

A Conflict of Two Freedoms: The Freedom of Information Act Disclosure of Confidential Settlements in the #MeToo Era

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TABLE OF CONTENTS

I.	INTRODUCTION	210
A.	<i>Former Detroit Mayor’s Attempt to Cover-Up the Murder of Tamara Green Foiled by Open Records Request</i>	210
II.	BACKGROUND.....	217
A.	<i>The Freedom of Information Act</i>	217
1.	<i>History of the Freedom of Information Act</i>	217
2.	<i>Scope of the Freedom of Information Act</i>	218
3.	<i>Policy Behind the Freedom of Information Act</i>	223
4.	<i>Making a Valid Freedom of Information Act Request</i>	224
5.	<i>Appealing an Agency’s Handling of a Freedom of Information Act Request</i>	228
B.	<i>Confidential Settlement Agreements</i>	230
1.	<i>Commonality of Pre-Trial Resolutions</i>	230
2.	<i>Settlements and Available Contract Remedies</i>	232
3.	<i>Policy Considerations Behind Confidential Settlements</i>	236
4.	<i>Confidentiality in Workplace Sexual Misconduct Cases</i>	239
C.	<i>Two Laws in Conflict</i>	243

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III.	ANALYSIS	247
A.	<i>Can the Policies Be Reconciled?—Preliminary</i>	
	<i>Choice of Law Questions</i>	247
	1. <i>Choice of Law Frameworks</i>	249
	2. <i>Government Interest Analysis, Comparative</i>	
	<i>Impairment, and the Restrained Approach</i>	251
B.	<i>Freedom of Information Act Policies Prevail When</i>	
	<i>Applying Government Interest Analysis</i>	254
	1. <i>Policy Behind the Freedom of Information Act</i>	256
	2. <i>Policy Behind Confidential Settlements</i>	258
	3. <i>The Restrained Approach</i>	261
C.	<i>Can the Policies Be Reconciled?</i>	264
IV.	CONCLUSION	265

I. INTRODUCTION

A. *Former Detroit Mayor’s Attempt to Cover-Up the Murder of Tamara Green Foiled by Open Records Request*

Former Detroit Mayor Kwame Kilpatrick had a rocky history of getting his hand stuck in the cookie jar. In his six years as the mayor of America’s fourteenth largest metro, Kilpatrick was almost constantly embroiled in scandal. First, his wife assaulted a stripper known as “Strawberry” at a party in the state-owned mayor’s mansion.¹ Strawberry was murdered one year later with a .40 caliber Glock pistol, the same type of weapon issued to officers of the Detroit Police Department.² Then, Kilpatrick

1. *See Former Clerk: I Saw Stripper’s Police Report of Manoogian Assault*, CRAIN’S DETROIT BUS. (Mar. 11, 2008), <https://www.crainsdetroit.com/article/20080311/SUB/244527761/former-clerk-i-saw-strippers-police-report-of-manoogian-assault> [<https://perma.cc/8BHY-TTMN>]. Debate still exists as to whether this party happened or is merely urban legend: state officials alleged to have attended the party are adamant the ordeal was made up, but the dancers feel differently. *See id.* For the account of one dancer, Tamika Ruffin, *Stripper Says She Danced at Manoogian Mansion, Saw Carlita Kilpatrick Assault Tamara Greene*, MLIVE (Nov. 22, 2010), https://www.mlive.com/news/detroit/2010/11/stripper_says_she_danced_at_de.html [<https://perma.cc/K3VX-VQXF>]. Retired Detroit Fire EMS Lieutenant Michael Kearns claims to have responded to the call of the assault of one “Tammy Green,” who told Kearns she danced at the mansion. For the account of Michael Kearns, see Elisha Anderson, *Unsolved Slaying of Stripper Tamara Green Gets National Audience in Podcast*, DETROIT FREE PRESS (Feb. 7, 2019, 8:00 AM), <https://www.freep.com/story/news/local/michigan/detroit/2019/02/07/tamara-greene-crimetown-podcast-detroit/2789295002/> [<https://perma.cc/TDP5-DHYA>].

2. *Episode Fifteen: The Murder of Tamara Greene*, CRIMETOWN (Feb. 4, 2019), <https://www.crimetownshow.com/transcripts-detroit-2/2019/2/4/episode-fifteen-the-murder-of-tamara-greene> [<https://perma.cc/W5PU-HC9D>]. Some of these records were destroyed. *See Kwame Scandal Flashback: The Manoogian Mansion Party*, MLIVE (Mar. 11, 2013), https://www.mlive.com/news/detroit/2013/03/kwame_scandal_flashback_the_ma.html [<https://perma.cc/N8AA-HLEN>].

stood trial for his role in the cover-up of Strawberry's murder.³ Former Deputy Police Chief Gary Brown and Kilpatrick's personal bodyguard Harold Nelthrope brought a civil whistleblower suit against Kilpatrick, alleging they were fired for probing into the mayor's personal life to investigate Strawberry's murder.⁴ In this trial, Kilpatrick and his Chief of Staff, Christine Beatty, testified under oath that they were not involved in an extramarital affair and denied firing Gary Brown for any improper reason.⁵ The jury nonetheless found for Brown and Nelthrope, awarding them \$6.5 million dollars in damages.⁶ Kilpatrick took to the steps⁷ of the

3. See Steven Yaccino, *Kwame M. Kilpatrick, Former Detroit Mayor, Sentenced to 28 Years in Corruption Case*, N.Y. TIMES (Oct. 10, 2013), <https://www.nytimes.com/2013/10/11/us/former-detroit-mayor-kwame-kilpatrick-sentencing.html> [<https://perma.cc/Z8CT-Y4LU>].

4. See *The Chain of Events*, DETROIT FREE PRESS (Jan. 24, 2008), <https://web.archive.org/web/20080127115706/http://www.freep.com/apps/pbcs.dll/article?AID=%2F20080124%2FNEWS05%2F801240419> [<https://perma.cc/JB63-N384>]. Strawberry's real name was Tamara Greene. *Episode Fifteen: The Murder of Tamara Greene*, *supra* note 2. She was a twenty-seven-year-old mother at the time of her murder, which remains unsolved. Anderson, *supra* note 1. Fans of Gimlet's "Crimetown" podcast may find this profile familiar—Tamara Greene's story was the focus of the podcast's February 4, 2019 episode. See *id.*; see also *Episode Fifteen: The Murder of Tamara Greene*, *supra* note 2. The specifics of the whistleblower case are also discussed on Crimetown's January 14, 2019 episode. See *Episode Thirteen: Gary Brown v. Mayor of Detroit*, CRIMETOWN (Jan. 14, 2019), <https://www.crimetownshow.com/transcripts-detroit-2/2019/1/14/episode-thirteen-gary-brown-v-mayor-of-detroit> [<https://perma.cc/LRY5-JWH4>]. Episodes of Crimetown are accessible via Spotify's "podcasts" genre page.

5. *The Chain of Events*, *supra* note 4. Kilpatrick and Beatty do admit the termination may have been "premature," but are adamant it was not "illegal." *Id.*

6. *Id.*

7. See Stephen Henderson, *Sting of Whispers Hurts Kilpatrick the Most*, DETROIT FREE PRESS (Sept. 13, 2007), <https://web.archive.org/web/20070916230903/http://www.freep.com/apps/pbcs.dll/article?AID=%2F20070913%2FCOL33%2F709130361&theme=KILPATRICK082007&imw=Y> [<https://perma.cc/X4XE-UE22>]. Kilpatrick's anger was mostly with the jury selection, which was "mostly suburban and, by implication, almost all white." See *id.* Kilpatrick, an African American, believed the allegations against him were intended to paint him as "thuggish" and to make his image into a "caricature," but admits his frustrations got the best of him in making his statement. *Id.* He later released a statement saying that he respected the judicial system, but felt he was personally attacked and painted as a "negative guy." *Id.*

Although Kilpatrick admits the statement was frustration-driven, data indicates that racial discrimination in jury selection is still a modern problem, despite the Supreme Court attempting to limit the practice. See, e.g., EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (2010), <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/L4EY-NW6Y>]. As recently as 2010, The Equal Justice Initiative conducted a study of

City Hall to declare the trial a sham, promising to appeal.⁸

Within weeks, Kilpatrick's view changed. He swiftly executed a confidential \$8.4 million settlement to avoid further litigation when he learned the plaintiffs had obtained evidence that he and Beatty had perjured themselves in the trial.⁹ Kilpatrick settled for \$1.9 million over the jury award to prevent knowledge of his affair from becoming public.¹⁰

The new evidence obtained by the plaintiffs was 682 pages of text messages exchanged on city-issued pagers between Kilpatrick and Beatty, proving their extramarital affair.¹¹ The messages also implicated the pair in firing Gary Brown without cause,¹² and indicated Kilpatrick had a role in choosing the investigator to clear his name.¹³ The messages further

jury selection in criminal cases in the American South, determining that some state-employed prosecutors are trained to eliminate potential jurors based on race, and some persons of color in capital cases are tried by an all-white jury. *See id.* The Equal Justice Initiative, like Kilpatrick in his statement from City Hall, argue that this practice undermines the credibility and reliability of the justice system and must be eliminated. *See id.*

However, at least one commentator believes Kilpatrick's tactic has always been to blame the white community for his political missteps. "'During difficult times he has always been able to portray his attacks as coming from the white community . . . trying to take down the black mayor,' said Steve Mitchell," a pollster and previous employee of Kilpatrick. Tim Jones, *The Downfall of Detroit's Champion*, CHI. TRIB. (May 29, 2008), <https://webcache.googleusercontent.com/search?q=cache:JaR3Cnzbg7EJ:https://www.chicago.tribune.com/news/ct-xpm-2008-05-29-0805280538-story.html+&cd=1&hl=en&ct=clnk&gl=us> [<https://perma.cc/U69E-W3S7>].

The racial conflict complicated public perception of Kilpatrick during the scandal, with some individuals believing there was "no clear racial divide" related to the issue, but others arguing Kilpatrick's image harmed a city already enduring difficult times. *Id.*

8. *See* Nick Bunkley, *Ex-Officers Ousted by Detroit Mayor Will Get \$6.5 Million*, N.Y. TIMES (Sept. 12, 2007), <https://www.nytimes.com/2007/09/12/us/12detroit.html> [<https://perma.cc/UHY7-UNBY>].

9. *See The Chain of Events*, *supra* note 4; *see also* Smokey Fontaine, *Kwame Kilpatrick's Scandalous Text Messages Revealed*, NEWS ONE (Mar. 13, 2009), <https://newsone.com/128681/kwame-kilpatrick-scandalous-text-messages-revealed/> [<https://perma.cc/7KTG-M7N6>]. This source contains sexually explicit messages.

10. *See The Chain of Events*, *supra* note 4. The settlement agreement also awarded the plaintiffs their costs in bringing the suit—an unknown, but likely significant, amount. *See id.*

11. *See* Fontaine, *supra* note 9.

12. *Id.*

13. *See Excerpts of Text Messages in Ex-Detroit Mayor Kwame Kilpatrick Saga*, MLIVE (Mar. 10, 2009), https://www.mlive.com/news/2009/03/excerpts_of_text_messages_in_e.html [<https://perma.cc/SY4B-8VPR>]. Kilpatrick discussed his preference of having Michigan Attorney General Mike Cox perform a separate investigation into the alleged Manoogian Mansion party. *See id.* Kilpatrick indicated Cox called him and asked "who [he] would rather be cleared by," either Cox himself or County Prosecutor Mike Duggan. *Id.*

Mike Duggan would go on to become mayor of Detroit after his stint as county prosecutor and would find himself in his own scandal during his tenure. *See* Kat Stafford & Joe Guillen, *Mayor Mike Duggan Set Her Up to Succeed. That Raises Questions.*,

showed Kilpatrick and Beatty's attempts to justify Brown's termination after-the-fact.¹⁴ This new evidence compelled Kilpatrick to swiftly settle with Brown and Nelthrope, despite Kilpatrick's earlier promise to appeal.¹⁵ Documents show that the day after the parties agreed to the settlement, Kilpatrick had it thrown out and replaced with two separate agreements: a monetary settlement without any reference to the text messages, and a confidentiality agreement intended to prevent the messages from becoming public.¹⁶

DETROIT FREE PRESS (May 7, 2019, 12:01 PM), <https://www.freep.com/in-depth/news/local/michigan/detroit/2019/04/04/mike-duggan-sonia-hassan-detroit/3367208002/> [<https://perma.cc/SV22-54F4>]. Duggan allegedly became romantically involved with the director of a nonprofit that received "preferential treatment" from the city. *See id.*; *see also* Steve Neavling, *3 Top Duggan Officials Schemed to Erase Emails to Hide City's Ties to a Nonprofit, IG Finds*, DETROIT METRO TIMES (Oct. 21, 2019, 3:50 PM), <https://www.metrotimes.com/news-hits/archives/2019/10/21/3-top-duggan-officials-schemed-to-erase-emails-to-hide-citys-ties-to-a-nonprofit-ig-finds> [<https://perma.cc/L4GF-S2PV>]. In response to these allegations, Duggan's chief of staff ordered public employees to delete all emails that referenced the nonprofit. *See Neavling, supra*. Duggan remains the mayor of Detroit. *Mayor's Office*, CITY DETROIT, <https://detroitmi.gov/government/mayors-office> [<https://perma.cc/NTQ4-GB4E>].

14. *See Fontaine, supra* note 9; *see also Excerpts of Text Messages in Ex-Detroit Mayor Kwame Kilpatrick Saga, supra* note 13.

15. *See* Nick Bunkley, *Detroit Mayor Loses Fight Over Secret Papers*, N.Y. TIMES (Feb. 28, 2008), <https://www.nytimes.com/2008/02/28/us/28detroit.html> [<https://perma.cc/R394-7HNV>]. *See generally* Henderson, *supra* note 7 (discussing Kilpatrick's speech on the steps of City Hall, declaring the trial a sham).

16. For a detailed discussion of the settlement agreement, associated confidentiality agreement, and Kilpatrick's legal fight to keep the messages private, *see Bunkley, supra* note 15. For the specific provisions contained in the confidentiality agreement, *see* Corey Williams, *Kilpatrick Approved Secret Deal*, CRAIN'S DETROIT BUS. (Feb. 8, 2008, 12:00 PM), <https://www.crainsdetroit.com/article/20080208/SUB/508567984/kilpatrick-approved-secret-deal> [<https://perma.cc/UW36-DJEP>]. Lawyers involved maintain that the confidentiality agreement was a requirement for documents obtained during mediation or settlement talks, as the confidentiality facilitated open communication between the parties and their attorneys, designed to enhance settlement. Bunkley, *supra* note 15. Certain documents involved in settlement negotiation are likely protected by the attorney work-product doctrine or attorney-client privilege, but documents constituting discoverable evidence between parties—such as the text messages at issue in the settlement—fall under neither category. *See generally* Alan Gassman, *Anything You Text May Be Held Against You*, FORBES (July 31, 2019, 3:26 PM), <https://www.forbes.com/sites/alangassman/2019/07/31/e-mail-stands-for-evidence-mail/#54bd5c9944bd> [<https://perma.cc/3SGZ-QZFU>].

A provision similar to that described by the attorneys involved in negotiating the settlement exists at the federal level under Federal Rule of Evidence 408: Compromise Offers and Negotiations. FED. R. EVID. 408. This "settlement privilege" prohibits the use of evidence surrounding a settlement in litigation to either prove or disprove settlement-related facts, or to impeach a prior inconsistent statement. *See id.* The rule does not keep

As part of Detroit's process for a city official to enter into a settlement, Kilpatrick was required to obtain the city council's approval of the settlement.¹⁷ When Kilpatrick sent the agreement to the city council for approval, he omitted any mention of the separate confidentiality agreement.¹⁸ The city council approved the settlement without knowing the messages even existed.¹⁹ Upon learning about the withheld messages, the settlement "sparked public outrage," and the city council began proceedings to remove Kilpatrick from office.²⁰

The *Detroit Free Press* requested the text messages through the Michigan Freedom of Information Act.²¹ The request demanded the City of Detroit release all settlement-related documents, ultimately providing powerful information to the already-angered public of the mayor's salacious affair and subsequent cover-up to protect his political position.²² Kilpatrick and Beatty were convicted of obstruction of justice, with Kilpatrick ultimately serving four months in prison for this offense.²³ Kilpatrick resigned his

settlement documents and discussions private to the public, unrelated to pending litigation. *See id.* This can be accomplished with a confidentiality provision in the settlement agreement itself, such as a non-disclosure agreement (NDA). *See* Nicole Einbinder, *What Happens If Someone Breaks a Non-Disclosure Agreement?*, PBS (Mar. 2, 2018), <https://www.pbs.org/wgbh/frontline/article/what-happens-if-someone-breaks-a-non-disclosure-agreement/> [<https://perma.cc/FX4R-Q8WY>]. Signing such an agreement with the government has been called "legally questionable." Caroline Cournoyer, *NDA's and Confidential Settlements Shake State Capitols and City Halls*, GOVERNING (Apr. 5, 2018), <https://www.governing.com/topics/mgmt/gov-nda-states-trump-confidential-settlement-employee-cities.html> [<https://perma.cc/6EGL-D2CB>].

17. *See* Kevin Krolicki, *Detroit's Mayor Indicted in Sex Scandal*, REUTERS (Mar. 24, 2008, 8:39 AM), <https://www.reuters.com/article/us-detroit-mayor/detroits-mayor-indicted-in-sex-scandal-idUSN2431691120080324> [<https://perma.cc/Y9EG-LS3F>].

18. *See id.*

19. *See id.*; *see also* Martha Neil, *Detroit v. Detroit: Law Prof Represents City as Council Seeks to Fire Mayor*, A.B.A. J. (June 11, 2008, 10:15 PM), https://www.abajournal.com/news/article/detroit_v_detroit_law_prof_represents_city_as_council_seeks_to_fire_mayor [<https://perma.cc/2VRA-Q36B>] (discussing the City of Detroit's legal representation in the civil suit against Kilpatrick).

20. Neil, *supra* note 19.

21. John Wisely, *Changes to Michigan's FOIA Drops Cost of Public Records*, DETROIT FREE PRESS (Jan. 18, 2015, 12:11 AM), <https://www.freep.com/story/news/local/michigan/2015/01/18/michigan-foia-changes/21928995/> [<https://perma.cc/W3D3-2L6R>].

22. *See* Jordan Zappala, *With the Power of FOIA*, NEWS MEDIA & L., Fall 2008, at 29, 30.

23. *Detroit Mayor Pleads Guilty to Obstruction, Will Quit*, NPR (Sept. 4, 2008, 11:00 AM), <https://www.npr.org/templates/story/story.php?storyId=94270506> [<https://perma.cc/EL7R-Y4DV>]. This is not Kilpatrick's only offense. He would go on to be sentenced to twenty-eight years in prison for corruption and financial crimes. *Kwame Kilpatrick, Former Detroit Mayor, Sentenced to 28 Years in Prison for Corruption*, CBS (Oct. 10, 2013, 1:24 PM), <https://www.cbsnews.com/news/kwame-kilpatrick-former-detroit-mayor-sentenced-to-28-years-in-prison-for-corruption/> [<https://perma.cc/UX7T-5PTA>]. If he serves the whole sentence, he will be released in 2041. *Id.*

position as mayor, surrendered his license to practice law, paid \$1 million in restitution to the City of Detroit, and was barred from running for office for five years.²⁴

The Kilpatrick-Beatty scandal illustrates what happens when a government official is able to hide behind a cloak of confidentiality, and what happens when a capable reporter presses the government for controversial records under a state's open records law. But the *Detroit Free Press* had an uphill battle: the information sought was initially unavailable due to settlement privilege,²⁵ and was ultimately subject to a confidentiality agreement in the subsequent settlement.²⁶ The *Detroit Free Press* then had to sue the City of Detroit to determine if a settlement agreement even *existed*—a lawsuit in which the lawyer for Gary Brown, in the previous case, was forced to provide his notes regarding the existence of a confidentiality agreement.²⁷ The mayor's advisor still maintained the position that “no secret deals exist or have ever existed.”²⁸

The scandal illustrates a conflict with two pieces of American governance: the Freedom of Information Act (FOIA),²⁹ which allows the public access

24. *Detroit Mayor Pleads Guilty to Obstruction, Will Quit*, *supra* note 23; Martha Neil, *How Mayor Kwame Kilpatrick Struck a Deal in Detroit*, A.B.A. J. (Sept. 8, 2008, 6:56 PM), https://www.abajournal.com/news/article/how_mayor_kwame_kilpatrick_struck_a_deal_in_detroit [<https://perma.cc/DDZ8-FYTE>].

25. *See Bunkley*, *supra* note 15. Because the parties were negotiating a settlement with the information sought by the *Detroit Free Press*, the Michigan Freedom of Information Act request was initially denied because a settlement had yet to be reached. *See id.* When Kilpatrick rejected the initial deal and bifurcated the settlement into two separate agreements, the confidentiality provision prevented the settlement from disclosure. *Id.* Litigation ensued to determine whether withholding the text messages under this confidentiality agreement was legitimate, and the *Detroit Free Press* was ultimately victorious. *Id.*

26. *See id.*

27. Corey Williams, *Reports: Detroit Approved Secret Deal*, FOX NEWS (Feb. 7, 2008), <https://www.foxnews.com/wires/2008Feb07/0,4670,DetroitMayorFOIALawsuit,00.html> [<https://perma.cc/M9RF-CHDX>].

28. *Id.*

29. In this case, Michigan's Freedom of Information Act was at issue. *See* Jim Schaefer, *City Fought for Years to Keep Text Messages a Secret*, DETROIT FREE PRESS (May 30, 2020, 4:00 AM), <https://www.freep.com/story/news/2020/05/30/city-detroit-fought-keep-kwame-kilpatrick-text-messages-secret/5263884002/> [<https://perma.cc/3VSC-FTNP>]. Every state has such an open records law, similar to that codified at the federal level as the Freedom of Information Act. *See Open Government Guide*, REPS. COMM. FOR FREEDOM PRESS, <https://www.rcfp.org/open-government-guide/> [<https://perma.cc/LZR4-R92A>]. For a discussion of state open records laws, as well as the similar protections that exist in the common law, see *Introduction to the Open Government Guide*, REPS. COMM. FOR FREEDOM PRESS, <https://www.rcfp.org/introduction-to-the-open-government->

to information to provide oversight to government activity, and confidentiality clauses in civil settlement agreements, which prevent sensitive and incriminating information from becoming public knowledge.³⁰ When the two conflict, there is no solution that can satisfy both the openness policy behind FOIA and the confidentiality policy behind a settlement agreement—they are necessarily polar opposites. As the *Detroit Free Press* learned, oftentimes an open records request fails to disclose that a settlement exists at all, frustrating a news organization’s effort to exercise its First Amendment rights in reporting on a settlement.³¹ This Comment aims to address the disparity behind these concepts, arguing that in a case of workplace sexual misconduct,³² confidentiality must necessarily give way to the policy behind an open government.

guide/ [https://perma.cc/9386-KDAC]. Similarly, over 100 other countries have enacted similar provisions. See *By Country*, GLOBAL RIGHT TO INFO. RATING, https://www.rti-rating.org/country-data/ [https://perma.cc/2WCR-W8AH]. For a discussion of open-records laws outside of the United States, see *infra* note 49.

30. See *infra* Section II.B for discussion about confidentiality clauses.

31. See *supra* note 27 and accompanying text. For a discussion of the ways certain otherwise-disclosable information may be withheld from a valid Freedom of Information Act request, see *infra* Section II.A.2 (discussing exemptions and exclusions to disclosure).

32. An important note is that Beatty never made sexual harassment, assault, or any similar allegations against Kilpatrick as a result of the scandal. See *Detroit Mayor Pleads Guilty*, *supra* note 23. The events of the scandal were portrayed as consensual. See *id.* The sexual activity—at least what is known through the text messages—occurred in the early 2000s, long before the #MeToo movement of the late 2010s. *Id.*; see also Gurvinder Gill & Imran Rahman-Jones, *Me Too Founder Tarana Burke: Movement Is Not Over*, BBC News (July 9, 2020), https://www.bbc.com/news/newsbeat-53269751#:~:text=Tarana%20began%20using%20the%20phrase,Harvey%20Weinstein%20of%20sexual%20assault [https://perma.cc/K37R-4M28]. Society has since come to understand that in certain situations, a power imbalance may render any sexual relationship inherently nonconsensual. See James Doubek, *Of Power, Predators and Innocent Mistakes: The Complex Problems of Sexual Harassment*, NPR (Nov. 5, 2017, 8:31 AM), https://www.npr.org/2017/11/05/562182050/power-consent-and-sexual-harassment-in-the-public-eye [https://perma.cc/VYJ3-TLGW]. For example, employees, typically women, at the behest of their bosses, typically men, endure sexual harassment out of fear of retaliation for reporting. See LAUREN P. DALEY, DNKA J. TRAVIS & EMILY S. SHAFFER, SEXUAL HARASSMENT IN THE WORKPLACE: HOW COMPANIES CAN PREPARE, PREVENT, RESPOND, AND TRANSFORM THEIR CULTURE 10 (2018), https://www.catalyst.org/wp-content/uploads/2019/01/sexual_harassment_in_the_workplace_report.pdf [https://perma.cc/F22Z-FYRW]. A similar pattern could be seen with Kilpatrick and Beatty, though no such claim was ever made. See Doubek, *supra*.

Another important note is that Kilpatrick is far from the only high-profile politician abusing his power to prey on vulnerable employees. For example, 2020 Democratic Presidential Candidate Michael Bloomberg, the former mayor of New York City, came under scrutiny for settling an undisclosed number of sexual harassment claims by requiring female employees of his private business to sign non-disclosure agreements. See Nick Corasaniti & Michael M. Grynbaum, *Bloomberg, in Reversal, Says He'll Release 3 Women from Nondisclosure Agreements*, N.Y. TIMES (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/us/politics/michael-bloomberg-nda.html [https://perma.cc/CJV5-UQED]. Senator

This Comment begins by addressing the history and policies behind FOIA, which are mirrored in the open records laws of all fifty states. This portion of the Comment concludes that FOIA's policies are openness and transparency in the government, specifically to create an informed electorate. The Comment next analyzes the scope and history of confidential settlement agreements in the context of the *#MeToo* movement. This Comment concludes that confidential settlements in workplace sexual misconduct cases can benefit both the accuser and the accused, but ultimately are aimed to protect the accused from additional claims by other potential victims. Then, this Comment attempts to reconcile the two laws—is there a way to adhere to the policies of openness and confidentiality in one, mutually-agreeable solution? The Comment analyzes the purpose behind the laws in accordance with a government interest analysis format.³³ Ultimately, the Comment determines that in this framework, the confidentiality provisions must necessarily give way to a valid FOIA request.

II. BACKGROUND

A. *The Freedom of Information Act*

1. *History of the Freedom of Information Act*

The federal Freedom of Information Act was signed into law by President Lyndon Johnson on July 4, 1966.³⁴ FOIA's passage came in response to President Eisenhower's firing of thousands of government employees suspected to be communists, and a subsequent refusal by the government

Elizabeth Warren, also a 2020 Democratic Candidate, shot back at Bloomberg's unwillingness to release the women from their NDAs. *See id.* "Michael Bloomberg needs to do a blanket release so that all women who have been muzzled by nondisclosure agreements can step up and tell their side of the story in terms of what Michael Bloomberg has done," Warren told reporters at Nevada's February 21, 2020 caucus. *Id.* Bloomberg's campaign agreed to release three women from their agreements, though many question why Bloomberg chose this number. *See id.*

33. This format is the underlying theory behind California's Choice of Law doctrine for tort and contracts disputes, and this author believes the best framework through which this nontraditional conflict of laws question can be addressed. *See Sommer v. Gabor*, 48 Cal. Rptr. 2d 235, 243 (1995) (applying and describing the governmental interest approach for a choice of law determination).

34. *Freedom of Information Act*, ENCYCLOPEDIA BRITANNICA (June 27, 2020), <https://www.britannica.com/topic/Freedom-of-Information-Act> [<https://perma.cc/X4XA-VN4X>].

to release any records from the dismissals.³⁵ Congressman John Moss fought for twelve years to pass the then-unpopular bill through Congress, believing that the bill fought a denial of a basic right inferred from the right to speak freely under the First Amendment to the Constitution.³⁶ Congressman Moss encountered vigorous opposition, including from the executive agencies and President Johnson.³⁷ The President believed the press “wanted to bring him down,”³⁸ and steadfastly opposed legislation designed to give the press more information about his Administration.³⁹ Knowing he lacked the votes to overrule a Presidential veto, Moss’s congressional backer Republican Donald Rumsfeld⁴⁰ stirred up political stakes, criticizing President Johnson for refusing to back the bill, and convincing Minority Leader Gerald Ford⁴¹ and the House Republican Committee to support the bill.⁴² The political pressure became too much to bear. Congress passed the bill, and an apprehensive President Johnson signed it into law.⁴³

2. Scope of the Freedom of Information Act

In theory, FOIA applies to all executive branch federal agencies, but the reality of FOIA’s reach is much narrower. FOIA requires certain government

35. *Freedom of Information Act*, HIST. (May 21, 2018), <https://www.history.com/topics/1960s/freedom-of-information-act> [<https://perma.cc/8B8Q-2J39>].

36. Michael R. Lemov & Nate Jones, *John Moss and the Roots of the Freedom of Information Act: Worldwide Implications*, 24 SW. J. INT’L L. 1, 2, 14 (2018). For an in-depth analysis of the history and intentions of Congressman Moss and his twelve-year battle to enact the Freedom of Information Act, see *id.*

37. See SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 23–24 (2007).

38. See Lemov & Jones, *supra* note 36, at 15.

39. *Id.*; see also PIOTROWSKI, *supra* note 37, at 23 (discussing President Johnson’s belief that the Act was a “personal attack”).

40. Congressman Rumsfeld would go on to work in the Nixon, Ford, and George W. Bush Administrations. *Donald H. Rumsfeld*, OFF. SEC’Y DEF. HIST. OFF., <https://history.defense.gov/Multimedia/Biographies/Article-View/Article/571280/donald-h-rumsfeld/> [<https://perma.cc/R35A-AEQW>]. He was the Secretary of Defense under President George W. Bush—and briefly at the end of President Ford’s Administration—and took a decidedly different stance on open records during that time. *Id.*

41. House Minority Leader Gerald Ford would go on to be appointed as the fortieth Vice President of the United States after the resignation of Spiro Agnew, and to become the thirty-eighth President of the United States at the resignation of President Richard Nixon, being the only person to serve as both Vice President and President without being elected to either position. *Gerald R Ford*, INDEPENDENT (Jan. 21, 2009, 1:54 AM), <https://www.independent.co.uk/news/presidents/gerald-r-ford-1451818.html> [<https://perma.cc/CV4C-5KCK>].

42. Lemov & Jones, *supra* note 36, at 17.

43. See *id.* at 30. To say the least—Johnson’s own Press Secretary said, “LBJ had to be dragged kicking and screaming to the signing ceremony.” *Id.*

agencies to produce documents in their possession upon receipt of a valid request,⁴⁴ and to make certain documents available to all by publication in the Federal Register.⁴⁵ The 1966 Legislature’s purpose in passing FOIA was to “clarify and protect the right of the public to information.”⁴⁶ The goals behind FOIA are to promote the timely identification of problems within the government, allowing the public to demand a response from Congress, and ultimately, vote as an informed electorate.⁴⁷ By its text, FOIA only applies to executive branch governmental agencies; the Act defines “agency” as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency.”⁴⁸ It further expressly excludes Congress and the courts of the United States from its scope.⁴⁹ Notably, FOIA is interpreted to exclude government

44. See 5 U.S.C. § 552(a)(3)(A)(i)–(ii). A request is valid if it “reasonably describes such records [sought]” and is “made in accordance with published rules.” *Id.*

45. 5 U.S.C. § 552(a)(1). Government agencies are required to make procedural information regarding Freedom of Information Act requests available through the Federal Register. *Id.* Agencies must also publish the basis for their rulemaking authority in the Federal Register. OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS 2, 4–5 (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/ZYV2-LEHS>].

46. S. REP. NO. 88-1219, at 1 (1964).

47. See generally *Freedom of Information Act*, U.S. DEP’T JUST., <https://www.foia.gov/> [<https://perma.cc/ANL9-QUZ6>] (“The basic function of [FOIA] is to ensure informed citizens, vital to the functioning of a democratic society.”).

48. 5 U.S.C. § 551(1). For an in-depth analysis of the issues in determining “agency” status, see *infra* note 51 and accompanying text.

49. 5 U.S.C. § 551(1)(A)–(B). The exclusion of the legislative branch is a notable difference between FOIA and similar laws of other nations. Over 100 countries have implemented a similar protection, but generally these laws apply to all branches of government, rather than just the executive. See *By Country*, *supra* note 29. For example, Canada’s Access to Information Act allows access to all federal records, *Canada*, GLOBAL RIGHT TO INFO. RATING, <https://www.rti-rating.org/country-data/Canada/> [<https://perma.cc/C4M3-JEKJ>]; the United Kingdom’s Freedom of Information Act covers all records of public authorities—with a specific carve-out for Scotland, governed by a separate law, *United Kingdom*, GLOBAL RIGHT TO INFO. RATING, <https://www.rti-rating.org/country-data/United%20Kingdom/> [<https://perma.cc/VU9X-PFU7>]; perhaps France’s Declaration of the Rights of Man and of the Citizen’s 1978 application most closely mirrors the United States’ FOIA, allowing citizens to demand a copy of any administrative document, see *France*, GLOBAL RIGHT TO INFO. RATING, <https://www.rti-rating.org/country-data/France/> [<https://perma.cc/BWR2-ZRJT>]. For an interactive map discussing the open records laws of different countries, see *The RTI Rating*, GLOBAL RIGHT TO INFO. RATING, <https://www.rti-rating.org/> [<https://perma.cc/3XZJ-DDRK>].

The global RTI (right to information) Rating system utilizes sixty-one different indicators in assessing the relative strength of a country’s open records framework and has implemented a scale from 0–150. *Id.* Several trends are interesting to note: primarily, western European

contractors, including those who conduct business directly with an agency.⁵⁰

Since its passage, FOIA has increased transparency surrounding government actions. However, the subject matter to which FOIA applies is nearly as restrictive as the government agencies within its scope.⁵¹ FOIA has nine exemptions, all of which create categories of records exempt from disclosure by the government, even when faced with a legitimate request. The categories exempt (1) properly classified matter related to national security and pursuant to a valid executive order; (2) matters related solely to the internal personnel rules and practices of an agency; (3) matters specifically exempted from disclosure by statute; (4) trade secrets, commercial matters, or financial matters obtained from a person who remains privileged or confidential; (5) intra- or inter-agency memorandums and letters that would not be available by law to a party other than an agency in litigation with the agency; (6) personal information that would clearly constitute an unwarranted invasion of privacy; (7) various law enforcement matters where disclosure

nations generally score quite poorly in the RTI system, even though, as discussed, their records laws encompass more branches of the government than those of the United States—though it is worth noting that the United Kingdom did still outperform the United States. *See By Country, supra* note 29. Second, the analysis notes that all but one of the top twenty-five scoring countries enacted their open records law in the last twenty years, suggesting that the quality of open records laws has been increasing over time. *The RTI Rating, supra*.

50. *See* PIOTROWSKI, *supra* note 37, at 75, 84.

51. FOIA's nine exemptions and three exclusions, discussed *infra* note 53, prevent disclosure of broad categories of records otherwise available under FOIA. The definition of what qualifies as an "agency" under FOIA is likewise restrictive, and has been held to exclude, for example: advisory bodies, *see* *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1043 (D.C. Cir. 1985); certain Justice Department entities, *see* *Ramirez v. Dep't of Just.*, 594 F. Supp. 2d 58, 61–62 (D.D.C. 2009); and the Office of the President, *see* *Nat'l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990).

Further, courts have held that what qualifies as an "agency" for purposes of FOIA must be determined on a case-by-case basis. *See, e.g.,* *Irwin Mem'l Blood Bank of the S.F. Med. Soc'y. v. Am. Nat'l Red Cross*, 640 F.2d 1051, 1053–54 (9th Cir. 1981) (holding that the defining characteristics of an "agency" are that the agency is a part of government "generally independent in the exercise of its functions and which by law has authority to take final and binding action affecting the rights and obligations of individuals," but still that the determination of what qualifies as an "agency" is a matter to be determined by the courts on a case by case basis (quoting *Lombardo v. Handler*, 397 F. Supp. 792, 795 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976))). This further complicates the FOIA process—in *Irwin Memorial Blood Bank*, the plaintiff sought disclosure of the Red Cross's financial records under FOIA, claiming it was an agency required to produce such records. *Id.* at 1051–52. The Red Cross claimed it was not an agency under FOIA's definition, forcing the parties to litigate this issue before the validity of the FOIA request could even be determined. *Id.* at 1052. As a result, when there is an underlying dispute about the status of a particular entity as an agency, a preliminary determination by a court is necessary to determine whether FOIA applies at all. *See id.*

could threaten the ongoing investigation or proceedings; (8) reports related to financial institutions; and (9) certain geological information and data.⁵²

In addition to the nine exemptions, a 1986 amendment added three exclusions permitting the government to withhold otherwise disclosable records.⁵³ The three exclusions permit the government to withhold information related to (1) a pending criminal investigation, in certain situations; (2) unacknowledged, confidential information; and (3) classified foreign intelligence or counterintelligence, or international terrorism records, held by the FBI.⁵⁴

Additionally, FOIA has been amended several other times.⁵⁵ The controversial 1974 Privacy Act amendments gave citizens the right to see records about themselves and amend those records if they are inaccurate or incomplete.⁵⁶ The Privacy Act also gave individuals a right to sue the government if an unauthorized individual accessed their personal records.⁵⁷ A 1976 amendment expanded exemption three of FOIA to allow the government to withhold information in a broad range of national security

52. 5 U.S.C. § 552(b).

53. See *Implementing FOIA's Statutory Exclusion Provisions*, U.S. DEP'T JUST., <https://www.justice.gov/oip/blog/foia-guidance-6> [<http://perma.cc/SZ6M-SWNG>]. The main difference between “exemptions” and “exclusions” is that in the case of exclusions, even public acknowledgement of the existence of the records could theoretically result in harm to law enforcement or national security. See *id.* Even when faced with a legitimate request that would otherwise uncover the records in this category, the government is permitted to act as if they do not exist at all. For an in-depth discussion of the specific exclusions and their application, see *id.*

The Department of Justice—the agency likely in possession of most documents in the “exclusion” categories—indicates that while these exclusions are encountered in FOIA requests, the frequency with which they are used is very low: an exclusion came up in only 123 requests, or 0.18% of all requests processed by the Department of Justice in fiscal year 2013. *Responding to Requests*, U.S. DEP'T JUST., <https://www.justice.gov/archives/open/responding-requests> [<https://perma.cc/4RG5-BU2H>].

54. *Implementing FOIA's Statutory Exclusion Provisions*, *supra* note 53.

55. See *id.*

56. See 5 U.S.C. § 552a(d). Codified as 5 U.S.C. § 552a, the Privacy Act further requires that agencies may maintain “only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order.” 5 U.S.C. § 552a(e)(1). Under the Privacy Act, agencies are not free to compile personal information without any express authority to do so. 5 U.S.C. § 552a(e)(3)(A).

57. § 552a(b).

situations.⁵⁸ The Act was limited by executive order in 1982,⁵⁹ expanded in the late 1990s,⁶⁰ made electronic by 1996,⁶¹ again limited post-9/11,⁶² re-defined in 2007's OPEN Government Act,⁶³ and finally given additional exemptions related to financial institutions in 2010, although this act was repealed two months later.⁶⁴

Despite its numerous exemptions, exclusions, and amendments, FOIA has been the primary vehicle through which the public became aware of a broad range of high-profile government scandals.⁶⁵ FOIA requests have shed light on the FBI's surveillance of African American writers, the EPA's knowledge that paper mills were polluting waterways with toxins, and the government's wasteful spending in response to Hurricane Katrina.⁶⁶ FOIA requests have also led to substantial government spending in legal costs, notably related to defending against an Iran-Contra related FOIA challenge.⁶⁷

58. See Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976) (amending 5 U.S.C. § 552(b)(3), the third exemption of FOIA).

59. See Exec. Order No. 12,356, 3 C.F.R. 166 (1983).

60. See Exec. Order No. 12,958, 3 C.F.R. 333 (1996) (changing classification system for national security information); Exec. Order No. 12,968, 3 C.F.R. 391 (1996), *reprinted in* 50 U.S.C. § 3161 (changing access to classified information); Exec. Order No. 13,142, 3 C.F.R. 236 (2000) (amending Executive Order 12,958). This was accomplished through numerous executive orders from President Clinton.

61. See Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (codified as amended in various sections of 5 U.S.C. § 552).

62. See Exec. Order No. 13,233, 3 C.F.R. 815 (2002) (restricting access to records of former Presidents; revoked 2009); Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383 (2002) (codified in scattered sections of U.S.C.) (amending 5 U.S.C. § 552(a)(3) to exclude "intelligence community agencies" from requirement to disclose information to foreign governments).

63. See OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007) (codified in scattered sections of 5 U.S.C. § 552) (defining "a representative of the news media," determining the payment of attorney's fees, prohibiting assessment of fees for an agency that does not comply with FOIA deadlines, and establishing an Office of Government Information Services ("OGIS") to review agency compliance with FOIA).

64. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of U.S.C.).

65. See generally *Freedom of Information Act*, *supra* note 35. For an interesting read of less high-profile, but more eccentric records obtained from FOIA requests—including the FBI's "Twitter slang dictionary" and the recipe for White House Honey Ale—see Adam D'Arpino, *10 Ridiculous Documents Released via the Freedom of Information Act*, MENTAL FLOSS (Sept. 4, 2014), <https://www.mentalfloss.com/article/58674/10-ridiculous-documents-released-through-freedom-information-act> [https://perma.cc/N9DA-C6FH].

66. See *Freedom of Information Act*, *supra* note 35.

67. See Scott Armstrong, *The War Over Secrecy: Democracy's Most Important Low-Intensity Conflict*, in *A CULTURE OF SECRECY: THE GOVERNMENT VERSUS THE PEOPLE'S RIGHT TO KNOW* 140, 143 (Athán G. Theoharis ed., 1998). In the Iran-Contra case, the Reagan Administration secretly sold arms to Iran and used the proceeds to fund the Contras in Nicaragua. See *id.* Congressional investigations and indictments ensued,

3. Policy Behind the Freedom of Information Act

The United States has only recognized the right to information under FOIA for fifty-three years, but the concept far predates its enactment.⁶⁸ Founding Father James Madison—considered the “philosophical founder” of FOIA—was notoriously concerned with the public’s access to knowledge.⁶⁹ Madison argued: “[A] popular government without popular information . . . is but a [p]rologue to a [f]arce or a [t]ragedy Knowledge will forever govern ignorance”⁷⁰ Madison’s statement reflects a societal concern at the time of the founding—that a lack of access to information would be disastrous for successful governance.⁷¹ Echoing Madison’s concerns, the American public now regards unfettered access to information as a cornerstone of American governance: along with the national government, every single state has enacted some kind of open records act,⁷² and the Department of Justice itself has stressed the importance of agency compliance with FOIA as requests continue to rise.⁷³

and through multiple subsequent Administrations, FOIA requests to obtain certain records were stymied. *See id.* at 143–54. The government was ultimately victorious, but the FOIA litigation cost the government over four million dollars, which was estimated to be over nine million dollars when adjusted to the market rate value of the government lawyers’ services. *See id.* at 159. This case also illustrates how FOIA requests can become an adversarial activity.

The Iran-Contra court case related to the FOIA request is *Armstrong v. Executive Office of the President*. 1 F.3d 1274 (D.C. Cir. 1993). However, the greater Iran-Contra scandal involved many complex parts, including congressional investigations, indictments, Presidential pardons, and so forth. For a compilation of documents released during the course of the congressional investigations, see *The Iran-Contra Affair 30 Years Later: A Milestone in Post-Truth Politics*, NAT’L SEC. ARCHIVE (Nov. 25, 2016), <https://nsarchive.gwu.edu/briefing-book/iran/2016-11-25/iran-contra-affair-30-years-later-milestone-post-truth-politics> [<https://perma.cc/554H-W37W>].

68. *See* Michael Doyle, *Misquoting Madison*, LEGAL AFFS. (July/Aug. 2002), http://www.legalaffairs.org/issues/July-August-2002/scene_doyle_julaug2002.msp [<https://perma.cc/J69Z-EMYJ>].

69. *Id.*

70. *FOIA Post (2008): Celebrating James Madison and the Freedom of Information Act*, U.S. DEP’T JUST. (Mar. 13, 2008), <https://www.justice.gov/oip/blog/foia-post-2008-celebrating-james-madison-and-freedom-information-act> [<https://perma.cc/E3TZ-BANQ>].

71. *See id.*

72. Laura Danielson, *Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media’s Use of FOIA Laws*, 2012 MICH. ST. L. REV. 981, 987 (2012).

73. *See DOJ Stresses Importance of FOIA and Open Government Through Performance Standards for Employees*, U.S. DEP’T JUST. (Jan. 7, 2016), <https://www.justice.gov/oip/blog/doj-stresses-importance-foia-and-open-government-through-performance-standards-employees> [<https://perma.cc/YH6A-S6GT>].

FOIA aims to promote openness in government and also serves as a tool for agency accountability to this goal.⁷⁴ Openness in government has obvious implications for an electorate, as Madison envisioned, but FOIA also helps consumers, property owners, reporters, teachers, and other everyday citizens find information helpful to their particular interest.⁷⁵ The movement promoting the importance of open government has even created an awareness movement—called Sunshine Week—occurring every year in March to promote the ideals and benefits of open government.⁷⁶ FOIA helps the public and private citizens uncover important information, ranging from the mundane details related to an individual’s hobby or property, all the way to global political scandals, all since the relatively short time since the United States first recognized the right to freedom of information.⁷⁷

4. Making a Valid Freedom of Information Act Request

The procedures in place for making and responding to a FOIA request aim to make the process a speedy one, but this is often far from the reality. One benefit of FOIA is that any individual can make a FOIA request.⁷⁸ No specific showing of “need” or “relevance” to some underlying question or issue must be made.⁷⁹ The requester need not even be an American citizen.⁸⁰ A valid request only “reasonably describes such records [sought]” and is “made in accordance with published rules.”⁸¹ “Published rules” refers to each agency’s rules and procedures for filing a request,⁸² which must be

74. See *id.*

75. For a list of common themes of open government activities, see, for example, *Idea Bank*, SUNSHINE WEEK, <http://sunshineweek.org/sw13-idea-bank/> [<https://perma.cc/3LJG-R368>].

76. See *Sunshine (Week) Spring: It’s Your Right to Know*, SUNSHINE WEEK, <http://sunshineweek.org/> [<https://perma.cc/8RJA-XV9U>].

77. See *supra* Section II.A.2.

78. *Frequently Asked Questions*, FOIA.GOV, <https://www.foia.gov/faq.html> [<https://perma.cc/6XB8-YZH5>] (answering that anyone can make a request).

79. See 5 U.S.C. § 552(a)(3)(A).

80. See *Frequently Asked Questions*, *supra* note 78.

81. 5 U.S.C. § 552(a)(3)(A). See *supra* note 44 and accompanying text for a discussion of the requirements of a FOIA request.

82. § 552(a)(1)(A). These requirements differ depending on the agency from which the information is sought. For instance, the Department of Energy has a centralized “E-FOIA” request form, see *DOE Headquarters FOIA Request Form*, U.S. DEP’T ENERGY, <https://www.energy.gov/doe-headquarters-foia-request-form> [<https://perma.cc/S2F5-4NMQ>], whereas the Department of Justice suggests sending requests to the specific “component” of the agency likely to have possession of the records sought. See *Make a FOIA Request to DOJ*, U.S. DEP’T JUST., <https://www.justice.gov/oip/make-foia-request-doj> [<https://perma.cc/4CZ2-JYD8>].

The specific agencies are free to enact a particular system through which FOIA requests are processed, so long as the overall system complies with the goals of the government in

published in the Federal Register.⁸³ This system has been streamlined, so a requester need not hunt down the appropriate agency on his or her own, but can sort through contacts in a centralized database and continue the process from there.⁸⁴

In certain ways, FOIA functions similarly to discovery in litigation. FOIA is a vehicle through which individuals are able to obtain information about a specific topic, including supporting evidence for a claim to bring against the government.⁸⁵ FOIA is often considered an “informal” discovery process, which can be done during the course of litigation, prior to litigation, or during a discovery hold period, where applicable.⁸⁶

rapidly processing FOIA requests. *See Frequently Asked Questions, supra* note 78 (answering how different agencies will have their own processes). For a further discussion of changing FOIA policies over time, *see infra* Section II.A.2.

The government’s overall policy on FOIA requests, as well as the funding given to agencies to ensure compliance, often shifts with changing Administrations. As a result, FOIA processing times—and even the amount of information provided in response to a FOIA request—vary from Administration to Administration. *See Fact Sheet: New Steps Toward Ensuring Openness and Transparency in Government*, WHITE HOUSE OFF. PRESS SEC’Y (June 30, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-new-steps-toward-ensuring-openness-and-transparency> [<https://perma.cc/27FY-GGPX>]. A common talking point amongst politicians running for the nation’s highest office is a commitment to “openness” or “transparency,” often measured—at least in part—through FOIA compliance. *See The Limits of Transparency and FOIA Under Trump*, FIRST AMENDMENT WATCH N.Y.U., <https://firstamendmentwatch.org/deep-dive/the-limits-of-transparency-and-foia-under-trump/#tab-news-updates> [<https://perma.cc/PJV2-A2PT>]. For a research project dedicated to tracking the transparency of new presidential Administrations, *see id.*

83. 5 U.S.C. § 552(a)(1). For further information regarding these publication requirements, *see supra* note 45.

84. For the interactive database of FOIA agency contacts, *see Agency Search*, FOIA.GOV, <https://www.foia.gov/#agency-search> [<https://perma.cc/5U7C-8YZR>] (scroll to the bottom of the page for the drop-down index of government agencies).

85. *See* Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119, 119–20 (1984).

86. *See Frequently Asked Questions, supra* note 78. The time required to process a FOIA request varies based on the information sought, the volume of documents required to review prior to answering the request, the agency from which the document was requested, and other factors. *See id.* Realistically, the timeframe for responding to a FOIA request—statutorily required to be completed within twenty days, but often not accomplished that quickly—potentially can take longer than the whole of the formal discovery process. *Responding to Requests, supra* note 53. For a discussion of the general timelines of processing FOIA requests, *see infra* note 93.

In the civil discovery context, certain jurisdictions impose a “hold period” during which no formal discovery may take place. For instance, in California most discovery propounded by the plaintiff is stalled for ten days after service of the summons and complaint on the

However, as exemption five notes, “intra- or inter-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency” are not subject to disclosure under FOIA.⁸⁷ This potentially frustrates the discovery-like aspect of FOIA, as certain records available during litigation are exempt from disclosure under FOIA.⁸⁸

Once a request is filed with an agency, the agency has twenty days from the day it receives the request to either accept or deny the request.⁸⁹ The agency may take extra time to process requests requiring more information from the requester,⁹⁰ or requests that encounter “unusual circumstances.”⁹¹ As a practical matter, agencies often do not meet their responsive deadlines.⁹² In 2010, the median response time for a “complex” request was 228 days—nearly eight months, and over ten times the statutorily defined amount.⁹³ When the requester is a news

defendant, or until the defendant’s first appearance in the action. Cal. Code Civ. Proc. § 2030.020; *see also* Noah Schwinghamer, *Civil Law Time Limits*, NOAH SCHWINGHAMER, ESQ., <http://www.nfsesq.com/resources/timelimits/> [<https://perma.cc/59FS-D7JF>] (discussing discovery timelines in California). This only places a hold on formal discovery, and as such, does not ban FOIA requests. As a result, in an action involving an agency defendant, the plaintiff may get a head start on discovery against the defendant by making a FOIA request, well before the defendant has even appeared in the action.

87. 5 U.S.C. § 552(b)(5).

88. *See id.* The potential troublesome scenario that can arise from this exemption is that an individual may have a legitimate claim against the government and not know it, as FOIA exemption five prevents disclosure of certain evidence that a party can only obtain through formal discovery. *See* Nate Jones, *The Next FOIA Fight: The B(5) “Withhold It Because You Want To” Exemption*, UNREDACTED (Mar. 27, 2014), <https://unredacted.com/2014/03/27/the-next-foia-fight-the-b5-withhold-it-because-you-want-to-exemption/> [<https://perma.cc/V294-7WEP>]. This can either lead to frivolous claims, for which the plaintiff believes he or she has a legitimate claim based on evidence that does not exist, or the more problematic scenario of a plaintiff never knowing he or she has a legitimate claim because the information sought is only available in formal discovery. *See id.*

The “B(5) exemption,” as it is commonly called, has been a particular area of concern for FOIA enthusiasts. *See id.* The exemption protects drafts of memoranda within the agencies, leading some agencies to designate years-old documents as “drafts” to escape disclosure of the document. *See id.* The exemption was applied to 12% of all processed FOIA requests in fiscal year 2013, leading some commentators to call it the “withhold-it-because-you-want-to” exemption. *Id.*

89. *Time Periods Under FOIA*, DIGIT. MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/time-periods-under-foia> [<https://perma.cc/D95S-S7LF>]. The agency need not actually deliver the records within the twenty days, but technically must respond with an acceptance or denial of the request. *Id.*

90. OPEN Government Act of 2007, Pub. L. No. 110-175, § 6(a)(1)(I), 121 Stat. 2524, 2526 (2007).

91. 5 U.S.C. § 552(a)(4)(A)(viii)(II)(aa).

92. *Time Periods Under FIOA*, *supra* note 89.

93. Josh Israel, *State Department FOIA Requests Unanswered Four Long Years Later*, CTR. FOR PUB. INTEGRITY (July 6, 2011), <https://publicintegrity.org/2011/07/>

organization⁹⁴ and timeliness is essential to publishing an important piece for public knowledge,⁹⁵ the information sought is long irrelevant after

06/5123/state-department-foia-requests-unanswered-four-long-years-later [https://perma.cc/LP8G-5MW7]. Several Presidential Administrations have emphasized the efficiency and openness of the FOIA process as one of their areas of concern. The Obama Administration was notably concerned with increasing transparency, despite FOIA responses under that Administration taking much longer than the statutory twenty days. *Id.* The Obama Administration also set a record—at the time—for the most outright denials of requests and censorships of records, cut 9% of the full-time employees tasked with handling FOIA requests, and spent \$434 million in fiscal year 2014 *alone* just to process requests. See Ted Bridis, *Obama Administration Sets New Record for Withholding FOIA Requests*, PBS (Mar. 18, 2015, 3:43 PM), <https://www.pbs.org/newshour/nation/obama-administration-sets-new-record-withholding-foia-requests> [https://perma.cc/5PN6-L5PX]. This number includes \$28 million in attorney’s fees spent litigating disputes from denied FOIA requests, despite the Administration itself acknowledging that one in three of its denials was legally improper. *Id.* For a discussion of presidential campaigns and promises of transparency, see *supra* note 82.

The Trump Administration also lacks transparency. During an impromptu speech given on May 22, 2019, President Donald Trump declared himself “the most transparent president” in U.S. history. *‘I Don’t Do Cover-Ups’: President Trump During Rose Garden Press Conference*, CNBC (May 22, 2019, 12:47 PM), <https://www.cnbc.com/video/2019/05/22/i-dont-do-cover-ups-president-trump-during-rose-garden-press-conference.html> [https://perma.cc/73AC-GD2K]. The Trump Administration earns low marks in compulsory disclosures—of note, the Administration requires White House staffers to sign non-disclosure agreements, and Donald Trump has not yet released his tax returns despite years of pressure for him to do so. Andrew Restuccia, *Trump’s ‘Most Transparent President’ Claim Looks Cloudy*, POLITICO (May 23, 2019, 6:45 PM), <https://www.politico.com/story/2019/05/23/trumps-transparency-1342875> [https://perma.cc/5KBD-GGBP]. In the formal FOIA realm, the Trump Administration also falls behind: within its first year, the Trump Administration denied or censored more FOIA requests than at any point in the previous decade, and FOIA lawsuits increased by 70% compared to the Obama Administration’s last full year. *Id.*

For an in-depth analysis of the philosophical basis behind other recent Administrations’ FOIA approaches, see Woojin Noh, *The Clinton and George W. Bush Administrations’ FOIA Policies: The Presidents’ Influences on FOIA Policies* (Oct. 17, 2011) (Ph.D. dissertation, Florida State University), <https://fsu.digital.flvc.org/islandora/object/fsu:183041/datastream/PDF/download/citation.pdf> [https://perma.cc/6WCS-8FDG].

94. Oftentimes, the requester is a political group seeking negative stories about its opponents. This common use of FOIA in election cycles has “inundated federal agencies with Freedom of Information Act requests” to leverage political gain. See Sam Stein, *When It Comes to Political FOIA Requests, the DNC Isn’t the Only Practitioner*, HUFFPOST (Oct. 28, 2010, 8:11 PM), https://www.huffpost.com/entry/when-it-comes-to-politica_n_775683 [https://perma.cc/6STK-RDGW].

95. This scenario comes up when a FOIA request is made in anticipation of publishing an article related to a presidential election: the FBI released a spreadsheet of all requests including the word “Trump” in 2016, along with the “open” and “close” dates of these files. *FOIA Requests Containing the Word Trump*, FBI, <https://vault.fbi.gov/foia-request->

waiting eight months, rendering the entire request process ineffective and useless.⁹⁶ Reforming the FOIA process is a common talking point amongst politicians, but little to no progress has been made in this area.⁹⁷

5. *Appealing an Agency's Handling of a Freedom of Information Act Request*

As the *Detroit Free Press* learned in the Kilpatrick scandal, a denial of an open records request is not necessarily the end of the process. The reporters for the *Detroit Free Press* were left in a catch-22: they knew the settlement existed,⁹⁸ but could not prove it without further evidence, and were denied any ability to obtain such evidence. Because this case involved a state open records request⁹⁹ rather than the federal equivalent, the reporters' only recourse was to sue the City of Detroit, hoping a judge would compel the city to release the information.¹⁰⁰

The federal government implemented a system requiring an appeal through the agency to which the request was directed prior to filing FOIA litigation.¹⁰¹ The Freedom of Information Act Appeals Officer is a single

containing-the-word-trump/foia-requests-containing-the-word-trump/view [https://perma.cc/6C5M-UHGS]. It is unclear when the spreadsheet was last updated, but many requests are listed as "open," as late as November 2019. *See id.*

96. *See* Danielson, *supra* note 72, at 1000–01.

97. *See supra* note 93 and accompanying text (discussing recent Administrations' attempts to increase transparency and the results of these efforts).

98. *See* Jim Schaefer & M.L. Elrick, *Mayor Lied Under Oath, Text Messages Show*, DETROIT FREE PRESS (May 30, 2020, 4:00 AM), <https://www.freep.com/story/news/2020/05/30/detroit-mayor-kwame-kilpatrick-lied-under-oath-text-messages-show/5271857002/> [https://perma.cc/4A8N-9RF5]. To those involved, it was evident a settlement must exist—Kilpatrick was adamant that he would appeal, but suddenly the entire case ended with an award greater than the jury-determined amount. *Id.* The Kilpatrick case illustrates how the existence of a settlement can be somewhat obvious, even when the settlement itself is confidential.

99. *FOIA Request Was Key in Detroit Mayor's Legal Saga*, REPS. COMM. FOR FREEDOM PRESS (Sept. 5, 2008), <https://www.rcfp.org/foia-request-was-key-detroit-mayors-legal-saga/> [https://perma.cc/VS3W-QL6Z].

100. The litigation process was not easy for the *Detroit Free Press*. Mayor Kilpatrick delayed his deposition and attempted to obtain testimony from the reporters regarding their state FOIA request. *Id.* However, the *Detroit Free Press* was ultimately victorious, and the records became public. *See id.*

The reporters who broke the Kilpatrick case, M.L. Elrick and Jim Schaefer, won a Pulitzer Prize in 2009 for their coverage of the story. *The 2009 Pulitzer Prize Winner in Local Reporting, Detroit Free Press Staff, and Notably Jim Schaefer and M.L. Elrick*, PULITZER PRIZES, <https://www.pulitzer.org/winners/detroit-free-press-staff-and-notably-jim-schaefer-and-ml-elrick> [https://perma.cc/Z4XA-6YZV]. For the specific articles the reporters authored that led to the award, *see id.*

101. *See* 43 C.F.R. § 2.57 (2016).

individual within each agency who makes decisions on FOIA appeals,¹⁰² and this intra-agency appeals process must be exhausted prior to filing a civil suit for enforcement of FOIA.¹⁰³ This process tacks on additional time to the processing of a FOIA request. The Code of Federal Regulations indicates that appeals are processed within a twenty-day time frame from the receipt of the appeal,¹⁰⁴ which can be made at any point within ninety days from the allegedly improper response.¹⁰⁵ If the request is time-sensitive, this process may add up to twenty days—in addition to the time required to prepare the appeal—to the overall waiting time for a final decision.

After a final agency decision has been reached on the issue, the individual is free to bring a suit under the FOIA seeking compliance with their request.¹⁰⁶ Lawsuits filed under FOIA reached a record high in 2018 and have been on the rise almost every year since 2008.¹⁰⁷ A record number of lawsuits were left without a decision in 2018, with 1,204 cases stalled somewhere along the litigation process.¹⁰⁸ The Departments of Justice and Homeland Security are the top-sued agencies under FOIA,¹⁰⁹

102. See 43 C.F.R. §§ 2.59(f), 2.60(a) (2016).

103. 43 C.F.R. § 2.57 (2016). One loophole exists to this process, codified in 5 U.S.C. § 552(a)(6)(C)(i): “Any person making a request . . . shall be deemed to have exhausted his administrative remedies . . . if the agency fails to comply with the applicable time limit provisions . . .” 5 U.S.C. § 552(a)(6)(C)(i). Under this provision, if an agency fails to respond within the twenty day timeframe—which may be tolled if the agency requires additional information from the requester, see *supra* note 90 and accompanying text, or extended for unusual circumstances, see *supra* note 91 and accompanying text—the agency automatically loses jurisdiction over the appeal, and the administrative remedies are deemed exhausted. See, e.g., Complaint for Declaratory and Injunctive Relief at 7, *Friends of the Earth v. U.S. Env’t Prot. Agency*, No. 1:18-cv-02837 (D.D.C. Dec. 4, 2018), ECF No. 1, https://www.biologicaldiversity.org/campaigns/open_government/pdfs/EPA-FOIA-Complaint-As-Filed-12-4-2018.pdf [<https://perma.cc/FR4W-8AY8>] (discussing the exhaustion of administrative remedies through 5 U.S.C. § 552(a)(6)(C)(i)). However, if the agency can show “exceptional circumstances” warranting the delay and “due diligence” in responding to the request, the agency may retain jurisdiction over the appeal. § 552(a)(6)(C)(i).

104. 43 C.F.R. § 2.58(a)–(b) (2019).

105. § 2.62.

106. § 2.61(b).

107. Christine Mehta, *Annual Report: FOIA Lawsuits Reach Record Highs in FY 2018*, FOIA PROJECT (Nov. 12, 2018), <http://foiaproject.org/2018/11/12/annual-report-foia-lawsuits-reach-record-highs-in-fy-2018/> [<https://perma.cc/W9RM-44YL>].

108. *Id.*

109. *Id.*

likely because a number of exemptions and exclusions apply only to these agencies.¹¹⁰

FOIA is a complex mechanism by which the general public becomes aware of the federal government’s activities. FOIA, however, does not ensure every piece of information sought will be disclosed, but absent a valid exception or exemption,¹¹¹ it is presumed disclosable.¹¹² However, even outside of the FOIA context, the government has an interest in keeping certain things confidential. The remaining introductory portion of this Comment will discuss the use of confidential settlement agreements.

B. Confidential Settlement Agreements

1. Commonality of Pre-Trial Resolutions

According to one commentator, “surprisingly little” information exists about how common settlement agreements are in civil litigation.¹¹³ The majority of civil cases settle—or are otherwise disposed of—prior to trial.¹¹⁴ Few cases complete the litigation process entirely—according to one U.S. Courts report, only 0.8% of cases reached trial in the U.S. District Courts in 2018.¹¹⁵ The majority of these cases that do not make it to trial still involve some level of court involvement, with most resolved “before trial”—200,549 pre-trial resolutions of 290,311 total cases—and another large amount resolved “during or after pretrial”—32,073 cases.¹¹⁶ Only 55,246 cases were resolved with no court involvement whatsoever,

110. For example, exclusion three related to FBI documents can necessarily only apply to the Department of Justice; exemption seven related to law enforcement efforts is likewise in the exclusive control of the Department of Justice; and documents pursuant to exemption one related to national security likely are only found in the Department of Homeland Security. *See supra* Section II.A.2.

111. *See generally supra* notes 51–54 and accompanying text (discussing FOIA’s exceptions and exemptions).

112. *See* 5 U.S.C. § 552(a)(1)–(2) (identifying information to be made available to the public).

113. Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112 (2009).

114. U.S. CTS., TABLE C-4: U.S. DISTRICT COURTS–CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2018, at 1 (2018), <https://www.uscourts.gov/file/25824/download> [<https://perma.cc/R3QF-VUMV>] [hereinafter TABLE C-4]. Pursuant to 28 U.S.C. § 604(a)(2), the Administrative Office of the U.S. Courts is required to publish caseload information annually; the Office reports this data every six months on the U.S. Courts website. *See Federal Judicial Caseload Statistics 2018*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics> [<https://perma.cc/A3HA-NRR3>]. The data does not identify the age of the case, so this information may also include cases not yet ready for trial.

115. TABLE C-4, *supra* note 114.

116. *Id.*

comprising only 19% of all cases in the U.S. District Courts in 2018.¹¹⁷ Many cases resolve prior to trial, but for reasons other than settlement.¹¹⁸

Settlement agreements are a way to creatively resolve claims without having to complete the litigation process.¹¹⁹ Confidential settlements are not the only specific subset of settlements—parties are free to opt for whatever provisions they want, so long as the agreement remains enforceable as a valid contract.¹²⁰ For instance, structured settlements are a subset of settlements often used when the beneficiary is a minor. The payments in these settlements are made over a long period of time pursuant to some agreed upon structure, generally intended to disallow the minor from spending the settlement money until he or she is of age.¹²¹ The evolving contractual nature of the field of settlements suggest how confidentiality became a provision on which parties are free to agree in their contracts.¹²²

117. *Id.*

118. *Covering Civil Cases – Journalist’s Guide*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/covering-civil-cases-journalists-guide> [<https://perma.cc/JAM5-WR8D>]. The data does not differentiate the disposition of the case, but reasonably these cases could be disposed of with a dispositive motion; dismissal, whether at the direction of the court or the plaintiff simply deciding to drop the case; pre-emption; removal; or any other potential method. *Id.* Because each district in the federal judiciary follows its own local rules, data collection becomes even more challenging. Additionally, each judge can enact his or her own chamber rules related to settlements. *Judges and Judicial Administration – Journalist’s Guide*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide> [<https://perma.cc/JU7J-QEXH>]. Determining the number of cases resolved due to settlement becomes a difficult task when the timelines for doing so are different within each individual district or chamber.

119. *What Does It Mean to Settle a Case?*, FINDLAW, <https://litigation.findlaw.com/legal-system/what-does-it-mean-to-settle-a-case.html> [<https://perma.cc/8HT8-WJDF>].

120. Enforceability of a contract is generally governed by state law, so the requirements for an enforceable contract vary. Krystyna Blokhina Gilkis, *Contract*, CORNELL L. SCH., L. INFO. INST. (July 2019), <https://www.law.cornell.edu/wex/contract> [<https://perma.cc/5BXV-R34Z>]. At the federal level, all federal contracts are governed by Title 41 of the U.S. Code. The general requirements for an enforceable contract are (1) mutual assent, expressed by a valid offer and acceptance; (2) adequate consideration; (3) capacity; and (4) legality. *See id.*; *see also* TIMOTHY MURRAY, 1 CORBIN ON CONTRACTS: FORMATION OF CONTRACTS § 1.19 (rev. ed. 2018).

121. *Structured Settlements for Minors*, CBC SETTLEMENT FUNDING, <https://cbcsettlementfunding.com/structured-settlement/minors/> [<https://perma.cc/B544-KNUM>].

122. *See generally* JOHN E. MURRAY, JR., 9 CORBIN ON CONTRACTS: THIRD PARTY BENEFICIARIES ASSIGNMENT JOINT AND SEVERAL CONTRACTS § 47.9 (rev. ed. 2020) (discussing confidentiality, structured settlements, claims against the government, and the changing public policy limitations on these situations over time).

2. Settlements and Available Contract Remedies

Confidential agreements also exist outside the settlement context. Confidentiality clauses are common in contracts,¹²³ exist as non-disclosure agreements,¹²⁴ and are implied from certain relationships.¹²⁵ Non-disclosure agreements are freestanding confidentiality agreements aimed to prevent one or both parties from disclosing certain information.¹²⁶ These agreements are common in business settings¹²⁷ and certain employment situations.¹²⁸ Non-disclosure agreements are different from confidentiality provisions found in settlements, but aim to accomplish similar goals.¹²⁹

123. See Elizabeth Tippet, *Non-Disclosure Agreements and the #MeToo Movement*, DISP. RESOL. MAG., Winter 2019, at 12, 13, https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/ [<https://perma.cc/VNV9-W6BD>] (discussing how confidentiality clauses are common in contracts for employees exposed to intellectual property, but how confidentiality clauses can often prevent an employee from disclosing unlawful conduct in the workplace).

124. See Richard Harroch, *The Key Elements of Non-Disclosure Agreements*, FORBES (Mar. 10, 2016, 11:45 AM), <https://www.forbes.com/sites/allbusiness/2016/03/10/the-key-elements-of-non-disclosure-agreements/#7341c1e4627d> [<https://perma.cc/2VGH-YTZS>] (discussing common components of a non-disclosure agreement).

125. MURRAY, *supra* note 120, § 1.19.

126. See Harroch, *supra* note 124.

127. See *id.*

128. For example, the Trump Administration requires all high-level White House staffers to sign a non-disclosure agreement (NDA), which extends to after the Administration's end. Ruth Marcus, *Trump Had Senior Staff Sign Nondisclosure Agreements. They're Supposed to Last Beyond His Presidency*, WASH. POST (Mar. 18, 2018, 12:56 PM), https://www.washingtonpost.com/opinions/trumps-nondisclosure-agreements-came-with-him-to-the-white-house/2018/03/18/226f4522-29ec-11e8-b79d-f3d931db7f68_story.html [<https://perma.cc/W9M7-NALR>]. These agreements force staffers who ultimately disclose confidential information about the President to pay damages for their contractual breach, allegedly in the amount of \$10 million. *Id.* The staffers indicate that the agreements are intended to mirror those signed by employees of Trump Tower prior to Donald Trump's presidency. *Id.* Some staffers only signed the agreement because they believed it would be unenforceable, or after being pressed to do so by former White House Chief of Staff Reince Priebus and The White House Counsel's Office. *Id.* Though not yet legally challenged, commentators have called the non-disclosure agreements "oppressive," "constitutionally repugnant," and "an outrageous effort to limit and chill speech." *Id.*

129. NDAs are common as addenda to contracts for everything ranging from employment agreements to purchases of tech companies. See Catherine Bragg, *Non-Disclosure Agreements in Review*, A.B.A. (Aug. 20, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/summer/non-disclosure-agreement/ [<https://perma.cc/3DAU-2FVK>]. The general premise with an NDA is that certain elements—identified in the NDA—are to remain confidential. *Id.* Like confidentiality clauses, they can bind one, or both parties. However, a settlement is reached after one person makes a claim, and the confidentiality provision is added as part of the resolution of that claim. *Id.* An NDA may be used this way, but is used preemptively to keep information confidential, unrelated to some sort of claim of misconduct that accompanies a settlement. See *id.*

The contractual nature of a confidential settlement also gives rise to contractual remedies for a breach of the settlement agreement.¹³⁰ If a party breaks a confidentiality clause, the non-breaching party can bring a breach of contract claim against the breaching party and recover damages.¹³¹ When the non-breaching party is an organization, the damages from a breach of confidentiality could be massive. If the potential impact of a company's unfavorable information going public was significant enough for the organization to agree to settle the issue, a breach of this agreement is likely to be very costly.¹³² Likewise, when a party breaches the confidentiality clause of the settlement agreement, the non-breaching party is entitled to rescission and restitution of the contract.¹³³ The settlement agreement can be withdrawn completely, including the financial benefit

130. See Edmund J. Sikorski, Jr., *Breach of Confidentiality Provision Leads to Loss of Settlement*, A.B.A. (Nov. 17, 2016), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2016/breach-of-confidentiality-provision-leads-to-loss-of-settlement/> [<https://perma.cc/D7XN-22PB>].

131. See *id.*

132. See, e.g., James V. Grimaldi & Caroline E. Mayer, *Firestone, Ford Settle Tire Lawsuit*, WASH. POST (Jan. 9, 2001), <https://www.washingtonpost.com/archive/politics/2001/01/09/firestone-ford-settle-tire-lawsuit/2e162ee3-c28f-4231-8f94-520e41b67360/> [<https://perma.cc/VH6H-NK98>]. A prominent controversy in this area arose in the early 2000's when Ford partnered with Firestone, a tire manufacturer, to provide tires for its Explorer line of SUVs. See *id.* The tires turned out to be defective and caused hundreds of accidents in the new Explorers. See *id.* Ford and Firestone settled claims with accident victims, including with one woman who received \$30 to \$45 million, according to sources familiar with the agreement. See *id.* The amount and terms of the settlements were not disclosed, effectively allowing Ford and Firestone to chill hundreds of claims of products liability while the companies attempted to recall and replace the tires. *Id.* The tires caused at least 174 deaths and 700 injuries. John Greenwald, *Inside the Ford/Firestone Fight*, TIME (May 29, 2001), <http://content.time.com/time/business/article/0,8599,128198,00.html> [<https://perma.cc/6FWX-QG5A>].

133. But see *Higbie v. United States*, 778 F.3d 990, 994–95 (Fed. Cir. 2015). *Higbie* analyzes a case where a plaintiff claimed the federal government breached a confidentiality agreement, arguing that the government's use of mediation materials violated the confidentiality agreement made during mediation. See *id.* at 992. Plaintiff *Higbie* won this argument, but the Court of Appeals for the Federal Circuit found that the agreement itself had provided for a remedy for its breach—that the mediation materials used by the government in subsequent proceedings must be excluded. *Id.* at 994. Because of this provision, the Court did not find monetary damages mandatory under the agreement, as the existence of agreed-upon non-monetary relief precluded mandating monetary damages. *Id.* at 994–95. The dissent by Judge Taranto finds no compelling basis to move away from the “principle long understood in contract law: ‘damages are always the default remedy for breach of contract.’” *Id.* at 996 (Taranto, J., dissenting) (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996) (plurality opinion)).

obtained by the breaching party.¹³⁴ The American Bar Association assesses the importance of the issue, stating that “confidentiality agreements need to be taken seriously and . . . the consequences of violating them can be serious.”¹³⁵ The availability of contractual remedies for a breach of a settlement agreement give the non-breaching party significant legal recourse, and give the parties creative freedom to contract for remedies of their choice.¹³⁶

When a confidentiality clause is broken, disagreement exists as to whether the underlying contract is open for re-evaluation. If it is, the other provisions of the contract may be open to judicial interpretation.¹³⁷ The U.S. Supreme Court has not decided whether a breached contract, subsequently sued upon, reopens the original claim.¹³⁸ The lower courts are divided on the issue.¹³⁹ The Ninth Circuit allows the reopening of the original claim.¹⁴⁰ In contrast, the Sixth Circuit believes doing so is “simply not supported” by precedent because the litigation on the breach of contract claim may be unrelated to the claims in the underlying lawsuit.¹⁴¹

134. The benefit refers to either the financial reward to the plaintiff in the underlying suit, or the defendant’s right not to be sued on the underlying issue, although this is subject to a jurisdictional split. *See generally infra* note 141 and accompanying text (discussing the jurisdictional split).

135. Sikorski, Jr., *supra* note 130.

136. For an example of contracting around default contractual remedies, see *Higbie*, 778 F.3d at 994–95. Freedom to contract for specific remedies, as endorsed by the Federal Circuit in *Higbie*, has potential for causing issues when the parties to a contract are not on equal footing in drafting the contract. *See id.* at 995. When one party is more sophisticated than the other—common in employment contexts—that party is incentivized to incorporate remedies for a breach of contract into the contract itself, as the less-sophisticated party may not understand the contracted-for remedy as precluding any other remedy. *See id.* at 996 (Taranto, J., dissenting). This issue was addressed by the dissent in *Higbie*, which expressly discusses case law allowing monetary damages for a breach of confidentiality provision in employment contracts, and several other specific contexts. *Id.* The employment case discussed in the *Higbie* dissent, *Youtie v. Macy’s Retail Holding, Inc.*, 626 F. Supp. 2d 511 (E.D. Pa. 2009), is a District court-level case. *See Higbie*, 778 F.3d at 996 (Taranto, J., dissenting).

137. *See* Jim Wagstaffe, *Enforcing Settlements and Consent Decrees*, LEXIS PRAC. ADVISOR J. (Sept. 12, 2018), <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/enforcing-settlements-and-consent-decrees> [<https://perma.cc/AW8X-8FBE>].

138. *Id.*

139. *Id.*

140. *See Keeling v. Sheet Metal Workers Int’l Ass’n*, 937 F.2d 408, 410 (9th Cir. 1991) (holding that the “frustration” of the purpose of the settlement agreement is sufficient to constitute an exceptional circumstance under 60(b)(6)). Under a rescission and restitution theory, in order to put the non-breacher in the position he or she would have been in had the contract never been made, the non-breacher must necessarily regain the right to sue on the underlying action, the pivotal bargaining point of the settlement agreement. *See id.*

141. *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491, 503 (6th Cir. 2000) (declining to extend Rule 60(b) to reopen a claim underlying a breach of contract of a settlement agreement). The Sixth Circuit takes the position that the litigation surrounding a

The Sixth Circuit case *McAlpin v. Lexington 76 Auto Truck Stop, Inc.* also addresses another issue with breach of contract claims arising out of breached settlement agreements.¹⁴² While a settlement may be obtained under a federal court claim, the settlement itself is a contract properly litigated in state court.¹⁴³ This distinction leads to confusion in the subsequent breach of contract claim when the settlement agreement is breached. Unless the parties satisfy diversity jurisdiction,¹⁴⁴ or some independent ground exists for supplemental jurisdiction,¹⁴⁵ the parties will be forced to litigate the

breach of contract claim may simply have nothing to do with the situation surrounding the formation of that contract, and the breach may be so minimal that reopening the underlying claim is fundamentally unfair. *See id.*

142. *See id.*

143. *See id.* at 498–99 (holding unless either independent grounds for jurisdiction exist or the federal court retains jurisdiction over a settlement, the federal court is a court of limited jurisdiction that may not hear disputes of settlements entered into based on federal court suits).

144. *See generally* 28 U.S.C. § 1332.

145. Likely, supplemental jurisdiction would arise when the original lawsuit between the two parties would be re-opened under Federal Rule of Civil Procedure 60(b) because of the breach of the settlement agreement, and the state law breach of contract claim would be a state law claim subject to supplemental jurisdiction of the federal courts in the subsequent re-litigation of the original—federal—claim. *See* 28 U.S.C. § 1367(a); FED. R. CIV. P. 60(b). Supplemental jurisdiction is discretionary, and the federal court may still choose not to hear the state claim. *See* 28 U.S.C. § 1367(c). Finally, lower courts are divided on whether to allow the original claim to reopen, as this may not be consistent with Fed. R. Civ. Proc. 60(b). *See McAlpin*, 229 F.3d at 502–03. In that case, there would be no basis for federal jurisdiction whatsoever—unless the claim meets the diversity requirements for 28 U.S.C. § 1332—and thus no federal claim on which to attach a supplemental state claim. *See id.* at 502; 28 U.S.C. § 1332(a). The Supreme Court has not heard the issue of reopening the underlying claim. *McAlpin*, 229 F.3d at 503 (referencing the Supreme Court’s acknowledgment that while it has not addressed the issue, other circuits have).

This analysis presupposes the contract was made pursuant to state law. In the vast majority of cases, this is appropriate—state law generally governs all contractual formation. *See, e.g., Walker v. Builddirect.com Techs., Inc.*, 349 P.3d 549, 552 (Okla. 2015). However, when the federal government enters into a contract, specific federal statutes apply. *See, e.g.,* 41 U.S.C. § 3101. Title 41 of the U.S. Code governs the formation of contracts with the federal government. A breach of contract claim arising under a Title 41 contract satisfies federal question jurisdiction and requires no supplemental source of jurisdiction. *See* 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); 41 U.S.C. § 7107 (“[A] contractor may appeal the [agency decision regarding a breach of contract claim] to the United States Court of Appeals for the Federal Circuit”); 41 U.S.C. § 7102 (“Unless otherwise specifically provided in this chapter, this chapter applies to any express or implied contract . . . made by an executive agency”); *see, e.g.,* PIOTROWSKI, *supra* note 37 (discussing the role of federal contractors in FOIA).

breach of contract claim in state court.¹⁴⁶ *McAlpin* stands for the proposition that an *independent* basis for federal jurisdiction is required, as the underlying case is not subject to reopening under Federal Rule of Civil Procedure 60(b).¹⁴⁷ Thus, the federal judiciary's involvement in contractual disputes is necessarily limited to the few categories of contracts arising under federal law, those with diversity jurisdiction, or the limited circumstances in which a court exercises discretionary supplemental jurisdiction over a state-law claim.

3. Policy Considerations Behind Confidential Settlements

Confidentiality arose as a natural extension of the freedom to contract. Confidentiality benefits defendants that are especially concerned with continued business aspects of the settlement.¹⁴⁸ For instance, large corporations frequently use confidential settlement agreements to settle workplace harassment claims or products liability actions.¹⁴⁹ The confidentiality provision in these types of settlements allows the corporation to pay the injured plaintiff's damages in return for the plaintiff's promised silence on the issue of the corporation's liability.¹⁵⁰ This keeps other would-be plaintiffs in the dark on their potential claims, and in the long run, could save the defendant corporation a great deal of money.¹⁵¹ The settlement is likely to be overvalued due to the confidentiality requirement, but the

146. See generally 28 U.S.C. §§ 1332, 1367; *supra* note 145.

147. *McAlpin*, 229 F.3d at 503; see FED. R. CIV. P. 60(b).

148. See Bradford J. Kelley & Chase J. Edwards, #MeToo, Confidentiality Agreements, and Sexual Harassment Claims, BUS. L. TODAY (Oct. 17, 2018), <https://businesslawtoday.org/2018/10/metoo-confidentiality-agreements-sexual-harassment-claims/> [<https://perma.cc/SCY2-UYH4>].

149. See *id.*; see also Kevin M. McDonald, *Separations, Blow-Outs, and Fallout: A Treadise on the Regulatory Aftermath of the Ford-Firestone Tire Recall*, 37 J. MARSHALL L. REV. 1073, 1078 (2004) (discussing the number of settlements of claims arising out of the Ford-Firestone products liability controversy).

150. See, e.g., McDonald, *supra* note 149, at 1078.

151. If the stand-by plaintiffs fail to bring their claim because of the settlement, the defendant corporation is incentivized to pay the plaintiff more in the settlement to swiftly execute the confidential agreement to prevent information about the claim reaching the stand-by plaintiffs. See, e.g., Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 556–57 (2008). The faster the defendant is able to confidentially settle the plaintiff's claims, the less likely it is that the stand-by plaintiffs will learn of the plaintiff's claims and recognize their own right to compensation. See generally Ronald L. Burdge, *Confidentiality in Settlement Agreements is Bad for Clients, Bad for Lawyers, Bad for Justice*, A.B.A. (Nov. 1, 2012), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_bad_clients_lawyers_justice/ [<https://perma.cc/7SX7-KEF4>] (arguing that confidentiality clauses protect the public from important information).

confidentiality could prevent many other claims from seeing the light of day.¹⁵² Similarly, corporations place extreme value in their reputations, and confidentiality provisions can provide security that their reputation will not be negatively impacted by the litigation.¹⁵³

However, the parties are not free to contract for anything they want. A confidentiality provision in a settlement agreement is never absolute, and can only accomplish one of two things: either the parties are not allowed to talk about the settlement itself, or the parties agree to seal the entire record—including discovery, pleadings, and so forth.¹⁵⁴ The first option allows for some creativity—confidentiality provisions can simply require the amount of the settlement to remain secret, or can require all terms to be confidential, or anything within this spectrum. Settlements and confidentiality agreements must also follow the regular rules of contract formation, and confidentiality agreements often conflict with the requirement that a contract may not be contrary to public policy.¹⁵⁵ When a contract

152. See Grimaldi & Mayer, *supra* note 132 (discussing the Ford-Firestone controversy that lead to large payments for plaintiffs in an attempt to chill subsequent claims); see also Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> [<https://perma.cc/D88Q-F3R2>] (discussing how Harvey Weinstein's confidential settlements with victims of his sexual misconduct prevented other victims from bringing their claims).

153. See Kelley & Edwards, *supra* note 148.

154. Blanca Fromm, Comment, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 677 (2001).

155. A modern debate as to the enforceability of a confidentiality agreement arguably contrary to public policy has come to the public's attention with the Donald Trump-Stephanie Clifford non-disclosure agreement scandal. In that agreement, Clifford, an adult actress, allegedly engaged in a sexual relationship with President Donald Trump prior to his election. See Wilson R. Huhn, *The Trump/Clifford Non-Disclosure Agreement: Violation of Public Policy and the First Amendment*, JURIS MAG. (May 13, 2018), <http://sites.law.duq.edu/juris/2018/05/13/the-trump-clifford-non-disclosure-agreement-violation-of-public-policy-and-the-first-amendment/> [<https://perma.cc/9LTW-UYBF>]. In 2016, before President Trump took office, his personal attorney Michael Cohen negotiated a non-disclosure agreement with Clifford. *Id.* Clifford was prohibited from disclosing any information about the alleged affair with Trump. *Id.* She received \$130,000 in exchange for signing the agreement. *Id.* Many commentators refer to this payout as “hush money.” See, e.g., *id.*

Clifford would later claim the agreement was unenforceable and attempt to be released from the agreement, enabling her to discuss the affair. See Michael Finnegan, *Stormy Daniels' Lawsuit Against Trump Is Dismissed by Judge*, L.A. TIMES (Mar. 7, 2019, 7:48 PM), <https://www.latimes.com/politics/la-na-pol-stormy-daniels-trump-lawsuit-dismissed-20180307-story.html> [<https://perma.cc/97PA-LWBE>]. She filed three lawsuits against Trump and Cohen, arguing that the agreement was invalid, that she had been defamed, and that her personal attorney colluded with Trump and Cohen and acted against her interests. *Id.* Clifford's first lawsuit, related to the validity of the contract, was dismissed after

is held to violate public policy, courts may not enforce the provisions of the contract.¹⁵⁶

While confidentiality has clear benefits for defendants, it can also benefit the individual plaintiff. If the representation on the plaintiff's behalf is aware of the policy surrounding confidentiality, the lawyer may push for a larger settlement amount in return for their client's confidentiality on the defendant's liability.¹⁵⁷ Even the dollar amount of the settlement can be confidential, requiring defendants to pay large sums of money without public awareness.¹⁵⁸ This benefits plaintiffs by ensuring the general public is not privy to their specific financial situation.

Confidentiality also discourages "stand-by" plaintiffs. Stand-by plaintiffs are individuals who wait and see what the outcome of their claim would be until they see the outcome of pending litigation against the same defendant.¹⁵⁹ If these stand-by plaintiffs are unable to watch from the sidelines, it is possible they will either be encouraged to bring their suit in

Trump and Cohen agreed to release Daniels from the agreement, rendering the lawsuit moot. *Id.* The court did not reach the issue of whether the agreement was enforceable or invalid as contrary to public policy. *Id.* Eventually, Cohen would be sentenced to jail time for campaign finance violations related to his role in using Trump's campaign funds to pay the \$130,000 to Clifford. See Kara Scannell & Gloria Borger, *Michael Cohen's Life Behind Bars*, CNN (June 7, 2019, 7:35 AM), <https://www.cnn.com/2019/06/06/politics/michael-cohen-jail-otisville/index.html> [<https://perma.cc/H2CM-425D>]. Beginning in the spring of 2017, Cohen began serving his three-year sentence. *Id.* According to one article, prison is treating Cohen very well and he is "more relaxed than he has ever been." *Id.*

156. See, e.g., *Saltzman v. Thomas Jefferson Hospitals, Inc.*, 166 A.3d 465, 475 (Pa. 2017). The contract may include a "severability clause," which provides that when one portion of a contract is found unenforceable, that portion is "severed" from the larger agreement, and the remaining agreement remains enforceable. See, e.g., *Penberthy v. AT&T Wireless Servs., Inc.*, 354 F. Supp. 2d 1323, 1327 (M.D. Fla. 2005) (discussing the enforceability of separate provisions in a contract that contains a severability clause).

157. See Stacy Perman, *#MeToo Law Restricts Use of Nondisclosure Agreements in Sexual Misconduct Cases*, L.A. TIMES (Dec. 31, 2018, 3:00 AM), <https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html> [<https://perma.cc/YU55-GRHB>] (discussing the bargaining imbalance that may hinder bargaining for plaintiffs and how some advocates believe a ban on confidential settlements may make it more difficult for victims to obtain settlements).

158. Both parties can request that the amount remain confidential. See *id.*

159. The rules of joinder and preclusion prohibit this practice to a certain extent, but unless the stand-by plaintiff was "adequately represented" in the initial action, the second action is usually valid. See *Taylor v. Sturgell*, 553 U.S. 880, 896–98 (2008). Only six situations exist in which a party can be bound by an earlier action in the res judicata context, all of which require some element of privity or representation of the second plaintiff in the initial action. *Id.* at 893–95. The federal rules of joinder only mandate joinder of a new plaintiff in situations where the court "cannot accord complete relief among existing parties" or disposing of the action without the additional plaintiff would either result in an inconsistent obligation to an existing party or impair the ability of the additional plaintiff in protecting his or her interests. FED. R. CIV. P. 19.

a timely manner, or not bring their suit at all.¹⁶⁰ This can be a driving force behind defendants pushing for confidentiality in their settlement agreements. Generally, the provision requiring confidentiality aims to avoid additional lawsuits on the same matter, a situation inherent in cases where stand-by plaintiffs are waiting to see if bringing their claims will be lucrative.¹⁶¹

4. Confidentiality in Workplace Sexual Misconduct Cases

The issue of confidentiality in settlements for sexual tort cases is complex, particularly those occurring in the workplace. These issues range anywhere from an “accidental” brushing against a person’s body¹⁶²

160. In the Harvey Weinstein scandal, the “chilling” effect confidentiality has on additional plaintiffs coming forward is a common call for a changed policy with regards to confidential settlements. See *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC NEWS (May 29, 2020), <https://www.bbc.com/news/entertainment-arts-41594672> [<https://perma.cc/N4E5-MPT7>]. Because Weinstein settled disputes confidentially, the hundreds—if not more—of women with claims of sexual misconduct against Weinstein all believed they were the only ones with such a claim. *Id.* When faced with a Hollywood mogul with significant industry power, bringing a claim as a lone claimant is a high-risk situation for plaintiffs, especially those looking to work in the industry. *Id.*

161. See, e.g., *Harvey Weinstein Timeline*, *supra* note 160 (an example of a widespread misconduct within an organization in which additional individuals made allegations over a period of time).

162. A common story with ex-Senator, ex-Vice President, and 2020 Presidential hopeful Joe Biden has been his “too-long hugs” and “brushing” up against female staffers. See Lissandra Villa & Charlotte Alter, *What We Know About Tara Reade’s Allegation that Joe Biden Sexually Assaulted Her*, TIME (May 2, 2020, 8:55 PM), <https://time.com/5831100/joe-biden-tara-rea-de-allegation/> [<https://perma.cc/VZ2R-UA7G>]. In the #MeToo era, at least seventeen women have come out with allegations of this sort against Biden—one of whom, Tara Reade, alleges that Biden sexually assaulted her by digitally penetrating her while she worked for him in the Senate in 1993. *Id.* Biden vehemently denies this allegation, and some are calling the allegation a “challenge” of the #MeToo movement. *Id.*; Mara Liasson, *Sexual Assault Allegation Against Joe Biden Presents MeToo Challenge*, NPR (May 20, 2020, 7:10 AM), <https://www.npr.org/2020/05/20/859280849/sexual-assault-allegation-against-joe-biden-presents-metoo-challenge> [<https://perma.cc/F5KC-WQBD>].

Many individuals, including Biden himself, are calling for the release of his records from his days in the Senate for the purpose of determining whether a complaint from Reade exists. Villa & Alter, *supra*. These records are not public until two years after the end of Biden’s public service career and cannot be requested through FOIA as they are from his position with the Senate, not his time in the Executive Branch. See *supra* Section II.A.2. This perhaps illustrates one shortcoming of FOIA—its scope is decidedly narrow when considering all the business conducted by and within the federal government.

to violent criminal offenses like rape and assault.¹⁶³ The #MeToo movement illustrated the prominence of sexual misconduct: 81% of women have reported experiencing some form of sexual harassment during their lifetime.¹⁶⁴ Allowing common offenders of sexual harassment to insist on the confidentiality of his or her victims as a condition of a settlement ensures the offender can continue to prey upon victims without knowledge of his or her past history of misconduct coming to light.¹⁶⁵

The public has begun to take notice of such settlements and demand change. Legislatures in many states have taken steps to disallow organizations from confidentially settling sexual misconduct claims at all.¹⁶⁶ In the #MeToo era,¹⁶⁷ new issues related to employers settling claims of sexual harassment arise quickly. Legislatures address these common questions,

163. Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1461–62 (1986).

164. Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018, 7:43 PM), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment> [https://perma.cc/TC58-UEYZ].

165. Harvey Weinstein, an entertainment mogul, extensively used non-disclosure agreements and large settlements with his victims as a tactic to evade accountability for twenty years. See Farrow, *supra* note 152. As of 2019, Weinstein is accused of a variety of sexual misconduct offenses by ninety-five women. *The Many Women Who Have Accused Harvey Weinstein of Sexual Misconduct*, YAHOO! ENT. (Sept. 9, 2019), <https://www.yahoo.com/entertainment/one-year-later-long-list-harvey-weinsteins-accusers-165106548.html?guc-counter=1> [https://perma.cc/Y7ZK-USPR]. Weinstein is currently facing charges of two counts of predatory sexual assault, one count of criminal sexual assault, and two counts of rape in New York. *Harvey Weinstein's Sex-Crimes Charges Streamlined by Judge in Consolidation Move*, USA TODAY (Sept. 6, 2019, 6:13 PM), <https://www.usatoday.com/story/entertainment/celebrities/2019/09/06/harvey-weinsteins-sex-crime-charges-streamlined-judge/2235732001/> [https://perma.cc/BX7Z-87V7]. In many cases, Weinstein accusers have been thwarted by statutes of limitations. See *id.*

166. See *States Move to Limit Workplace Confidentiality Agreements*, CBS NEWS (Aug. 27, 2018, 8:39 AM), <https://www.cbsnews.com/news/states-move-to-limit-workplace-confidentiality-agreements/> [https://perma.cc/Q44A-VQQG]. For a list of those states having passed, or attempting to pass, legislation disallowing employers to confidentially settle sexual harassment claims, see *id.*

167. The #MeToo movement began in October of 2017 and continues today. #MeToo: *A Timeline of Events*, CHI. TRIB. (Aug. 10, 2020, 4:32 PM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmstory.html> [https://perma.cc/8TFH-326V]. The phrase “Me Too” has historic ties to 2006, when it was used to unite victims of sexual violence. *Id.* The movement began when actress Ashley Judd accused Harvey Weinstein of sexual misconduct, and gained momentum when actress Alyssa Milano tweeted: “If all the women who have been sexually harassed or assaulted wrote ‘Me too.’ as a status, we might give people a sense of the magnitude of the problem.” *Id.*; see also Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976 (“If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”). For a comprehensive running timeline of significant events in the movement, see #MeToo: *A Timeline of Events*, *supra*.

echoing concerns of the general public: Should employers be allowed to confidentially settle their employee's sexual harassment claims? What if their contract has an arbitration agreement, and that claim never sees the light of day in court—and never becomes public knowledge? Should prominent public figures be allowed to commit sexual misconduct and pay the victim large sums of money in return for their silence? Is this just government-endorsed hush money?¹⁶⁸

Social media also plays a critical role in modern sexual misconduct cases. In the world of social media, news travels fast—a lesson learned the hard way by the Snay family in *Gulliver Schools, Inc. v. Snay*.¹⁶⁹ A college-aged daughter's conduct revoked the settlement award of her parents when she commented on her Facebook page: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."¹⁷⁰ The court in *Gulliver*¹⁷¹ articulated that this was "precisely what the confidentiality agreement was designed to prevent," even though the person who disclosed the information publicly was not a party to the litigation.¹⁷² Patrick Snay, the father involved in the settlement, was not permitted to disclose the terms of the settlement to his daughter, who ultimately posted the information on Facebook.¹⁷³ Even though the daughter was not a party to the settlement, her announcement of the settlement frustrated the confidentiality agreed to by her parents.¹⁷⁴

Likewise, in the #MeToo era, the news of yet another sexual harassment scandal at the hands of a large organization, corporation, or high-profile

168. MJ Lee, Sunlen Serfaty & Juana Summers, *Congress Paid Out \$17 Million in Settlements. Here's Why We Know So Little About that Money.*, CNN POLITICS (Nov. 16, 2017, 8:10 PM), <https://www.cnn.com/2017/11/16/politics/settlements-congress-sexual-harassment/index.html> [<https://perma.cc/4V5K-LKNR>].

169. *Gulliver Schs., Inc. v. Snay*, 137 So. 3d 1045 (Fla. Dist. Ct. App. 2014).

170. On a procedural point, the recession of the settlement agreement was based on Mr. Snay's, her father, breach. *Id.* at 1046–47. The daughter was not a party to the lawsuit. *Id.* at 1047. When Mr. Snay disclosed to his daughter that he settled with Gulliver, he breached the confidentiality he held with Gulliver. *Id.* at 1046, 1048.

171. *Snay* is a breach of contract case; the underlying issue involved a claim by plaintiff Snay against defendant Gulliver Schools. *Id.* at 1046. Because the initial lawsuit between the parties settled, the second lawsuit involved a breach of contract—the settlement agreement—and a claim to enforce the provisions of that agreement. *See id.* at 1046–47.

172. *Id.* at 1047–48.

173. *Id.* at 1046–47.

174. *Id.*

individual quickly becomes a news story.¹⁷⁵ Victims of sexual misconduct are speaking out through participation in awareness events,¹⁷⁶ social media posts,¹⁷⁷ traditional news outlets,¹⁷⁸ and numerous other methods of expression. Given the speed with which news travels, organizations in a position to prevent the disclosure of unfavorable information are very incentivized to do just that.¹⁷⁹

In response to *#MeToo*, the State of California passed legislation prohibiting confidential settlements in sexual assault, harassment, and workplace discrimination cases.¹⁸⁰ This law also includes provisions for a “failure to prevent” an act of workplace harassment or discrimination based on sex, invalidating confidential settlement agreements based on claims against employers under negligent employment theories.¹⁸¹ California’s law accomplishes two things: (1) it prevents defendants from confidentially settling claims related to any number of sexual torts, but (2) it also prevents plaintiffs with these claims from enjoying the bargaining power that comes along with confidentiality.¹⁸² California has therefore shifted from an individual-plaintiff mentality, to a collective good justification: what is good for all plaintiffs is better than what is good for any individual plaintiff. A number of other states have joined California in this shift. Bills introduced in the legislatures of sixteen states in response to *#MeToo*

175. See generally *#MeToo: A Timeline of Events*, *supra* note 167.

176. See, e.g., Lauren Hernandez, *Roughly 1,000 March Through Salem for Womxn’s March*, STATESMAN J. (Jan. 21, 2018, 5:08 PM), <https://www.statesmanjournal.com/story/news/2018/01/21/salem-womens-march-2018/1042874001/> [<https://perma.cc/HUR8-2GDX>] (publishing a picture of this Comment’s author which appeared on the cover of a Salem, Oregon newspaper in the 2018 Womxn’s March, raising her hand to signify that she has experienced sexual harassment and identifies with the *#MeToo* movement).

177. Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RSCH. CTR. (Oct. 11, 2018), <https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/> [<https://perma.cc/9BC8-DR9W>].

178. See, e.g., Alexandra Jaffee et al., *Reade: ‘I Didn’t Use Sexual Harassment’ in Biden Complaint*, AP NEWS (May 2, 2020), <https://apnews.com/article/aec7beb03e9e0e0e6e3c58111293e0ea>.

179. See, e.g., *Harvey Weinstein Timeline*, *supra* note 160.

180. See Michael Tener, *New Laws Affecting Civil Litigation Practice*, SAN JOAQUIN CTY. BAR ASS’N (May 18, 2017), <https://www.sjcbar.org/attorney-resources/new-laws-affecting-civil-litigation-practice.html> [<https://perma.cc/M9GR-SWZ5>]. The Code of Civil Procedure prohibits “a provision within a settlement agreement that prevents the disclosure of factual information” when the underlying claim is related to (1) an act of sexual assault, (2) an act of sexual harassment, (3) an act of workplace harassment or discrimination based on sex, or (4) an act of harassment or discrimination based on sex. CAL. CIV. PROC. CODE § 1002 (2020). This statute was enacted in 2007, but the portion regarding the ban on confidential settlements was added in 2017. See Tener, *supra*; Assemb. B. 2875, 2006–2007 Leg., Reg. Sess. (Cal. 2006).

181. CAL. CIV. PROC. CODE § 1001(a)(3) (West 2019).

182. See Perman, *supra* note 157.

disallow cases of sexual misconduct to confidentially settle.¹⁸³ However, the nation as a whole has declined to follow suit, leaving open many questions about who is able to obtain what information when a sexual harassment case confidentially settles.¹⁸⁴

C. Two Laws in Conflict

As discussed *supra* Part II, “Confidential Settlement Agreements,” many open questions remain as to what information the public is able to obtain when a sexual misconduct case settles. At the state law level, which encompasses the vast majority of settlements and contractual non-disclosure agreements,¹⁸⁵ the enforcement of a confidentiality provision in a sexual misconduct case is open to a choice of law analysis. Depending on what law the state’s choice of law doctrine requires the state to follow, the provisions of the settlement or agreement may be subject to public disclosure, or they may remain confidential.¹⁸⁶

183. *States Move to Limit Workplace Confidentiality Agreements*, CBS NEWS (Aug. 27, 2018, 8:39 AM), <https://www.cbsnews.com/news/states-move-to-limit-workplace-confidentiality-agreements/> [<https://perma.cc/5F6X-UQDD>].

184. For example, will a state that disallows confidential settlements in sexual harassment cases enforce one from another state? This analysis involves questions of the state’s contractual choice of law doctrine, but as a general principle, it is an open concept. A similar question was invoked in *Baker v. General Motors Corp.*, in which the U.S. Supreme Court unanimously held that a party to a confidential settlement was not barred from testifying in a deposition in a different state, even though he or she would be barred from doing so in the state that governed the settlement agreement. 522 U.S. 222, 238–41 (1998).

185. Contracts are usually governed by state statutory law and some general bodies of common law. See Gilkis, *supra* note 120. Many common law principles are reflected in contract law throughout the United States—such as the various Restatements on Contracts or the Uniform Commercial Code—but these principles are dependent upon the individual states adopting them. See *id.* Unless the contract is one entered into pursuant to some specific federal statute, the contract is based on state law. See *infra* note 191 for a discussion of federal employment contracts based on federal law.

186. As a general note, many contracts contain a choice of law clause, requiring that a certain state’s law be utilized in interpreting the agreement. Michael Giusto, *Why You Need the Right Choice of Law Clause in Your Contract*, NEUFELD, O’LEARY & GIUSTO (Sept. 28, 2017), <https://www.noglaw.com/need-right-choice-law-clause-contract/> [<https://perma.cc/EZ7B-CYAK>]. These provisions aim to prevent uncertainty in how the contract will be interpreted should an action on the contract be brought later. Glenn West, *Make Sure Your “Choice-of-Law Clause” Chooses All of the Laws of the Chosen Jurisdiction*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 18, 2017), <https://corpgov.law.harvard.edu/2017/09/18/making-sure-your-choice-of-law-clause-chooses-all-of-the-laws-of-the-chosen-jurisdiction/> [<https://perma.cc/SJ5D-JZED>]. Without a choice of law clause, judicial interpretation of the contract depends on where the action on the contract is brought, and

At the federal level, many questions related to the enforceability of sexual misconduct settlements remain unanswered. The federal government declined to adopt the trend among the states of enacting legislation to prevent confidential settlements of sexual misconduct cases, so these settlements remain valid in the federal context.¹⁸⁷ Few categories of contracts are governed by federal law, but several are important: federal government employment contracts,¹⁸⁸ and contracts involving organizations that provide services for the federal government, which are governed by Title 41 of the U.S. Code, pertaining to Public Contracts.¹⁸⁹ Employment contracts for federal agency employees are governed by various federal provisions,¹⁹⁰ and are subject to the body of case law created by the Court of Appeals for the Federal Circuit and the Court of Federal Claims.¹⁹¹ These contracts include those of employees and contractors of executive agencies.¹⁹² When a contractor of an executive agency has a contractual dispute, the contractor must submit the dispute to the contracting agency prior to taking further action.¹⁹³ The contractor is then permitted to appeal to the agency board, or file a *de novo* action in the Court of Federal Claims.¹⁹⁴

what that state's choice of law doctrine requires. *See* Giusto, *supra*. For a primer on the major choice of law doctrines used by the states, see *infra* note 220.

187. However, in response to #MeToo, the federal tax law has rescinded the business expense deduction previously available to businesses involved in litigation over certain sexual harassment claims. Jan Frankel Schau, *Where Confidentiality and Transparency Collide*, DISP. RESOL. MAG., Winter 2019, at 6, 8, https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/schau-where-confidentiality-and-transparency-collide/ [<https://perma.cc/2BKN-TX7Z>]. Now, a business may only claim the deduction if the claim reaches a public resolution—either through the courts, or through a non-confidential settlement. *Id.* at 8–9; *see also* Michelle R. Smith, *Some States Place Limits on Secret Harassment Settlements*, AP NEWS (Aug. 27, 2018), <https://apnews.com/448968e898554d128c3247e41f7d8d91/Some-states-place-limits-on-secret-harassment-settlements> [<https://perma.cc/ZET2-E3DB>] (discussing various states passing legislation related to #MeToo and the federal response via the Tax Cuts and Jobs Act of 2017).

188. *See, e.g., supra* note 128 (discussing White House staffers' contractual agreements).

189. *See generally* 41 U.S.C. §§ 101–8707.

190. *See, e.g.,* 5 C.F.R. § 300.104 (2019). Title 5 of the Code of Federal Regulations groups employment-related statutes into specific provisions for each agency and Title 20 codifies federal employee benefits.

191. *See* Robert Porter, *Contract Claims Against the Federal Government: Sovereign Immunity and Contractual Remedies* 3–4 (Harvard L. Sch. Fed. Budget Pol'y Seminar, Briefing Paper No. 22, 2006), http://www.law.harvard.edu/faculty/hjackson/Contract_Claims_22.pdf [<https://perma.cc/JJY9-2UKU>].

192. Agencies have particular obligations under 41 U.S.C. §§ 1701–1713.

193. 41 U.S.C. § 7103(a).

194. 41 U.S.C. § 7104.

The nature of confidential settlements means that often, very little is known about their prevalence or existence.¹⁹⁵ Congressman Gary Palmer took issue with this situation and proposed legislation requiring federal agencies to disclose the amounts of settlements paid for by taxpayer dollars.¹⁹⁶ The bill also requires that every confidential settlement entered into by the federal government be accompanied by a public statement explaining the non-disclosure.¹⁹⁷ The bill received a unanimous vote of support in the House of Representatives, but never received a vote in the Senate.¹⁹⁸

The current situation is one without any substantial guidance. The federal government's official position disfavors confidential settlements,¹⁹⁹ but provides no method through which this policy can be enforced:

It is the policy of the Department of Justice that . . . it will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents. This policy flows from the principle of openness in government and is consistent with the Department's policies regarding openness in judicial proceedings . . . and the Freedom of Information Act²⁰⁰

195. The Department of Justice maintains that its official position disfavors entering into confidential settlements on behalf of the United States. 28 C.F.R. § 50.23(a) (2019). Doing so, however, is not prohibited—and the Department of Justice indicates that in “rare circumstances” such an agreement may be permissible. § 50.23(b). The Department nonetheless requires the confidentiality provision to be drawn as narrowly as possible, but indicates that even without a confidentiality provision, the Department of Justice may not be required to disclose the information to the public under the Privacy Act or certain executive orders. § 50.23. Essentially, the government's official policy is that it disfavors confidential settlements, but the government drafted the language of that decision to give itself unfettered discretion in deciding whether or not to follow its own policy. *Id.*

196. Congressman Palmer's bill, H.R. 995: Settlement Agreement Information Database Act of 2019, required that any government agency that enters into a settlement be required to report the settlement to compile a searchable database. Settlement Agreement Information Database Act, H.R. 995, 116th Cong. (2019). Before Congressman Palmer's bill, only those settlements that utilized the “Judgment Fund”—a fund used to pay for settlements when an agency lacks funds to pay the settlement out of its own budget—were required to be disclosed. *H.R. 995: Settlement Agreement Information Database Act of 2019*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr995/summary> [<https://perma.cc/3R6L-BJBL>].

197. Settlement Agreement Information Database Act, H.R. 995, 116th Cong. (2019).

198. *H.R. 995: Settlement Agreement Information Database Act of 2019*, *supra* note 196.

199. 28 C.F.R. § 50.23 (2019).

200. § 50.23(a). See *supra* note 195 for a discussion of the government's current stance on confidential settlements.

Despite the Department of Justice’s official position, Congress has failed to enact any substantial check on the agencies’ power to conduct confidential business.²⁰¹ As a result, little is known about how prevalent confidential settlements are with the U.S. government.²⁰²

There is also FOIA. The nature of FOIA exemptions indicates there are certain elements of a settlement the agencies would not be required to disclose anyway, even when presented with an otherwise valid request.²⁰³ Exemptions under category five—related to legally privileged communications—can arise in the context of settlement agreements.²⁰⁴ When the existence of a settlement is confidential, it necessarily is only available to the parties in the litigation and nobody else.²⁰⁵ Therefore, the confidential settlement would not be disclosable under FOIA.²⁰⁶ However, when a settlement is not subject to an exemption or exception, the solution is less clear.

When the confidentiality provisions of a settlement agreement conflict with FOIA’s general policy of openness, which law prevails?

201. See *supra* note 196 for a discussion of the failed House Resolution to address the issue of confidentiality within the agencies.

202. See *H.R. 995: Settlement Agreement Information Database Act of 2019*, *supra* note 196.

203. See *supra* Section II.A.2 for a discussion of the exemptions to FOIA.

204. For a discussion of FOIA exemption 5, see *supra* note 88.

205. The parties are free to contract for disclosure to no one or to whomever they wish. *Nondisclosure Agreements: What Are They, and How Do They Work in Sexual Harassment Cases?*, SPIGGLE LAW FIRM, <https://www.spigglelaw.com/employment-blog/nondisclosure-agreements-work-sexual-harassment-cases/> [<https://perma.cc/CVC6-WJFC>]. As a result, non-disclosure agreements come in two forms: mutual agreements, where both parties are bound to confidentiality; and one-way agreements, where only one party discloses confidential information, and the receiving party is bound to the confidentiality. Aileene Koh, *11 Mistakes that Could Invalidate Your NDA*, EVERYNDA (Nov. 16, 2017), <https://www.everynda.com/blog/11-ways-invalidate-nda/> [<https://perma.cc/N6KH-V5C4>]. Generally, the nature of the non-disclosure agreement depends on the nature of the confidential information disclosed. In a traditional employment context, both parties have disclosed information that will remain confidential—the employer’s employment of a sexual tortfeasor or lack of policies to protect employees, and the employee’s factual circumstance regarding the harassment. *Nondisclosure Agreements: What Are They, and How Do They Work in Sexual Harassment Cases?*, *supra*. This would result in a mutual non-disclosure agreement. In many cases, the existence of these settlements is confidential as well. See Koh, *supra*.

206. This was the initial problem the *Detroit Free Press* encountered in the Kwame Kilpatrick scandal. The *Detroit Free Press* knew a settlement must exist based on the facts of the case. See *supra* note 16 and accompanying text (discussing the various settlement provisions). However, because of the confidentiality provision and specific exceptions for documents used in litigation, the settlement was not discoverable under Michigan’s open records law. See Bunkley, *supra* note 15.

III. ANALYSIS

A. Can the Policies Be Reconciled?—Preliminary Choice of Law Questions

A preliminary question is whether the policy of openness associated with FOIA, implied from the freedoms of the First Amendment,²⁰⁷ can ever be reconciled with the policies of confidentiality and privacy behind a confidential settlement agreement. This is not a case where one policy is a clear moral winner because both policies have accomplished positive outcomes for the individuals or groups involved.²⁰⁸ Freedom of information is considered a cornerstone to American governance,²⁰⁹ but confidentiality is considered essential to good business and fair compensation for injured plaintiffs. Neither of these principles necessarily is “better” than the other in a moralistic, value judgment sense of the word.²¹⁰

The policy of openness in government records is intended to increase effective government oversight, something Congress decided was necessary and important enough to codify in the laws of the United States.²¹¹

207. FOIA’s initial congressional backer believed the right to freedom of information was necessarily implied in the rights granted in the First Amendment. *See* Lemov & Jones, *supra* note 36, at 14. Without generally available, public information on which to rely, the freedoms of speech and the press have little impact. *Id.*

208. FOIA aims to “ensure an informed citizenry . . . and [] hold governors accountable to the governed.” *FOIA*, DEP’T JUST., <https://www.justice.gov/archives/open/foia> [<https://perma.cc/SK43-MB5Q>] (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The purpose of a confidential agreement is to “protect information exchanged” between the parties in order to protect business interests or personal privacy. *See What Is the Purpose of Confidentiality Agreements?*, UPCOUNSEL, <https://www.upcounsel.com/purpose-of-confidentiality-agreement> [<https://perma.cc/X8WU-QPRN>].

209. *Stats for Stories: Sunshine Week and Freedom of Information Day, March 15-21 & 16, 2020*, U.S. CENSUS BUREAU (Mar. 15, 2020), <https://www.census.gov/newsroom/stories/2019/sunshine.html> [<https://perma.cc/4EEZ-A95N>] (quoting *How to Get Involved*, SUNSHINE WK. (Jan. 4, 2017), <http://sunshineweek.rcfp.org/how-to-get-involved/> [<https://perma.cc/8F49-N2HH>]).

210. A value judgment is a comparison of the “goodness” of a group of things for the purpose of determining their subsequent value, or utility, to a person. *See* Mark Schroeder, *Value Theory*, STAN. ENCYCLOPEDIA PHIL. (Feb. 5, 2008), <https://plato.stanford.edu/entries/value-theory/> [<https://perma.cc/9YTQ-L8NN>]. At least one commentator argues that there is no way to remove value judgments from judicial decision making, stating that “the balancing and weighing that characterize the judicial process cannot be escaped,” and that the “occasional value judgment [is] necessary to solve particular problems” in the choice of law realm. Michael Traynor, *Conflict of Laws: Professor Currie’s Restrained and Enlightened Forum*, 49 CAL. L. REV. 845, 875–76 (1961).

211. *FOIA*, *supra* note 208.

Confidentiality in settlement agreements is expressly disfavored in the Code of Federal Regulations, but nonetheless, the Department of Justice avoids being bound to this opinion.²¹² Congress has never directly spoken on the issue of confidential settlements in this context in a broad sense.²¹³ The policies in support of a confidential settlement in a sexual misconduct case—to protect victims, to encourage economic productivity, to promote judicial efficiency, and to give the individual bargaining power against a large organization—are all pursuits not addressed by Congress.²¹⁴

The path of least resistance in determining a way to work with these conflicting policies is to see whether they can be reconciled. If the government is faced with a legitimate FOIA request, but that request would uncover a confidential settlement, an attempt to strike a balance between the policies of openness of FOIA and the policies of restricted access to information of the confidential settlement should be weighed

212. 28 C.F.R. § 50.23 (2019).

213. Congress has addressed the issue of settlements of harassment claims against members of Congress, passing a bill in late 2018 forcing members of Congress to pay out-of-pocket to settle sexual harassment lawsuits made against them. See Elise Viebeck, *Congress Sends Trump Bill to Make Lawmakers Liable for Harassment Settlements*, WASH. POST (Dec. 13, 2018, 12:04 PM), https://www.washingtonpost.com/powerpost/congress-sends-trump-bill-to-make-lawmakers-liable-for-harassment-settlements/2018/12/13/cbcdc5fe-fef6-11e8-83c0-b06139e540e5_story.html [<https://perma.cc/NWV9-PYTX>]. The Act also required the settlements be made public. See *id.* Speaker of the House Nancy Pelosi indicated that this was just the beginning: “We must end the culture of complicity and silence around workplace harassment by ensuring that taxpayer money will never again be used for settlements, and that members are held personally liable for discrimination in their offices.” *Id.* President Trump signed the bill in late 2018. Katherine Tully-McManus & Niels Lesniewski, *Donald Trump Signs Overhaul of Anti-Harassment Law for Members of Congress*, STAFF, ROLL CALL (Dec. 21, 2018, 9:58 PM), <https://www.rollcall.com/2018/12/21/donald-trump-signs-overhaul-of-anti-harassment-law-for-members-of-congress-staff/> [<https://perma.cc/924U-RJDJ>].

Congress also included a provision in the 2017 tax reform law intended to discourage the use of confidential settlements, but that law simply disallowed federal tax deductions for company expenses related to confidential settlements of certain sexual misconduct claims. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13307(a), 131 Stat. 2054, 2129 (2017); see also Schau, *supra* note 187, at 8.

214. In contrast to many states, Congress has not passed any piece of legislation banning confidential settlements in workplace sexual misconduct cases. See Lee, Serfaty & Summers, *supra* note 168. Congress did, eventually, pass a bill regulating how sexual misconduct settlements are paid for when they involve a claim against a member of Congress. Kelsey Snell, *Congress to Make Members Pay Out of Pocket for Sexual Harassment Settlements*, NPR (Dec. 12, 2018, 5:50 PM), <https://www.npr.org/2018/12/12/676209258/congress-to-make-members-pay-out-of-pocket-for-sexual-harassment-settlements> [<https://perma.cc/KRG8-UQR5>]. The previous system allowed payment of such settlements out of a general fund set up by the U.S. Treasury, and individual lawmakers were not responsible for paying costs out of their own budget. See Lee, Serfaty & Summers, *supra* note 168. In 2018, Congress passed a bill making individual lawmakers responsible for these costs. Snell, *supra*.

and addressed carefully.²¹⁵ However, the resolution is not so simple. Confidentiality and openness are inherently polar opposite concepts, and when an agency is expected to make the determination as to which prevails, doing so is no more than a value judgment by the agency.²¹⁶ Choice of law analysis provides a helpful framework for agencies making these determinations when two competing policies are at play.

This is not a traditional choice of law question.²¹⁷ Traditional choice of law questions deal with two different jurisdictions having conflicting laws and the issues with which law applies.²¹⁸ Traditional choice of law questions do not address what to do when two conflicting laws on opposite ends of the same spectrum exist in conflict. However, an analysis through choice of law doctrines provides a useful framework for addressing the underlying issue: which law is superior when both laws seem well-supported.²¹⁹

1. Choice of Law Frameworks

Many choice of law frameworks exist in American jurisprudence.²²⁰ The traditional approach is jurisdictional-specific, and applies the law of

215. For a discussion weighing these competing policies, see Traynor, *supra* note 210, at 875–76 (arguing that such comparisons are inherent in all judicial decision making).

216. See Schroeder, *supra* note 210.

217. Traditional choice of law questions involve a forum, usually a state, determining which substantive and procedural law to apply to a certain dispute. Max Rheinstein, Ulrich M. Drobniq & Peter Hay, *Choice of Law*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/conflict-of-laws/International-criminal-law> [<https://perma.cc/HUB7-2GTZ>].

218. See *id.*

219. In situations involving a state-law based contract—the more common type of contract—and a federal FOIA request, the federal law would, at least in theory, preempt the state law under the Constitution’s Supremacy Clause. U.S. CONST. art. VI, cl. 2. However, finding a state contract that would be responsive to a FOIA request may be a large hurdle in this specific kind of case—FOIA only applies to the federal executive branch, so locating a contract entered into by the federal executive that is governed by state law is a bit of an issue itself. See *About FOIA and Other Information Access Programs*, U.S. DEP’T ST., <https://foia.state.gov/learn/> [<https://perma.cc/G4CM-D7CK>]. The issue this Comment addresses involves a question of a *federal* contract—governed by Title 41 of the U.S. Code. This makes the issue one outside of the scope of federal preemption, as FOIA is a federal statute, as are the U.S. Code provisions that govern federal contract formation.

220. For a brief analysis of the main choice of law approaches, see *Approaches to Choice of Law*, US LEGAL, <https://civilprocedure.uslegal.com/choice-of-law/approaches-to-choice-of-law/> [<https://perma.cc/3JU5-ZD25>].

the state in which the “right[] ‘vested.’”²²¹ This vested rights theory emphasizes approaching the problem from the time of the injury, and applies the law, as it existed at the time of the injury, from the jurisdiction in which the injury took place.²²² This approach is of minimal use in shedding light on a non-jurisdictional, non-time dependent issue. The Second Restatement of Conflict of Laws approaches choice of law analysis slightly differently and applies the law of the forum with the “most significant relationship” to the injury and the parties.²²³ This analysis promotes “protecting the expectations of the parties” and emphasizes “the values of certainty, predictability, and uniformity of result” achieved when applying the law the parties anticipated would apply, based on the significance of that law to the parties.²²⁴ This approach, emphasizing the protection of the parties’ expectations, does not prove particularly helpful when determining which law to apply between two laws that are heavily relied upon by different parties, like FOIA and confidential settlements.²²⁵

221. Perry Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 YALE L.J. 1191, 1194–95 (1987) (first citing JOSEPH H. BEALE, 1 A TREATISE ON THE CONFLICT OF LAWS 1–2 (1935); then citing ALBERT V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 1–2 (2d ed. 1908)) (analyzing the First Restatement’s Vested Rights Theory).

222. *Id.* at 1195. The underlying point of the Vested Rights Theory is that the jurisdiction where the injury occurred has the greatest connection to the injury, such that applying its law to the injury makes the most logical sense. *Id.* Vested Rights Theory takes this one step further and applies the law of that jurisdiction as it existed at the time of the injury. *Id.*

223. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. L. INST. 1969).

224. *Id.* § 188 cmt.(b).

225. Many Americans rely on FOIA as a source of information for Executive Branch activities. As of Fiscal Year 2018, more FOIA requesters are seeking information about themselves from executive agencies than any other topic, overtaking journalists as the number one category of requesters. See Amelia Brust, *2018 Sees Record Number of FOIA Requests, Information Seekers Change*, FED. NEWS NETWORK (June 7, 2019, 5:17 PM), <https://federalnewsnetwork.com/open-datatransparency/2019/06/2018-sees-record-number-of-foia-requests-information-seekers-change/> [<https://perma.cc/3MHH-M4BK>]. The personal interest in information ranges from requesters seeking their own immigration documents or documentation to obtain veterans’ benefits all the way to individuals seeking genealogical research from the National Archives. See *id.*

Confidential settlements are also widely used as an end to litigation. Confidential settlement agreements induce reliance by committing one, or both, parties to an agreement of secrecy on certain topics of the agreement. See Kelley & Edwards, *supra* note 148, at 1–3. Employers particularly rely on the confidentiality when settling disputes with employees, as the employee’s sworn confidentiality on the issue essentially ensures no other employees can use the settlement information to bring another, similar lawsuit against the company. *Id.* In the #MeToo context, this allows misconduct to continue with new victims. See *id.*

2. *Government Interest Analysis, Comparative Impairment, and the Restrained Approach*

The most valuable choice of law analysis shedding light on the conflict between confidentiality and FOIA is comparative impairment analysis, a version of the government interest analysis approach.²²⁶ Comparative impairment analysis evaluates the policies underlying each of the conflicting laws, and applies the law that will be most impaired if that law is not applied.²²⁷ This necessarily implies that different jurisdictions have different interests in having their own law applied to a particular set of facts, and that these interests are more or less important than the interests of the other jurisdictions.²²⁸ This determination is made by analyzing which law's policy interests will be more frustrated if that law does not apply in the given situation.²²⁹ This approach can provide valuable insight into any situation where two laws conflict and have differing policies, such as the conflict between confidentiality in settlement agreements and FOIA.

Choice of law analysis, including the comparative impairment approach, provides a useful framework to choose one law in a given situation when multiple laws could theoretically apply, and the results differ depending on which law is used. Courts often struggle to determine which jurisdiction's law applies in a case where different jurisdictions have different interests in having their own law applied, and the outcome of the case would be

226. See generally Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847. Symeonides's article discusses Currie's conception of government interest analysis as a doctrine, as well as the popularity of the doctrine since Currie developed it in the 1950s and 1960s. See *id.* at 1890–91.

227. See *id.* at 1864–65.

228. See generally *id.* at 1850–67 (discussing the use of Currie's government interest analysis approach).

229. This final, and not often utilized, step is referred to as an independent body of choice of law doctrine called "comparative impairment." See *id.* at 1864–65. Some jurisdictions choose to include comparative impairment in their use of government interest analysis, whereas others pick and choose different elements of the doctrine to incorporate into their own choice of law doctrines. See *id.* at 1889. This leads to major inconsistencies between the different states in the ways they apply purportedly the same choice of law doctrine, with some commentators arguing that utilizing comparative impairment is contrary to the "doctrinal purity" of government interest analysis. Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577, 578 (1980).

different depending on the law used.²³⁰ Although different states use different approaches to this “choice of law” question,²³¹ comparative impairment focuses on the policies behind the law, not the effect on the individual case, to determine which law should prevail. Comparative impairment requires the court to ask three questions to determine the outcome:

- (1) Do the laws differ substantively, such that the outcome under each law would be different?
- (2) Does each jurisdiction have an interest in having its law applied? If only one jurisdiction has a legitimate interest in having its law applied, that law will naturally apply, and the analysis can end.
- (3) Which jurisdiction’s interest will be more “impaired” if its law is not applied?²³²

The analysis is approached differently among the states using government interest analysis; only some states incorporate the final question—the comparative impairment element—to their analysis.²³³ Additionally, some courts attempt to find a way that both competing policies in a choice of law analysis can coexist, allowing a more flexible rule that does not *require* one state’s law to apply to every similar situation as a bright-line rule.²³⁴ This approach focuses on finding a way to bridge the gap between the competing policies in order to allow them to exist side by side without a conflict.²³⁵ This “restrained method” of government interest analysis focuses on harmonizing two seemingly different ideas, allowing the court to step away from the role of making a value judgment regarding the moral rightness

230. See *Government Interests Approach*, US LEGAL, <https://conflictoflaws.uslegal.com/laws-applicable-to-torts/government-interests-approach/> [<https://perma.cc/EVA3-NNDY>].

231. See *supra* Section III.A.

232. *Government Interests Approach*, *supra* note 230. The final subpart is accomplished through “comparative impairment” analysis. For a discussion about comparative impairment and its role in government interest analysis, see Kay, *supra* note 229, at 578. For an example of a case decided using this approach, and the subsequent analysis of the method in that case, see generally Case Note, *Conflict of Laws—Choice of Law—Governmental Interest Test Applied to Hold Tavern Owner Liable Under Local Law—Bernhard v. Harrah’s Club*, 1976 BYU L. REV. 953, 953.

233. See generally Kay, *supra* note 229, at 577.

234. This approach may have been Currie’s goal all along. One commentator argues that Currie “urged” that, in cases where there was an apparent true conflict—when both states with an interest in applying their own laws had differing laws—the state should “reexamine the content of its own [] laws” and provide its law a “restrained and moderate interpretation” in an effort to avoid a true conflict. Leo Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255, 256 (1978) (discussing Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963)).

235. See *id.* at 258.

of one law over the other, and into the role of a mediator, to find common ground for each policy interest.²³⁶

This Comment advocates for the restrained approach to government interest analysis, but regardless of what the specific form of the analysis looks like, the analyzing court must look to the policies underlying each law to determine whether the laws can exist in harmony or if one law must necessarily be applied over the other.²³⁷ When two laws appear to be in conflict, government interest analysis requires the deciding court to identify the “focal point” in support of each law.²³⁸ In analyzing these policy interests, courts are permitted to look at legislative history and case law interpretations of the law in question.²³⁹ Courts that take the restrained approach must give the law a “restrained and moderate interpretation” with the ultimate goal of avoiding a true conflict.²⁴⁰

If a court using the restrained approach cannot avoid a true conflict, it uses comparative impairment to determine which jurisdiction’s interest will be “more impaired” should its law not apply.²⁴¹ Impairment is essentially a shorthand phrase for identifying which jurisdiction has a stronger focal point policy in support of its own law. The procedural elements of government interest analysis intend to safeguard the process against value judgments by the courts, but these judgments nonetheless sneak their way into the analysis at this stage.²⁴²

236. See generally Schroeder, *supra* note 210, and Traynor, *supra* note 210, for a discussion of value judgments and their role in judicial decision making. Whether value theory has a place in the judicial process is open to debate.

237. See generally Kanowitz, *supra* note 234.

238. Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 221 (1958).

239. Lea Brilmayer, *Government Interest Analysis: A House Without Foundations*, 46 OHIO ST. L. REV. 459, 462–63 (1985) (arguing that utilizing methods of statutory interpretation in government interest analysis undermines the legitimacy of the doctrine).

240. See Kanowitz, *supra* note 234, at 256.

241. *Government Interests Approach*, *supra* note 230.

242. See generally Brilmayer, *supra* note 239 (offering one commentator’s argument that government interest analysis is too flexible as a doctrine, essentially allowing the court to come to whatever decision they wish, and to use the doctrine retroactively to support that decision).

B. Freedom of Information Act Policies Prevail When Applying Government Interest Analysis

Utilizing the government interest analysis approach requires first determining if the outcome under each law would be different if that law was applied. If the answer is yes, the analysis considers whether there is an important policy justification behind applying either law. If important policies exist behind each law, the analysis continues to the comparative impairment question—asking which policy would be “more impaired” if that law were not to apply. If one policy would be “more impaired” if that law was not applied, the court should use that law.²⁴³

The threshold question of all varieties of government interest analysis is whether the outcome would actually be different under each law as stated. In the case of a confidential settlement in conflict with FOIA, the clear answer is yes. When a confidential settlement agreement with a government agency is disclosable under FOIA,²⁴⁴ but the confidentiality provision prevents certain information from disclosure, the outcome of the FOIA request will differ depending on whether the agency decides to comply with FOIA or with the confidentiality requirement of the settlement. As previously noted, the Obama Administration admitted that one-third of its withheld FOIA responses had no proper legal basis for the failure to disclose.²⁴⁵ This illustrates the broad discretion with which agencies and

243. *Government Interests Approach*, *supra* note 230.

244. This situation only applies when no valid FOIA exemption is invoked. If there is a legitimate, statutory reason for refusing to grant a FOIA request, no laws are in conflict—the FOIA statute already provided for an exemption in that particular context. *See* 5 U.S.C. § 552(b)(3), (5). The most likely exemption invoked by a confidential settlement would be exemption five for privileged inter-agency communications. § 552(b)(5). Exemption three, which applies to information that is prohibited from disclosure by another federal law, *may* be invoked but the government’s basis for this claim is weak, § 552(b)(3): while confidential settlements with the federal government are technically allowed, the Department of Justice has indicated that its official position “disfavors” such settlements, and that only in “rare circumstances” such an agreement is permissible. *See* 28 C.F.R. § 50.23 (2019). If the government chose to withhold a confidential settlement based on exemption three, it would potentially face litigation on the issue related to whether the “rare circumstances” requirement applies. *See id.*; *see also* 5 U.S.C. § 552(b)(3). *See supra* note 195 for a discussion on the government’s view on confidential settlements.

245. *See* Bridis, *supra* note 93 (discussing the Obama-era policies regarding FOIA, and the Administration’s inability to abide by their own policies). This creates a potential problem for FOIA requesters, especially when considering the analysis of exemption three. *See supra* note 244 and accompanying text. The government must meet the high standard of showing that the confidential settlement was one of the “rare circumstances” where the government permits such an agreement, but the individual requester has zero oversight into the government’s decision-making on that issue. *See* 28 C.F.R. § 50.23 (2019). Further, knowing that one-third of withheld FOIA requests had no proper legal basis for the failure to disclose, *see* Bridis, *supra* note 93, significantly undermines the government’s credibility in responding to valid FOIA requests, and all but assures confidential settlements can be

Administrations are able to handle FOIA requests, including the discretion to choose to withhold certain records on less-than-solid legal footing.²⁴⁶ As a result, a probable outcome is that FOIA requests will be denied if they uncover a confidential settlement, regardless of whether such settlement is legally enforceable, or such settlement actually falls within a certain exemption or exception to FOIA.²⁴⁷ If the agencies strictly adhered to FOIA, the outcome may differ.

Next, the analysis shifts to whether each jurisdiction—or in this case, the basis of each law—has a legitimate interest in that law’s application.²⁴⁸ This framework addresses the policy in support of each law. Again, courts are permitted to look at the regular instruments of statutory interpretation—legislative history and case law interpretations—in identifying each law’s focal point.²⁴⁹ With the current conflict, it must be assumed that the FOIA request was sufficiently narrow, and that no FOIA exemptions or exceptions apply.²⁵⁰

The following sections analyze legislative history and case law interpretations to identify the focal point of each law.

withheld without giving the requester an opportunity to bring a legitimate opposition, even if there is no legitimate legal basis for withholding the settlement in the first place.

246. See Bridis, *supra* note 93.

247. This outcome is likely. The agencies responding to FOIA requests are equipped to do so and are knowledgeable about the FOIA disclosure process and the various exemptions and exceptions. See Jory Heckman, *Why a FOIA Workforce Shortage? Employees May See Work as ‘Punishment,’* FED. NEWS NETWORK (Oct. 30, 2018, 7:45 AM), <https://federalnewsnetwork.com/open-datatransparency/2018/10/why-a-foia-workforce-shortage-employees-may-see-work-as-punishment/> [<https://perma.cc/FL9N-E4GP>]. As a result, an agency employee tasked with responding to FOIA requests encountering a confidential settlement agreement may be in an unfamiliar situation and may reasonably believe that the confidentiality always precludes disclosure. Employees assigned to handle FOIA processing often see this work as a form of punishment, and may be inexperienced, or not take the process seriously. See *id.* For a discussion of potential FOIA exemptions that may be invoked by a confidential settlement agreement, see *supra* note 244.

248. *Government Interests Approach*, *supra* note 230.

249. See Lauren Mattiuzzo, *Legislative Intent and Statutory Interpretation*, HEINONLINE BLOG (Mar. 22, 2018), <https://home.heinonline.org/blog/2018/03/legislative-intent-and-statutory-interpretation/> [<https://perma.cc/BN2J-8YJJ>].

250. See *id.* If a FOIA exemption or exception were to apply, no conflict analysis would be necessary—FOIA’s exemptions and exceptions are statutory provisions that prevent the release of information, so when this law encounters a confidential settlement, the laws accomplish the same goal. See *id.*

1. Policy Behind the Freedom of Information Act

FOIA was passed under the view that the right to free, unfettered access to information was implied in the First Amendment right to free speech.²⁵¹ Congressman Moss began his long-fought battle to enact FOIA out of disdain for the House “Un-American Activities Committee” tasked with “investigating” suspicious groups alleged to be front organizations for the Communist Party.²⁵² The information used to convict members of these groups, and fire them from their government employment, was generally hearsay evidence compiled by the FBI.²⁵³ It was this environment of secrecy that led Congressman Moss to champion FOIA and follow a twelve-year path to attain its enactment.²⁵⁴

Taking a broad approach at what constitutes “legislative history,” the concept behind FOIA may have developed centuries prior to Congressman Moss’s enactment campaign. James Madison is considered the “philosophical founder” of FOIA and stated that “knowledge will forever govern ignorance” in his warnings against the perils of becoming “a popular government, without popular information.”²⁵⁵ Madison’s warning conjured up imagery of an uninformed electorate, believing that without freedom of information, the electorate would be unable to perform its most basic and essential task—electing officials. The need for information for the purpose of informing the electorate is the theoretical concept at the core of FOIA.²⁵⁶ FOIA and subsequent amendments responded to concerns of government misdealing, believing such incidents could be prevented, or at the very least voted out of office, given a broad availability of information to the public.²⁵⁷ In terms of broad values, the core purposes of FOIA are openness, accessible information for the electorate, and knowledge.

As far as the Supreme Court has ruled on the issue, the basic philosophy behind FOIA is “a general philosophy of full agency disclosure.”²⁵⁸ Courts generally enter FOIA analysis after a FOIA request was denied and

251. See Lemov & Jones, *supra* note 36, at 14.

252. See *id.* at 3.

253. *Id.*

254. *Id.* at 4.

255. See *FOIA Post: Celebrating James Madison and the Freedom of Information Act*, *supra* note 70.

256. *Id.*

257. See Lemov & Jones, *supra* note 36, at 2–4 (discussing the political climate during FOIA’s passage, and the public’s concerns about the government’s attempts to oust any communist from federal government employment).

258. *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting S. REP. NO.89-813, at 3 (1965)) (regarding the legislative history in passing FOIA)).

that denial is challenged in the courts.²⁵⁹ Thus, the courts' role is often in interpreting the exemptions and exceptions to FOIA, and the justifications in support of those, rather than the justifications of FOIA as a whole.²⁶⁰ When courts do interpret FOIA as a whole act, they have interpreted the act's philosophy as "disclosure," indicating that a core value of FOIA is open accessibility to agency information.²⁶¹

Because of the complexities of FOIA and its long-term philosophical background, analyzing each and every potential source of both legislative and judicial interpretation on FOIA would be nearly, if not actually, impossible. The trends, discussed *supra* Part II, "Policy Behind the Freedom of Information Act," indicate that the ascertained goals of FOIA are values of openness, knowledge, and fairness, all implied from the First Amendment; and the ability of an electorate to make informed decisions in selecting representatives.²⁶² This echoes Madison's concerns about popular governance requiring popular information, foreshadowing a problematic situation in which an electorate relies on alternative facts.²⁶³

Taking a restrained view of FOIA's policies, it becomes evident that FOIA is not actually as broad as its philosophical founder may have desired.²⁶⁴ FOIA involves numerous exemptions and exceptions, which curtail the government's responsibility to disclose valid information sought by the public.²⁶⁵ Therefore, FOIA does still stand for the above-articulated policies of openness, transparency, and creating and informed electorate—but does not have an absolutist approach in doing so. FOIA allows for

259. See, e.g., *id.* at 354–55; see also 43 C.F.R. § 2.57 (2016) (highlighting the statutory rules governing the appeals process, which must be exhausted prior to entering the court system).

260. *Rose*, 425 U.S. at 360 (interpreting the internal personnel rules exemption to FOIA).

261. *Id.*

262. See Lemov & Jones, *supra* note 36, at 14.

263. See generally S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137 (2017) (discussing post-truth politics and potential remedies for misinformation among the electorate).

264. Founding Father James Madison seemed to champion a broad interpretation of freedom of information, arguing that without free knowledge, the people would be governed by ignorance. See Doyle, *supra* note 68. However, at least one commentator believes Madison did not actually practice open government of the sort he argued was necessary for effective governance. See Paul Rosenzweig, *Transparency, Within Reason*, HERITAGE FOUND. (Mar. 14, 2005), <https://www.heritage.org/government-regulation/commentary/transparency-within-reason> [<https://perma.cc/TA4R-9A6M>]. Because Madison was involved in the Constitutional Convention, of which secrecy was an essential component, perhaps his approach to transparency was not absolute. See *id.*

265. See *supra* note 244 and accompanying text.

many kinds of information to be shielded from disclosure, all of which could potentially sway voters or work to enhance transparency. FOIA essentially plays a balancing game by weighing its broad philosophical goals against the practical necessity of secrecy in conducting government operations. However, the exemptions and exceptions are to be narrowly construed²⁶⁶ and generally only apply to limited areas. The “restrained” FOIA view is that of government openness, but qualified to allow certain areas of information to be withheld, contrary to the policy of openness.

2. Policy Behind Confidential Settlements

The interests behind confidentiality include the freedom to contract and ability to increase bargaining ability of plaintiffs.²⁶⁷ Confidentiality increases bargaining power for plaintiffs, as confidentiality incentivizes certain defendants to settle when the defendant cares less about the financials and more about the potential public relations fallout from a lawsuit.²⁶⁸ This trend is prominent in products liability cases,²⁶⁹ but also has implications in areas of sexual misconduct.²⁷⁰ For a government agency looking to settle a claim that a manager sexually harassed employees, confidentiality offers some limited reassurance that no other plaintiffs will bring a similar suit, as they may be entirely unaware they have the ability or resources to do so. Confidentiality further provides an element of enhanced job security for an official within the government that may be compelled to resign—or have to face an angry constituency in re-election—in the face of known harassment claims.²⁷¹

266. U.S. Dep’t. of Just. v. Julian, 486 U.S. 1, 8 (1988).

267. See generally Perman, *supra* note 157 (discussing on the use of confidentiality as a bargaining tool for plaintiffs in sexual misconduct cases).

268. *Id.*

269. The State of California recently tried to ban such confidential settlements, but the measure died in the State Assembly. See *Two Bills from 2017 Die on the Vine*, CAL. NEWS PUBLISHERS ASS’N (Feb. 2, 2018), <https://cnpa.com/two-bills-from-2017-die-on-the-vine/> [<https://perma.cc/BT2S-KPLV>]. The proposed bill, which essentially mirrored California’s ban on confidential settlements in sexual misconduct cases, would also prevent product manufacturers from confidentially settling any claim that was “a danger to the public health or safety.” Assemb. B. 889, 2017–2018 Leg., Reg. Sess. (Cal. 2017).

270. See Perman, *supra* note 157.

271. See Lee, Serfaty & Summers, *supra* note 168. This article discusses how little the general public actually knows about confidential settlements of sexual misconduct claims involving members of Congress, and how the funding for such settlements previously came from taxpayer dollars. *Id.* Because the settlements were allowed to remain confidential, taxpayers—and thus, voters—were not made aware that their representatives were spending large sums of public funds on settling their personal sexual misconduct allegations. *Id.* Whether this would have caused voters to not vote for that representative again is an open question—and one the 2016 election complicated further, as 46% of voters voted for Donald Trump, see *An Examination of the 2016 Electorate, Based on Validated Voters*,

The contractual nature of a confidential settlement has policy implications in contract law. The freedom to contract is cherished in American governance as a way to create an entirely custom body of private law for a particular transaction or relationship.²⁷² So long as the provisions of the agreement are not contrary to public policy or otherwise subject to a limitation, a contract will likely be enforced.²⁷³ The ability to contract for confidentiality in settlements is a concept of autonomy.²⁷⁴ The parties have a freedom to

PEW RSCH. CTR. (Aug. 9, 2018), <https://www.people-press.org/2018/08/09/an-examination-of-the-2016-electorate-based-on-validated-voters> [<https://perma.cc/96XF-EX4G>], despite the public release of audio recordings of Trump claiming his star power allowed him to “grab ‘em by the pussy,” Mark Makela, *Transcript: Donald Trump’s Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html> [<https://perma.cc/BPC5-SHLH>]. This data suggests that even when a public official is faced with legitimate claims of sexual misconduct, the electorate may still cast a vote in favor of that candidate. See *An Examination of the 2016 Electorate, Based on Validated Voters*, *supra*; Makela, *supra*; ; see also Eli Yokley, *Bloomberg Loses Ground Following Debate Debut in Las Vegas*, MORNING CONSULT (Feb. 21, 2020, 2:34 PM), <https://morningconsult.com/2020/02/21/michael-bloomberg-polling-post-debate-las-vegas> [<https://perma.cc/G9X5-5DTY>] (discussing Michael Bloomberg’s 17% share of first-choice voters and third place spot among all 2020 Democratic candidates, despite public concern about his treatment of women in the workplace); *supra* note 32 and accompanying text (discussing Michael Bloomberg’s troubled candidacy).

272. See Gilkis, *supra* note 120.

273. See *Unenforceable Contracts: What to Watch Out for*, NOLO, <https://www.nolo.com/legal-encyclopedia/unenforceable-contracts-tips-33079.html> [<https://perma.cc/9BEL-YZZV>]. This is not the only material limitation on contracting. Contracts can be invalidated for many reasons, including issues with the form of the contract, issues with fraud in procuring the contract, and so forth. See, e.g., *Muschany v. United States*, 324 U.S. 49, 58 (1945). The public policy limitation ensures that no contract that is contrary to “the laws and legal precedents” of the governing jurisdiction will be valid. *Id.* at 66 (citing *Vidal v. Mayor of Philadelphia*, 43 U.S. 127, 197–98 (1844)) (analyzing whether a contract to purchase land from the federal government was invalid as a matter of public policy). *Muschany* holds that the public policy must be articulated in actual laws or legal precedent, and that “general considerations of proposed public interest” are insufficient to establish a public policy for contractual invalidation purposes. *Id.* (citing *Vidal*, 43 U.S. at 197–98).

274. U.S. CONST. art. I, § 10, cl. 1 (“No state shall enter into . . . any Law impairing the Obligation of Contracts . . .”). This autonomy is not absolute. The Constitution generally prohibits states from impairing the right to freely contract, but has held certain intrusions into this freedom appropriate—for example, contracts that restrict wages of women workers were found to be a valid use of the states’ police powers, see *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 386, 389 (1937); the ability to extend the redemption period on a mortgage entering foreclosure was found not to violate the Contract Clause, as the measure was temporary, see *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444–48 (1934); and contracts found to violate public policy are considered invalid, see, e.g., *Neiman v. Provident Life & Accident Ins. Co.*, 217 F. Supp. 2d 1281, 1286 (S.D. Fla. 2002).

choose whatever contractual provisions they wish, so long as those choices are fair and within the scope of good public policy.²⁷⁵

Taking a restrained view of the policies behind confidential settlements requires looking at the specific settlements entered into by the federal government. A common government contract is for labor, whether via traditional employment or through independent government contractors.²⁷⁶ In this context, the government has interests in having a freedom to contract—government contracts are generally awarded after a bidding process, necessarily requiring a freedom on both the part of the government and the contractor to establish terms and rates of pay.²⁷⁷ However, when litigation arises in the employment context, the government’s freedom to contract involves different priorities. For example, the government may wish to keep specific trade secrets confidential, especially when dealing with technical contractors;²⁷⁸ but in the case of a sexual misconduct claim, the government’s freedom to contract does not cleanly encompass any legitimate government concern. The government may wish to act like a corporation with a public relations strategy to confidentially settle sexual misconduct claims, but government officials, unlike corporate entities, are subject to public oversight in the form of reelection or FOIA. By becoming a public employee, individuals have already given up their ability to have their affairs remain wholly confidential, so extending a freedom to contract for confidentiality in a settlement makes minimal sense in this narrow view.²⁷⁹

275. *Neiman*, 217 F. Supp. 2d at 1286.

276. Certain safeguards exist within the Code of Federal Regulations for the selection of contractors, in which contractors must meet certain employment requirements. Generally speaking, the internal workings of a government contractor are not subject to FOIA, as it is not an “agency” under the scope of FOIA; however, different procedural devices for oversight exist. See 41 C.F.R. § 50-201.3 (2019) (inclusive of the general regulations placed on government contractors); 41 C.F.R. § 60-20.8 (defining “harassment and hostile work environments” pursuant to Exec. Order No. 11246 (1965), which established anti-discrimination policies for hiring and employment on the part of government contractors).

277. See *How to Become a Federal Government Contractor*, USA.GOV, <https://www.usa.gov/become-government-contractor> [<https://perma.cc/R32T-DSZV>] (discussing interactive tools related to the demand and pricing of specific services for government contracts).

278. 18 U.S.C. § 1905 (providing criminal penalties for individuals who disclose trade secrets or related material).

279. Whether or not this restriction on public employees’ ability to keep information private is a positive or negative is not a straightforward question. For example, when Tamir Rice, a twelve-year-old African American child was shot by police in 2014, the officer’s personnel records were obtained through a state open records request. Caroline Cournoyer, *How Much Privacy Do Public Employees Actually Have?*, GOVERNING (Sept. 24, 2018), <https://www.governing.com/topics/workforce/gov-government-public-employee-privacy.html> [<https://perma.cc/AG37-R5XU>]. Those records contained information from the officer’s previous employer, citing his “inability to perform basic functions” and a “dangerous loss of composure” when handling firearms. *Id.* Despite public outrage, the officer was cleared

Taking the restrained view of the policies behind confidentiality, the policies encourage fair bargaining for plaintiffs, allow for autonomy via freedom to contract, and allow the government, as a party to a contract, to prevent sensitive information from becoming public. However, this restrained view affords no place for confidentiality in sexual misconduct settlements, as the public officials involved already committed to public oversight into their affairs.

3. *The Restrained Approach*

The policies in support of FOIA and confidential settlements must be afforded a “restrained” interpretation, with the ultimate goal of allowing the laws to coexist and avoiding a “true conflict.”²⁸⁰ To do so, the policies of each law that can work in agreement must be identified.²⁸¹

The freedom to contract is not substantially limited by requiring confidential settlements to be disclosed pursuant to a FOIA request. The freedom to contract is not already without its limitations; imposing another limitation does not substantially reduce the effectiveness or legitimacy of the freedom.²⁸²

of wrongdoing in the incident and hired by a different police department thereafter. *Id.*; Matthew Haag, *Cleveland Officer Who Killed Tamir Rice Is Hired by an Ohio Police Department*, N.Y. TIMES (Oct. 8, 2018), <https://www.nytimes.com/2018/10/08/us/timothy-loehmann-tamir-rice-shooting.html> [<https://perma.cc/87S6-HGRP>].

On the other hand, activist groups are using open records acts to gain information about university researchers and using this information in an attempt to stop certain areas of scientific development. Activist groups have targeted research into pollution, gun violence, climate change, genetically modified foods, and the connections between mining and cancer, among others. Puneet Kollipara, *Open Records Laws Becoming Vehicle for Harassing Academic Researchers, Report Warns*, SCI. (Feb. 13, 2015, 12:15 PM), <https://www.sciencemag.org/news/2015/02/open-records-laws-becoming-vehicle-harassing-academic-researchers-report-warns> [<https://perma.cc/Z9EV-WUMJ>]. By seeking the scientists’ emails, handwritten notes, and research strategies, the effect has been to chill the researchers’ free speech rights and prevent scientific development altogether. *Id.* Because the scientists are at government-funded universities, their activities are subject to open records laws. *Id.*

In both the case of Tamir Rice and the scientific researchers, no elected officials were involved. These are the stories of regular, non-elected public employees, dealing with increased public awareness of their professional lives simply because they exist in a framework that allows anyone to request records pertaining to their work. *See id.* All government employees, including elected and unelected officials, necessarily open themselves up to this kind of oversight.

280. Kanowitz, *supra* note 234, at 256 (citing Currie, *supra* note 234, at 757).

281. *Id.*

282. *See generally* Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall,”* 79 B.U. L. REV. 263, 265–67 (1999) (discussing the various restraints on

Further, imposing an additional limitation is not even necessary under the restrained approach—requiring a confidential settlement to be disclosed under FOIA would make sense within the public policy limitation on the freedom to contract. Because the Department of Justice has already taken a stance disfavoring confidential settlements of federal government claims and therefore articulated public policy in this area, requiring confidential settlements to be disclosed under FOIA is a natural extension of the public policy limitation on contracting.²⁸³ In taking this restrained approach, the freedom to contract and openness policies can coexist, and the goal of the restrained approach is met.²⁸⁴

In a situation where the confidential settlement was concealing information already exempted under FOIA—for example, the settlement contained trade secrets or inter-agency communications—no conflict exists and the information would not be disclosed.²⁸⁵ This necessitates a case-by-case analysis of the content of the settlement and FOIA request when the information contained may be responsive to a FOIA exemption.²⁸⁶ If the settlement contains only exempted material, no detriment is done to the policies in support of FOIA by withholding that information; nor is any detriment done to the confidentiality of the settlement agreement, because the information was not disclosed. This is a “false conflict.”²⁸⁷

the freedom to contract and the emergence of these restraints over time). Pettit argues that limitations on the freedom to contract are limitations on the concept of freedom itself, but concludes that “[i]f there is a direct conflict between freedom of contract and some other clearly articulated value, even some that might not seem particularly significant, freedom of contract often loses.” *Id.* at 354. Despite Pettit articulating the freedom to contract as a “fundamental” right, he indicates that this freedom is easily taken away. *Id.* at 353–54.

283. 28 C.F.R. § 50.23(a) (2019). See *supra* note 195 and accompanying text for a discussion regarding the government’s “official position” on confidential settlements as articulated in 28 C.F.R. § 50.23. The government has not created a strict policy to adhere to this position.

284. See Kanowitz, *supra* note 234, at 256 (citing Currie, *supra* note 234, at 758).

285. See 5 U.S.C. § 552(b)(1)–(9); see also *supra* note 244 (discussing FOIA’s statutory exemptions). This situation does not create a “true conflict” as discussed by Professor Currie’s methodology. See Kanowitz, *supra* note 234 (citing Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, U. Chi. L. Rev. 227, 251 (1958)). Instead, this situation involves two laws actually working together—FOIA’s exemption for the relevant material, and the confidentiality provision of the agreement. The analysis in this Section regarding the restrained approach to this particular scenario shows the need to evaluate the merits of each FOIA request independently. See *generally id.*

286. See *supra* note 285 and accompanying text (discussing how the outcome would not be classified as a “true conflict” and thus a case-by-case analysis is necessary for all FOIA requests).

287. See Symeonides, *supra* note 226, at 1862–63 (discussing Professor Currie’s “False Conflicts” doctrine and establishing the false conflict situation as one in which only one state has a legitimate interest in having its law applied).

In the case of confidential settlement of an employment-context sexual misconduct case, the confidentiality provision of the settlement is already disfavored by many states and the federal government. This is shown by the 2017 Tax Cuts and Jobs Act's refusal to allow a tax deduction for employers' litigation expenses arising out of a sexual misconduct claim that ultimately ends in a confidential settlement.²⁸⁸ Additionally, the Department of Justice disfavors all confidential settlements involving the federal government.²⁸⁹ Both of these policies make it difficult to consider a confidential settlement as anything but "contrary to public policy,"²⁹⁰ and an assumption should be made that when a valid FOIA request seeks a confidential settlement agreement, the agreement is contrary to public policy.²⁹¹

At their very core, the concepts behind FOIA and the ability to confidentially settle a sexual tort dispute are at odds and create, at the very least, an "apparent conflict" under this analysis.²⁹² The apparent conflict exists when it appears that each law has a legitimate policy interest in its application in the given situation.²⁹³ However, categorizing the laws as having a "true conflict" can be avoided by giving the laws a restrained interpretation. When analyzing the policies side by side, it becomes apparent that, at least in the context of a sexual misconduct settlement, the laws can coincide.²⁹⁴

288. Schau, *supra* note 187, at 8.

289. See 28 C.F.R. § 50.23(a) (2019).

290. *Muschany v. United States*, 324 U.S. 49, 50, 66 (1945) (discussing that the public policy must be articulated in actual laws or legal precedent, and that "general considerations of proposed public interest" are insufficient). As the government's official position is articulated in the Code of Federal Regulations, this qualifies as public policy under *Muschany*, despite the government not always following its own mandate. See Jason Clayworth, *10 Top Iowa Officials Signed Secret Settlements with State Workers*, DES MOINES REG. (Mar. 25, 2014, 11:45 PM), <https://www.desmoinesregister.com/story/news/investigations/2014/03/26/10-top-iowa-officials-signed-secret-settlements-with-state-workers/6900285/> [<https://perma.cc/V2KZ-59FH>] (discussing twenty-four uncovered secret settlements from the Iowan government that contained confidentiality clauses, some of which involved two assistants of the Iowa attorney general's office). If the government did not wish to take the position articulated in 28 C.F.R. § 50.23 as its official policy regarding confidential settlements, the government should have refrained from articulating such a position in the "actual laws" as defined by *Muschany*. 324 U.S. at 66.

291. See *Muschany*, 324 U.S. at 50, 66.

292. *Government Interests Approach*, *supra* note 230; see also Symeonides, *supra* note 226, at 1850–67 (discussing the historical use of the general governmental interest analysis framework).

293. *Government Interests Approach*, *supra* note 230.

294. See Kanowitz, *supra* note 234, at 256.

Because confidential settlements, especially those of sexual misconduct claims, are generally disfavored by the states and the federal government, these settlements are contrary to public policy and not enforceable when sought by a FOIA request.²⁹⁵ However, when the settlement contains information that would otherwise be shielded from disclosure under FOIA,²⁹⁶ whether through an exception or exemption, the confidentiality of that agreement may remain without eroding the reach of FOIA.²⁹⁷

C. *Can the Policies Be Reconciled?*

Despite appearing as polar opposites, the restrained approach of government interest analysis allows the policies behind FOIA and confidential settlements to coexist in the situation of a FOIA request that would uncover an otherwise-confidential settlement. Because all confidential settlements are disfavored by the federal government in 28 C.F.R. § 50.23, they are considered contrary to public policy.²⁹⁸ However, there is no law directly forbidding such settlements at the federal level, so the government is free to continue to contract for confidential settlements despite the official policy disfavoring these settlements. Within the FOIA context, a FOIA request has strong policies in favor of openness and disclosure, which coexist with the policy against confidential settlements articulated in 28 C.F.R. § 50.23. As a result, information regarding the confidential settlement must be disclosed unless subject to an exemption or exception. Of note, FOIA has already been limited in certain discrete ways through exemptions and exceptions—none of which specifically exempt disclosure of the information sought by a FOIA request uncovering a confidential sexual misconduct settlement.²⁹⁹ If an exemption or exception applies, the policy of openness behind FOIA would no longer be a relevant consideration, and the information would not be disclosed as there is no true conflict.³⁰⁰

Absent an applicable exemption or exception, a confidential settlement agreement in a sexual misconduct case must be disclosed pursuant to a FOIA

295. See *Muschany*, 324 U.S. at 64–69.

296. Information not required to be disclosed under FOIA is found in 5 U.S.C. § 552(b)(1)–(9) and discussed herein *supra* Section II.A.2.

297. See *supra* note 285 (discussing the “false conflict” situation).

298. See *Muschany*, 324 U.S. at 64–69; see also *supra* note 290 and accompanying text (discussing the government’s position articulated in 28 C.F.R. § 50.23, disfavoring confidential settlements, as meeting *Muschany*’s requirement that the public policy be articulated in “actual laws” in order for it to qualify as an invalidation on a contract).

299. See *supra* notes 51–54 and accompanying text for FOIA’s exemptions and exceptions.

300. See *supra* note 285 and accompanying text (discussing the “false conflict” that arises when the policies behind two laws appear to be different, but actually accomplish the same goal).

request because the restrained approach is able to align the government's official position against confidential settlements with the policy of openness in FOIA.

IV. CONCLUSION

Kwame Kilpatrick would still be behind bars if the open records request that uncovered his salacious affair was not granted, but only because he would go on to commit several white-collar crimes, landing him a substantial prison sentence.³⁰¹ Had the *Detroit Free Press* been denied Kilpatrick's settlement information, the City of Detroit would have never learned the information used to remove their corrupt mayor from office—including that he lied to the city council in gaining approval of the confidential settlement in the first place.³⁰² Kilpatrick may have stayed in office, even after his egregious cover-up of a murder and affair with his chief of staff, if the *Detroit Free Press* had not unraveled the settlement information from a knot of confidentiality.³⁰³

The strong policies behind FOIA emphasize the need for openness and transparency to help create an informed electorate.³⁰⁴ The policies behind confidentiality in settlements are likewise strong, emphasizing freedom to contract and autonomy, and allowing plaintiffs greater settlement bargaining power when faced with a large institutional defendant who wishes to keep a claim quiet.³⁰⁵ When using government interest analysis, the threshold question is whether the two policies can actually coexist side-by-side, resulting in the same outcome regardless of which law is applied.³⁰⁶ When taking the traditional government interest analysis approach, it becomes apparent that these policies are polar opposites—the secrecy of the settlement necessarily opposes the openness of FOIA—but in taking a restrained

301. Robert Snell, *Former Detroit Mayor Loses Latest Bid for Freedom*, DETROIT NEWS (Nov. 15, 2019, 11:12 AM), <https://www.detroitnews.com/story/news/local/detroit-city/2019/11/15/former-detroit-mayor-kwame-kilpatrick-loses-latest-bid-freedom/4201472002/> [<https://perma.cc/B6CP-5FTF>].

302. See Zappala, *supra* note 22, at 30.

303. See *id.*

304. See *supra* Section II.A.3 (analyzing the history behind FOIA and the legislative intent in its passage, as well as its modern usage).

305. See Section III.B.2 (analyzing common usage and contractual reliance theories of confidential settlement agreements).

306. See sources cited *supra* note 232 and accompanying text (discussing the government interest analysis framework, including the preliminary questions to be asked when utilizing the framework).

approach, the competing policies can be reconciled.³⁰⁷ The federal government has articulated a policy, codified in the Code of Federal Regulations,³⁰⁸ opposing confidential settlements in any claim involving the government. Because this position satisfies the definition of “public policy,”³⁰⁹ the restrained view indicates that a confidential settlement is contrary to the public policy of the United States and should be disclosed under FOIA.

Kilpatrick was a public official who gave up a great deal of his ability to confidentially conduct business when he submitted to the public’s oversight.³¹⁰ Michigan’s open records act, an analog to the federal FOIA, has a policy promoting openness, but not an absolute policy—despite having exemptions and exceptions, the drafters of the statute did not provide for this type of information to be withheld.³¹¹ Because the justification for the confidentiality of the settlement was necessarily eroded by the conduct of Kilpatrick, and the open records request involved information that was otherwise disclosable, the policies behind the laws are not truly in conflict under a restrained interpretation. Michigan rightfully granted the request after the *Detroit Free Press* pursued the issue.³¹² The same cannot be said for every case at the federal level, with a recent Administration admitting to improperly withholding one-third of its FOIA responses with no legal basis for doing so.³¹³

The Kilpatrick story and surrounding use of open records laws reflects a broader issue at the federal level. Individuals in the United States use the federal government’s policy of transparency as a way to supervise the government and ensure it acts in the best interest of the people.³¹⁴ However, when the opportunity exists for a high-level federal official to confidentially settle sexual misconduct claims and insulate that claim from public oversight, the official is incentivized to do just that in order to keep his or her official position.³¹⁵ The Kilpatrick scandal illustrates the extent to which a government official is capable of withholding information

307. See *supra* Section III.B.3 (holding that the policies can be reconciled when using the restrained approach of government interest analysis).

308. 28 C.F.R. § 50.23(a) (2019).

309. *Muschany v. United States*, 324 U.S. 49, 66 (1945) (holding that a public policy must be articulated in actual laws or legal precedent, and that “general considerations of proposed public interest” are insufficient to establish a public policy for contractual invalidation purposes).

310. See sources cited *supra* note 279 and accompanying text.

311. Michigan Freedom of Information Act, MICH. COMP. LAWS §§ 15.231, 15.243 (1976).

312. See *supra* notes 20–21 and accompanying text.

313. Bridis, *supra* note 93.

314. See *supra* Section II.A.3 (analyzing the history behind FOIA and the legislative intent in its passage, as well as its modern usage).

315. See Burdge, *supra* note 151 (discussing the incentive of large organizational defendants to confidentially settle claims when they believe stand-by plaintiffs may exist).

that may be relevant to a voter, pursuant to the legal channels of a confidential settlement. Given the policies of openness and transparency, articulated by the federal government in the Code of Federal Regulations,³¹⁶ this practice can no longer be maintained.

Information matters.³¹⁷ Forty-seven percent of Americans believe it is difficult to know whether the information they encounter is true.³¹⁸ Americans are also shutting the doors on confidentiality—it took until 2017 for America to start the difficult conversation about what to do when a person in power causes pain to hundreds of women and pays them hush money in the form of a settlement agreement.³¹⁹ Realizing that they could have protected other similarly situated individuals, many victims broke their non-disclosure agreements, seeking justice from the courts in the process.³²⁰ America is shifting how it views confidentiality, and how it views information—FOIA requests increase year after year, and yet are still often denied without a legal basis for doing so.³²¹ The cultural shift to demand transparency, legitimate oversight, and fairness and equality for employees is rooted in a community-based mindset that all people should look out for the best interests of others. One initial step to accomplishing this goal is allowing public access to information about misconduct occurring at the federal level.

316. 28 C.F.R. § 50.23(a) (2019).

317. See Ariel Edwards-Levy, *Young Voters Don't Feel Well-Informed. Some Think That Means They Shouldn't Vote.*, HUFFPOST (Oct. 18, 2018, 8:03 PM), https://www.huffpost.com/entry/young-voters-not-informed-midterm-elections_n_5bc90345e4b0d38b587661b4 [<https://perma.cc/K5JL-995W>].

318. Sabrina Tavernise & Aidan Gardiner, *'No One Believes Anything': Voters Worn Out by a Fog of Political News*, N.Y. TIMES (Nov. 18, 2019, 12:42 PM), <https://www.nytimes.com/2019/11/18/us/polls-media-fake-news.html> [<https://perma.cc/7NXX-TGC6>].

319. See *Harvey Weinstein Timeline*, *supra* note 160.

320. See, e.g., Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FINANCIAL TIMES (Oct. 23, 2017), <https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589> [<https://perma.cc/RGE9-MC59>].

321. Bridis, *supra* note 93.

