TOO MUCH SUN CAN BURN: REASSESSING PUBLIC ACCESS TO CONFIDENTIAL EMPLOYMENT SETTLEMENT AGREEMENTS IN PUBLIC EDUCATION

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INTRODUCTION

In 2018, a New York school district reached a confidential settlement to resolve an employment discrimination claim brought by a school administrator.[1] Under the terms of agreement, the school district provided the administrator $380,000, health care coverage for two years, and a "neutral letter of recommendation."[2] Both parties were prohibited from discussing the underlying dispute because of a confidentiality clause in the agreement.[3] Such confidential settlements allow employers and employees to avoid expensive and risky trials and conserve resources,[4] making them sound public policy.[5] For public school districts, resource conservation benefits are important, especially in light of the chronic underfunding of public education.[6]

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[1] Joseph P. Shaw, *Former Administrator Received Nearly $500,000 in Settlement with Southampton School District*, SOUTHAMPTON PRESS (Feb. 6, 2018), http://www.27east.com/news/article.cfm/Southampton-Village-Surrounding-Areas/546594/Former-Administrator-Received-Nearly-500000-In-Settlement-With-Southampton-School-District.

[2] *See id.*

[3] *See id.*

[4] *See* Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 286 (1999) (writing that confidential private settlement of disputes is favored by courts as they preserve public and private resources in avoiding trial); *see also* Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 22, 37 (1996) (noting the benefits of private settlement).

[5] *See* discussion and notes *infra* Part II.A.

[6] The underfunding of schools is so severe as to rise to a state constitutional violation. *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186, 191–92, 197 (Ky. 1989); *see also* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994) (providing an overview of the

Despite confidentiality clauses, many agreements become public knowledge.[7] In the New York situation, cited above, the settlement ultimately entered the public discourse because a newspaper requested its release under New York's Freedom of Information Law, the state's open government law.[8] New York's law is not unique; all fifty states have similar statutes that create a public right of access to government documents.[9] Legislatures enacted these laws to promote government transparency as a matter of policy.[10] This policy objective has been interpreted to require public inspection of confidential settlement agreements, thereby effectively destroying any confidentiality guarantees between the parties to keep the cause of the settlement out of public view.[11]

But the assumptions behind state open records laws are dubious.[12] At a minimum, they are a "simplistic model of linear communication" resting on the unproven assumption that public access to information improves public oversight and, in turn, our representative democracy.[13] More troubling is that the unintended costs of these laws are overlooked. Justice Antonin Scalia characterized such laws as the "Taj Mahal of the Doctrine of Unintended Consequences, the Sistine Chapel of [c]ost-[b]enefit . . . ignored."[14] Thus, attention to the costs and benefits of open records laws vis-a-vis other competing policy interests, such as the use of settlement agreements to conserve public resources, is needed.[15] This paper begins that analysis in the

various state constitutional challenges to public school finance statutes).

[7] *See, e.g.*, Shaw, *supra* note 1.

[8] *See id.*; N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2018).

[9] *See, e.g.*, WIS. STAT. § 19.31 (2017) (codifying the Wisconsin Open Records Act); *see also* Michael W. Field, *Rhode Island's Access to Public Records Act: An Application Gone Awry,* 8 ROGER WILLIAMS U. L. REV. 293, 294 (2003) (noting that all fifty states have some version of an open records statutes).

[10] *See* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 897–98, 928–30 (2006) (criticizing the general policy presumption behind open government laws that suggest transparency creates an informed electorate).

[11] *See* Richard Fossey, *Secret Settlement Agreements Between School Districts and Problem Employees: Some Legal Pitfalls*, 12 J. PERSONNEL EVALUATION IN EDUC. 61, 62 (1998) ("[A] string of court cases have struck down school districts' confidential settlement agreements on the grounds that such agreements violate state open-records laws.").

[12] *See* Fenster, *supra* note 10, at 903; Antonin Scalia, *The Freedom of Information Act Has No Clothes*, AEI J. ON GOV'T & SOC'Y, Mar.–Apr. 1982, at 16–17.

[13] *See* Fenster, *supra* note 10, at 894; *see also* Scalia, *supra* note 12, at 16 ("[T]he [Freedom of Information Act] and its amendments were promoted as a . . . boon to the . . . little guy . . . . [I]t is a far cry from John Q. Public finding out how his government works.").

[14] *See* Scalia, *supra* note 12, at 15.

[15] *See id.* at 19; Douglas P. Mitchell, Note, *Public Access to Governmental Records in Arizona*, 16 ARIZ. L. REV. 891, 895 (1974). Justice Scalia characterized enactment of these laws as lacking any cost-benefit analysis, excluding any assessment of competing interests, and "loss of all sense of proportion." Scalia, *supra* note 12, at 16.

context of employment settlement agreements made by public school districts.

This article contends that the current legislative and judicial presumption in most states that such agreements are completely open to inspection should be revised for several reasons. First, as noted above, open records laws' contributions to creating an informed electorate are questionable, if they exist at all.[16] Second, in contrast, settlement agreements have clearly established benefits – resources conservation – and have been declared sound public policy.[17] Yet open records laws threaten the confidentiality protections, the lynchpin of most agreements.[18] Third, the cost savings of confidential settlement agreements are particularly significant in the context of public education school finance; school districts rarely receive the amount of public resources required to meet increased demands for student performance.[19]

To be sure, transparency is a laudable policy goal.[20] The public has a right to know their government's actions, and that idea is deeply rooted in our history.[21] But too much public oversight (and publicity)

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[16] *See* Ryan C. Fairchild, Comment, *Giving Away the Playbook: How North Carolina's Public Records Law Can Be Used to Harass, Intimidate, and Spy*, 91 N.C.L. REV. 2117, 2133 (2013) (identifying ways in which the state of North Carolina's public records statutes can lead to absurd results, especially in the public higher education setting); Fenster, *supra* note 10, at 893 (writing that transparency has limits and there must be an effort to account for the costs and benefits of public disclosure); Field, *supra* note 9, at 294–95 (noting that freedom of information laws have led to unintended consequences and uses unrelated to their purpose).

[17] *See e.g.*, Tuft v. City of St. Louis, 936 S.W.2d 113, 117–18 (Mo. Ct. App. 1996) (describing how the policy benefits of confidential settlement agreements may outweigh perceived benefits of public access to confidential settlement agreements). Moreover, there are considerable costs associated with complying with public requests for government documents. *See* Fenster, *supra* note 10, at 907; Scalia *supra* note 12, at 16 ("[Open laws] have greatly burdened [investigations] and the courts."). School districts have hired employees to be exclusively tasked with handling open records requests from the public. *See, e.g.*, *WCASD Open Record Office*, WEST CHESTER SCH. DIST., https://www.wcasd.net/domain/45 (last visited Nov. 4, 2018).

[18] *See, e.g.*, Fenster, *supra* note 10, at 891–92 ("[C]osts of complying with these laws . . . may adversely affect the ability of all federal, state, and local agencies to make effective decisions in a rational, deliberative, and efficient manner.").

[19] *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186, 198 (Ky. 1989); Jessica Calefati, *Why L.A. Unified May Face Financial Crisis Even with a Giant Surplus this Year*, L.A. TIMES (June 4, 2018), http://www.latimes.com/local/lanow/la-me-edu-los-angeles-unified-budget-woes-20180604-story.html; Colleen Wright, *Tallahassee's Proposed Budget Would Leave $6-8 Million Deficit*, TAMPA BAY TIMES (Mar. 13, 2018), http://www.tampabay.com/blogs/gradebook/2018/03/13/pinellas-tallahassees-proposed-budget-would-leave-6-8-million-deficit/.

[20] *See, e.g.*, Bradley Pack, Note, *FOIA Frustration: Access to Government Records Under the Bush Administration,* 46 ARIZ. L. REV. 815, 815–16, 823 (2004) (highlighting the difficulty in obtaining government documents after the World Trade Center attacks on September 11, 2001 and need for greater access to government actions through open records laws).

[21] *See, e.g.*, Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE JAMES MADISON PAPERS, 1819-1836, 103, 103 (Gaillard Hunt ed., 1910), http://oll.libertyfund.org/titles/madison-the-writings-vol-9-1819-1836 ("[A] people who mean to be their own Governors, must

impedes government actors from efficiently executing their assigned responsibilities,[22] including making personnel decisions. The task, then, is to balance between competing policy goals of transparency (that, again, have theoretical benefits) and of encouraging settlement agreements (which has demonstrable value to public entities and taxpayers.)[23]

The article proceeds as follows: Part I overviews state open government laws; Part II discusses the cost-effectiveness of confidential settlement agreements in efficiently resolving disputes; Part III examines cases at the intersection of open records requests and confidential settlement agreements; Part IV proposes some alternatives that balance the public's right to know about their government and school officials' need to use confidential agreements to achieve cost savings to the taxpayer and benefit to schools.

I. PUBLIC ACCESS TO GOVERNMENT RECORDS

A. Common Law

At common law, the public did not enjoy a right to access government information as a citizen or taxpayer.[24] Government officials considered the purpose of the review,[25] and inspection was predicated on the idea that the information sought had value for purposes of litigation.[26] The scope of that right later expanded to include other legal documents, like deeds, tax regulations, and wills.[27]

arm themselves with the power which knowledge gives.").

[22] Mitchell, *supra* note 15, at 895 ("The interests of citizens and their elected representatives can best be served through an open exchange of information in some matters and insulation of government action from public view in others.").

[23] *See* Tuft v. City of St. Louis, 936 S.W.2d 113, 117–18 (Mo. Ct. App. 1996); Dore, *supra* note 4, at 290. S*ee also In re* Smith, 926 F.2d 1027, 1029 (11th Cir. 1991) (citing Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Settlement is generally favored because it conserves scarce judicial resources.").

[24] *See* Mitchell, *supra* note 15, at 906–07. *See also* David S. Cohen, Note, *Public's Right of Access to Government Information Under the First Amendment*, 51 CHI.-KENT L. REV. 164, 167 (1974) ("[I]t is important to note that through legislative sensitivity to the needs and desires of a democratic people, such rights of access have developed in an area where the common law was silent.").

[25] *See* Fairchild, *supra* note 16, at 2123 (noting that expansion of public access to government information without requirements). *See also* 5 JAMES A. RAPP, EDUCATION LAW § 13.02(2)(a)(i) (Mathew Bender & Co. 2018) (providing an overview of public records laws in the context of public education).

[26] *See, e.g.*, Nowack v. Auditor Gen., 219 N.W. 749, 751 (Mich. 1928).

[27] *See* HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 28 (1953).

Courts expanded public access to records over time.[28] A valid public or private interest permitted inspection.[29] Nevertheless, a requirement that there be a valid interest remained a precondition of access and right to inspect public records.[30] Mere curiosity was not sufficient grounds to access public documents.[31] The valid interest requirement has been removed by legislatures with the creation of open government laws.[32]

B. Constitutional and Statutory Rights to Inspect Public Records

1. Origins of Public Records Laws

Open government statutes emerged in federal and state law in a post-Watergate era.[33] State open government laws have two primary components which are those: (1) governing public access to meetings and; (2) covering government records.[34] The latter is the concern of this paper. All fifty states have created a right for inspection of government records by way of statute[35] and some have such a right embedded in their state constitution.[36]

The state public policy behind such laws is to ensure government transparency and, therefore, an informed electorate.[37] For example, the "Declaration of Policy" of Wisconsin's open records statute reads as follows: "[i]n recognition of the fact that a representative government is dependent on an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the

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[28] *See id.* at 26.

[29] *See id.* at 32.

[30] *See id.*

[31] *See, e.g.*, Citizens for Better Educ. v. Bd. of Educ., 308 A.2d 35, 37 (N.J. Super. Ct. App. Div. 1973) (citing Moore v. Bd. of Chosen Freeholders of Mercer Cty., 184 A.2d 748 (N.J. Sup. Ct. App. Div. 1962); Taxpayers Ass'n of Cape May v. City of Cape May, 64 A.2d 453 (N.J. Super. Ct. App. Div. 1949); Ferry v. Williams, 41 N.J.L. 332, 334 (N.J. 1879)); Redding v. Jacobsen, 638 P.2d 503, 506 (Utah 1981).

[32] *See* Cohen, *supra* note 24, at 170–71.

[33] *See* Field, *supra* note 9, at 301–02.

[34] *See* Cohen, *supra* note 24, at 166–67.

[35] Field, *supra* note 9, at 294.

[36] *See, e.g.*, FLA. CONST. art. I, § 24(a) ("Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf . . . .").

[37] *See* Linda De La Mora, Comment, *The Wisconsin Public Records Law*, 67 MARQ. L. REV. 65, 65 (1983) ("A major premise underlying public records laws is the rationale that in a self-governing society the electorate must be able to examine the conduct of the affairs of government as contained in documents and records kept by government officials."). This assumption is noted in numerous declarations of policy intent in some state open records statutes. *Id.* at 65 n.6. *See also* Mitchell, *supra* note 15, at 891 (citing the importance of an informed public to the workings of democracy).

greatest possible information regarding the affairs of government . . . ."[38] This legislative public policy goal of government transparency assumes that a broad public right and presumption that government documents are subject to public inspection is an integral part of an informed, self-governing population.[39] Courts emphasize this policy basis[40] and it can be dispositive in those cases concerning settlement agreements made by school boards.[41] Extending this logic, some contend that access to government records is a constitutional right under the First Amendment.[42]

Because legislatures have expressed a policy favoring disclosure, courts presume records are open to inspection.[43] Those seeking to enjoin release bear the burden of overcoming this presumption.[44] There are some exceptions to disclosure, and these are state specific.[45] Some states allow for courts to balance competing interests, such as privacy, against the public's right to review government documents.[46]

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[38] WIS. STAT. ANN. § 19.31 (2018).

[39] *See* De La Mora, *supra* note 37, at 67 ("The expansion of the right to inspect public records [through state legislation] reflected a concern that citizens should have access to public records in order to monitor the acts of public officials."). S*ee also* Ruth Mayes Barnes, *Government in the Sunshine: Promise or Placebo,* 23 U. FLA. L. REV. 361, 361 (1971) (documenting the state of Florida's purpose in enacting its open government law); Matthew V. Munro, Comment, *Access Denied: How Woznicki v. Erickson Reversed the Statutory Presumption of Openness in the Wisconsin Open Records Law*, 2002 WIS. L. REV 1197, 1198 (2002) ("The stated public policy behind [Wisconsin Open Records Law] is that 'a representative government is dependent upon an informed electorate' . . . .").

[40] *See, e.g.*, NLRB v. Robbins Tire & Rubber Co. 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."); Press-Enter. Co. v. Super. Ct., 478 U.S. 1, 18 (1986) (Stevens, J., dissenting) ("Without some protection for the acquisition of information about the operation of public institutions . . . the process of self-governance contemplated by the Framers would be stripped of its substance.").

[41] *See, e.g.*, Journal/Sentinel v. Sch. Bd., 521 N.W.2d 165, 168, 171 (Wis. Ct. App. 1994) (ruling that release of confidential settlement agreement was appropriate given underlying policy of an open records law and the presumption in favor of release).

[42] *See, e.g.*, Field, *supra* note 9, 294 ("Unreasonable restrictions or delay upon the right to inspect government records can infringe upon a citizen's right to free speech and hinder the public's decision-making process, perhaps even reaching into the voting booth.").

[43] *See* Munro, *supra* note 39, at 1198.

[44] *See, e.g.*, *Journal/Sentinel*, 521 N.W.2d at 168 (noting the presumption of complete access); *see also* Munro, *supra* note 39, at 1232–33 (noting that Wisconsin's Open Records Law creates a rebuttable presumption by clear and convincing evidence that a record should not be released).

[45] *See, e.g.*, 38 R.I. GEN. LAWS § 2-2(4)(A–AA) (2018) (listing exclusions from definition of "public records"); Fairchild, *supra* note 16, 2120 n.15, 2121. North Carolina does not permit court created exceptions. *See id.* at 2121.

[46] *See* HAW. REV. STAT. § 92F-13(1) (2018); KAN. STAT. ANN. § 45-221(a)(30) (2018); KY. REV. STAT. ANN. § 61.878(1)(a) (West 2018); MASS. GEN. LAWS ch. 214, § 1B (2018); MICH. COMP. LAWS § 15.243(1)(a) (2018) (discussion *infra* Part II.A).

2. Determining a Public Record Open to Inspection

To be a public record available for inspection the information must be: (a) created by a public body or entity, (b) a public record, and (c) not exempt from disclosure by way of statute or common law exception.[47] These requirements are discussed immediately below.

i. Public Body

Some public agencies are creatures of statute and easily satisfy the definition of a "public body." A city or town clerk, board of selectmen, or mayor's office, are clear examples of public entities.[48] Public schools and their administrative offices are creatures of state statute and, therefore, public entities.[49] Questions arise as to whether third-party vendors or agencies contracted by the state are public bodies subject to open records laws.[50] In the education context, courts have been asked to determine if charter schools,[51] interscholastic athletic associations,[52] unions[53], or student groups satisfy this prong.[54]

ii. Statutorily Defined Public Records Open to Access and Exceptions

To be accessible for public inspection, the information requested must also be a "public record," a defined term under state statute.[55] A record created by a public entity is presumed to satisfy this requirement.[56] Moreover, states broadly define the definition of "record." For example, New Hampshire's "Right to Know" law defines

[47] *See, e.g.*, Hathaway v. Joint Sch. Dist., 342 N.W.2d 682, 687 (Wis. 1984).

[48] *See* Grider v. City of Auburn, 618 F.3d 1240, 1261 (11th Cir. 2010) (quoting Denny v. City of Albany, 247 F.3d 1172, 1190 (11th Cir. 2001)).

[49] *See e.g.*, MASS. GEN. LAWS ch. 71, § 68 (2018) (requiring towns to create a system of public schools and manage them through school committees).

[50] *See* Fromer v. Freedom of Info. Comm'n, 875 A.2d 590, 592 (Conn. App. Ct. 2005).

[51] *See* Zager v. Chester Cmty. Charter Sch., 934 A.2d 1227, 1231 (Pa. 2007).

[52] *See* Better Gov't Ass'n v. Ill. High Sch. Ass'n, 2016 IL App. (1st) 151356, ¶ 21.

[53] *See* Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ., 789 N.W.2d 495, 498 (Mich. Ct. App. 2010).

[54] *See* Red & Black Publ'g Co. v. Bd. of Regents, 427 S.E.2d 257, 259 (Ga. 1993).

[55] *See* Schneider v. City of Jackson, No. W2005-01234-COA-R3-CV, 2006 Tenn. App. LEXIS 405, at *30–31 (Ct. App. June 14, 2006).

[56] *See, e.g.*, Schill v. Wis. Rapids Sch. Dist., 2010 WI 86, ¶¶ 20, 142, 372 Wis. 2d 572, 586, 633, 786 N.W.2d 177, 185, 208 (recognizing the presumption that a record produced by a school district is subject to public review, but holding that personal emails of teachers was not a public record); Hathaway v. Joint Sch. Dist., 342 N.W.2d 682, 687 (Wis. 1984) ("[T]he general presumption . . . is that public records shall be open to the public unless there is a clear statutory exception, unless there exists a limitation under the common law, or unless there is an overriding public interest in keeping the public record confidential.").

government records as:

> [*A*]*ny* information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term "governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" shall also include the term "public records."[57]

To be sure, information may be a public record, but excepted from public inspection.[58] State statutes specifically enumerate certain exclusions.[59] For example, the Pennsylvania legislature has declared that numerous documents are *not* public records subject to public inspection, including:

> A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority,"[60]

among numerous others.[61] Other states have similar provisions.[62]

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[57] N.H. REV. STAT. ANN. 91-A:1-a (2018) (emphasis added).

[58] *See, e.g.*, State *ex rel.* Anderson v. City of Vermillion, 134 Ohio St. 3d 120, 2012-Ohio-5320, 980 N.E.2d 975, at ¶ 15 (noting exception to duty to permit public inspection of public record).

[59] *See, e.g.*, 65 PA. CONS. STAT. § 67.708 (2018) (noting numerous exceptions to the Pennsylvania state right to know law).

[60] *Id.*

[61] *See, e.g.*, 65 PA. CONS. STAT. § 67.708(b). Of course, Pennsylvania is but one example, and other states have their own legislatively created exemptions.

[62] *See, e.g.*, N.C. GEN. STAT. § 132-1.10(b)(5) (2018) (social security numbers); N.C. GEN. STAT. § 132-1.6 (2018) (emergency response plans); N.C. GEN. STAT. § 132-1.1(a) (2018) (attorney-client communications). *See also* 38 R.I. GEN. LAWS § 2-2(4)(A)(I)(a)–(b) (2018) (exempting from public access all records which are identifiable to an individual applicant for benefits, client, patient, student, or employee); WIS. STAT. § 19.36(1) (2018) (any record exempted from disclosure under federal law is exempted from disclosure under state law).

iii. Court Determined Public Records and Exceptions

Courts also have created exceptions applicable to the definition of public records subject to release[63] that overcome the general presumption that a public record is subject to release.[64] For example, in *Schill v. Wisconsin Rapids School District* the Wisconsin Supreme Court held that personal emails sent by public school teachers on school computers and servers were not public records.[65] The *Schill* court reasoned that the legislature did not intend to include "personal emails" in the statutory definition of "records."[66]

In determining whether a record may be exempt from disclosure, courts frequently apply a balancing test that weighs competing public policy goals.[67] On the one hand, there is the policy goal of government transparency.[68] On the other hand, there are competing, but also recognized public policy interests. Such competing interests that might defeat the presumption of disclosure include: a public's interest in protecting the privacy of its citizens[69] or the public's interest in having its government operate efficiently without interference.[70]

However, even in applying a balancing test, courts presume disclosure and an entity seeking non-disclosure bears the burden of

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[63] There are other issues associated with public access to records that go beyond the scope of this paper. *See, e.g.*, State *ex rel.* Youmans v. Owens, 137 N.W.2d 470, 472 (Wis. 1965) (concluding that a newspaper publisher could bring an action to enforce rights under the Wisconsin open records statute).

[64] *See, e.g.*, Schill v. Wis. Rapids Sch. Dist., 2010 WI 86, ¶142, 372 Wis. 2d 572, 633, 786 N.W.2d 177, 208.

[65] *See id.* The court framed the issue as:

> whether the contents of the Teachers' personal e-mails are records available . . . [under the state's open records law], where the e-mails are sent or received on government e-mail accounts and created or maintained on government-owned computers pursuant to the employer's permission for occasional personal use, and the content has no connection to the government function.

Id. at ¶16, 372 Wis. at 584–85, 786 N.W.2d at 184.

[66] *See id.* at ¶ 9, 372 Wis. at 582, 786 N.W.2d at 183.

[67] *See, e.g.*, Providence Journal Co. v. Kane, 577 A.2d 661, 663 (R.I. 1990) (balancing tests apply after a record has been determined a government record under the state public records law).

[68] *See supra* Section I.B.1; De La Mora, *supra* note 37, at 65.

[69] *See, e.g.*, Linzmeyer v. Forcey, 646 N.W.2d 811, 820 (Wis. 2002) (recognizing a common law exception to disclosure in order to protect the privacy and reputational interests of citizens).

[70] *See, e.g.*, MacEwan v. Holm, 359 P.2d 413, 421 (Or. 1961) ("In determining whether the records should be made available for inspection in any particular instance, the court must balance the interest of the citizen in knowing what the servants of government are doing and the citizen's proprietary interest in public property, against the interest of the public in having the business of government carried on efficiently and without undue interference.").

persuasion.[71] For instance, some states make explicit that the injury to the public by disclosure must be "substantial"[72] and others prohibit the use of a balancing test.[73] A party seeking to prevent public inspection of a confidential settlement agreement must satisfy this burden.[74] Before discussing specific cases on this point, this paper now turns to a discussion of the public policy value of confidential settlement agreements and, specifically, their capacity to conserve public resources.

II. VALUABLE DISPUTE RESOLUTION TOOLS: CONFIDENTIAL SETTLEMENT AGREEMENTS

A. Judicial Preference Favoring Settlement

Courts have expressed a preference for settlement of disputes as a matter of public policy for several reasons that are all generally related to savings of court and taxpayer resources.[75] First, settlements promote efficient use of court (and, therefore, public) resources by reducing already heavily burdened court dockets[76] and under-resourced court system.[77] Second, settlement agreements

[71] *See* RAPP, *supra* note 25, §13.03(b) (writing that courts typically adopt a policy in favor of complete disclosure of government records).

[72] *See, e.g.*, COLO. REV. STAT. § 24-72-204(6)(a) (2018).

[73] *See, e.g.*, Wait v. Fla. Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979); Hovet v. Hebron Pub. Sch. Dist., 419 N.W.2d 189, 191 (N.D. 1988).

[74] *See, e.g.*, § 24-72-204(6)(a).

[75] *See, e.g.*, Evans v. Jeff D. , 475 U.S. 717, 736–38 (1986); Janneh v. GAF Corp., 887 F.2d 432, 435 (2d Cir. 1989) (declaring that settlement is "indispensable to judicial administration."); Tuft v. City of St. Louis, 936 S.W.2d 113, 117 (Mo. Ct. App. 1996) (describing the efficiencies captured through settlement of cases); FED. R. CIV. P. 16(a)(5) (requiring that settlement is a goal of pre-trial conferences); FED. R. CIV. P. 68(allowing parties to make an "Offer of Judgment"). Under Rule 68, the party defending an action (the offeror) may make an offer to the opposing party (the offeree) at least fourteen days prior to trial. FED. R. CIV. P. 68(a). If the offer is rejected and the case goes to trial, but the judgment obtained is less than the offer of judgment, the offeree must pay the costs incurred after the offer was made. FED. R. CIV. P. 68(a). The rule forces both parties to take an honest assessment of their case. *See also* Dore, *supra* note 4, at 286 ("Courts sanction . . . confidentiality agreements in order to promote the private settlement of disputes—a long-established public policy aimed at . . . conserving both public and private resources by avoiding trial.").

[76] *See, e.g.*, *In re* Smith, 926 F.2d 1027, 1029 (11th Cir. 1991) ("Settlement is generally favored because it conserves scarce judicial resources."); Bruce Hay & K. Spier, *Litigation and Settlement* 20 (Harvard Law Sch. John M. Olin Ctr. for Law, Econ. & Bus. Discussion Paper Series, Paper 218, 1997). *See also* Cordray, *supra* note 4, at 36–37 (exploring the Supreme Court's stated preference for settlement as a matter of policy). Some scholars have engaged in empirical analysis to explore the ramifications of settlement. *See* Hay & Spier, *supra*, at 2.

[77] *See* Stephen Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 48 (1992) ("The dramatic increase in both the number of cases filed per federal judge and in the percentage of those cases that impose severe time demands on judges may

preserve resources of the parties involved.[78] Specifically, they reduce costs associated with litigation (e.g., attorney fees, pre-and post-trial motions, discovery, appeals, etc.).[79] Cost savings are particularly important in the case of public education. Public schools are chronically underfunded and face perennial budget shortfalls and struggles.[80]

Third, settlements reduce reputational risk exposure for parties.[81] Trials are public events, and unflattering accusations (even if unproven) can enter the public dialogue.[82] For an employer, this can have an adverse impact on business and for an employee, this could adversely impact future employment prospects or reputational harm.[83] In the case of public schools, it may lead to sweeping, but unsubstantiated allegations of mismanagement that can go "viral," especially with social media.[84]

Fourth, settlements create equitable results, especially those where a legitimate dispute exists where reasonable minds could disagree.[85] In this context, settlement agreements allow parties to tailor remedies through negotiations that can account for the "grey" areas of their cases.[86] Yet, if facts or information about a case are

suggest that individual settlements could substantially reduce the federal backlog.").

[78] *See* Dore, *supra* note 4, 286.

[79] *See id.* at 293.

[80] *See, e.g.*, Calefati, *supra* note 19; Wright, *supra* note 19.

[81] *See* Dore, *supra* note 4, 308.

[82] *See* Marti Cecilia Howell-Collins, Court of Public Opinion: How the Convicted Perceive Mass Media Have Affected Their Criminal Trials and Personal Lives (Aug. 2012) (unpublished Ph.D. dissertation, Syracuse University) (manuscript at 59) (discussing the media's habit of publicizing all stages of a crime story from the commission of a crime to the trial); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 486 (1991).

[83] *See* Mitchell, *supra* note 15, at 894 (commenting that if certain information were readily available to the public it "could harm individual reputations or employer-employee relations."); Joel A. Kravetz, *Deterrence v. Material Harm: Finding the Appropriate Standard to Define an "Adverse Action" in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315, 349–50 (2002); Timothy P. Glynn, *Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations*, 32 BERKELEY J. EMP. & LAB. L. 279, 286 (2011).

[84] *See, e.g.*, Betsy Webster, Winnetonka High School Employee Quits Job Amidst Social Media Allegations, KCTV NEWS (Nov. 19, 2015), https://www.kctv5.com/news/winnetonka-high-school-employee-quits-job-amidst-social-media-allegations/article_07a2572b-6fd7-569c-901e-ea7e18226ae6.html.

[85] *See, e.g.*, Cordray, *supra* note 4, at 37 ("[S]ettlement can result in a more satisfying resolution than would occur in litigation, because in negotiation the parties are free to consider the entire spectrum of relevant facts and principles, whether or not they are formally cognizable in law. Further, the parties have the flexibility to craft more creative—and potentially more responsive—solutions to their problems, because they are neither limited to the traditional legal remedies . . . .").

[86] *See id.*; *see also* Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 654 (1976) (noting advantages of settlement negotiations).

presented for public view, this may force the parties to posture in front of the public.[87] This temptation to "try a case in public" is particularly relevant with respect to school boards, whose membership is generally comprised of elected public officials.[88]

B. Confidentiality: The Lynchpin of Settlement Agreements

Confidentiality clauses are essential ingredients in promoting settlement.[89] They foster open exchange of information between parties (sometimes without resorting to the use of a discovery process), allowing both sides to better understand the strengths and weaknesses of their position.[90] Economic models suggest that the greater the exchange of information, the higher the chances that parties will seek settlement.[91] Potentially high-visibility cases, especially those involving unsubstantiated accusations, are dependent on confidentiality.[92] Without the confidentiality, parties will be reluctant to share information that might be later exposed to the public and create embarrassment.[93] Incorporating a confidentiality clause in a settlement agreement binds the parties to non-disclosure by way of contract law.[94]

Settlement agreements have been criticized.[95] Some suggest they prevent courts from making rulings on important legal issues,[96] depriving the public of judicial direction and precedence.[97] Moreover, settlement may create a loss of trial skills and practice for both

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[87] *See* Mitchell, *supra* note 15, at 894 ("A related concern is the time may be wasted when officials feel compelled to take advantage of the opportunity to make speeches to their constituents rather than limiting the discussion to that necessary in reaching decisions.").

[88] *See* Dore, *supra* note 4, at 369; 1 JAMES A. RAPP, EDUCATION LAW § 3.04(1) (Mathew Bender & Co. 2018).

[89] *See* Dore, *supra* note 4, at 286.

[90] *See id.* at 304.

[91] *See* Andrew F. Daughety & Jennifer F. Reinganum, *Economic Theories of Settlement Bargaining* 3 (Vanderbilt Univ. Dep't. of Econ., Working Paper No. 05-W08, 2005) ("[I]f [the] information was common knowledge to both bargainers, there would be no barrier to settlement").

[92] *See, e.g.*, Marcus, *supra* note 82, at 463; *see also* William E. Shull, *Protective Orders*, LITIG. NEWS, June 1993, at 3, 11 (noting the particular benefits of confidentiality in potentially high-profile disputes).

[93] *See* Marcus, *supra* note 82, at 486, 486 n.164.

[94] *See, e.g.*, Pierce v. St. Vrain Valley Sch. Dist. RE-1J, 981 P.2d 600, 601 (Colo. 1999).

[95] *See* Dore, *supra* note 4, at 293–94.

[96] *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984). Fiss notes that settlement may depend on the relative resources each party has, putting those with less at a disadvantage and thus more amenable to settlement, as opposed to facing costs of a trial. *See id.* 1076.

[97] *See* Dore, *supra* note 4, at 294; *see* David Luban*, Settlements and the Erosion of the Public Realm,* 83 GEO. L.J. 2619, 2622 (1995).

attorneys and judges.[98] Settlements that take place out of public view may also prevent the public from hearing facts which would ordinarily be available in an open courtroom.[99]

The confidentiality aspect of settlement agreements, in particular, has also been criticized. One commentator has noted:

> The sticking point with settlements is not truth but openness. Parties consummate settlements out of public view. The facts on which they are based remain unknown, their responsiveness to third parties who they may affect is at best dubious, and the goods they create are privatized and not public. Settlements are opaque.[100]

Regardless of the merits of views on the value or appropriateness of settlement agreements, the policy preference is firmly established.[101] Thus, given this fact, it is important to assess how competing variables—like public records laws—might undercut the policy benefits of settlement agreements. Toward that end, the next section of this paper discusses how courts have treated confidential settlement agreements in the context of public records laws.

III. CASES INTERPRETING OPEN RECORDS LAWS

The presumption and weight of judicial opinion is that confidential settlement agreements are government records open to public inspection.[102] However, there are limited statutory and common law exceptions discussed below.

A. Cases Interpreting Selected Statutory Exemptions

1. Personnel Records

Many states exclude "personnel records" from disclosure.[103] These

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[98] *See* Luban, *supra* note 97, 2623–25.

[99] *See id.* at 2623, 2625.

[100] *Id.* at 2648.

[101] *See* note 75 and accompanying text.

[102] *See* Fossey, *supra* note 11, at 65; *see also* N.H. REV. STAT. ANN. § 91-A:4(VI) (2018) ("Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.").

[103] *See, e.g.*, MASS. GEN. LAWS ch. 4, §7(26)(c) (2018) (exempting personnel or medical files); N.H. REV. STAT. ANN. § 91-A:5(IV) (2018) (exempting records related to internal personnel

records may contain sensitive information on individual employees, such as job performance evaluations, disciplinary actions, or other considerations.[104] For example, Massachusetts excludes from its definition of public records material or data that are "personnel and medical files."[105] The extent to which a confidential settlement agreement is excluded because it is related to a personnel file has been debated in numerous state courts.[106]

For example, an Iowa newspaper sought a settlement agreement between a school district and principal following accusations that the principal may have mismanaged her school.[107] The district filed a petition for declaratory judgment seeking to determine whether the requested documents were confidential and thus exempt from disclosure.[108] The state supreme court disagreed, citing the legislative intent to promote transparency.[109] Other cases have involved claims that settlement agreements are exempt from disclosure as personnel records, or similar exceptions, but with limited success.[110] Thus, the general presumption favoring disclosure

practices).

[104] *See* Ruth Mayhew, *What Is the HR Department's Responsibility for Confidential Personnel Files?*, HOUS. CHRON., https://smallbusiness.chron.com/hr-departments-responsibility-confidential-personnel-files-59706.html (last visited Nov. 5, 2018).

[105] *See* § 7(26)(c).

[106] *See, e.g.*, Hayes v. Bos. Pub. Health Comm'n, No. 11-11859-MLW, 2013 U.S. Dist. LEXIS 144698, at *18 (Mass. Dist. Ct. 2013); Des Moines Indep. Cmty. Sch. Dist. Pub. Records v. Des Moines Register & Tribune Co., 487 N.W.2d 666, 669 (Iowa 1992) (citing Anchorage Sch. Dist. v. Anchorage Daily News, 779 P.2d 1191, 1193 (Alaska 1989)); Denver Publ'g Co. v. Univ. of Colo., 812 P.2d. 682, 684–85 (Colo. App. 1990); Guy Gannet Publ'g Co. v. Univ. of Me., 555 A.2d 470, 472 (Me. 1989); Librach v. Cooper, 778 S.W.2d 351, 356 (Mo. Ct. App. 1989)).

[107] *See Des Moines Indep. Cmty. Sch. Dist. Pub. Records*, 487 N.W.2d at 667–68. Parents had charged that the principal disrespected students, failed to attend certain meetings, among other things, she counterclaimed with a discrimination suit and, ultimately, the principal and district reached a confidential settlement agreement. *See id.*

[108] *See id.* at 668. Iowa law excludes from disclosure personal information in confidential personnel records, communication made by persons outside the government, and student records. *Id.* at 669.

[109] *See id.* ("We cannot believe our legislature intended a different rule [other than disclosure].").

[110] *See, e.g.*, BRV, Inc. v. Superior Court, 49 Cal. Rptr. 3d 519, 528, 530 (Cal. Ct. App. 2006) (investigation of verbal abuse by a district administrator was a personnel record that was subject to release, subject to some redaction of names); Doe v. Univ. of Iowa, 828 N.W.2d 326 (Iowa Ct. App. 2013) (citing *Des Moines Indep. Cmty. Sch. Dist. Pub. Records*, 487 N.W.2d at 669) (settlement agreement with university employee was not exempt because it did not fit within state's "confidential personnel records" exempt category); Librach v. Cooper, 778 S.W.2d 351, 355 (Mo. Ct. App. 1989) (ruling settlement agreement to not be a modification of superintendent's employment agreement and thus not excluded as "individually identifiable records" or "records pertaining to employment."). *But see* ACLU v. Records Custodian Atl. Cmty. Sch. Dist., 808 N.W.2d 449 (Iowa Ct. App. 2011) (citing DeLaMater v. Marion Civil Serv. Comm'n, 554 N.W.2d 875, 879) (Iowa 1996)); Des Moines Indep. Cmty. Sch. Dist. Pub. Records, 487 N.W.2d at 670) (finding disciplinary records of employee were "performance records" not

has been maintained.[111]

To be sure, some information within a settlement agreement or underlying dispute may fall under a "personnel record."[112] Moreover, to the extent a settlement agreement may contain sensitive information that, alone, would be exempt as a personnel record, courts will fashion a remedy to release as much information as possible.[113] In one instance, a court determined that while a settlement agreement was not an exempt "personnel record," it did contain information that would be statutorily exempt.[114] Redaction of excluded information can be a remedy in such instances.[115]

2. Documents Related to Litigation

Records classified as attorney-client privilege or those related to litigation strategy or process, may be raised as grounds to exempt information from public inspection.[116] For example, an Ohio school district contended that numerous settlement agreements reached with teachers to avoid litigation qualified as "trial preparation records," exempt from public disclosure.[117] The court rejected that argument distinguishing the agreements as "contracts" to prevent litigation.[118] Similarly, the Wisconsin Court of Appeals concluded that a memo prepared by a school attorney that recited the terms of a settlement agreement ending employment of a school superintendent was not exempted from public disclosure under the attorney-client privilege.[119] Other courts have addressed the extent

subject to disclosure).

[111] *See* Fossey, *supra* note 11, at 65 (noting the general presumption of disclosure and legislative preference).

[112] *See e.g.*, LaRocca v. Bd. of Educ., 632 N.Y.S.2d 576, 578 (App. Div. 1995) (citing *In re* Hanig v. State Dep't of Motor Vehicles, 588 N.E.2d 750, 753 (N.Y.1992); *In re* Farbman & Sons v. N.Y.C. Health & Hosps. Corp., 464 N.E.2d 437, 439 (N.Y.1984); Bd. of Educ. v. Areman, 362 N.E.2d 943, 947 (N.Y. 1977)) (finding that the settlement agreement was not an exempt "employment history," but ordering redaction of certain information contained within the agreement).

[113] *See LaRocca*, 632 N.Y.S. at 578; *see also* Teras v. Wilde, No. 14-0244, 2015 U.S. Dist. LEXIS 23522, *31–32 (Md. Dist. Ct. 2015) (where the Court denied a motion to seal on the grounds that confidential information could be redacted).

[114] *See LaRocca*, 632 N.Y.S.2d at 578 (unsubstantiated allegations contained in settlement documents would be considered an unwarranted invasion of privacy if released to public).

[115] *See id.*

[116] *See, e.g.*, WILLIAM FRANCIS GALVIN, SEC'Y OF THE COMMONWEALTH OF MASS., A GUIDE TO MASSACHUSETTS PUBLIC RECORDS LAW 1 (2017), www.sec.state.ma.us.pre/prepdf/guide.pdf (recognizing the common law attorney-client privilege may prevent release of a document, but that the agency asserting the privilege must be specific in its claim of the privilege).

[117] State *ex rel.* Kinsley v. Berea Bd. of Educ., 582 N.E.2d 653, 655 (Ohio Ct. App. 1990).

[118] *See id.*

[119] *See* Journal/Sentinel v. Sch. Bd., 521 N.W.2d 165, 172–73 (Wis. Ct. App. 1994) (citing *In*

to which some government documents (settlement agreements or otherwise) may fall within a litigation exception to the general rule favoring release.[120] The presumption favoring disclosure as a matter of transparency is generally cited in court analysis finding that agreements are not excepted from public inspection.[121]

B. Cases Applying Balancing Tests to Assessing Competing Policy Goals

Courts may also apply a balancing test if a record does not qualify as a statutory exemption.[122] The policy interests behind state open records laws (transparency) are weighed against some other competing interest.[123] Public interests that may prevent release of a document are: a state's interest in protecting an individual's right to privacy,[124] a government agency's interest in operating efficiently,[125]

re Sealed Case, 737 F.2d 94, 98–99 (D.C. Cir. 1984); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950)).

[120] *See, e.g.*, Doe v. Twp. High Sch. Dist. 211, 2015 IL App (1st) 140857, ¶¶ 21, 101 (finding that attorney-client privilege did not apply to notes made by a special education director because they were not intended to be communications with an attorney); Purdue Univ. v. Wartell, 5 N.E. 797, 808 (Ind. Ct. App. 2014) (finding that attorney-client privilege was not applicable to prevent disclosure of an investigation of a complaint filed against a university official); Herald Co. v. Ann Arbor Pub. Sch., 568 N.W.2d 411, 417 (Mich. Ct. App. 1997) (citing Taylor v. Blue Cross & Blue Shield of Mich., 517 N.W.2d 864 (1994)) (concluding that under Michigan's open records law, a school district could not invoke attorney-client privilege to block disclosure of a recorded investigatory interview between a teacher and an attorney); Librach v. Cooper, 778 S.W.2d 351, 354 (Mo. Ct. App. 1989) (finding that the litigation exception in Missouri's open records law did not prohibit disclosure of a contract on the basis that a school board consulted an attorney during negotiation).

[121] *See, e.g.*, *Librach*, 778 S.W.2d at 353 (noting Missouri's public policy favoring records open to the public); *LaRocca*, 632 N.Y.S.2d at 578 (citing Fink v. Lefkowitz, 393 N.E.2d 463 (N.Y. 1979); *In re* Farbman & Sons v. N.Y.C Health & Hosps. Corp., 464 N.E.2d 437, 439 (N.Y.1984); *In re* Hanig v. State Dep't of Motor Vehicles, 588 N.E.2d 750 (N.Y.1992)) (noting that New York records, including the agreement at issue in the case, are presumptively available for public disclosure).

[122] *See, e.g.*, ACLU Found. of Iowa, Inc. v. Records Custodian, 818 N.W.2d 231, 235 (Iowa 2012) (citing Des Moines Indep. Cmty. Sch. Dist. Pub. Records v. Des Moines Register & Tribune Co., 487 N.W.2d 666, 669 (Iowa 1992)); Lamy v. N.H. Pub. Utils. Comm'n, 872 A.2d 1006, 1010 (N.H. 2005) (citing N.H. Civil Liberties Union v. City of Manchester, 821 A.2d 1014, 1017–18 (N.H. 2003)).

[123] *See, e.g.*, *Lamy*, 872 A.2d at 1010.

[124] For example, to decide whether disclosure of public records would constitute an invasion of privacy, the New Hampshire Supreme Court utilizes a three-part test that (1) identifies the "privacy interest at stake that would be invaded by the disclosure," (2) assesses whether disclosure would "inform the public about the conduct and activities of [its] government," and (3) "balance[s] the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." Lambert v. Belknap Cty., 949 A.2d 709, 717 (N.H. 2008) (citing *Lamy*, 872 A.2d at 1010).

[125] *See* Mitchell, *supra* note 15, at 894 (describing the various reasons why a government agency would not want disclosure of, for example, a lawsuit settlement).

and, in at least one instance, the public policy preference to promote settlement agreements.[126] Court application of those balancing tests is described below in settlement agreement cases.

1. Public Policy Interest in Transparency Versus Public Interest in Personal Privacy

Parties resisting disclosure have attempted to raise a state's interest in citizens' privacy rights as a competing policy concern sufficient to enjoin release of confidential settlement agreements sought under open records laws.[127] As a preliminary matter, states recognize the importance of privacy as a matter of public policy,[128] and, of course, such rights are well established under the U.S. Constitution.[129] Against this backdrop, courts must weigh a legislature's policy concern for transparent government as expressed in open records laws.[130]

A case from Wisconsin illustrates how a court assessed these forces. In *Zellner v. Cedarburg*,[131] the Wisconsin Supreme Court determined that the privacy interests of the individual did not outweigh the public's right to access documents and information produced during settlement talks.[132] In *Zellner*, a school board terminated a teacher for allegedly viewing pornographic images on a school computer during the weekend.[133] Through settlement negotiations, the school board produced additional evidence to demonstrate the strength of their case to the teacher, including a CD and a memo which detailed the websites that the teacher allegedly viewed.[134] A newspaper sought the CD and memo[135] and the teacher sought to enjoin their release arguing that his privacy interests prevailed over the public's right to know.[136]

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[126] *See* Tuft v. City of St. Louis, 936 S.W.2d 113, 117–18 (Mo. Ct. App. 1996).

[127] *See* LaRocca v. Bd. of Educ., 632 N.Y.S.2d 576, 577–78 (App. Div. 1995).

[128] *See Lambert*, 949 A.2d at 717.

[129] *See* U.S. CONST. amend. IV; Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[130] *See* Lamy v. N.H. Pub. Utils. Comm'n, 872 A.2d 1006, 1011 (N.H. 2005).

[131] Zellner v. Cedarburg Sch. Dist., 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240.

[132] *See id.* at ¶ 58 (citing Linzmeyer v. Forcey, 2002 WI 84, ¶ 12, 254 Wis. 2d 306, 646 N.W.2d 811). The court so held while also acknowledging that the state had recognized that a competing interest in protecting the reputation and privacy of citizens may favor non-release. *See id.* at ¶ 43 (citing Woznicki v. Erickson, 549 N.W.2d 699, 705 (Wis. 1996); State *ex rel.* Youmans v. Owens, 137 N.W.2d 470, 476 (1965)).

[133] *Zellner*, 2007 WI 53, at ¶ 7.

[134] *See id.* at ¶ 8.

[135] *See id.* at ¶ 1.

[136] *See id.* at ¶¶ 1–2.

The *Zellner* court held that the privacy interest did not outweigh a policy of transparency.[137] Its analysis cited the "strong public policy" presumption favoring public access.[138] While the court recognized a "public interest in protecting [the] individuals' privacy and reputation,"[139] it did not view that interest at stake on these facts. In this case, the court determined that the teacher was merely seeking to avoid embarrassment, and this avoidance could not be equated with the public policy objective of protecting privacy for its citizens.[140] Put another way, to succeed on a privacy theory (at least in Wisconsin), there must be some showing of a threat to citizens, at-large, as opposed to individual reputational harm to defeat the presumption of release.

A Michigan court assessed the privacy interest at stake with the public release of a confidential settlement agreement involving a teacher accused of misconduct in *Booth Newspapers, Inc. v. Kalamazoo*.[141] In this case, a school district prepared a document of allegations of sexual misconduct by a teacher[142] that included identities of the teacher and students in preparation for a termination hearing.[143] The parties reached a settlement agreement before the hearing occurred.[144] A newspaper sought the documents and underlying agreement.[145]

The appellate court's ruling balanced the privacy rights of state citizens and the public's right to know about its government activity: while it ruled the document was a public record subject to release, it conditioned that release on the redaction of the identifying names of the teacher and students.[146] Dispositive to the *Booth* court was the fact that because the settlement agreement foreclosed a hearing, the

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[137] *See id.* at ¶ 5.

[138] *Id.* at ¶ 49.

[139] *Id.* at ¶ 50 (quoting Linzmeyer v. Forcey, 2002 WI 84, ¶ 31, 254 Wis. 2d 306, 646 N.W.2d 811).

[140] *See Zellner*, 2007 WI 53, at ¶ 52; (citing *Linzmeyer*, 2002 WI 84, at ¶ 36).

[141] Booth Newspapers, Inc. v. Kalamazoo Sch. Dist., 450 N.W.2d 286, 287, 288 (Mich. Ct. App. 1989) (quoting Mich. State Emps. Ass'n v. Mich. Dep't of Mgmt. & Budget, 404 N.W.2d 606, 616 (Mich. 1987) (Brickley, J., concurring in part and dissenting in part)) (describing a balancing test of privacy interests that considers whether the essence of the information is personal as one prong of a two-prong test).

[142] *See Booth*, 450 N.W.2d at 287. Before a district terminates a tenured teacher, there must be a hearing as a matter of due process. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539, 541, 542 (1985) (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

[143] *See Booth*, 450 N.W.2d at 287.

[144] *See id.*

[145] *See id.*

[146] *See id.* at 288, 289.

allegations remained unproven.[147] Thus, the release of the teacher's name was inappropriate, especially since the requested information pertains "only to bare allegations."[148]

Similar to *Booth,* a New York case attempted to protect the competing policy interest of privacy through the use of redaction.[149] In *LaRocca v. Board of Education*, a school district listed numerous "charges" against the principal for purposes of preparing for a termination hearing.[150] The parties ultimately reached a settlement agreement that foreclosed a hearing, but an open records request was made for the termination charges and agreement.[151] The school district argued that the release of the documents would amount to an unwanted invasion of privacy.[152] While the *Larocca* court noted the presumption favoring disclosure,[153] it also noted that releasing portions of unproven or denied accusations infringed on privacy interests at stake, including those of the teachers who may have been referenced in allegations.[154] Thus, like the court in *Booth Newspapers*, the court found the potential invasion of privacy with respect to public knowledge of denied or unsubstantiated charges outweighed *full* public disclosure.[155]

In sum, while the right to privacy may not completely defeat a release of a settlement agreement, courts can fashion remedies through redaction that attempt to strike a balance of the policy interests at stake.[156] This is particularly the case where accusations have been lodged against an administrator or involve a reference to

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147 *See id.* at 288.

148 *See id. But see also* Bowman v. Parma Bd. of Educ., 542 N.E.2d 663, 665, 666–67 (Ohio Ct. App. 1988) (ruling that confidentiality provision in settlement agreement between teacher who had multiple allegations pertaining to the teacher's status as a child molester was void as a matter of public policy).

149 *See* LaRocca v. Bd. of Educ., 632 N.Y.S.2d 576, 579 (App. Div. 1995). The court noted that several exceptions to the presumption of release were at issue. These included an exception for confidentiality in disciplinary hearings, employment records, and unwanted invasion of privacy. *See id.* at 578. The court's disposition of the case rested on its balancing of the privacy interests of the individual. *See id.* at 579.

150 *Id.* at 577.

151 *Id.*

152 *See id.* at 577–78.

153 *Id.* at 578 (citing *In re* Farbman & Sons v. N.Y.C. Health & Hosps. Corp., 464 N.E.2d 437, 439 (N.Y.1984); *In re* Hanig v. State Dep't of Motor Vehicles, 588 N.E.2d 750 (N.Y.1992)). The court wrote: "[t]hus, to the extent that the settlement agreement, or any part thereof, purports to deny the public access to it in its entirety, such a provision is unenforceable as against the public interest." *LaRocca*, 632 N.Y.S.2d at 578.

154 *See LaRocca*, 632 N.Y.S.2d at 578.

155 *See id.*

156 *See, e.g.*, *id.*; Booth Newspapers, Inc. v. Kalamazoo Sch. Dist., 450 N.W.2d 286, 289 (Mich. Ct. App. 1989).

a teacher, but those accusations have not been adjudicated or proven.[157]

2. Public Policy of Transparency Versus Government Duty to Manage School Districts

Efficient management of government operations has also been raised as a competing policy to object to public release of settlement agreements.[158] By way of background, school board members are duly elected officials with constitutional and statutory responsibilities.[159] Managing employment and personnel matters is a recognized important part of executing these responsibilities as school administrators.[160] In this light, just like the private sector, such management may require the discretion and use of confidential settlement agreements that school officials believe may resolve a dispute in the best interest of the district.

In *Pierce v. St. Vrain Valley School District*, the Colorado Supreme Court contemplated the relationship between a school board's management prerogative and the public's right to know terms of a settlement agreement.[161] In *Pierce,* a school board investigated a superintendent for sexual misconduct but ultimately reached a confidential settlement agreement terminating his employment.[162] The terms prohibited the school board from commenting about the allegations or making "disparaging" statements,[163] but comments about the agreement from school board members were ultimately

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[157] *Compare Booth*, 450 N.W.2d at 289 (enjoining release of contents of agreement containing unproven allegations) *with* Bowman v. Parma Bd. of Educ., 542 N.E.2d 663, 666–67 (Ohio Ct. App. 1988) (finding that a confidentiality provision to prohibit the school district from disclosing substantiated allegations of pedophilia by a teacher to be unenforceable as against public policy).

[158] *See, e.g.*, Pierce v. St. Vrain Valley Sch. Dist. Re-1J, 981 P.2d 600, 607 (Colo. 1999) ("[T]he members of the Board clearly concluded at the time they entered into the agreement that the public interests in the efficient administration of the school system outweighed considerations regarding the accessibility of this information to the public.").

[159] For example, New Jersey's Constitution requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. CONST. art. 8, § IV, ¶ 1; Hamel v. State, 728 A.2d 264, 269 (N.J. Super. Ct. App. Div. 1999) (quoting Durgin v. Brown, 180 A.2d 136, 141 (N.J. 1962)) ("[L]ocal boards are 'obligated to meet the educational needs of the children' of their respective districts. This mandate stems from our State constitution."). *See also* RAPP, *supra* note 88, at § 3.04(6)(c) (noting that election is the most common method for selecting school board members).

[160] *See e.g.*, *In re* Kennedy, 27 A.3d 844, 847 (N.H. 2011).

[161] *See Pierce*, 981 P.2d at 601.

[162] *See id.*

[163] *Id.*

reported in the paper.[164] The former superintendent sued the school district for breach of the confidentiality terms of the agreement.[165]

The school board argued that the agreement was void as a matter of public policy (and therefore it could not be bound by confidentiality terms) because it violated the presumption of public access to government records.[166] The superintendent, however, argued that the agreement was valid because the school board executed it pursuant to its duty to effectively manage school operations in the best interest of the district, as codified under state law.[167] In other words, the school district's use of the settlement agreement was consistent with some of the policy purposes of settlement agreements to efficiently resolve disputes and allow a government agency to focus resources and attention in its primary mission.[168]

The *Pierce* court concurred with the superintendent's argument and wrote:

> [T]he Board could reasonably have decided that it was in the District's best interests to forego the opportunity to discuss the circumstances of [superintendent's] resignation publicly in exchange for his immediate resignation. The Board chose to resolve the problem . . . in a manner designed to minimize the disruption *and expenditures* that might have resulted from protracted litigation over the allegations . . . ."[169]

The court further noted that the school board's action were justifiable pursuant to its elected responsibilities to oversee a school district.[170]

However, the *Pierce* court's analysis on this point is dicta, because the case sounded in contract, not the law of government open

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[164] *Id.* at 602. In addition, an "anonymous source" verifying allegations of harassment, noted that school members indicated the district would face lawsuits because of the superintendent's behavior, and quoted the board president as saying he was frustrated that he could not talk about the situation. *Id.*

[165] *Id.* The case sounded in contract and did not involve the strict assessment of whether the state's open records law would require disclosure. *See id.*

[166] *Id.* at 604. The irony that the school district argued that the agreement it negotiated and entered was void should be noted.

[167] *Id.* at 604.

[168] *See id.* at 604–05 (quoting Blair v. Lovett, 582 P.2d 668, 672–73 (Colo. 1978)).

[169] *Pierce*, 981 P.2d at 605 (emphasis added).

[170] *See id.* at 604 (citing Weisman v. Bd. of Educ., 547 P.2d 1267, 1273 (Colo. 1976) ("[T]he Board acted in a manner consistent with legitimate government interests and administrative responsibilities").

records.[171] Yet the case is significant in the sense that a court recognized other legitimate public policy arguments that may outweigh transparency, including the ability of a government to operate in a manner consistent with its elected responsibilities.[172] A policy presumption favoring disclosure was not absolute and may yield to other competing policy objectives, ensuring the effective management by school officials.

3. Public Policy Interest of Transparency Versus Public Policy Promoting Settlement

As noted above, there is a clear legislative and judicial public policy favoring settlement of disputes because they preserve public (and private) resources.[173] To a very limited extent, courts have recognized this as a competing policy to be assessed against the policy of transparency in open records laws.[174] For example, in *Journal/Sentinel v. School Board*, the Wisconsin Supreme Court recognized some value of settlement agreements.[175] The school district in that case opposed release of a settlement agreement because such access would discourage parties from the type of open exchange of information that encourages quick and cost-effective resolutions of cases.[176]

The Wisconsin Supreme Court disagreed with that argument.[177] Significantly, the court assumed a strong link between the state's open records law and its benefits,[178] while simultaneously omitting an assessment of the benefits of settlement agreements to school districts including the ways in which agreements help schools

[171] *See id.* at 602.

[172] *See id.* at 606 n.7 ("Our conclusion here does not resolve the question of whether the District would be required to disclose the contents of the agreement in the face of an Open Records Act request from a third party. We only conclude that, as between these parties, the agreement is not so plainly a public record that a promise to keep its terms confidential would be unenforceable as contrary to the public policy expressed in the Act."); *id.* at 602 (noting that the action arose as a breach of contract when the former superintendent charged the school board with violating the terms of the confidential settlement agreement when the newspaper reported the existence of the agreement).

[173] *See id.* at 604–05; *supra* Section II.A.

[174] *See generally* Journal/Sentinel v. Sch. Bd., 521 N.W.2d 165, 172 (Wis. Ct. App. 1994) (acknowledging the policy interest in promoting settlements but deeming it a collateral matter in their assessment of the public interest in transparency).

[175] *See id.*

[176] *See id.*

[177] *See id.* ("[I]f the school board's argument were accepted, public scrutiny of most if not all settlement agreements involving government would be barred—promises of confidentiality would then be *de rigueur*.").

[178] *See id.* at 168 n.1.

conserve resources.[179] In fact, the *Journal/Sentinel* court appeared unconcerned that, absent a confidential settlement agreement, a trial might result.[180] This result is at odds with the policy objectives (conserve resources) of settlement agreements recognized by courts[181] and scholars.[182] Moreover, the court did not consider that a settlement agreement executed by school officials could be part of their statutory or constitutional obligations to manage schools.[183]

In contrast, in *Tuft v. City of St. Louis*, a Missouri appellate court cited the conservation of resources as a reason to rebut the presumption of disclosure.[184] The court framed the issue as determining the "proper balance between competing policies: the policy of openness and the policy of conserving public resources [by using confidential settlement agreements to resolve disputes]."[185] The court recognized the significant savings for taxpayers through confidential settlement agreements,[186] their frequent use in the private sector,[187] and that a strong public policy favoring disclosure could give way to other, equally compelling policies.[188] Importantly, the court also noted that the public's right to know the financial particulars of a settlement agreement could still be achieved without

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[179] *Compare generally id.* at 165–73 (omitting analysis on the cost of litigating after a failed settlement agreement), *with* Tuft v. City of St. Louis, 936 S.W.2d 113, 117–18 (Mo. Ct. App.1996) (acknowledging that the taxpayer has to pay for extended litigation in its analysis). *See also* Scalia, *supra* note 12, at 16 (cautioning against just this type of omission of any cost-benefit analysis of open records laws).

[180] *See Journal/Sentinel*, 521 N.W.2d at 172.

[181] *See, e.g.*, *Tuft*, 936 S.W.2d at 117–18.

[182] *See, e.g.*, Dore, *supra* note 4, at 286.

[183] *Compare Journal/Sentinel*, 521 N.W.2d at 165–73 (omitting analysis of the statutory and constitutional obligations of the school board to manage schools), *with* Pierce v. St. Vrain Valley Sch. Dist. RE-1J, 981 P.2d 600, 604 (Colo. 1999) (finding that school board members can enter into a confidential settlement agreement as part of their elected responsibilities to manage school districts).

[184] *See* Tuft v. City of St. Louis, 936 S.W.2d 113, 118 (Mo. Ct. App. 1996).

[185] *Id.*

[186] *See id.* at 117–18 ("[Newspaper] fails to acknowledge [in its argument in favor of release based on the assertion that the records may reflect spending of taxpayer funds] that the taxpayer also foots the bill for extended litigation as well as any judgment . . . against the city.").

[187] *See id.* at 118 ("Settlements have long been a favorite of the law and an agreement not to disclose the terms of the settlement is often an important factor in achieving a settlement in the first place. Otherwise, a party accused of wrongdoing might feel compelled to carry on the litigation in order to clear his name and to avoid the public perception of 'giving in,' thus wasting valuable public resources and presenting a risk, of whatever degree, that a judgment could be entered against the City.").

[188] *See id.* ("[W]e discern no legislative intent to deprive governmental bodies of the same valuable settlement techniques available to *and prized by* other litigants, which include agreements to maintain confidentiality . . . .") (emphasis added).

breaching the confidentiality of the settlement agreement,[189] thus suggesting that both policy interests (transparency and conservation of resources) could be achieved.[190]

IV. STRIKING A BALANCE: CONSERVING RESOURCES AND MAINTAINING TRANSPARENCY

Discussed below are two potential means by which legislatures and courts may explore as a means to rectify some of the unintended costs and consequences of open records laws as they apply to confidential settlement agreements. The first is the case of Idaho, which has set up a statute that allows the public access to the amounts of settlement but also preserves confidentiality of the underlying dispute.[191] The second is represented in a case from the Missouri Court of Appeals whereby the court engaged in a specific cost-benefit analysis assessing the costs of release against the benefits of a confidential agreement.[192]

A. Statutory Solutions: Idaho

Idaho's statute governing access to public records balances the public's interest to know about settlement agreements in the public sector and the government's need to use them as a confidential means to efficiently resolve disputes. Specifically, the statute limits public disclosure to "actual amounts paid" with respect to settlement agreements.[193] Thus, potentially sensitive terms would remain out

[189] *See id.* at 119–20 (writing that the city comptroller would still be compelled to provide information about salary, position, and employment status found in other government documents).

[190] *See infra* Part IV.

[191] *See* IDAHO CODE § 74-107(11) (2018).

[192] *See Tuft*, 936 S.W.2d at 118.

[193] *See* § 74-107(11). The statutory provision reads as follows:

> Records of any risk retention or self-insurance program prepared in anticipation of litigation or for analysis of or settlement of potential or actual money damage claims against a public entity and its employees or against the industrial special indemnity fund except as otherwise discoverable under the Idaho or federal rules of civil procedure. These records shall include, but are not limited to, claims evaluations, investigatory records, computerized reports of losses, case reserves, internal documents and correspondence relating thereto. At the time any claim is concluded, *only statistical data and actual amounts paid in settlement shall be deemed a public record* unless otherwise ordered to be sealed by a court of competent jurisdiction. Provided however, nothing in this subsection is intended to limit the attorney-client privilege or attorney work product privilege otherwise available to any public agency or independent public body corporate and politic.

Id. (emphasis added).

of public view. In this way, the public retains access to how the government is spending their money and in what quantities for purposes of settling disputes without resorting to trial.

The Idaho Supreme Court has interpreted the state's open records statute as protecting the confidentiality of the underlying terms of a settlement agreement, except for the actual amounts paid.[194] In *Cowles Publishing Co. v. Kootenai County Board of County Commissioners,* a newspaper sought terms of a settlement between an insurer of a government agency and a former government employee.[195] The court ruled against the paper noting that the "plain language" of the statute limited public access only to the "amount[s] paid."[196]

The Idaho exemption to settlement agreements balances competing policy purposes of government transparency and conserving resources through settlement in at least two important ways. First, the Idaho approach satisfies a core legislative intent with respect to open records laws: allowing the public the ability to see how their tax dollars are spent by government officials.[197] Indeed, some courts outside of Idaho have repeatedly cited this reason (understanding how the government spends tax dollars) as dispositive in ordering release of settlement agreements in total.[198] Thus, the Idaho statute satisfies this requirement without going so far as requiring the release of the entire settlement agreement.

Second, the Idaho model preserves the policy benefits that inure to settlement agreements by ensuring their confidentiality with respect to the underlying circumstances.[199] Because the context of the settlement agreement is not disclosed under Idaho's open records statute,[200] both parties are free to exchange in the sort of open but confidential discussions that promote and encourage fair settlements.

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194 Cowles Publ'g Co. v. Kootenai Cty. Bd. of Cty. Comm'rs, 159 P.3d 896, 903 (Idaho 2007).

195 *Id.* at 898–99.

196 *See id.* at 903.

197 *See* Journal/Sentinel v. Sch. Bd., 521 N.W.2d 165, 172 (Wis. Ct. App. 1994) (quoting 74 Wis. Op. Att'y Gen. 14, 16 (1985)) (stating that the purpose of a public records law is to allow the public to monitor the performance of public officials).

198 *See Journal/Sentinel*, 521 N.W.2d at 172 ("Taxpayers of a community have the right to know how and why their money is spent."). *But see* Tuft v. City of St. Louis, 936 S.W.2d 113, 117 (Mo. Ct. App. 1996) (noting that one of the reasons asserted for full release of confidential settlement agreements by a newspaper is to reflect the expenditure of taxpayer funds, but this was not persuasive).

199 *See Cowles Publ'g Co.*, 159 P.3d at 903.

200 *See* IDAHO CODE § 74-107(11) (2018) ("[O]nly statistical data and actual amounts paid in settlement shall be deemed a public record.").

Importantly, the Idaho statute still allows the public oversight—and therefore a "check"—on its government's use of public funds. Specifically, the public can view the amount and nature of funds used for settlement agreements and make an informed opinion as to whether an agency is overusing such agreements or funds.[201]

Indeed, the Idaho state legislature has stated that its statutory scheme, which protects confidential settlement agreements, has been enacted to promote government transparency.[202] But it has gone a step further than many states in seeing that while transparency is a core principle of self-government, it can co-exist with government's duty to efficiently manage its personnel and resources.[203] If voters view the public expenditure on settlement agreements as too high, or indefensible, their remedy is at the ballot box.

B. Court Solution: Assessing Costs and Benefits of Settlement Agreements

Courts can also play a role in finding a balance by heeding Justice Scalia's advice to consider the costs and benefits of open records laws on a case-by-case basis.[204] One case stands out as a model for this type of analysis. In *Tuft v. St. Louis*, for example, a Missouri court ruled that the legislative presumption and public policy favoring transparency did not, *per se*, overrule considerations of competing public policy favored by a legislature, such as conserving public resources through settlement agreements.[205] Wrote the court: "[W]e discern no legislative intent to deprive governmental bodies of the same valuable settlement techniques available to and prized by other litigants, which include agreements to maintain confidentiality [of settlement terms] . . . ."[206] In that case, the court declined to order

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[201] *See id.*

[202] *See* OFF. OF THE ATT'Y GEN., IDAHO PUBLIC RECORDS LAW MANUAL: IDAHO CODE §§ 74-101 THROUGH 74-126, at i (2016) ("In 2015, the Legislature re-codified the public records law to provide one place for citizens to find laws relating to government transparency."); Brian Kane, *Idaho's Open Meetings Act: Government's Guarantee of Openness or the Toothless Promise?*, 44 IDAHO L. REV. 135, 159 (2007) (stating that the legislative purpose of the Idaho statute is transparency and openness in government).

[203] *See* TIM REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT—MAY 2003 PROGRESS REPORT 5 (2003) (noting that Idaho is one four states that require a finding that privacy interests outweigh public interests).

[204] *See* Scalia, *supra* note 12, at 16.

[205] *See* Tuft v. City of St. Louis, 936 S.W.2d 113, 117–18 (Mo. Ct. App. 1996) ("[The newspaper seeking release of the documents] fails to acknowledge . . . that the taxpayer also foots the bill for extended litigation as well as any judgment that might ultimately be rendered against the City.").

[206] *Id.* at 118.

the release of the agreement because it related to "potential litigation."[207]

The *Tuft* test still emphasizes a presumption of public inspection and transparency, while allowing a consideration for competing interests. Indeed, under *Tuft*, the government bears the burden of showing that its use of a settlement agreement benefits the public.[208] Toward that end, a government agency seeking to prevent disclosure, must demonstrate that the settlement agreement was obtained to avoid the costs and risks of litigation.[209] As the *Tuft* court notes, the government carries a "heavy burden" and must show a "substantial likelihood" that litigation would occur and that there is a "clear nexus" between potential litigation and the settlement agreement reached.[210]

This higher standard addresses a concern that government officials may simply enter into settlement agreements as an "end-run" around open records laws.[211] Courts have contended that the potential of a "slippery slope" is justification for public disclosure.[212] But the *Tuft* test requires the government to demonstrate that the policy benefits of settlement agreements, including cost savings to the public by avoiding risky litigation, are promoted in each instance.[213]

CONCLUSION

Justice Louis Brandeis famously noted that "[S]unlight is said to be the best of disinfectants"[214] and the phrase has been something of a moniker for those advocating open government laws. Of course, there is no doubt that an informed electorate can make better decisions about their government through elections. But, as another Supreme Court Justice pointed out, there is doubt as to the extent that open records laws further this interest. In fact, the causal relationship between greater public access to government

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[207] *See id.* at 119.

[208] *Cf. id.* at 118 (recognizing the Legislature's view of the state's open records law requires a balance between the policy of openness and the policy of conserving public resources).

[209] *See id.* at 117–18.

[210] *Id.* at 118.

[211] *See* Journal/Sentinel, Inc. v. Sch. Bd., 521 N.W.2d 165, 172 (Wis. Ct. App. 1994). The court concluded that open records laws trump confidentiality agreements because if "public scrutiny of most if not all settlement agreements involving government would be barred—promises of confidentiality would then be *de rigueur*. This would effectively end-run the openness mandated by Wisconsin's public-records law, and the presumption of access." *Id.*

[212] *See, e.g.*, *id.* at 171–72.

[213] *See Tuft,* 936 S.W.2d at 118.

[214] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY – AND HOW BANKERS USE IT 92 (1914).

information and an informed electorate, is theoretical.[215]

To suggest that some government operations function more efficiently out of immediate public view is politically unpopular. It invites backlash and perhaps accusations that the government is acting surreptitiously. If anything, popular opinion demands more access, not less.[216] But there are real costs to the taxpayer in simply presuming that open records laws promote core tenets of a representative democracy.[217] In fact, many state open records laws threaten or dilute the promotion of other competing public interest priorities, like allowing elected officials the ability to manage their agencies with the tools of efficiency used in the private sector, like confidential settlement agreements.[218]

Legislatures and courts should consider the extent to which this is occurring in the context of public schools, given the chronic challenges schools face regarding funding. States can find a balance that serves the public interest of access to their government's operations and preserve school district's ability to negotiate confidential settlement agreements. While no government can or should be free from the review of its people, government agencies should enjoy some autonomy to fulfill their obligations as elected or appointed officials. Deepening our understanding of the ways in which government transparency laws promote or inhibit this is essential to achieving this objective.

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[215] *See* Scalia, *supra* note 12, at 16.

[216] *See generally* Dave Solomon, *Lawmakers Approve Bills to Strengthen Right-to-Know Laws,* UNION LEADER (Mar. 15, 2018), http://www.unionleader.com/state-government/Lawmakers-approve-bills-to-strengthen-Right-to-Know-laws-03152018 (demonstrating that three Right-to-Know bills were passed by New Hampshire lawmakers to provide more access to public records).

[217] *See Tuft*, 936 S.W.2d at 117–18.

[218] *See* Fossey, *supra* note 11, at 62.