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## *A Unique Check on Government Power: Reconceptualizing The Right to Know as a Democracy-Promoting Provision*

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## A UNIQUE CHECK ON GOVERNMENT POWER: RECONCEPTUALIZING THE RIGHT TO KNOW AS A DEMOCRACY-PROMOTING PROVISION

Constance Van Kley\*

### I. INTRODUCTION

Montana's unique constitutional Right to Know appears to tell us exactly how to interpret it: "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."<sup>1</sup> From the face of the provision, we know both that the Right to Know is in tension with the Right to Privacy and that the Right to Know generally should prevail.

But the text leaves some questions unanswered; some problems involve conflicts other than those between the Right to Know and the Right to Privacy.<sup>2</sup> While two broad principles clearly are in play, there are others under the surface that can and should inform courts' interpretations of conflicts arising under the Right to Know. A few points of context are essential: (1) Montana's constitutional Right to Know truly is unique among state constitutions; (2) the Framers intended it to be unique and broad; and (3) the Right to Know, when read in conversation with other democracy-promoting constitutional provisions, elevates the role of the People as not only the source of, but also a meaningful check on government power. Considering these points of context, I argue that we should reframe our understanding of the Right to Know, which blurs lines between positive and negative rights and even between powers and rights themselves.

The Montana Law Review has published a number of excellent works of scholarship on the Right to Know, many of which address the Right to Know alongside its sister provision, the Right to Participate,<sup>3</sup> or as a source of tension with the Right to Privacy.<sup>4</sup> In 1978, David Gorman anticipated

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1. MONT. CONST. art. II, § 9.

2. See, e.g., *Nelson v. City of Billings*, 412 P.3d 1058, 1071 (Mont. 2018) (attorney-client privilege and work product doctrine can shield documents from production under the Right to Know); *Mountain States Tel. & Tel. Co. v. Dep't of Pub. Serv. Regul.*, 634 P.2d 181, 189 (Mont. 1981) (corporate trade secrets are not disclosable), *overruled on other grounds*, *Great Falls Trib. v. Mont. Pub. Serv. Comm'n*, 82 P.3d 876 (Mont. 2003).

3. MONT. CONST. art. II, § 8.

4. *Id.* art. II, § 10.

issues likely to arise where the Right of Privacy and the Right to Know conflict; his work predated any Supreme Court decisions under Article II, Section 9.<sup>5</sup> In 2005, Professor Fritz Snyder published an exposition of the rights to know and participate, providing a helpful analysis of judicial and executive interpretations preceding his article.<sup>6</sup> Adam Wade's 2015 note on *Billings Gazette v. City of Billings*<sup>7</sup> addresses a newly created limitation on information about employees who do not hold positions of "public trust."<sup>8</sup> Most recently, Peter Michael Meloy, an expert in Right to Know legal practice, published a comprehensive analysis of the Montana Supreme Court's decisions involving the tension between the Right to Know and the Right to Privacy.<sup>9</sup>

This comment builds on these prior works, which have greatly informed the author's view of the Right to Know and its interpretation. I take a different approach to understanding the right than previous scholars; I focus not on judicial interpretations but instead on first principles to provide a broad theoretical base for solving future interpretive problems. In addition to the Right of Privacy, the Right to Know should be placed alongside the Right to Participate, the Right of Suffrage, and the citizens' initiative powers, which together make the People the ultimate check on state government power. In Montana, like all other states, the People have a role to play in government beyond voting for and against officeholders.<sup>10</sup> The Right to Know is a democracy-promoting provision that alters the balance of powers in state government, even as it provides for an individual right.

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5. David Gorman, *Rights in Collision: The Individual Right of Privacy and the Public Right to Know*, 39 MONT. L. REV. 249 (1978).

6. Fritz Snyder, *The Right to Participate and the Right to Know in Montana*, 66 MONT. L. REV. 297 (2005).

7. 313 P.3d 129 (Mont. 2013).

8. Adam Wade, *Billings Gazette v. City of Billings: Examining Montana's New Exception to the Public's Right to Know*, 76 MONT. L. REV. 185 (2015).

9. Peter Michael Meloy, *Double and Nothing: Open Government in Montana under Article II, Section 9 and Section 10*, 79 MONT. L. REV. 49 (2018); see also Larry M. Elison & Dennis NettikSimmons, *Right of Privacy*, 48 MONT. L. REV. 1 (1987); James H. Goetz, *Interpretations of the Montana Constitution: Sometimes Socratic, Sometimes Erratic*, 51 MONT. L. REV. 289 (1990); Fritz Snyder & Mae Nan Ellingson, *The Lawyer-Delegates of the 1972 Montana Constitutional Convention: Their Influence and Importance*, 72 MONT. L. REV. 53 (2011).

10. See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 876, 878 (2021) (24 states have a constitutional or statutory initiative process. 19 states authorize recalls. "State constitutions generally provide for multiple paths to constitutional amendment . . .").

## II. ARTICLE II, SECTION 9 IN CONTEXT: STATE CONSTITUTIONAL RIGHTS TO GOVERNMENT INFORMATION

Citizens throughout the nation regularly request information from their governments.<sup>11</sup> Generally, the process—and the citizen’s right to information—is defined by statute, not constitutional provision.<sup>12</sup> There is no recognized federal constitutional right to access information from federal officeholders,<sup>13</sup> let alone state or local government entities.<sup>14</sup> As a matter of federal law, the United States Supreme Court has interpreted the historical record, finding no right to government information at common law<sup>15</sup> or early American jurisprudence.<sup>16</sup>

Of course, the absence of a federal constitutional provision is not the end of the story.<sup>17</sup> Montana is one of eight states with a constitutional right to request and receive government information.<sup>18</sup> No two provisions are identical, although most share common features and limitations. Of these eight states, even recognizing the differences among provisions, Montana is

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11. Although Montana does not publish records of the numbers of requests received and fulfilled, the federal government does. In fiscal year 2021, the federal government received a total of 838,164 Freedom of Information Act (“FOIA”) requests. Office of Information Policy, U.S. Dep’t of Justice, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2021 at 2, <https://perma.cc/BJ8Z-BA2Y> (LAST VISITED DEC. 1, 2022).

12. See, e.g., *Miss. Publishers Corp. v. Coleman*, 515 So.2d 1163, 1167 (Miss. 1987) (“The petitioners are simply wrong in their claim that the right of access to public records is of constitutional dimensions. It is a right derived from the common law and from applicable statutes.”) (citations omitted).

13. *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) (“The Constitution itself is [not] a Freedom of Information Act . . .”).

14. See generally *McBurney v. Young*, 569 U.S. 221 (2013) (rejecting argument under the Privileges and Immunities and Dormant Commerce clauses); but see *Caledonian Rec. Pub. Co. v. Walton*, 573 A.2d 296, 299 (Vt. 1990) (“Pursuant to the First Amendment, it is generally recognized that the public and the media have a constitutional right of access to information relating to the activities of law enforcement officers and to information concerning crime in the community.”).

15. *McBurney*, 569 U.S. at 233.

16. *Id.* at 233–34.

17. “[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.” William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

18. In his 2005 article on the Right to Know, Professor Fritz Snyder identified four provisions. Snyder, *supra* note 6, at 298 nn.9–10. One of the provisions identified, Oklahoma Constitution Article II, § 34, provides for a right of access to information regarding criminal proceedings. Because only crime victims and their family members have this right under the Oklahoma Constitution, I have omitted Oklahoma from my list because my focus is on a *public* right to know. If provisions similar to Oklahoma’s were counted, the number of state constitutional rights would be much higher, as a majority of states have adopted Marsy’s Law or similar victims’ rights provisions, which generally include a right to access information regarding criminal investigations and proceedings. See Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy’s Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 100-01 (2020).

an outlier. Article II, Section 9 is the only state constitutional Right to Know that does not clearly provide for or anticipate government regulation of the right.

A. *State Constitutional Rights to Access Government Information*

State constitutional rights to government information share several common features. Without exception, these provisions are modern and politically popular. Michigan, which ratified its constitution in 1964 was the first state<sup>19</sup> to recognize a constitutional right to access public records of any kind, though its constitutional right to know extends only to records regarding government spending.<sup>20</sup> Montana was the first to extend the constitutional right beyond financial information.<sup>21</sup> When the citizens of any state have the opportunity to vote separately on right to know provisions, the initiatives pass by overwhelming majorities.<sup>22</sup>

The provisions vary somewhat more in substance, although commonalities remain. With the exception of Montana, all state constitutional rights to know anticipate regulation of the right.<sup>23</sup> Several provisions incorporated exceptions to the right to know that were on the books when the provision went into effect; several others do not place any apparent limitations on the government in exempting information from the public right to know. While many of the provisions use rights-conferring language, only Article II, Sec-

19. The Florida provision enacted in 1992 may have been misunderstood by voters to be truly novel. See Kara Tollett, *The Sunshine Amendment of 1992: An Analysis of the Constitutional Guarantee of Access to Public Records*, 20 FLA. ST. U. L. REV. 525 (1992) (“When voters approved article I, section 24 of the Florida Constitution, Florida became the only state to provide this right by constitutional decree.”) In fact, Florida was the seventh of the eight states to ratify its provision.

20. MICH. CONST. art. IX, § 23.

21. Michigan, in 1964, was the first to adopt a constitutional right to know, but it covered only financial information. *Id.* Like Michigan, Illinois’s provision, ratified in 1970, is limited to financial information. ILL. CONST. art. VIII, § 1(c). Montana was the third state to adopt a constitutional right to information and thus the first to broaden the scope of the right to more than financial information. MONT. CONST. art. II, § 9. Next came: New Hampshire and Louisiana in 1974; North Dakota in 1976; Florida in 1992; and finally, California in 2004. N.H. CONST. pt. I, art. 8; LA. CONST. art. XII, § 3; N.D. CONST. art. XI, § 6; FLA. CONST. art. I, § 24; CAL. CONST. art. I, § 3(b).

22. Cal. Prop. 59 (2004) passed with 83.4% of the vote. CALIFORNIA SECRETARY OF STATE STATEMENT OF VOTE (2004) at 39, <https://perma.cc/HKP4-FNQQ> (LAST VISITED DEC. 1, 2022). The margin is extraordinary; between 1990 and 2019, “[o]nly four propositions since 1990 received approval from a registered majority.” David A. Carillo, et al., *California Constitutional Law: Direct Democracy*, 92 S. CAL. L. REV. 557, 602 (2019). Similarly, 83.0% of Florida voters approved the Florida provision in 1992. FLORIDA SECRETARY OF STATE DIVISION OF ELECTIONS OFFICIAL RESULTS (November 3, 1992), <https://perma.cc/C3ED-2H7H> (LAST VISITED DEC. 1, 2022).

23. CAL. CONST. art. I, § 3(b)(2); FLA. CONST. art. I, § 24; ILL. CONST. art. VIII, § 1(c); LA. CONST. art. XII, § 3; MICH. CONST. art. IX, § 23; MONT. CONST. art. II, § 9; N.H. CONST. pt. I, art. 8; N.D. CONST. art. XI, § 6.

tion 9 creates a right that truly restricts—rather than merely regulates—governmental limitations of the right.<sup>24</sup>

Thus, all other states with seemingly analogous constitutional rights give government actors the first opportunity to define the scope of the right. While the creation of a constitutional right would suggest that the government must be accountable and open to the people, this cannot be constitutionally guaranteed when the government itself determines the public's right of access.

### 1. *Montana*

Montana's Right to Know is notable for its brevity and strength. Nearly the shortest of the state constitutional provisions, Article II, Section 9 omits the major limitation on public rights to information found in other state constitutions—the open-ended invitation to judges, legislators, and agencies to burden the right. The provision, in its entirety, reads: “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.”<sup>25</sup>

### 2. *California*

The California Constitution provides for a “right of access to information concerning the conduct of the people's business . . . .”<sup>26</sup> Passed in 2004,<sup>27</sup> Proposition 59 added significantly to Article I, Section 3, the provision within the California Constitution providing for the “right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.”<sup>28</sup> As amended, Section 3 provides:

(b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of ac-

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24. There is room for scholarship and debate about how to define Montana's constitutional Right to Know—whether it is, like most American federal and state constitutional rights, a negative right or instead a fairly unique positive right.

25. MONT. CONST. art. II, § 9.

26. CAL. CONST. art. I, § 3(b).

27. CALIFORNIA SECRETARY OF STATE STATEMENT OF VOTE (2004), *supra* note 22, at 39.

28. CAL. CONST. art. I, § 3(a).

cess. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

(7) In order to ensure public access to the meetings of public bodies and the writings of public officials and agencies, as specified in paragraph (1), each local agency is hereby required to comply with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code), and with any subsequent statutory enactment amending either act, enacting a successor act, or amending any successor act that contains findings demonstrating that the statutory enactment furthers the purposes of this section.<sup>29</sup>

California's constitutional right to know is notable for both its length and its limitations. The provision incorporates all preexisting limits on citizens' access to information.<sup>30</sup> And it provides an easy mechanism for future legislation: the legislature need only set forth findings "demonstrating the

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29. *Id.* art. I, § 3(b).

30. *Id.* art. I, § 3(b)(2), (5)–(6).

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interest protected by the limitation and the need for protecting that interest.”<sup>31</sup>

### 3. *Florida*

In 1992, Florida amended its constitution to provide a constitutional right to government information.<sup>32</sup> Like the California amendment, the Florida provision is long on words but short on substantive meaning. The provision reads, in its entirety:

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

(c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

(d) All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court

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31. *Id.* art. I, § 3(b)(2).

32. Tollett, *supra* note 19, at 525.



that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.<sup>33</sup>

The Florida provision appears to be broad—and it even applies to the judiciary—but its length and rights-conferring language are misleading. By its own terms, the provision did not disturb any existing limitations to examine public records.<sup>34</sup> And there already was a comprehensive statutory open records scheme, so constitutionalization had no immediate practical effect. Indeed, a contemporary commentator noted that the provision left intact well over five hundred recognized exemptions to the right.<sup>35</sup>

The Florida provision also gives the state legislature the option to exempt additional categories of public records in the future, though any future exemptions would require a supermajority vote.<sup>36</sup> Similar to the California provision, the Florida provision also requires the legislature to justify restrictions on the public right to know.

#### 4. *Michigan*

Michigan was the first state to include a constitutional right to government information. Its constitution, adopted in 1964, includes a limited right to know, which extends only to public spending.<sup>37</sup> It reads: “All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law.”<sup>38</sup>

#### 5. *Illinois*

Illinois ratified its constitution only two years prior to Montana, in 1970.<sup>39</sup> Although Illinois and Montana are contemporaries in this sense, their constitutional provisions are easily distinguishable. Like the Michigan provision, the Illinois right addresses only information regarding government spending: “Reports and records of the obligation, receipt and use of

33. FLA. CONST. art. I, § 24.

34. *Id.* art. I, § 24(d).

35. “[A]ll 562 current exemptions were retained,” but a “sunset review guarantees that each current exemption which remains in force will eventually have to meet this more stringent constitutional criteria.” Tollett, *supra* note 19, at 541. The referenced “sunset review” came about through legislation enacted in 1985. See Barry Richard & Richard Grosso, *A Return to Sunshine: Florida Sunsets Open Government Exemptions*, 13 FLA. ST. U. L. REV. 705, 705 (1985). Thus, it is not a feature of the constitutional provision itself.

36. FLA. CONST. art. I, § 24(c).

37. MICH. CONST. art. IX, § 23.

38. *Id.*

39. Illinois ex rel. Ogilvie v. Lewis, 274 N.E.2d 87, 91 (Ill. 1971).

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public funds of the State, units of local government and school districts are public records available for inspection by the public according to law.”<sup>40</sup>

In addition to its narrow scope—governing the release of financial records—the Illinois provision provides for information only as provided by law.

#### 6. *Louisiana*

Louisiana, like Illinois, ratified its constitution within two years of Montana. In 1974, Louisiana voters approved the state’s current—and eleventh<sup>41</sup>—constitution. While the Louisiana provision is not limited in scope to a single category of documents (like the Illinois provision), it provides that the right to know can be regulated: “No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.”<sup>42</sup> Louisiana courts view the “right of access to public records [as] fundamental,” but access nonetheless “may be denied . . . when the law specifically and unequivocally denies access.”<sup>43</sup>

#### 7. *North Dakota*

North Dakota amended its constitution in 1978<sup>44</sup> to create a public right to review government documents.<sup>45</sup> Similar to Louisiana’s provision, the North Dakota right to know contemplates that the right will be regulated:

Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.<sup>46</sup>

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40. ILL. CONST. art. VIII, § 1(c).

41. Mark T. Carleton, *Elitism Sustained: The Louisiana Constitution of 1974*, 54 TULANE L. REV. 560, 560 (1980).

42. LA. CONST. art. XII, § 3.

43. *Krielow v. La. St. Univ. Bd. of Supervisors*, 290 So.3d 1194, 1201 (La. App. 1st Cir. 2019).

44. Like Montanans, North Dakotans considered passing a new constitution in 1972, following a state constitutional convention. In North Dakota, however, the proposed constitution failed. W. Logan Caldwell, *The History of the Initiated Measure in North Dakota: Removing the People’s Power or Watching for the Wolf in Sheep’s Clothing?*, 97 N.D. L. REV. 217, 226 (2022).

45. N.D. CONST. art. XI, § 6.

46. *Id.*

The North Dakota provision is unique among all constitutional rights to know in one way: it applies to private entities that receive or spend public funds.<sup>47</sup>

### 8. *New Hampshire*

New Hampshire's constitutional right to government information arguably presents the closest analogue to Montana's. Adopted in 1976, the right amends an article original to the New Hampshire Constitution, which went into effect nearly 200 years earlier, in 1784.<sup>48</sup> The provision, which has since been amended to provide a right of enforcement of restrictions on government spending,<sup>49</sup> reads:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted. The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer. However, this right shall not apply when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal by statute or otherwise by the parties to that proceeding.<sup>50</sup>

Similar to the Louisiana and North Dakota provisions, the New Hampshire provision anticipates regulation of the right. By stating that the right to know "shall not be unreasonably restricted," the provision clearly authorizes some restrictions on the right to know.<sup>51</sup>

### III. MONTANA'S UNIQUE CONSTITUTIONAL RIGHT TO KNOW

Article II, Section 9 is unique; the significance of its singularity, however, is not immediately apparent. Often, when legal questions are un-

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47. See *Energy Transfer LP v. N.D. Priv. Investigative & Sec. Bd.*, 973 N.W.2d 404, 411–13 (N.D. 2022) (rejecting limitation on scrutiny of private business's records to documents used "in connection with public business").

48. N.H. CONST. pt. I, art. 8.

49. *New Hampshire Question 1, Taxpayer Standing to Bring Legal Actions against Government Amendment (2018)*, BALLOTPEdia, <https://perma.cc/6CU8-WCAH> (last visited Nov. 22, 2022).

50. N.H. CONST. pt. I, art. 8.

51. *Id.*

clear—and, in Montana, they often are<sup>52</sup>—the first impulse is to look to other jurisdictions for well-developed rules to follow.<sup>53</sup> But, because Montana’s constitutional provision is immediately different from other state constitutional rights and because there is no analogous federal right, we know that we cannot begin with extra-jurisdictional law.<sup>54</sup>

Our Right to Know is a Montana-specific provision, and interpretive solutions must be grounded in resources specific to Montana. Fortunately, the Montana constitutional convention transcripts provide a rich source of materials to explain the Framers’ intent in drafting constitutional provisions later ratified by the people.<sup>55</sup> In addition to the Framers’ views of the provision, judicial, legislative, and scholarly interpretations of the Right to Know provide helpful interpretive tools.

#### A. *The Framers’ Goals of Increasing Transparency and Participation*<sup>56</sup>

Through the Right to Know, the Framers intended to “presume the openness of government documents and operations” in response to the “increasing concern of citizens and commentators alike that the government’s sheer bigness threatens the effective exercise of citizenship.”<sup>57</sup> The drafting committee “intend[ed] by this provision that the deliberations and resolution of all public matters must be subject to public scrutiny. It [wa]s urged that this is especially the case in a democratic society wherein the resolution of increasingly complex questions leads to the establishment of a complex and bureaucratic system of administrative agencies.”<sup>58</sup>

Open government increases accountability by allowing the people to exercise their rights as the final check and balance on elected officials. The

52. Montana has no intermediate appellate court. In 2020, the Montana Supreme Court oversaw 576 cases, 338 of which were disposed by opinion on appeal. *2020 Caseload Dispositions Report*, OFF. OF THE CLERK OF THE MONT. SUP. CT., <https://perma.cc/CM6J-GTEC> (last visited Nov. 22, 2022). In contrast, the federal courts of appeals oversaw approximately 50,000 cases over the same period. *Federal Judicial Caseload Statistics 2020*, U.S. CTS., <https://perma.cc/6UQR-A3MT> (last visited Nov. 22, 2022).

53. See *Montana v. Ingram*, 478 P.3d 799, 803 n.2 (Mont. 2020) (“We look to other jurisdictions when interpreting . . . issues of first impression.”) (citation omitted).

54. Even in the face of an analogous federal provision, the Montana Supreme Court will, at times, “refuse[] . . . to march lockstep with the United States Supreme Court’s pronouncements concerning similar provisions of the federal constitution.” *Kafka v. Mont. Dep’t of Fish, Wildlife, & Parks*, 201 P.3d 8, 50 (Mont. 2008) (Nelson, J., dissenting).

55. See, e.g., *Brown v. Gianforte*, 488 P.3d 548, 557 (Mont. 2021) (considering transcript material).

56. It has been argued, and quite convincingly, that focus on the Framers’ intent is misplaced, as “[i]t was the voters of Montana who had to approve the final constitution and all the sections within it.” Snyder, *supra* note 6, at 300. Because voters received relatively little instruction on Article II, Section 9, however, their intent is difficult to discern. *Id.* at 300-02.

57. 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1670 (1981) [hereinafter CONVENTION TRANSCRIPT VOL. 5].

58. *Id.*

Framers recognized and endorsed this principle. In the words of Delegate Ben Berg:

Now I want to see all agencies, in particular, opened up to the public. I want their documents examined; I want their deliberations open. I am particularly interested in the operations of the city councils and boards of county commissioners, as well as all other agencies and commissions and forms of government. I want their deliberations open; I want their documents available for inspection.<sup>59</sup>

The Framers were not only concerned about holding government accountable; they also expressed optimism about the benefits of public access to government information. Delegate Dorothy Eck, a member of the Bill of Rights Committee, which drafted and introduced the provision, described the Committee's efforts to "creat[e] an atmosphere of openness in government" with the belief that building public access would carry with it "confidence in government."<sup>60</sup>

Most notably, the Framers considered and rejected an amendment to the provision that would have given the Legislature the first opportunity to weigh the interests of privacy and public disclosure.<sup>61</sup> Convention President Leo Graybill opposed "push[ing] on the legislature the duty of determining what the rights of the people are in this state . . . [T]he more language you give that agency to work with, the less . . . there's going to be left, because they'll be able to interpret it right out of the window."<sup>62</sup>

Thus, it need not be merely presumed that the Framers intended to draft a uniquely broad provision, unlimited by future legislative action. In fact, the Framers considered and rejected a proposal that would have allowed the legislature to take initial action to define the right.<sup>63</sup>

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59. 7 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 2499 (1981) [hereinafter CONVENTION TRANSCRIPT VOL. 7].

60. CONVENTION TRANSCRIPT VOL. 5, *supra* note 57, at 1670.

61. *Id.* at 1671-72. Had the amendment been adopted, the provision would read: "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 *as may be provided by law* in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." The amendment failed, 56 to 30. *Id.* at 1671-72, 1678-79 (emphasis added).

62. CONVENTION TRANSCRIPT VOL. 7, *supra* note 59, at 2496-97. See Peter Michael Meloy, *Double & Nothing: Open Government in Montana under Article II, Section 9 and Section 10*, 79 MONT. L. REV. 49, 59-60 (2018) (excerpting President Graybill's speech at length).

63. CONVENTION TRANSCRIPT VOL. 5, *supra* note 57, at 1677-79 (rejecting amendment to add words "as may be provided by law"). One commentator has theorized that this rejection is attributable to concerns about self-interest on the part of legislators and other public officials. Brian D. Howell, *Rough Start for a New Right: An Analysis of Montana's Right to Know*, GRADUATE STUDENT THESES, DISSERTATIONS, & PROFESSIONAL PAPERS. 5217 (1994) (manuscript at 36), <https://perma.cc/9LFE-6UPF>.

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*B. Judicial Interpretations*

The Montana Supreme Court has said, in no uncertain terms, that “the [R]ight to [K]now is a fundamental right subject to the highest degree of protection.”<sup>64</sup> The right extends to all “documents generated or maintained by a public body which are somehow related to the function and duties of that body.”<sup>65</sup> Consistent with the convention transcripts, the Court has recognized that “the delegates [to the Constitutional Convention] . . . essentially declared a constitutional presumption that every document within the possession of public officials is subject to inspection.”<sup>66</sup>

Despite the breadth and strength of the provision, the Court has recognized significant limitations on the Right to Know.<sup>67</sup> Commentators have argued that these limitations, many of which are recent, represent new limitations in right-to-know law and an abrogation of the Court’s constitutional obligations to the citizens.<sup>68</sup> Notably, the Court has determined that the right does not extend to: information about employee discipline when the discipline is unrelated to a violation of the public trust;<sup>69</sup> information protected by the attorney-client privilege and work product doctrine;<sup>70</sup> corporate trade secrets;<sup>71</sup> court deliberations;<sup>72</sup> and meetings involving less than a quorum of a legislative body.<sup>73</sup>

*C. Legislative Framework*

The Montana Constitution was adopted against a backdrop of legislation outlining and limiting citizens’ rights to access government information.<sup>74</sup> “To the general rule”—that government was open to the people—“were . . . a plethora of exceptions, a general one for statutes which required closed meetings and specific exceptions meetings relating to:

- (1) national or state security;

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64. *Nelson v. City of Billings*, 412 P.3d 1058, 1064 (Mont. 2018).

65. *Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 906 P.2d 193, 197 (Mont. 1995).

66. *Bryan v. Yellowstone Cnty. Elementary Sch. Dist. No. 2*, 60 P.3d 381, 390 (Mont. 2002).

67. *Nelson*, 412 P.3d at 1065–69.

68. *See Meloy, supra* note 9, at 94 (“[R]ecent decisions create confusion in right-to-know jurisprudence and reflect a lack of institutional memory and a disturbing erosion of the 45-year development of case law enforcing open government in Montana.”).

69. *Billings Gazette v. City of Billings*, 313 P.3d 129, 140–41 (Mont. 2013).

70. *Nelson*, 412 P.3d at 1069 (Mont. 2018).

71. *Mountain States Tel. & Tel. Co. v. Dep’t of Pub. Serv. Regul.*, 634 P.2d 181, 188–89 (Mont. 1981), *overruled on other grounds*, *Great Falls Trib. v. Mont. Pub. Serv. Comm’n*, 82 P.3d 876 (Mont. 2003).

72. *Goldstein v. Comm’n on Prac. of Sup. Ct.*, 995 P.2d 923, 931–32 (Mont. 2000); *see also* *In re the Selection of a Fifth Member to the Mont. Districting & Apportionment Comm’n*, 1999 WL 608661 (Mont. Aug. 3, 1999).

73. *Associated Press v. Usher*, 503 P.3d 1086, 1089 (Mont. 2022).

74. *Gorman, supra* note 5, at 259.

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- (1) disciplining of public officers;
- (2) employment, promotion, dismissal, etc. of public officials;
- (3) purchase of public property or investment of public funds;
- (4) revocation of licenses; and
- (5) law enforcement, crime prevention, probation and parole.”<sup>75</sup>

It took the Legislature five years to bring the code into rough conformity with the constitutional Right to Know.<sup>76</sup> The State affirmatively recognizes its obligation to provide information to the People in certain ways, including by publishing online a database disclosing state financial information, which is open to and searchable by the public.<sup>77</sup>

Today, public information requests remain regulated by statute, but the modern open records laws generally do not restrict categories of information.<sup>78</sup> Statutory exceptions to disclosure do exist, but they are limited, extending to distribution lists;<sup>79</sup> certain nonpublic information donated to the Montana Historical Society by private donors;<sup>80</sup> and “information relating to individual or public safety or the security of public facilities, including public schools, jails, correctional facilities, private correctional facilities, and prisons, if release of the information jeopardizes the safety of facility personnel, the public, students in a public school, or inmates of a facility.”<sup>81</sup> Regulations include significantly more exceptions.<sup>82</sup>

The Montana Code also expressly authorizes agencies to charge fees for providing government information requested by citizens, including “the time required to gather public information.”<sup>83</sup>

#### IV. THE RIGHT TO KNOW AS A DEMOCRACY-PROMOTING PROVISION

With any legal issue, it is tempting to begin with the most recent court decision discussing the issue; this is how most practitioners begin their research, and it often is a good place to start. But constitutional problems are often different. They carry broad implications, and constitutional provisions accordingly must be read with foundational principles in mind.

A comprehensive understanding of the Right to Know must consider the broader constitutional context within which the right arises. The right

75. *Id.*

76. *Id.* at 259-60.

77. *Transparency in Government Portal*, STATE INFORMATION TECHNOLOGY SERVICES DIVISION, <https://perma.cc/CU97-77PM> (last visited Nov. 23, 2022).

78. MONT. CODE ANN. § 2-6-1001 (2021).

79. *Id.* § 2-6-1017.

80. *Id.* § 2-6-1003(3).

81. *Id.* § 2-6-1003(2).

82. *See, e.g.*, MONT. ADMIN. R. 2.21.6615 (2011) (exempting from disclosure most information within employee personnel records).

83. MONT. CODE ANN. § 2-6-1006(3).

cannot be divorced from the structural pro-democracy principle animating the Framers, which echoes throughout the Montana Constitution. A structural analysis of the right carries two major implications. First, the Right to Know arises from the constitution’s recognition of the People as the source of all political power. And second, the right furthers other democracy-promoting provisions, serving as an essential tool for the People to operate not only as a check on government power but as constitutional architects.

#### A. *Popular Sovereignty*

Delegate Wade Dahood, Chairman of the Bill of Rights Committee, introduced the proposed declaration of rights with a reminder that “the guidelines and protections for the exercise of liberty in a free society come not from government but from the people who create government.”<sup>84</sup> The Declaration of Rights, including the Right to Know, was drafted to create and reinforce “a more responsible government that is Constitutionally commanded never to forget that government is created solely for the welfare of the people . . . .”<sup>85</sup>

Delegate Dahood’s eloquence notwithstanding, the Declaration of Rights likely does not require further explanation. It starts off with a broad animating principle: “All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.”<sup>86</sup> It continues with the necessary implication of that principle: “The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary.”<sup>87</sup>

The popular sovereignty principle embodied in Article I, Sections 1 and 2 is not unique to the Montana Constitution.<sup>88</sup> As Jessica Bulman-Pozen and Miriam Seifter have explained, state constitutions are, by design, more democratic than the federal constitution, and they share many common pro-democracy features.<sup>89</sup>

The Right to Know, on the other hand, is not common among the states—particularly not as a right that may limit the legislature in controlling that right.<sup>90</sup> It nonetheless is an essential means of implementing the

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84. 2 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 619 (1981).

85. *Id.*

86. MONT. CONST. art. II, § 1.

87. *Id.* art. II, § 2.

88. “Every state constitution but New York’s includes an express commitment to popular sovereignty.” Bulman-Pozen & Seifter, *supra* note 10, at 869.

89. *See generally* Bulman-Pozen & Seifter, *supra* note 10.

90. *See supra* Section II.



popular sovereignty principle underlying the Montana Constitution. The People are not only the source of government power but also the ultimate check on government power.

### B. *The Initiative & Referendum Powers*

The Right to Know is often read in combination with the Right to Participate and the Right of Privacy.<sup>91</sup> The relationship between the three provisions is deeply important, and it has informed significant constitutional decisions. The Court has noted “little discussion regarding the provisions’ interrelationship,” which it attributes to the “resounding clarity in the comments to Article II, Section 9”—through which the Bill of Rights Committee described the Right to Know as a “companion to the preceding right of participation.”<sup>92</sup>

But, while the Right to Know often implicates the rights of participation and privacy, other provisions, too, should inform our understanding of the right. Montana has a recognized tradition of reading constitutional provisions cohesively,<sup>93</sup> and the Right to Know should be understood as an inherently democratic provision within Montana’s pro-democracy constitution.

Relevant to a full understanding of the Right to Know are the People’s rights to make law directly through the constitutional<sup>94</sup> and ballot initiative<sup>95</sup> and referendum<sup>96</sup> powers. As Anthony Johnstone has noted, the constitutional initiative power “serves . . . as a direct practical guarantee of the primary provisions of the Declaration of Rights, popular sovereignty and self-government.”<sup>97</sup> If the constitutional initiative power is the opportunity for the People to determine how government should work, the Right to Know is an essential means by which the People may gather the information necessary to do their work conscientiously. A closed government cannot give the People the tools they need to understand where problems exist and how to correct them.

91. Right to Know expert and longtime attorney for Montana newspapers Martha Sheehy describes the three provisions as a “three-legged stool”—“[T]he balancing of those three rights is built into the Constitution, and that’s the genius of the Con-Con. It’s that they had the foresight that those would always be together.” Mara Silvers, *Fifty years later, is Montana’s ‘Right to Know’ working?*, MONT. FREE PRESS (March 22, 2022), <https://perma.cc/RSD4-JBD6>.

92. *Bryan v. Yellowstone Cnty. Elementary Sch. Dist. No. 2*, 60 P.3d 381, 388 (Mont. 2002) (citation and italics omitted).

93. Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WIS. L. REV. 1001, 1004-06 (2021).

94. MONT. CONST. art. XIV, § 9.

95. *Id.* art. III, § 4.

96. *Id.* art. III, § 5.

97. Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 MONT. L. REV. 325, 326 (2010).

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In this sense, the Right to Know operates in the space between the creation of government and the exercise of suffrage. Like the corollary Right to Participate, the Right to Know gives Montanans opportunities to interact with government away from the ballot box. And because government power is not only “derived from” but “vested in” the people,<sup>98</sup> right-to-know transactions can be seen as transactions between two government actors. This reconceptualization elevates the People to their proper role as a participant in—and ultimately, the final check on—the government.

## V. CONCLUSION

Article II, Section 9 is without equal. Unlike nearly every other constitutional right to access government information, Montana’s Right to Know does not anticipate and cannot allow legislative or administrative infringements on the right. The Framers deliberately chose, and the People ratified, a Right to Know that is “self-executing and on its own mandates governmental transparency.”<sup>99</sup>

The reimagining of the Right to Know as a feature of Montana’s democratic system of government raises serious questions about government regulations of the right. While the People have delegated power to government actors, government information continues to belong to the People. This raises serious questions about the constitutionality of any restrictions on the People’s right to know, including fee assessments, particularly to the degree they are calculated to restrict access to information.

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98. MONT. CONST. art. II, § 1.

99. *Associated Press v. Usher*, 503 P.3d 1086, 1088 (Mont. 2022).

