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Do FOI Laws Counteract Court Secrecy?

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### **Abstract**

Secret settlements of civil cases pose a serious threat to transparency and accountability when the government is a party. Ten states have banned the practice, but the practice continues in other jurisdictions. This study examines the extent to which Freedom of Information (FOI) laws counteract that secrecy. Relying on a report from the Federal Judicial Center, we identified sixty-seven cases in which a government defendant engaged in a secret settlement. Public records requests were then sent to the public entities that were party to such agreements.

The results of study demonstrate that FOI laws provide an effective counter-balance to government secrecy in 32.8% of the cases. The remainder was split between denials and non-responsiveness. A few of the denials were justified by the prevailing FOI laws, but the vast majority of denials were without legal basis.

The underlying cases in this study were often of public significance. The largest category of cases involved civil rights claims, often against police or correctional institutions. The secrecy surrounding the outcome of litigation against government is widespread and worrisome. Simple reforms to ban this practice and provide better information about government as litigant would be useful.

### **Secret Settlements with Government as a Defendant: Do FOI Laws Counteract Court Secrecy?**

#### **Introduction**

There has been considerable discussion in the United States about the prevalence and consequences of secret settlement agreements in civil cases. This discussion emanates from the fact that courts are public institutions; they are administered by public employees and their operations are paid for by public funds. But the outcome of many cases is shielded from the public by agreement of the parties and/or by judicial decree. Either way, the outcome of a dispute filed in a public institution ends up being private. Investigative reports by several newspapers have demonstrated that court secrecy is often used to limit embarrassment or to protect the wealthy and privileged (e.g., Seattle Times 2007; Danner & Christensen 2006; Rich & Altimari 2003). As advocates of open government point out, those not appropriate reasons for prohibiting access to information about civil actions.

There is a vast literature by legal academics that examines the merits of proposals to ban secret settlements in civil proceedings (Doré 2006, p. 463 fn. 2 citing 39 recent

law review articles). Much of that literature is focused on tort cases, where proponents of more transparency argue that valuable deterrent effects of liability law will be muted if settlements are shrouded in secrecy. While there is significant disagreement about the nature and extent of the deterrent effects of liability law, there is a subset of civil litigation that seems particularly infused with public interest implications: cases in which a government entity is party. Beyond the general arguments for transparency in courts, there are additional arguments about accountability when the government is a party. Not only are public funds the direct or indirect source of payments—depending on insurance arrangements—made to settle civil cases, but civil suits often allege wrongdoing by government officials. If government entities can settle such claims confidentially then they escape a measure of accountability for their expenditures and their practices. While proposals to prohibit secret settlements in all civil suits are quite controversial, the idea that government should not participate in such agreements is already acknowledged in case law and in statutes. The FJC study identified ten states with rules limiting secret settlements by public bodies (Reagan 2003, p. 444, fn. 43). Moreover, the U.S. Department of Justice adopted a general policy that disfavors entering into settlement agreements with confidentiality provisions (U.S. DOJ 1999).

How often do government entities engage in this questionable practice? Given all of the commentary and concern about secret settlements, there have been surprisingly few empirical studies of the practice. While there are inherent difficulties in studying secrecy, various newspapers have demonstrated that with sufficient time and effort, it is often possible for reporters to piece together information about confidentiality in civil suits. The most comprehensive effort to study confidential settlements in the United States was conducted under the auspices of the Federal Judicial Conference in 2003. Employing full-text searching of electronic docket information and then scrutinizing cases by hand, the authors concluded that less than one-half of one percent of federal civil cases involved sealed settlements. While the total number of cases is miniscule compared to the number of cases in federal court, a distinct subset of these cases prompted the research reported in this article. There were over 100 cases with secret settlements that involved government as a party in the FJC sample of federal cases settled in 2000 and 2001.

Most of the “government party” cases identified in the FJC Report involved state and local agencies. There were a handful of cases against federal agencies. Virtually all of these government defendants operate under the jurisdiction of a freedom of information law or public records act. These Freedom of Information (FOI) laws were intended to promote transparency and accountability, values that are undercut when government engages in secret settlements. Do confidentiality agreements between the parties, or orders from the judiciary, override FOI laws? What would happen if the sealed settlements that were identified in the FJC report were requested directly from the public entity under the relevant FOI law, rather from the court where they have been deemed confidential? Those questions motivated this study, which involved public records requests to public entities identified in the FJC study as being party to secret settlements.

## **Method**

The FJC study, which focused on 52 federal court districts, determined that 1, 270 civil cases terminated in 2001 or 2002 had sealed settlement agreements (Reagan, p. 452). The report includes the case name, federal docket number, and a brief

narrative concerning the secrecy in the each case. The case names in the FJC report are limited to the primary parties. While the case descriptions in some instances indicated that an action was against the government, we did not include cases where it was unclear whether the lead defendant was subject to an open records law. We also restricted the study to the 50 states and the District of Columbia. That eliminated 20 cases in the FJC study from Puerto Rico and Guam. In the end, 67 cases were identified in which a public entity was the defendant and, according to the FJC, entered into a secret settlement. The public entities in these cases were almost entirely state and local agencies. The largest group was cities and towns. School boards, fire districts, and universities were also represented. There were a few state agencies and one federal defendant.

The nature of the cases was divided largely between civil rights claims (n=39) and employment actions (n=21). The civil rights claims were generally Section 1983 actions seeking damages for violations by police or other authorities. The employment actions were generally discrimination cases; a few were sexual harassment claims. The remaining cases (n=8) included multiple categories: medical malpractice, personal injury, false claims act, and other statutory actions.

Public records requests were sent in writing to the government entities in each of these cases. To convey seriousness of purpose, the request was sent on university letterhead and the letter indicated that the request was part of an academic study of settlement agreements entered into by government agencies. Follow-up requests were made after 60 days to any jurisdiction that did not respond to the initial request. The goal of this research was to obtain a substantive response, either providing the documents or issuing some kind of denial. Accordingly, there was additional correspondence with jurisdictions whose initial response contained a question or referred our inquiry to someone else. We did not initiate any formal appeals, even if a denial seemed clearly without sufficient legal basis. Formal appeals might have resulted in the eventual attainment of more settlement agreements, but this research was intended to gauge the application of FOI provisions in the way in which they are most likely to be applied.

## Findings

Almost two-thirds of the jurisdictions (62.7%) either complied with the request or issued an official denial. The remaining jurisdictions either did not respond at all (14.9%) or they communicated that the request was pending but never provided any additional response (22.4%). Both of those categories constitute denials in this study, although it is certainly possible that some of these public entities would have provided the documents if there had been a third or fourth round of follow-up letters.

Among the jurisdictions that provided a substantive response, there were more positive responses than negative ones. Twenty-two government entities (32.8%) provided copies of the settlement agreement. See Table 1. In two cases, the documents were provided in redacted form to protect information about a juvenile. In one case, separate divisions of the same government agency answered the inquiry differently; one denied the request entirely and the other provided a 24-page settlement agreement without any redactions.<sup>1</sup> All but one of these 20 cases involved

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<sup>1</sup> The case was the most unusual in the entire study in one respect. It was the only case with a sealed docket sheet. That supposedly meant that no information was available beyond the case name. But the lead plaintiff was the United States and the lead defendant was the Board of Regents of the University of Florida. We made a public records request to the

financial payment to the plaintiff; the amounts ranged significantly from a low of \$1,500 to a high of \$6.8 million. There appears to be no relationships between the size of the payment and the likelihood of a confidentiality provision. Many of the cases with the largest monetary payments did not include specific confidentiality terms.

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US Department of Justice and to the University of Florida. The University said it could find no record of the lawsuit. The FOI office at the U.S. Department of Justice denied the request on the grounds that the documents were sealed. Somehow, a copy of our request was forwarded to the Civil Division of the same office. They provided the settlement. The case was about Medicare reimbursement practices at the University hospital.

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**Table 1. Information on Received Settlement Agreements, ordered by amount of financial payment**

<b>Defendant</b>	<b>State</b>	<b>Nature of Suit</b>	<b>Amount</b>	<b>Confidentiality terms</b>
City of New York	New York	Civil rights claims	1,500	No
Columbia Housing Authority	South Carolina	Disability discrimination	2,800	Yes
City of Tulsa	Oklahoma	Privacy invasion	9,000	No
Frontier Central School District	New York	Employment discrimination	10,000	Yes
City of Chicago	Illinois	Employment sexual harassment	26,000	No
City of Bartow	Florida	Employment action	30,000	Yes
Gallup McKinley County School Board	New Mexico	Civil rights action	30,000	Yes
City of Novato	California	Civil rights claims	50,000	Yes
Albuquerque Public School District	New Mexico	Personal injury	75,000	Yes
Town of Oakland	Florida	Civil rights claims	100,000	No
School Board of Miami-Dade County	Florida	Employment, sexual harassment	100,000	Yes
City of New Castle	Pennsylvania	Civil rights claims	130,000	No
Pittsford Central School District	New York	ADA civil rights	150,000	Yes
Hennepin County	Minnesota	Civil rights action	200,000	Yes
City of Detroit	Michigan	Civil rights claims	225,000	No
City of New York	New York	Employment discrimination	375,000	Yes
City of Scottsdale	Arizona	Employment discrimination	875,000	No
Sikeston Department of Public Safety	Missouri	Civil rights action	1,000,000	No
City of Miami	Florida	Civil rights claim	1,250,000	No
BD of Regents, Florida	Florida	Medicare reimbursement fraud	6,837,738	No <sup>2</sup>
New York State Dept Environmental Conservation	New York	American with Disabilities Act (ADA) claim	Non-monetary	No
Board of Trustees of the University of Illinois	Illinois	Employment discrimination	Percentage raise	Yes

<sup>2</sup> There were no confidentiality terms in the settlement agreement; but the entire docket was sealed.

Half of the settlement agreements that were provided contained specific provisions or language concerning confidentiality. For the other half, it was not clear on the face of the settlement documents why these cases were included in the original FJC study. If the documents were not labelled or stamped confidential, and they did not contain any kind of confidentiality provisions, then the terms might already be in the public record. That was clearly the case in *Estate of Runnels v. City of Miami*, a civil rights action for wrongful death. The settlement agreement that was provided by the City in response to our request was stamped "City Commission Resolution No. 02-161." In other words, the settlement had been presented in a public meeting and it was likely attached to the minutes of the meeting. It was not a "secret settlement." Apparently the reason it was included in the FJC Study is that settlement discussions were sealed. But the seal was temporary. An order unsealing documents was entered after the clerk of the court identified the case as closed and notified the parties of their right to object (Order, *Estate of Runnels v. City of Miami*).

The settlement agreements that contained a confidentiality provision of some sort varied significantly in scope. Four of the eleven agreements bound only the plaintiff. Perhaps it went without saying, at the time of settlement, that the defendant had no desire to disseminate or publicize the details of a civil settlement. Or perhaps the public entity was legally constrained, or felt ethically constrained, from making promises of confidentiality. Whatever the explanation, some of these confidentiality agreements were written in a way that did *not* constrain the government from complying with a public records request. The other seven settlement agreements contained language that bound *both* parties to confidentiality, subject to certain exceptions. In two instances, there was a specific exception for public records requests.<sup>3</sup> In the remaining cases, however, the language of the confidential settlement appears to prohibit the government entity from disclosing the document or its terms. But the public entity responded to the public records document nonetheless.

Twenty public entities (29.9%) formally denied the request. See Table 2. Various reasons were provided by the public entities that denied the request. Some were denied with a specific reference to a provision in the relevant public records act. One request was denied on the grounds that Pennsylvania law exempts from disclosure any records protected by "judicial order or decree" (Pennsylvania Statutes, 2009). One denial was because the request was not from a Pennsylvania resident. One denial was based on an exception for educational records. In three other cases, all employment discrimination suits, the denial was based on an exception for personnel records. All of these denials had a basis in law, although one might argue that redacted records should have been provided instead of blanket denials in several instances. A redacted version should be able to protect identities in the employment and education cases but still provide the public with information about the terms of the settlement. Indeed, two of the public entities that complied with the request did so in this fashion. Both were cases from educational settings and both involved minors.

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<sup>3</sup> *Washington v. School Board of Miami* ("except as required by law, including public records law") and *Jeswald v. Frontier Central School* (Exceptions to confidentiality include "in response to a request for disclosure made pursuant to the New York State Freedom of Information Law")

**Table 2. Information on denials (excluding denial by non-response)**

<b>Defendant</b>	<b>State</b>	<b>Nature of Suit</b>	<b>Stated reason for denial</b>
Board of Fire Commissioners	New York	Employment discrimination	"Not in our possession"
Bucks County Schools Intermediate Unit No.22	Pennsylvania	Civil rights	Not a Pa. resident
City of Attalla	Alabama	Civil rights	"There was no settlement agreement" <sup>4</sup>
City of Birmingham	Alabama	Employment discrimination	Settlement under seal
City of Monessen	Pennsylvania	Civil rights	Sealed document, citing relevant law
City of Philadelphia	Pennsylvania	Civil rights	No records
City of Sterling Heights	Michigan	Civil rights	Employment record
County of Erie	New York	Employment discrimination	"Unwarranted invasion of privacy" <sup>5</sup>
County of Nassau	New York	Employment discrimination	Sealed document
County of Rensselaer	New York	Civil rights	"Records no longer in possession of the county" <sup>6</sup>
Dale County Board of Education	Alabama	Civil rights	Confidentiality clause
Dept of HUD		Statutory action	"No records responsive to request"
District of Columbia	DC	Civil rights	No records
Middle Country Central School District	New York	Civil rights	Confidential settlement
Otterville R-VI School District	Missouri	Civil rights	Sensitive subject
Town of Front Royal	Virginia	Employment discrimination	Personnel record
Town of Front Royal	Virginia	Employment discrimination	Personnel record
Washington Metropolitan Area Transit Authority	DC	Employment discrimination	Could not find any documents
Wayland Union Schools Board of Education	Michigan	Civil rights	Educational record

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<sup>4</sup> The federal docket sheet includes a Joint Motion to Seal "the settlement agreement."

<sup>5</sup> There was no offer of a redacted version of the settlement agreement.

<sup>6</sup> The response did not contain any statement about what the county did with the documents or who might have them.

The remainder of the denials were more problematic. Some were based on the claim that public entity did not have any responsive documents. The problem with that response is that the request was for a specific document: the settlement agreement in a specific case with a specific docket number. It seems implausible on its face that a public entity that entered into a settlement agreement in a recent civil case would not have a copy of the settlement agreement. But that is precisely what the City of Philadelphia claimed in response to a request for the settlement agreement in *Tara M. v. City of Philadelphia*. The underlying lawsuit, filed by the court-appointed advocate for a 9-year-old girl who suffered terrible abuse at the hands of her foster parents, resulted in significant publicity in Philadelphia (see e.g., Giordano 1997, Woodall 1996).

While the inability to locate the settlement agreement strains credulity in some instances, it is clear that the involvement of outside legal counsel in many cases complicates such public records request. A private lawyer might be in possession of a document that comes under the jurisdiction of the relevant public records law. If so, it is incumbent on the public records officer in the public agency to obtain the document from counsel or direct the request to them. Many public entities in this study failed at that task.

In five cases, the confidentiality agreement itself was cited as the reason for denying the request. It was likely a factor in some of the other instances in which there was a denial or an effective denial. However, *in only one of the denials was there a specific claim that the public records act made an exception for sealed documents*. None of the other denials contained reference to any legal authority that exempted the document from the public records act. The City of Sterling Heights, Michigan, for example, has a one-page form response for Freedom of Information Act requests. There are eleven separate boxes that might be checked as a reason for denial. The first ten boxes refer to provisions in the Michigan law. None of those boxes were checked—only the eleventh box, which reads “Please see attached.” The Confidentiality Order issued by U.S. District Court Judge Nancy Edmunds was attached. Similarly, an attorney for the Dale County (Alabama) Board of Education responded to our public records request by saying “the matter remains under seal” and “the settlement agreement has a confidentiality clause.” The attorney did not make any reference to the public records act or cite any legal provision to support the claim that an agreement of the parties trumps the public records act.

Three states accounted for more than half the cases where the request was denied: New York (5), Pennsylvania (3), and Alabama (3). One might be tempted to conclude that these states have a legal or political culture is that more hostile to open government than other states. But New York also accounted for five positive responses—more than any other state. Pennsylvania, on the other hand, is clearly more restrained than other jurisdictions in its basic FOI law. It turns out that there are two separate provisions in Pennsylvania’s FOI law justify the denial of requests in this study: sealed documents are protected under the FOI law and public entities are not required to respond to requests from non-residents. We also received settlements from five different cases in Florida, although one of those came from the Department of Justice, not from a Florida institution. But none of the denials came from Florida and five of the settlement agreements did.

## Discussion

There were a few encouraging findings in this study for advocates of open government. First, existing FOI laws were effective in preventing court secrecy from shielding the settlement of cases involving public entities in some cases. In a job discrimination case against the Town of Oakland, Florida, for example, the parties managed to shield all details of the settlement from public view. The Notice of Settlement that was filed with the court did not contain any of the settlement terms, and the transcript of the final pre-trial conference was purposely left out of the PACER database. Nevertheless, the Town responded to a public records request by providing a copy of the actual settlement agreement. There were five other cases where the FOI law prevailed over the secrecy created in the court system. But those cases were the exception, constituting only 8% of the cases in this study.

Second, there were indications that courts are becoming more sensitive to the arguments for transparency. In a few cases, the court drew a clear distinction between the importance of confidentiality *during* litigation and the countervailing importance of transparency afterwards. In an invasion of privacy case against the City of Tulsa, Oklahoma, for disclosing confidential medical information about the plaintiff, U.S. District Judge Sven Holmes ordered "both the existence of the case and the agreed upon judgment should be made a matter of public record" at the conclusion of the case (*Order, Doe v. City of Tulsa*). Similarly, at the conclusion of the case, a Florida court unsealed documents involving a \$1,250,000 settlement in a civil rights claim against a Miami police officer over a fatal shooting (*Order Unsealing Documents, Runnels v. City of Miami*). Indeed, an order at the conclusion of *Brown v. County of Oneida* offers the promising thought that Federal Records Center Policy might encourage the unsealing of federal cases for archival purposes. The Order to Show Cause states that "the Federal Records Center will not accept sealed records for storage," so the court ordered the closed case unsealed for storage. The County denied our request for a copy of the settlement, making this a highly unusual case in which the settlement would apparently be available from the institution that sealed it in the first place, but not from the government party subject to the FOI law. But courts apparently decide whether or not to send cases the Federal Records Center. In *Smith v. City of Monessen*, the federal docket sheet indicates that upon termination the case was "returned to the closed filing system of the Clerk's Office." A closed filing system is the antithesis of open government.

This study also provides several reasons to be concerned about secrecy in cases involving government parties. First, there was a disconcerting amount of non-responsiveness from government agencies. Almost half of the public entities contacted in this study did not provide any kind of response after two separate letters that described the request with specificity. In virtually all of those cases, a timely response of some sort was mandated by statute. The timely and professional response by so many of the remaining respondents in the study demonstrates that better performance is possible by the non-responsive public entities.

It is clear that there are special difficulties involved in requesting records related to litigation or settlement by public entities. Sometimes all of the papers concerning litigation are held by a private law firm that represents the public entity or their insurer. A public entity faced with a request for records about the settlement has the responsibility under basic FOI law to identify the custodian of documents, if they do not have possession. Virtually every one of the requests that was "pending" months

after multiple requests and follow-up messages involved outside counsel. We received a host of messages from private law firms to the effect that the matter was being investigated. Not one of those communications resulted in the eventual production of the requested documents. More persistent follow-ups might have prompted better results, but we followed up at least once with each of these firms.

Second, clerks at public agencies outside of the judicial system have a tendency to refer to the court system any request that includes the mention of litigation. We were told repeatedly in initial responses that we should request the settlement documents from the court. We explained explicitly in a second letter that we were not asking for the court's copy, we wanted the copy in possession of an agency that was party to the suit and is subject to the public records act. But some clerks refused to hear this. In a few jurisdictions we were referred to the court even after we explained a second time that we were making a public records request directly to the agency that had entered into the agreement. We were effectively denied the record in those jurisdictions.

Third, some public officials responded in ways that seemed obstructionist. The Assistant Superintendent for the Wayland Union Schools in Michigan claimed that the estimated cost of complying with the request would "exceed \$100" and conveyed the district's policy of requiring payment in advance of releasing the documents. After expressing surprise that a specifically identified document would be so difficult to locate, we conveyed our willingness to pay whatever costs were incurred. The official then responded that the document in question was exempt as an "educational record." Other public entities appeared to be purposely uncooperative. The Board of Fire Commissioners of the Levittown Fire District responded in one sentence that the settlement agreement "is not in the possession of the fire district, nor has it ever been in the possession of the first district."<sup>7</sup> That claim is hard to square with the fact that the settlement agreement was signed by a representative of the fire district and that the docket sheet indicates that it was "reviewed and approved" by them. Presumably that could not be accomplished without having the document in hand at some point. Moreover, the Fire District Secretary would undoubtedly know, or have the ability to find out, the custodian of this document. But that information was not provided.

Overall, the problem of secrecy in civil settlements involving government is considerable. While the practice may not be as prevalent as suggested in the FJC study, it is clear that many of these cases have public implications. And while some public entities were willing to disclose these settlements, others took specific measures to design to make that difficult or impossible. One popular technique is to read the terms of the settlement in court but to leave them out of any documents filed with the court (see e.g., Order, *Bell v. Jacksonville City Board of Education*; January 18, 2001). In *Thompson v. Town of Front Royal*, an employment case about racial discrimination, the case ended with an order to destroy all documents filed with the court "in a manner which will assure that the confidentiality of the materials will be maintained" (Order Disposing of Materials Under Seal). An attorney for the Town declined our public records request for the settlement on the grounds that it was an "employment record." But it turns out that the terms of the settlement were discussed by the Mayor at a Town Council meeting, who presumably was not considered to be disclosing a private "employment record" (Trice 2001). Six of the

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<sup>7</sup> Letter of September 17, 2007

settlement agreements received in response to our requests were civil rights claims involving employment; all were from jurisdictions in which employee records have special protection; in none of those instances was the settlement agreement considered an “employee record.”

The cases represented in this small study implicate the public interest in various ways. There were numerous civil rights actions against the police or correctional officers. That is consistent with Miller and Wright’s (2004, p. 775) conclusion that “secret settlement and judgments sealed by courts” explain “the silence of the records” on the existence and results of civil suits against the police. We received the settlement agreement in two cases against the police. In the first case, the terms apparently became public when the plaintiff’s lawyer leaked the \$400,000 settlement agreement immediately after it was finalized with a confidentiality clause (*Lawsuit is settled*, July 10, 2002). The defendants responded with an unsuccessful Motion for Gag/Protective Order. One legal observer described the settlement as “the largest police brutality settlement in Missouri” (Id.). In the other case, *Arlow v. City of Novato*, the settlement agreement anticipated that possibility and included specific provisions barring the plaintiff and the plaintiff’s attorney from disclosing anything, including the existence of a settlement. The County Clerk gets credit, however, for producing the agreement in response to a public records request. The idea that a public entity would go to such lengths to hide the terms of a major police brutality case should nevertheless concern everyone.

The idea that they are successful in some cases is even more troublesome. The County of Oneida, New York did not respond to multiple requests for the settlement agreement in a case alleging that black deputies at the county correctional institution were treated more harshly than white deputies. Brown sued for \$5 million in compensatory damages and \$1 million in punitive damages. “All I can say is my client is extremely happy,” his lawyer told the Associated Press (“County and Ex-Sheriff’s Deputy Settle Suit,” 2001). The settlement terms in a case alleging systematic wrongdoing in a public institution should not be confidential.

Two cases in this study involved civil suits stemming from high-profile child protection cases. The Tara M. case generated significant publicity in Philadelphia, but the terms of the settlement of a federal lawsuit remain confidential. Similarly, the death of 4-year-old Caprice Reid came to signify the “inability to track foster parents who repeatedly abused children” in New York. There were 23 articles about the matter in the New York Times. But regardless of the public interest involved in the case, the wrongful death suit by the girl’s biological mother was settled confidentially.

Finally, there were two *qui tam* actions in this study—cases in which private parties initiate litigation against a public entity for defrauding the federal government. Often, the federal government intervenes as co-plaintiff. These cases are considered public interest by nature; they involve allegations of government fraud and waste. Ironically, these “public interest” cases were the most secretive of all. One case, against the Board of Regents of the University of Florida was sealed entirely—including the docket sheet. The other case, against the University of Virginia Health System, was settled with a strong protective order.

## Conclusion

There are many reasons why government entities should not engage in secret settlements of civil cases. While the FJC study may have overstated the total number of cases in which government parties engage in this practice, there are nevertheless a non-trivial number of such cases and many of them involve issues of clear public importance. FOI laws almost never contain a specific provision that exempts documents sealed by courts from disclosure to the public. Only one such state, Pennsylvania, was identified in this study. But entities across the country declined to provide settlement agreements that had been sealed even if there was no apparent basis for that position in FOI law. A small number of public entities provided the settlement agreement either because the agreement itself allowed for disclosure in response to a public records request, or because the public entity came to the conclusion that the FOI law mandated disclosure notwithstanding whatever the parties or the court may have said.

Ten jurisdictions have prohibited secret settlements by public bodies. None of those states are represented in the denials in this study, suggesting that those laws might be generally effective. Other jurisdictions should adopt similar bans. This would promote transparency and accountability. Litigation can also help advance this cause. A newspaper in New Jersey recently succeeded in obtaining a confidential settlement in a sexual harassment suit against Monmouth County, establishing an appellate precedent that "the parties' agreement cannot override the public's right to access under OPRA [the Open Records Act]" (*Asbury Park Press v. County of Monmouth* 2009). Significant questions remain, however, about the extent to which FOI laws ensure access to information about settlement negotiations. During the Reagan Administration, the Department of Justice labelled "judicial reluctance to permit protection of sensitive 'settlement' information" as one of the "most troubling areas of case law" under the Freedom of Information Act (U.S. DOJ 1985). Subsequent cases have interpreted FOIA exemptions broadly in order to advance "the public interest to encourage settlement negotiations" (*M/A-Com Information Systems v. HHS* 1986). Whether exemptions provide too much protection to settlement-related materials merits more study and deliberation. The need to establish a clear right to access to the final settlement agreement in cases in which government is a party seems clear.

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