 P.2d 962 (Mont. 1984).
86. *Id.* at 963–964.
87. *Id.* at 963.
88. *Id.* at 974.
89. *Id.* at 968.
90. *Id.* at 970.
91. *Missoulian*, 675 P.2d at 969.

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III. *Billings Gazette v. City of Billings*

A. Factual Background

In 2012, the City of Billings ("City") investigated and ultimately suspended five employees ("Employees") without pay for a period of five days for viewing pornographic material on City computers during work hours.[92] The Employees actively defeated the City's computer security system and violated the express terms of the City's computer Acceptable Use Policy.[93] The Billings Gazette ("Gazette") requested the City's investigative records about the matter, but the City cited the Employees' privacy rights and denied the requests on two separate occasions.[94] After the Gazette's third request, the City provided copies of the records with all Employee identification information removed from the documents.[95] The Gazette argued the information was subject to Montana's right to know and sought court intervention to release the Employees' identities.[96]

B. District Court's Decision

Relying upon federal and state precedent, the district court examined whether a privacy interest existed in this case; that is, whether the Employees had an actual or subjective expectation of privacy that society is willing to accept as reasonable.[97] The district court found the Employees had a subjective expectation of privacy,[98] but held their privacy expectations were unreasonable in light of the City's Acceptable Use Policy. The district court concluded the Employees' privacy rights did not "clearly exceed the merits of public disclosure."[99] The court ordered the City to turn over the complete, un-redacted records. However, the district court also granted the City's motion to stay the order pending appeal.[100]

C. The Parties' Arguments on Appeal

1. City of Billings' Argument

On appeal, the City argued that disclosing the identities of the Employees would violate the Employees' privacy rights because the records at is-

92. *Billings Gaz.*, 313 P.3d at 131–132.
93. *Id.* at 143 (McKinnon & Cotter, JJ., dissenting).
94. *Id.* at 132 (majority).
95. *Id.*
96. *Id.*
97. *Id.* at 145 (McKinnon & Cotter, JJ., dissenting).
98. *Billings Gaz.*, 313 P.3d at 145 (McKinnon & Cotter, JJ., dissenting).
99. *Id.* at 148 (citing Mont. Const. art. II, § 9).
100. *Id.* at 132 (majority).

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sue were not public writings and were subject to a reasonable expectation of privacy.[101] The City further argued that Montana precedent favored the right of privacy for public employees not involved in illegal activities and that public employees do not waive their rights "simply because they are employed by a municipality."[102]

The City contended that unlike elected officials, the Employees were not subject to the public's right to know because the Employees' privacy rights could not be infringed without a "compelling state interest."[103] Therefore, since the Gazette had already reported the incident (shielding only the Employees' identities from public disclosure), members of the public already had ample information to satisfy their right to know.[104] The City concluded that revealing the Employees' identities would not advance the public's right to know and would only serve to embarrass the Employees.[105]

2. Billings Gazette's Argument

The Gazette offered five arguments to counter the City's claims. First, the Employees' identities were located in "public documents" for which there was no reasonable expectation of privacy.[106] Second, the City's Acceptable Use Policy expressly removed all privacy expectations.[107] Third, the Employees' conduct could be characterized as illegal under the Computer Fraud and Abuse Act, and by the City's own admission, such a characterization would subject the Employees to the public's right to know.[108] Fourth, in redacting the Employees' identifying information, the City violated both the right to know and the freedom of the press guaranteed by the First Amendment. This violation occurred because the City usurped the Gazette's right to fully inform the public and assess the fairness of the City's punishments.[109] Finally, even if the Employees had a reasonable expectation of privacy, the public's right to know outweighed the Employees' expectations.[110]

101. Appellant's Opening Br., *Billings Gaz. v. City of Billings*, 2013 WL 1292500 at *9 (Mont. Mar. 14, 2013) (No. DA 12-0739).

102. *Id.* at **9–10.

103. *Id.* at **10–12.

104. *Id.* at **10–11.

105. *Id.*

106. Appellee's Answer Br., *Billings Gaz. v. City of Billings*, 2013 WL 2391299 at **9–10 (Mont. May 15, 2013) (No. DA 12–0739).

107. *Id.* at **16, 22–24.

108. Appellee's Answer Br., *Billings Gaz. v. City of Billings*, 2013 WL 2391299 at *18 (Mont. May 15, 2013) (No. DA 12-0739) (citing 18 U.S.C. § 1030 (2013)).

109. *Id.* at **19–20 (citing *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 723–724 (1971) (Douglas, J., concurring)).

110. *Id.* at *29.

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D. Montana Supreme Court Majority Opinion

With two Justices dissenting, the Montana Supreme Court reversed the district court and ruled in favor of the Employees.[111] The Court did not address whether the documents requested by the Gazette were "public documents" subject to the right to know and claimed the issue was moot because the Gazette already published the details of the Employees' misconduct.[112] Nevertheless, the Court suggested the requested information was not part of a public document because internal disciplinary matters become part of an employee's personnel file, which an employee reasonably expects to remain confidential.[113]

The Court determined the Employees' use of government computers and their collective breach of government security measures to view pornographic websites during work hours "was not related to their public duties."[114] The majority did not address whether the Employees' expectations of privacy were reasonable in light of the City's Acceptable Use Policy, which expressly stated that Internet use on City computers was not private and would be monitored.[115]

The Court placed decisive weight on the absence of criminal charges against the Employees and reasoned that the misconduct in this case did "not rise to the level of illegal conduct" present in prior right-to-know cases.[116] Relying on the absence of criminal charges, the Court determined that "an allegation of misconduct by a public employee does not summarily end the privacy analysis."[117]

The Court weighed the Employees' expectations of privacy against the merits of public disclosure and concluded privacy "clearly" outweighed the merits of public disclosure considering the Employees' status (not holding positions of public trust) and the nature of their misconduct.[118] This balancing approach placed decisive weight in the amount of "public trust" inherent in the Employees' positions and deemphasized crucial underlying facts such as the City's Acceptable Use Policy.[119] Applying this analysis, the Court primarily relied on the distinguishable facts of *Missoulian* and concluded that society would accept a public employee's expectation of privacy for "internal disciplinary matters when that employee is not in a posi-

111. *Billings Gaz.*, 313 P.3d at 141.
112. *Id.* at 133.
113. *Id.* at 139 (citing *Mont. Human Rights*, 649 P.2d at 1288).
114. *Id.* at 138.
115. *Id.* at 134.
116. *Id.* at 139.
117. *Billings Gaz.*, 313 P.3d at 139.
118. *Id.* at 141.
119. *Id.* at 140.

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tion of public trust."[120] This decision created a poorly defined hierarchy of "public trust" that left the majority and dissent with different conclusions based upon the same *in camera* inspection.[121]

E. Dissenting Opinion

Beginning with the majority's misstatement of the issue, the dissent objected to almost every aspect of the majority opinion. The dissent disagreed with how the majority framed the issue and argued the majority redefined the pertinent inquiry "to recognize a privacy interest that other courts have uniformly held to be unreasonable."[122] The dissent argued the majority incorrectly analyzed the Employees' expectations of privacy as applied to "internal disciplinary proceedings."[123] Instead, the Court should have simply determined whether Montana citizens would recognize a reasonable expectation of privacy for public employees who violated the express terms of the City's Acceptable Use Policy.[124]

The dissent argued the Employees did not possess a reasonable expectation of privacy in viewing pornographic materials on City computers because the City's Acceptable Use Policy expressly removed all expectations of privacy.[125] Specifically, the City's Acceptable Use Policy warned each Employee that Internet use on City computers was not anonymous and would be monitored.[126]

The dissent criticized the majority's failure to apply the knowledge gained from the Court's *in camera* inspection, namely, that some of the Employees held "upper-level positions and/or were involved in law enforcement."[127] The dissent took issue with this critical omission and stated the majority ignored the Gazette's valid argument that favored the public's "right to assess whether the City meted out discipline fairly."[128]

The dissent also took issue with the majority's deviation from precedent regarding the illegality of the Employees' misconduct. Specifically, the dissent objected to the majority's reliance on the lack of criminal charges filed against the Employees. According to the dissent, the majority's actions "[put] the cart before the horse" because the information the City redacted

120. *Id.* at 140–141.

121. *Id.* at 138, 143 (McKinnon & Cotter, JJ., dissenting) (majority and dissent arrived at different conclusions while applying the poorly defined "public trust" analysis to the same *in camera* inspection).

122. *Id.* at 142.

123. *Billings Gaz.*, 313 P.3d at 142 (McKinnon & Cotter, JJ., dissenting).

124. *Id.*

125. *Id.* at 141.

126. *Id.*

127. *Id.* at 143.

128. *Id.*

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was "precisely the information the public has the right to know in order to evaluate conduct of public officials."[129]

Finally, the dissent objected to the majority's personnel file rationale. The dissent stated, "[c]ontrary to the Court's reasoning, . . . the City's placement of the final disciplinary report in each Employee's personnel file does not give the document protections that it otherwise would not have."[130] The City's Acceptable Use Policy effectively extinguished all expectations of privacy relating to the Employees' use of City computers.[131] Therefore, the mere act of placing the documents in a personnel file did not resurrect the Employees' expectations of privacy.[132]

IV. Analysis

Montana provides an interesting venue in which to analyze public employee privacy rights because of the inherent conflict between Montana's heightened individual privacy rights and the public's right to know. Despite this tension, Montana's precedent indicates the public's right to know is greater when the requested information is related to the official duties of a public employee[133] and the public employee did not receive express assurances of confidentiality that fostered a reasonable expectation of privacy.[134]

The Court in *Billings Gazette* made several errors, created confusion in a previously clear area of Montana law, and improperly used its powers of equity to reach a shortsighted decision that will cause problematic results in future Montana cases. First, the Court deviated from decades of consistent precedent. The Court ignored the Employees' misconduct while taxpayers paid the Employees to perform their official duties and ignored the City's Acceptable Use Policy, which expressly removed all expectations of privacy related to the Employees' use of City computers. Second, the Court erred when it gave an investigative report (comprised of objective computer use violations) the same level of privacy protection afforded to private personnel files. Third, the Court downplayed the Employees' involvement in arguably criminal activities by focusing on the fact that no criminal charges were actually filed. Finally, the Court assigned too much weight to the Employees' potential embarrassment while balancing the Employees' privacy

129. *Billings Gaz.*, 313 P.3d at 144 (McKinnon & Cotter, JJ., dissenting).

130. *Id.* at 147.

131. *Id.*

132. *Id.*

133. *See Billings Gaz. (Anthony)*, 267 P.3d 11; *Yellowstone Co.*, 143 P.3d 135; *Svaldi*, 106 P.3d 548; *Jefferson Co.*, 79 P.3d 805; *Bozeman Daily Chron.*, 859 P.2d 435; *Whitlock*, 844 P.2d 74; *Cascade Co. Sheriff*, 775 P.2d 1267.

134. *See Missoulian*, 675 P.2d 962.

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interests against the merits of public disclosure.[135] Although the Court's decision to avoid embarrassing the Employees is admirable, it came at the high price of creating ambiguous precedent that will cause problematic, unpredictable results in future Montana cases.

A. Notable Errors in Billings Gazette

1. The Court's Deviation from Precedent

Before *Billings Gazette*, the Montana Supreme Court overwhelmingly favored the public's right to know when the underlying facts of a case involved misconduct that was directly related to a public employee's official duties.[136] After *Billings Gazette*, this clearly defined aspect of Montana right-to-know analysis no longer exists. The Employees' misconduct in *Billings Gazette* was clearly related to their official duties. The Employees breached City security measures to view prohibited material during work hours.[137] The Employees' misconduct exposed the City's network to unknown threats and robbed taxpayers of the very services their tax dollars were intended to provide.[138] While this misconduct occurred, the Billings taxpayers in effect paid the Employees to peruse expressly prohibited online materials. Regardless of the Employees' positions, this misconduct was directly related to their official duties because the Employees could not perform any official tasks while participating in this misconduct. The facts in *Billings Gazette* are similar to previous Montana right-to-know decisions, and the Court should have followed established precedent and honored the public's right to know.

The following illustrates the factual similarities between *Billings Gazette* and Montana's right-to-know precedent to highlight the *Billings Gazette* Court's deviation from established precedent.

(1) Like the police officer in *Cascade County Sheriff*, the Employees' misconduct occurred during (what should have been) the performance of their official duties.

(2) Like *Whitlock*, the information at issue in *Billings Gazette* was not "related to private sexual activity, general performance evaluation, or proceedings where [the Employees'] character, integrity, honesty, or personalit[ies] were discussed."[139] Rather, the information "was

135. *Billings Gaz.*, 313 P.3d at 146 (McKinnon & Cotter, JJ., dissenting).

136. *See Billings Gaz. (Anthony)*, 267 P.3d 11; *Yellowstone Co.*, 143 P.3d 135; *Svaldi*, 106 P.3d 548; *Jefferson Co.*, 79 P.3d 805; *Bozeman Daily Chron.*, 859 P.2d 435; *Whitlock*, 844 P.2d 74; *Cascade Co. Sheriff*, 775 P.2d 1267.

137. *Billings Gaz.*, 313 P.3d at 143 (McKinnon & Cotter, JJ., dissenting).

138. *Id.*

139. *Whitlock*, 844 P.2d at 78.

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the result of an investigation into misconduct related to the performance of [the Employees'] official duties."[140]

(3) Like the police officer in *Bozeman Daily Chronicle*, the Employees took part in expressly prohibited misconduct during the performance of their official public duties.[141]

(4) Like the County Commissioner in *Jefferson*, the Employees' misconduct was "directly relate[d] to [their] ability to effectively perform [their] job duties."[142] While the Commissioner's misconduct (driving under the influence with an expired license) was only tangentially related to her ability to perform her official duties, the Employees' misconduct actually rendered them incapable of performing their official duties while the misconduct occurred. The *Jefferson* Court concluded "information relating to an official's ability to perform public duties should not be withheld from public scrutiny" and favored the public's right to know even though the Commissioner's misconduct did not occur in the performance of her official public duties.[143] Here, the Court in *Billings Gazette* had even more reason to honor the public's right to know because the Employees' misconduct directly interfered with their ability to perform their official public duties.

(5) Like the School District in *Svaldi*, the City conducted an internal investigation after allegations of misconduct that directly related to the Employees' official duties. Like the School District, the City compiled the findings of the investigation in a comprehensive report.[144] The *Svaldi* Court ordered public disclosure of the investigative documents and favored the public's right to know because the alleged misconduct was related to the teacher's official duties.[145]

(6) Like the Interim Chief in *Yellowstone*,[146] the Employees did not assert any privacy interests before disclosing information they later sought to protect. Additionally, like the information contained in the *Yellowstone* transcripts, the investigative reports in *Billings Gazette* were directly related to the Employees' official duties. However, unlike *Yellowstone*, the City expressly removed all expectations of privacy relating to the Employees' use of City computers.

(7) Finally, like the Administrator's misconduct in *Anthony*,[147] the Employees' misconduct was directly related to their official duties and involved public funds. Here, the City paid the Employees' salaries during their misconduct. Furthermore, the City devoted additional funds to the legal battle that followed the Employees' misconduct.[148] *Anthony* correctly favored the public's right to know be-

140. *Id.*
141. *Bozeman Daily Chron.*, 859 P.2d at 440.
142. *Jefferson Co.*, 79 P.3d at 809.
143. *Id.* at 807, 809 (citing *Bozeman Daily Chron.*, 859 P.2d at 440; *Whitlock*, 844 P.2d at 78).
144. *Billings Gaz.,* 313 P.3d at 131–132; *Svaldi*, 106 P.3d at 549.
145. *Svaldi*, 106 P.3d at 553.
146. *Yellowstone Co.*, 143 P.3d 140.
147. *Billings Gaz. (Anthony)*, 267 P.3d 11.
148. *Billings Gaz.,* 313 P.3d at 144 (McKinnon & Cotter, JJ., dissenting).

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> cause the Administrator's misconduct was directly related to official duties and involved significant public funds.

The pattern in case law prior to *Billings Gazette* supports the contention that Montanans have the right to know about public employee misconduct that is related to an employee's official duties. Unfortunately, *Billings Gazette* contradicted decades of Montana Supreme Court decisions and erased this clear precedent. *Billings Gazette* leaves Montana practitioners with more questions than answers.

2. Assurances of Confidentiality

Before *Billings Gazette*, Montana precedent only favored public employee privacy interests for work-related information when the employee received express assurances of confidentiality. After *Billings Gazette*, this clearly defined aspect of Montana right-to-know analysis no longer exists. *Missoulian* represents Montana's primary authority favoring public employee privacy interests for work-related information.[149] The *Missoulian* Court ruled in favor of the university presidents and protected their privacy interests because the presidents received express assurances of confidentiality.[150] However, unlike the *Missoulian* presidents, the Employees did not receive any assurances of confidentiality, express or otherwise. In fact, the City took affirmative steps to remove *all* expectations of privacy related to the Employees' use of City computers. The *Billings Gazette* Court should have recognized this important distinction and honored the public's right to know. Unfortunately, *Billings Gazette* erased this bright line and created an anomaly in Montana case law that causes confusion and will produce unpredictable results in future cases.

3. Objective Records Treated as Personnel Files

By ruling in favor of the Employees, the *Billings Gazette* Court improperly applied personnel file privacy protections to a report that summarized objective computer use violations. This faulty analysis required a leap of logic and a misapplication of the distinguishable facts of *Montana Human Rights Division v. Billings*.[151] In *Montana Human Rights*, the Human Rights Commission ("HRC") requested access to private employee personnel records.[152] The Court ordered the records released, but strictly limited disclosure to the HRC.[153] The privacy interests in *Billings Gazette*

149. *Missoulian*, 675 P.2d 962.
150. *Id.* at 968.
151. *Mont. Human Rights*, 649 P.2d 1283.
152. *Id.* at 1285.
153. *Id.*

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(an objective report with all privacy interests expressly removed) are quite different from the privacy interests in *Montana Human Rights* (the entire contents of employee personnel files with all associated expectations of privacy). While the Employees in *Billings Gazette* waived their privacy interests with their assent to the City's Acceptable Use Policy, the *Montana Human Rights* employees provided no such waiver and maintained a reasonable expectation of privacy.[154] These two cases are distinguishable; and the *Billings Gazette* Court improperly relied upon *Montana Human Rights* to reach its decision.

Citing *Montana Human Rights*, the *Billings Gazette* Court asserted, "public employees possess a privacy right in their personnel files" because such files contain sensitive information.[155] Although there is nothing facially wrong with the Court's assertion, the statement does not apply to the facts of *Billings Gazette*. As the dissent correctly noted, "the City's placement of the final disciplinary report in each Employee's personnel file does not give the document protections that it otherwise would not have."[156] The City's Acceptable Use Policy removed all of the Employees' privacy interests in the documents requested by the Gazette, and the simple act of placing the documents in the Employees' personnel file does not resurrect their privacy interests.[157]

4. Possible Criminal Conduct

The Court in *Billings Gazette* improperly relied on the absence of criminal charges and ignored a crucial aspect of Montana right-to-know analysis that could have avoided the Court's erroneous result. As identified in *Billings Gazette*, public employees do not have a reasonable expectation of privacy for allegations that arise in a criminal context.[158] Before *Billings Gazette*, when a public employee faced allegations of potential criminal misconduct that were related to the employee's official duties, the Court favored the right to know even in the absence of official criminal charges.[159] Like the police officer in *Bozeman Daily Chronicle*, the Employees faced allegations of illegal conduct, but never faced actual criminal charges.[160] And like the newspaper in *Bozeman Daily Chronicle*, the Gazette simply attempted to access the identity of the individuals involved in the alleged criminal activity. Ultimately, the state did not file criminal

154. *Id.* at 1287–1288.
155. *Billings Gaz.*, 313 P.3d at 139 (majority).
156. *Id.* at 147 (McKinnon & Cotter, JJ., dissenting).
157. *Id.*
158. *Id.* at 140, 144 (majority).
159. *Bozeman Daily Chron.*, 859 P.2d at 437; *Svaldi*, 106 P.3d at 553.
160. *Bozeman Daily Chron.*, 859 P.2d at 436–437.

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charges against the police officer in *Bozeman Daily Chronicle*, yet the Court still factored the officer's potentially criminal conduct into its analysis and concluded the requested information was subject to the public's right to know.[161] The Court in *Svaldi* also favored the public's right to know the details of the investigative report despite the lack of criminal charges against the teacher.[162] Therefore, the *Billings Gazette* Court improperly relied on the absence of criminal charges and should have followed the clear precedent set forth in *Bozeman Daily Chronicle* and *Svaldi* and honored the public's right to know.

5. Potential for Employee Embarrassment Given Undue Weight

The *Billings Gazette* majority gave undue weight to the Employees' potential embarrassment in its analysis and needlessly "carve[d] out an exception" to well-established precedent to protect the Employees from embarrassment.[163] The majority correctly noted the Gazette already published the details of the Employees' misconduct and claimed the public already knew the pertinent details of the events in question, with only the Employees' identities omitted.[164] However, the majority concluded the public already possessed "all the information it need[ed] to voice its opinions" and claimed the potential for Employee embarrassment outweighed the "limited merits" of releasing the Employees' identities.[165] While the Court is free to assign weight to relevant facts at its discretion, the Court must do so under the guiding principles of established case law. Regardless of the Court's admirable reasons for protecting the Employees from embarrassment, this decision created a poorly defined exception for Montana right-to-know analysis that will be difficult to apply consistently in future cases.

6. Gazette's Valid First Amendment Argument Unaddressed

The Court in *Billings Gazette* did not address the Gazette's valid First Amendment argument and may have overstepped its constitutional authority when it did not allow the Gazette to publish the Employees' identities. As Justice Douglas noted in his concurring opinion in *New York Times Co. v. United States*,[166] "[t]he dominant purpose of the First Amendment [is] to prohibit the widespread practice of governmental suppression of embarrass-

161. *Id.* at 440.

162. *Svaldi*, 106 P.3d at 553.

163. *Billings Gaz.*, 313 P.3d at 146 (McKinnon & Cotter, JJ., dissenting).

164. *Id.* at 141 (majority).

165. *Id.* at 141, 146.

166. *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 723–724 (1971).

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ing information."[167] This compelling statement provides obvious applications in *Billings Gazette*, but unfortunately the Montana Supreme Court did not address this crucial analysis.

There are several important parallels that can be drawn between *New York Times* and *Billings Gazette*. In *New York Times*, the United States government tried to prevent the New York Times and the Washington Post from publishing the contents of a classified study about the government's decision-making processes during the Vietnam War.[168] The Supreme Court held the United States did not meet its heavy burden to justify its prior restraint on the newspapers' freedom of expression.[169] Here, like the United States in *New York Times*, the City attempted to prevent the Gazette from publishing potentially embarrassing information. However, unlike *New York Times*, the City was not trying to protect the contents of a classified study and merely wanted to protect the Employees' identities from being associated with viewing pornographic material during work hours. The government had a much more compelling interest in preventing public disclosure in *New York Times* than in *Billings Gazette*, yet the U.S. Supreme Court protected the newspapers' rights to publish in *New York Times*, and the Montana Supreme Court prevented the newspaper from publishing in *Billings Gazette*. The facts in *Billings Gazette* lend even stronger support for the Gazette's ability to determine the content of its own publication than *New York Times*; therefore, the Court should have respected the Gazette's discretion and released the Employees' identities.

B. Problematic Future Treatment

Billings Gazette eroded the public's right to know, created ambiguous precedent that will cause unpredictable results in future cases, and left many unresolved questions.

1. Erosion of Montanans' Right to Know

Billings Gazette improperly bolstered public employee privacy protections and recognized a privacy interest "that other courts have uniformly held to be unreasonable."[170] The Court concluded society should be willing to accept "a public employee's expectation of privacy in his or her identity with respect to internal disciplinary matters when that employee is not in a

167. Appellee's Answer Br., *Billings Gaz. v. City of Billings*, 2013 WL 2391299 at **19–20 (Mont. May 15, 2013) (No. DA 12–0739) (citing *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 723–724 (1971) (Douglas, J., concurring)).

168. *N.Y. Times Co. v. U.S.*, 403 U.S. at 714.

169. *Id.*

170. *Billings Gaz.*, 313 P.3d at 142 (McKinnon & Cotter, JJ., dissenting).

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position of public trust, and the misconduct resulting in the discipline was not a violation of a duty requiring a high level of public trust."[171] However, this decision eroded the fundamental protections provided by Montana's right to know and effectively insulated public employee misconduct from public scrutiny when the employee does not occupy a position of "public trust."

Neither Montana precedent, nor the founding principles of Montana's right to know support the creation of a "public trust" exception to the public's right to know. Montana case law does not support the *Billings Gazette* decision; the right to know was originally created to serve as a tool to open the "doors and desks of government to the eyes and ears of the governed."[172] The 1972 Montana Constitutional Convention Transcripts do not mention a public trust exception and the delegates implicitly understood that "[p]ublic awareness and access seem to be the only tools to remind the great mass of public servants that their job is to serve the needs of the public and no other."[173] *Billings Gazette* created an unwarranted exception to Montana's right to know and eroded a fundamental public right. This decision delivered a significant blow to the public's right to know and severely weakened society's ability to hold public employees accountable for their misconduct in the future.

2. Unpredictable Results in Future Cases

Billings Gazette will cause unpredictable results in future cases because it created ambiguous precedent that will be difficult to apply in a consistent manner. The Court concluded society would be willing to accept "a public employee's expectation of privacy in his or her identity with respect to internal disciplinary matters when that employee is not in a position of public trust."[174] To reach this decision, the Court relied on a vague hierarchy of public trust, but failed to define the very position it relied upon. The Court offered a few examples of "public trust" positions to guide future holdings, but some of the Court's own examples come with their own unique challenges. To illustrate this point, the Court offered a "high-level employee" as an example of a position with inherent public trust.[175] However, the Court failed to describe what constitutes a "high-level employee." Therefore, future Montana cases must decipher the Court's ill-defined examples.

171. *Id.* at 140 (majority).

172. Snyder, *supra* n. 18, at 9 (quoting Delegate James Garlington in *1971–1972 Montana Constitutional Convention Verbatim Transcript* vol. VII, 3027 (1981)).

173. *1971–1972 Montana Constitutional Convention*, *supra* n. 3, at 1670.

174. *Billings Gaz.*, 313 P.3d at 140.

175. *Id.*

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3. Unresolved Questions

Billings Gazette created a quagmire of unresolved questions that must now wind their way through the Montana court system. The following illustrates the four main questions left unresolved by the *Billings Gazette* decision:

(1) What is a position of public trust? The *Billings Gazette* Court failed to adequately define the very position that created the exception to Montana's right to know.
(2) When the disputed information is related to the official duties of public employees, how will the underlying facts—that once dictated the outcome of Montana right-to-know analysis—come into play?
(3) Is it fair to assume that all allegations of misconduct involve some measure of "internal discipline?" If so, how will the courts address and define this term in the future? *Billings Gazette* redefined public employees' reasonable expectations of privacy in Montana, and the future impact of this decision is unclear.
(4) What are the future implications of the *Billings Gazette* Court's failure to apply the terms of the City's Acceptable Use Policy, which expressly removed all expectations of privacy related to the Employees' misconduct on City computers?

V. Conclusion

The Court in *Billings Gazette* made a critical error in its analysis when it favored the Employees' privacy rights over the public's right to know. This case ignored the rationale behind Montana's right-to-know provision, contradicted decades of consistent precedent, and created a confusing exception in a formerly well-defined area of law. Instead of basing its decision on a poorly defined hierarchy of public trust, the Court should simply have evaluated the underlying facts in accordance with prior analogous decisions and assessed the Employees' privacy interests in light of their misconduct. The Employees' misconduct was directly related to their official duties, and the Employees did not receive any express assurances of confidentiality. Therefore, the Employees did not possess any reasonable expectations of privacy, and the public had every right to know about their work-related misconduct. This decision represents a significant departure from well-established precedent and should be overruled at the first available opportunity.

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