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Constitutionalizing Access: How Courts Weigh State Constitutional Claims in Open-Government Litigation

Jessica Terkovich and Aryeh Frank *

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Abstract

State constitutions receive relatively little academic attention, yet they are the source of significant substantive rights—and, when compared to the U.S. Constitution, they are relatively easily amended to comport with contemporary needs and values. Unlike the constitutions of dozens of other nations, the U.S. Constitution contains no explicit recognition of a right to information from the government, and the Supreme Court has declined to infer that such a right exists, apart from narrow exceptions. Conversely, seven states expressly memorialize the public’s right of access to government meetings and records in their constitutions. In this paper, the authors examine case law applying the constitutional right of access, concluding that the right is somewhat underutilized and rarely seems to produce an outcome clearly different from what a litigant could expect relying on state statutory rights alone.

* Jessica Terkovich and Aryeh Frank are rising third-year law students at the University of Florida’s Levin College of Law. They wrote this article as part of a research project for UF’s Brechner Center for Freedom of Information. Please send correspondence about this article to Jessica Terkovich at JessicaTerkovich@gmail.com.

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I. Introduction

The public's right of access to government documents and proceedings can be a fickle friend, subject to legislative manipulation at the whim of special interests.¹ While the public's entitlement to access generally depends on the will of state legislators, a handful of U.S. states have fortified the right to receive information from the government by enshrining it in the state constitution. Presumably, elevating the public's interest in being informed to the level of a constitutionally guaranteed right should produce more pro-access outcomes when a dispute arises, since a constitutional right should override a conflicting executive or legislative directive.

While some state constitutions, such as Missouri's, reference the duty of openness only in passing,² seven states explicitly detail the public's right to attend government meetings or inspect government documents: California, Florida, Illinois, Louisiana, Montana, New Hampshire, and North Dakota. Access to government records and proceedings is essential for journalists, researchers, and citizen watchdogs to perform their oversight function. As one legal commentator and longtime investigative journalist wrote: "Public records serve as a flashlight to illuminate the dark crevices of government. In a news world crowded by public information officers, press releases, and spin-doctors, reporters rely on public documents to expose the unvarnished facts about government activity."³ A constitutionally guaranteed right of access suggests that litigants should have the upper hand in disputes when state or local agencies try to close meetings or conceal records. This article tests that theory by looking at the outcomes of open-government litigation in states with a constitutional assurance of transparency.

Section II provides a brief overview of the workings of state open-government laws and their recognized societal importance. Section III surveys the landscape of states with constitutional guarantees of government transparency to determine whether judicial applications indicate that the presence of a constitutional right of access, as opposed to just a statutorily based right, demonstrably results in more pro-access outcomes. Section IV concludes by attempting to identify the most effective constitutional language that states may find worth considering, as well as to identify avenues for further research that might add to the body of knowledge about the relative value of constitutionalizing the right to government transparency.

II. The importance of access

In a recently published commentary, Prof. Chad G. Marzen made the case for constitutionalizing the right of access to information at both the U.S. federal and state levels, arguing that access to the workings of government is of comparable importance to, and complementary of, the recognized right to freedom of the press.⁴ A growing number of countries have taken the step of

¹ See Caitlin Ginley, *The State of Open Records Laws: Access Denied*, Ctr. for Pub. Integrity (Jun. 1, 2012), <https://publicintegrity.org/politics/state-politics/the-state-of-open-records-laws-access-denied/> ("Every state theoretically gives citizens the right to access government information. But an analysis of public records policies by the State Integrity Investigation reveals that, in state after state, the laws are riddled with exemptions and loopholes that often impede the public's right to know rather than improve upon it.")

² MO. CONST., ART. 3, SEC. 19(b).

³ Paul Aker, *Toward Darkness: Ohio's Presumption of Openness Under the Public Records Act*, 41 CAP. U. L. REV. 361, 367 (2013).

⁴ See e.g. Chad G. Marzen, *A Constitutional Right to Public Information*, 29 B.U. PUB. INT. L.J. 223, 224 (2020) (proposing and analyzing the benefits of an amendment to the United States Constitution reading: "The right to public information, being a necessary and vital part of democracy, shall be a fundamental right of the people. The right of the

elevating the public's entitlement to information to a constitutionally guaranteed interest, either by explicit constitutional guarantee or by judicial interpretation.⁵ The United States has not.

Federal courts have recognized a constitutional right of access to government documents in only limited contexts. For instance, it is understood that the First Amendment right of access to criminal court proceedings necessarily implies a right to view the transcripts of trial proceedings.⁶ Some lower courts have recognized a broader common-law right of access to case files maintained at courthouses or records shared with juries,⁷ though the Supreme Court has hesitated to go so far.⁸

Notwithstanding this limited strain of case law, the Supreme Court has declined to find that the First Amendment contemplates a generalized right of access to government information. For example, in *McBurney v. Young*, the Court unanimously refused to recognize a constitutional entitlement to state records that would override Virginia's statutory prohibition against granting freedom-of-information requests by nonresidents.⁹

Because there is no federal constitutional right to demand information from the government, requesters must look to statutes—or, occasionally, to state constitutions—to protect their ability to attend government proceedings and review government records. State freedom-of-information statutes vary, but all are based on the understanding that the public's ability to monitor and participate in government depends on access to reliable information.¹⁰ In most states, the right begins and ends in statute. But in a handful of jurisdictions, the right of access is elevated to the level of constitution.

State constitutions get relatively little scholarly attention, yet they are the source of substantive rights, as they tend to be relatively lengthy and detailed as compared to the U.S. Constitution.¹¹ State constitutions are described as “documents of limitation” rather than, as with the first three articles of the U.S. Constitution, affirmative grants of authority to government.¹² Unlike the federal Constitution, which has been amended 27 times, state constitutions are relatively more easily revised, meaning they are responsive to the demands of the populace and more easily kept up-to-date with contemporary needs.¹³ It is worth considering, then, whether states might learn from the handful of attempts at codifying a right of access by constitution.

people to inspect and/or copy records of government, and to be provided notice of and attend public meetings of government, shall not unreasonably be restricted.”)

⁵ Toby Mendel, *FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY* (UNESCO: Paris, 2008) at 20.

⁶ See *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 13 (1986) (recognizing that the media had a “qualified” First Amendment right of access to the preliminary hearing in a high-profile criminal trial, which also extended to the ability to review the hearing transcript).

⁷ See *United States v. Hickey*, 767 F. 2d 705, 708-09 (10th Cir. 1985) (recognizing common-law right of access to court documents, but declining to hold that it is of constitutional dimension or that it extends to the contents of a sealed plea agreement).

⁸ See Kaytlynn Hobbs, *Establishing a Reporter's Right of Access to All Court Documents Under the First Amendment*, 88 U. CINN. L. REV. 581, 581 (2020) (explaining that, although Supreme Court case law recognizes a clearly established right to attend the critical phases of a criminal proceeding, “no Supreme Court case explicitly defines the scope of the press' right to *court documents* in common law or within the contexts of the First or Fourteenth Amendments”) (emphasis in original).

⁹ *McBurney*, 569 U.S. 221 (2013).

¹⁰ See *State Employees Ass'n of N.C., Inc. v. N.C. Dept. of State Treasurer*, 695 S.E.2d 91, 97 (N.C. 2010) (“The approach that the state agency has the burden of compliance, subject to judicial oversight, is entirely consistent with the policy rationale underpinning the Public Records Act, which strongly favors the release of public records to increase transparency in government.”)

¹¹ Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 192 (2002).

¹² *Id.* at 207.

¹³ See Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1523-24 (2009) (explaining that states provide more routes to amending their constitutions than does the federal government, including 16 states in which voters can initiate constitutional amendment by way of referendum).

III. The application of state constitutional access rights

Multiple states have seen substantial pro-access outcomes attributable at least in part to constitutional provisions granting a right of access. Limits exist, including where a request for information collides with personal privacy rights, which necessitates a judicial balancing of interests. But the existence of a state constitutional right of access may help tip the balance toward disclosure in close judgment cases.

A. California

California's constitution provides that the people have a right to access information "concerning the conduct of the people's business"¹⁴ and, therefore, citizens have the right to access public meetings and the writings of public officials and agencies. As in many other states with favorable access provisions, California law states that public interest in disclosure is sufficient to warrant access, though access can be denied for a number of reasons, such as the presence of confidential personal information.¹⁵ However, promises of confidentiality do not serve as an automatic bar to disclosure.¹⁶ As long as responsive records can be located with reasonable effort, there is a duty of disclosure, although this does not extend into forcing an agency to create new records in response to a request.¹⁷

Some major clarifications to California's open records provisions came in *American Civil Liberties Union Foundation v. Superior Court*, in which the California Supreme Court heard the case of two civil liberties organizations seeking the disclosure of automatic license plate reading technology records from the Los Angeles Police Department, seeking to inform the debate over the rights of innocent citizens who were having their data collected.¹⁸ Though the LAPD wanted to block disclosure of the records, citing active investigations, the court found little risk of compromising legitimate law enforcement interests, because "the scans are not conducted as part of a targeted inquiry into any particular crime or crimes."¹⁹ The vast majority of the license plate scans proved "irrelevant" for law enforcement purposes, and thus were available for disclosure.²⁰ Additionally, seeking information from the LAPD database regarding specific vehicles did not transform the scans into exempt records of investigations.²¹

Critically, the court stated that "[v]ague safety concerns" cannot foreclose the public's right of access.²² Without a conclusive showing of an active investigation, police scans remain open for public inspection, promoting openness and responsibility in policing. Exemptions are to be narrowly construed in light of the court's constitutional obligations to favor free access of information.²³ An

¹⁴ CAL. CONST. ART. 1, SEC. 3. California's Proposition 59, adopted into this amendment, was ratified in 2004, extending the right to access to court proceedings to cover all government proceedings unless special circumstances prevented disclosure. See Joseph R. Grodin, *Freedom of Expression under the California Constitution*, 6 CAL LEGAL HIST 187, 219-20 (2011). http://repository.uchastings.edu/faculty_scholarship/1067.

¹⁵ *Sander v. State Bar of Calif.*, 314 P.3d 488 (Cal. 2013).

¹⁶ *Id.* In *Sander*, the confidential personal information had been released to the state Board of Bar Examiners in applications for admission.

¹⁷ *Sander v. Superior Court*, 237 Cal. Rptr. 3d 276 (Ct. App. 2018).

¹⁸ *American Civil Liberties Union Foundation v. Superior Court*, 3 Cal.5th 1032, 1036 (Cal. 2017).

¹⁹ *Id.* at 1042.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1046.

²³ *Id.* at 1037.

agency can withhold a record only if, based on the particular facts of the case, the interest served by nondisclosure would outweigh the interest served by disclosing the record.²⁴ This promotes a “case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality.”²⁵

The case of *Sander v. State Bar of California* provides an especially salient example of the weight of a state constitutional provision in tipping the outcome of a court’s decision to order disclosure.²⁶ In *Sander*, researchers sought access to the “de-identified” records of California bar exam takers, as part of a study to determine whether the exam disfavors people of certain races or ethnicities. This was a somewhat aggressive use of the California Public Records Act; the State Bar of California is privately incorporated, state bar exams are administered under extreme secrecy, and the California Bar has a regulation (“Rule 4.4”) making the records of applicants confidential.²⁷ Nevertheless, the California Supreme Court found that the data, with minimal redactions designed to protect applicant identities, was subject to disclosure. The court cited the existence of California’s constitutional right of access as a factor in favor of disclosure when weighing the requesters’ interests in light of the Bar’s confidentiality rule: “If there were some doubt about whether Rule 4.4 prohibits public access to the State Bar’s database even in a de-identified form, we nevertheless must interpret the rule in light of article I, section 3, subdivision (b) of the California Constitution.”²⁸ While perhaps not the decisive factor, the constitutionally based right proved to be a persuasive consideration on the side of access.

B. Florida

When Floridians overwhelmingly voted to ratify an amendment adding an open-records provision to the state constitution in November 1992, the Sunshine State became the first to memorialize the importance of access on a constitutional level.²⁹ Florida’s constitutional provision recognizes a right of access to public records and meetings and constrains the legislature’s ability to create statutory exemptions by requiring a supermajority vote, requiring that exemptions be justified with specificity and be drawn “no broader than necessary to accomplish the stated purpose of the law.”³⁰ Florida courts consistently hold that all exceptions must be narrowly construed and that the state constitution should be interpreted as tilting the scales in favor of disclosure. As one Florida court put it: “If there is any doubt as to whether a matter is a public record subject to disclosure, the doubt is to be resolved in favor of disclosure.”³¹ This has led to a robust pro-disclosure body of case law in Florida.

The right of access in Florida did not originally come from the constitution, but from the Sunshine Law³² and Open Records Act,³³ which provide the framework under which public officials

²⁴ *Id.* at 1043.

²⁵ *Id.*, citing Michaelis, Montanari & Johnson v. Superior Court, 38 Cal.4th 1065, 1071 (2006).

²⁶ *Sander*, 314 P.3d at 488.

²⁷ *Id.* at 496.

²⁸ *Id.* at 497.

²⁹ Kara M. Tollett, Comment, *The Sunshine Amendment of 1992: An Analysis of the Constitutional Guarantee of Access to Public Records*, 20 FLA. ST. U. L. REV. 525 (1992). This push for an amendment followed a controversial makeshift open-records ruling in *Locke v. Hawks* that served to allow access to potentially confidential records until the legislature could draft a broader solution not limited to the ruling of *Locke*. See *Locke v. Hawkes*, 16 Fla. L. Weekly 716 (1991), *overruled by* *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992).

³⁰ FLA. CONST. ART. 1, § 24(a)-(c).

³¹ *Morris Pub. Group, LLC v. Fla. Dept. of Educ.*, 133 So. 3d 957, 960 (Fla. 1st DCA 2013).

³² FLA. STAT. § 286.011.

³³ FLA. STAT. § 119.01.

must disclose their records. The Sunshine Law requires that meetings of public bodies must be open to public attendance and the minutes of those meetings kept open for public inspection,³⁴ while the Open Records Act defines the universe of government business records that must be made accessible and under what terms.³⁵ A growing body of targeted exemptions identifies the subset of records that state legislators have determined may (or in some cases, must) be withheld from disclosure.³⁶ The constitutional amendment was enacted in 1992 as a testament to Florida’s commitment to disclosure.

Since then, the constitution has almost never been the sole grounds for a decision. Though it has been in effect for nearly 30 years, it is cited in decisions far less frequently than either the Sunshine Law or the Open Records Act. In decisions where it is cited, it is almost always for the same proposition: Courts must lean towards disclosure, all else being equal. In the recent case of *Everglades Law Center v. South Florida Water Management*, access to unredacted transcripts from a mediation meeting was being sought.³⁷ Mediation communications are subject to redaction from the transcript of an otherwise-public meeting.³⁸ The court said that the constitutional amendment elevated the public’s right to “government in the sunshine” to constitutional proportions, and the “Sunshine Law,” is the primary statute that implements the amendment.³⁹ Though the court ruled against disclosure, the judges emphasized that the mediation exception is narrowly construed.⁴⁰

In the rare case that turned decisively on Florida’s constitution, the state Supreme Court ruled in favor of access. In *Memorial Hospital-West Volusia v. News-Journal Corp.*, media requesters sought a declaration that a private, nonprofit corporation leasing a public hospital is subject to open records requests.⁴¹ The court applied Sec. 24(a) and (b) of the Florida constitution in concluding that the nonprofit operating company was performing a governmentally delegated function—operating a publicly owned hospital—and as such, must disclose records and meetings pertaining to its performance of that duty.⁴²

The court in *Memorial Hospital* acknowledged the existence of a 1998 legislative enactment purporting to create a targeted exemption for exactly the records at issue—business records of a private operator of a public hospital—but chose not to grapple with the reach of that enactment because it did not apply retroactively to the dispute at hand.⁴³ That same year, the justices confronted a challenge to a related statutory exemption and applied Florida’s constitutional right of access to find it deficient.

In *Halifax Hospital Medical Center v. News-Journal*, the same Daytona Beach newspaper facially challenged the enactment of a 1995 exemption that enabled otherwise-public hospital boards to deny the public access to meetings and records involving marketing strategies.⁴⁴ The newspaper argued that the exemption was insufficiently detailed to satisfy Sec. 24(c) of the Florida Constitution, and the state Supreme Court agreed.

The newspaper challenged the closure of a meeting at which two public hospital agencies negotiated an affiliation agreement between their hospitals and the refusal to release minutes

³⁴ FLA. STAT. § 286.011.

³⁵ FLA. STAT. § 119.01.

³⁶ FLA. STAT. § 286.011.

³⁷ *Everglades Law Ctr. v. South Florida Water Mgt. Dist.*, 290 So.3d 123 (Fla. 4th DCA, 2019).

³⁸ FLA. STAT. § 286.011.

³⁹ *Everglades Law Ctr.*, 290 So.3d at 123.

⁴⁰ *Id.*

⁴¹ *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729, So.2d 373 (Fla. 1999).

⁴² *Id.* at 381-83.

⁴³ *Id.* at 384.

⁴⁴ 724 So. 2d 567 (Fla. 1999).

documenting what went on at the meeting.⁴⁵ The court concluded that the exemption did not “meet the exacting constitutional standard of article I, section 24(c), of specificity as to stated public necessity and limited breadth to accomplish that purpose and is therefore facially unconstitutional.”⁴⁶ The operative terms of the exemption—“strategic plan” and “critical confidential information”—were so vague that a hospital could justify excluding the public from decisions that have no bearing whatsoever on the stated rationale for the exemption (enabling publicly owned hospitals to compete effectively against privately owned hospitals that have the benefit of secrecy).⁴⁷

Florida decisions largely suggest that the constitutional right of access is more aspirational than operational; the right is rarely cited or relied on by the courts, except as a make-weight in a balancing analysis. As shown in *Halifax Hospital*, the “teeth” in Florida’s constitutional right of access are more the result of constraining the legislature from carving out new exemptions. The procedural requirements of Sec. 42(c) are not merely precatory; they provide enforceable standards above-and-beyond the requirements of the open-meetings and open-records statutes themselves. This “bite” is uniquely forceful in Florida constitutional law—although even that deterrent has not inhibited Florida’s legislature from recognizing more than 1,000 statutory exemptions, and growing.⁴⁸

C. Illinois

Illinois has a constitutional right of access solely relating to information regarding the expenditure of public funds.⁴⁹ As one court explained the bounds of the right: “What is critical is that the public have access to those papers which are necessary to determine where revenue originates, where it is spent and how it is employed while in the custody of the government or its fiscal agents.”⁵⁰ Though few Illinois cases cite this constitutional provision, in those that do, the right of access generally prevails.

The open records provision was enacted “to assure that the Illinois citizen has the broadest possible access to information on the fiscal conditions and operations of the state and local government, so that he may hold the elected officials accountable for their performance in office.”⁵¹ In *Oberman v. Byrne*, the court held that records of a “contingency fund” maintained for discretionary spending by the Chicago mayor fit the constitution’s broad definition of publicly accessible financial records, subject only to statutory limits on time, place, and manner of access (for instance, access could be limited to agency business hours).⁵² By placing circumscribed limits on the reasons for denying public records requests, Illinois courts have underscored the importance of openness and transparency in government, especially when it comes to spending.

Illinois courts have, however, limited the right to disclosure in the sense that the right cannot “extend to every working paper, every paper that may bear upon the financial transactions of state and local government.”⁵³ General reports “which might be said to recapitulate or to summarize the

⁴⁵ *Id.* at 568.

⁴⁶ *Id.* at 569.

⁴⁷ *Id.* at 570.

⁴⁸ Elizabeth Koh & Emily L. Mahoney, *Legislature adds to the more than 1,000 exceptions to Florida’s public records law*, MIAMI HERALD (Mar. 11, 2018), <https://www.miamiherald.com/news/politics-government/state-politics/article204472014.html>.

⁴⁹ ILL. CONST. ART. VIII, § 1.

⁵⁰ *Mid-America Television Co. v. Peoria Housing Auth.*, 93 Ill. App. 3d 314, 316-17 (1981).

⁵¹ *Oberman v. Byrne*, 112 Ill. App. 3d 155, 162 (1983).

⁵² *Id.* at 161. *See also* *Lopez v. Fitzgerald*, 76 Ill. 2d 107 (1979) (holding that strong countervailing factors are needed to overcome the general policy of openness in government).

⁵³ *Pope v. Parkinson*, 48 Ill. App. 3d 797, 801 (1977).

general records”⁵⁴ were enough to satisfy the court in *Pope v. Parkinson*, where financial records of the University of Illinois were sought. Although specific donors and expenditures of the university were blocked from discovery, general reports still had to be produced.⁵⁵ Though the scope of eligible records can be limited, once a record does fall within the bounds of the constitutional right of access, Illinois jurisprudence seems to require disclosure of as much information as possible, only allowing withholding only if there is a substantial showing of necessity for non-disclosure.

D. Louisiana

Louisiana’s constitution frames its open record provision as a “Right to Direct Participation,” providing that no person can be denied the ability to observe public meetings or examine public documents.⁵⁶ Courts have construed this provision liberally, concluding that if there is any doubt, “the doubt must be resolved in favor of the public’s right to see; to allow otherwise would be an improper and arbitrary restriction on the public’s constitutional rights.”⁵⁷

Few cases cite the constitutional provision, instead relying on the Louisiana Public Records Act. When the constitutional provision is cited, it is often used in passing as a supplementary authority, as was the case in *Misita v. St. Tammany Parish Government*, where a couple sought public records about flooding issues that affected a large swath of land, including their property.⁵⁸ Though the court stated that it was “well settled that the public’s right of access to public records is a fundamental right guaranteed by [...] the Louisiana Constitution,” the court instead chose to rely on the Public Records Act.⁵⁹

The constitutional provision was explored in depth in *Maldonado v. Cannizzaro*, where a reporter sought records of all subpoenas issued by a district attorney over a substantial period of time.⁶⁰ Although the request was voluminous, as the reporter sought thousands of records from storage with a retrieval cost of \$8.10 per file, the court ultimately ordered disclosure of a substantial percentage of the records, because a district attorney has a duty of accountability to the public and must produce records upon request.⁶¹ As the constitutional provision and the Public Records Act “should be construed liberally in favor of free and unrestricted access to public documents,”⁶² there must be a compelling showing to overcome the presumption that a document is available for disclosure.

The state constitutional provision is not heavily relied on in Louisiana courts, but when it is invoked, it tends to be persuasive. As is the case in many other states, the Louisiana constitution declares that citizens have the right to examine public records, but its implementation and practical usage is a product of the state’s freedom of information statute.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ LA. CONST. ART. XII, SEC. 3.

⁵⁷ *Maldonado v. Cannizzaro*, 257 So.3d 733, 739 (La. Ct. App. 2018) (*quoting* *Shane v. Parish of Jefferson*, 209 So.3d 726, 735 (La. 2015)).

⁵⁸ *Misita v. St. Tammany Parish Govt.*, 286 So.3d 440 (La. Ct. App. 2019) (remanded solely in order to fully state a cause of action).

⁵⁹ *Id.* at 444.

⁶⁰ *Maldonado*, 257 So.3d at 733.

⁶¹ *Id.* at 736.

⁶² *Id.* at 739. (*quoting* *Shane*, 209 So.3d at 735).

E. Montana

Montana’s constitutional access provision, aptly titled the “Right to Know,” states that no one will be denied the “right to examine documents” or “observe the deliberations of [...] state government and its subdivisions” unless “privacy clearly exceeds the merits of public disclosure.”⁶³ By setting the bar at “clearly exceeds,” the state evidenced a policy preference in favor of disclosure if the balance of interests is a close call. This right was deemed to be so fundamental that it was included in the body of the state constitution itself. As Justice Trieweiler of the Montana Supreme Court put it, the drafters of the state constitution recognized that government operates best and is easily held accountable when it is subject to public scrutiny.⁶⁴

The Right to Know provision has been interpreted to guarantee access to criminal courts. In *State ex rel. Smith v. Dist. Court*, the Montana Supreme Court decided that the *Great Falls Tribune* newspaper and the public had the right to view pretrial criminal proceedings.⁶⁵ Basing its decision on the Right to Know provision and the federal First Amendment, the court held that the public could be excluded from pretrial hearings only if “dissemination of information acquired at the hearing would create a clear and present danger to the fairness of defendant’s trial and no reasonable alternative means [ould] be utilized to avoid the prejudicial effect.”⁶⁶ This decision aligns with the body of U.S. Supreme Court cases that secure journalists’ right to view criminal proceedings as conduits for public knowledge,⁶⁷ allowing them to assure the public that justice is being carried out with regularity—or call attention to miscarriages of justice.

The right to access criminal proceedings extends to the public’s ability to hold participants in the justice system accountable for how they discharge their duties. In *Yellowstone County v. Billings Gazette*, the court held that public defenders, as court officers charged with safeguarding the public’s constitutional rights, hold positions of “public trust” and therefore the public has a right to know about disciplinary actions they face.⁶⁸ Though the public defender in question had legitimate privacy interests, the public’s right to access depositions involved in a departmental discrimination case outweighed those privacy interests.⁶⁹ The court found that third parties’ privacy interests could be safeguarded with minimal redactions while still enabling the public to review the performance of government employees holding sensitive jobs.⁷⁰

The *Yellowstone County* case outlined an analytical framework for applying the Right to Know provision in court. First, the court must ask whether the provision applies to the particular entity named in the suit.⁷¹ Then the court must ask whether the documents at issue are subject to public inspection.⁷² Finally the court must ask whether an individual’s privacy interests are involved,

⁶³ MONT. CONST., ART. II § 9.

⁶⁴ Fritz Snyder, *The Right to Participate and the Right to Know in Montana*, 66 MONT. L. REV. 297, 311 3(2005).

⁶⁵ *State ex rel. Smith v. Dist. Court*, 654 P.2d 982, 379 (Mont. 1982).

⁶⁶ *Id.* at 380. *See also* *Bozeman Daily Chronicle v. City of Bozeman Police Dep’t*, 859 P.2d 435 (Mont. 1993) (holding the media had a right to access documents related to an officer involved in an accident and subsequent criminal filings, subject only to the redaction of names and identifying information of witnesses and non-parties).

⁶⁷ *See* *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980) (holding journalists have a right to attend murder trials as a way to show the public that justice is being carried out properly). *See also* *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 509 (1984) (holding journalists have a right to view hearing transcripts).

⁶⁸ 143 P.3d 135, 140 (Mont. 2006).

⁶⁹ *Id.*

⁷⁰ *Id.* at 141.

⁷¹ *Id.* at 139.

⁷² *Id.*

and if so, whether those interests outweigh the benefits of disclosure.⁷³ A “compelling interest” must be shown to override individual privacy concerns.⁷⁴

The need for transparency is especially crucial when secrecy puts vulnerable people in a position to be harmed by government action or inaction. In *T.L.S. v. Montana Advocacy Program*, the court assessed the needs of the public to be informed about the conditions in a residential facility for people with disabilities after a resident, “T.L.S.,” died in the care of the Montana Developmental Center.⁷⁵ Applying the constitutional Right to Know provision, the court found that the Montana Advocacy Program, an organization that investigates the deaths of those in state-funded care, was entitled to previously-sealed records of the commitment hearing that led T.L.S. to be confined in the Montana Developmental Center.⁷⁶ The court found that whatever privacy interests remained after T.L.S. died did not clearly outweigh the interests of the Developmental Center and the larger public in discussing the circumstances of the commitment hearing, which might produce reforms to further protect people who have a limited ability to advocate for themselves.⁷⁷

Montana courts have long attempted to balance the right of access with individual privacy concerns, but when they conflict, courts look to see whether the privacy concern is both subjective and objectively reasonable.⁷⁸ If so, the court may deny the requested disclosure. When courts reject the disclosure of information on privacy grounds, it is often done to protect groups with enhanced degrees of privacy rights.⁷⁹

The case of *Pengra v. State* illustrates how Montana courts have applied the balancing of interests in keeping with the state constitutional directive to err on the side of disclosure in close cases.⁸⁰ In *Pengra*, a man whose wife had been murdered by a prisoner who was out on probation sued the state, obtained a financial settlement, and requested that the settlement records be sealed⁸¹ to protect his family’s privacy and his minor child’s healing process.⁸² Despite the sympathetic facts, the court found insufficiently compelling grounds to prevent disclosure.⁸³ The court found that minors do not have increased privacy rights, so Pengra’s claim on behalf of his daughter was subject to the same level of scrutiny as an adult’s privacy claims would be.⁸⁴

In balancing the public’s right to know about the settlement agreement and the Pengra family’s right of privacy, the court examined both the subjective expectation of privacy and the

⁷³ *Yellowstone Cnty.*, 143 P.3d at 139.

⁷⁴ Mont. Const., Art. II § 10.

⁷⁵ *T.L.S.*, 144 P.3d 818, 821 (Mont. 2006).

⁷⁶ *Id.* at 825.

⁷⁷ *Id.*

⁷⁸ *Id.* at 206.

⁷⁹ See *Krakauer v. Montana*, 445 P.3d 201 (Mont. 2019) (recognizing an enhanced right of privacy in student records when sought by an author investigating sexual assault claims at the University of Montana).

⁸⁰ *Pengra*, 14 P.3d 499, 500 (Mont. 2000). Under Montana law, the constitutional privacy balancing test applies only to the privacy interests of “natural human individuals” and not corporations. See *Great Falls Tribune v. Mont. PSC*, 82 P.3d 876, 883, 887 (Mont. 2003). Corporations can rely on the federal Due Process Clause to oppose requests for government records that compromise corporate secrets so as to deprive the corporations of property rights. Documents filed with government regulators are, presumptively, accessible to the public under Montana’s constitutional Right to Know, but that the presumption can be overcome by satisfying the strictures of the Uniform Trade Secrets Act, which would give rise to a protectable due process interest.

⁸¹ *Pengra*, 14 P.3d 499, 500 (Mont. 2000).

⁸² *Id.* at 501.

⁸³ *Id.* at 502.

⁸⁴ *Id.* at 501.

objective reasonableness of that expectation,⁸⁵ finding that neither weighed in favor of withholding records of the settlement agreement from the public.⁸⁶

The claim that the Pengras had a subjective expectation of privacy in the settlement agreement was discredited by the circumstances surrounding the suit against the state.⁸⁷ Pengra took no steps to close the proceedings or otherwise keep the lawsuit private, and admitted that his legal team was prepared to move for a public jury trial if the settlement agreement was insufficient.⁸⁸ Since he had continuously opened the case to the public, Pengra could not manifest a subjective expectation of privacy.

Nor was the court prepared to recognize that accepting a litigation settlement payment from a government agency gave rise to an objectively reasonable expectation of privacy. A disclosure provision in the settlement agreement showed that the state was not willing to recognize an expectation of privacy in tort settlements with private parties.⁸⁹ The court found that there were compelling reasons to release the settlement amount, including the right of taxpayers to know where their money is being spent.⁹⁰ Additionally, the court found that it would be impossible to manifest an expectation of privacy once the money was appropriated by the state legislature to pay out the settlement, since appropriations are routinely disclosed to the public.⁹¹ Because there was no legally cognizable expectation of privacy, and the public had an overriding interest in disclosure, the settlement terms could not remain sealed.

As compared with other states, the constitutional right of access is regularly cited as a basis for ruling on disputes over disclosure of records. This has produced a robust body of case law, most of it coming down on the side of public access. However, in a 1994 case involving secret meetings to select the head of Montana's government ethics office, the Montana Supreme Court applied the doctrine of constitutional avoidance and stated that, when possible, disputes should be resolved by reference to applicable statutes without grappling with issues of constitutional interpretation.⁹² Notwithstanding this cautionary note, Montana courts have freely invoked the constitutional Right to Know alongside state open-records and open-meetings statutes, including the Montana Supreme Court.⁹³ Practitioners should be unhesitant to cite the constitutional right, which has proven influential if not decisive in recent history.

F. New Hampshire

Of the seven states reviewed for this study, New Hampshire produced the least discernible degree of success for requesters who went to court in reliance on the constitutional right of access. New Hampshire's constitution emphasizes power being derived from the people, and therefore, the government being "open, accessible, accountable and responsive" to the people through open access.⁹⁴ Though a right of access is important to New Hampshire, courts have had a difficult time

⁸⁵ *Id.* at 502.

⁸⁶ *Id.* at 502-03.

⁸⁷ *Id.* at 502.

⁸⁸ *Id.*

⁸⁹ *Id.* at 503.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Common Cause v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices*, 868 P.2d 604, 607-09 (Mont. 1994).

⁹³ *See Yellowstone Cnty. v. Billings Gazette*, 143 P.3d 135, 140 (Mont. 2006); *see also Pengra v. State*, 14 P.3d 499, 500 (Mont. 2000); *Great Falls Tribune v. Mont. PSC*, 82 P.3d 876, 883 (Mont. 2003); *T.L.S. v. Mont. Advocacy Program*, 144 P.3d 818, 824 (Mont. 2006).

⁹⁴ N.H. Const. pt. 1, art. 8.

grappling with what constitutes an unreasonable restraint on this right. Its legislative standing remains strong, however, with nearly 40 modifications being made to state law in order to further strengthen the right to know.⁹⁵

There is a presumption that court records are public⁹⁶ in both civil and criminal cases.⁹⁷ This issue was examined in *In re Keene Sentinel*, in which a newspaper was allowed access to a political candidate's divorce records to research an article on his candidacy.⁹⁸ Though the newspaper was not a party in the underlying divorce case, it had standing to request access to court records just like any other member of the public.⁹⁹ The court held that the burden rests on the party seeking to withhold the records to demonstrate that there is a "sufficiently compelling interest" in nondisclosure outweighing the public's right to know.¹⁰⁰ The candidate and his ex-wife could not simply assert a general privacy interest to have their records withheld.¹⁰¹ In asserting that a compelling interest must be at stake, the court came down firmly on the side of access to judicial records.

In a subsequent case also involving the *Keene Sentinel* newspaper, the state Supreme Court elaborated on what would constitute a compelling interest overriding the public's right of access. In *Bowman Search Warrants*, the court explained that a compelling interest can be found if releasing information would impede active investigations¹⁰² or otherwise interfere in the criminal justice process. The *Bowman* court held that the State made a strong showing that releasing warrants and internal police information about suspects would impede an active investigation where no arrests had been made.¹⁰³ The court cited several concerns raised by disclosure of warrants and related materials in the midst of an incomplete investigation, including the possibility that exposure might cause witnesses to hesitate to testify before a grand jury for fear of retaliation, and that disclosure might stigmatize those referenced in the documents who turned out to be innocent. *Bowman* in no way repudiates the constitutional right to government records, but rather is mostly about the *timing* of access; nothing foreclosed the newspaper from re-submitting the request at a later stage of the case when the investigation was no longer "active."

The "active investigation" exception to disclosure has proven decisive in several cases implicating New Hampshire's constitutional right to know. In one 2011 case, the state Supreme Court decided that the precise locations of city surveillance equipment are exempt from public discovery because the information could reasonably provide criminals with knowledge about areas to avoid or how to change their behavior to avoid detection.¹⁰⁴ As in *Bowman*, the decisive consideration was the concern for compromising law enforcement's ability to prevent, detect and solve crimes. Denying access to police surveillance records was deemed a reasonable restriction on public access because of the compelling interest in public safety.¹⁰⁵ Significantly, the requester seeking details about police surveillance tactics argued that the state constitutional right of access imposed a more heightened standard on agencies seeking to avoid disclosure than did the state Freedom of Information Act.¹⁰⁶ The court did not view the constitutional burden as especially demanding, equating the government's

⁹⁵ State Law – History, RIGHT TO KNOW NH, <https://righttoknownh.wordpress.com/state-law/state-law-history/>.

⁹⁶ *In re Keene Sentinel*, 612 A.2d 911, 913 (N.H. 1992).

⁹⁷ *Id.* at 915.

⁹⁸ *Id.* at 913.

⁹⁹ *Id.* at 914.

¹⁰⁰ *Id.* at 916.

¹⁰¹ *Id.*

¹⁰² *In re State (Bowman Search Warrants)*, 781 A.2d 988, 994 (N.H. 2001).

¹⁰³ *Id.*

¹⁰⁴ *Montenegro v. City of Dover*, 34 A.3d 717, 723 (N.H. 2011).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

burden to a mere “reasonableness” standard.¹⁰⁷ In other words, it is the view of the New Hampshire courts that the constitutional right of access is implicated only where a restriction is unreasonable. This derives directly from the constitutional provision, which concludes, “the public's right of access to governmental proceedings and records shall not be unreasonably restricted.”¹⁰⁸ The court’s literal application of Art. 8 places a higher premium on the government’s interests in nondisclosure as compared with a more common balancing-of-interests approach, as the government’s justification can be “reasonable” and yet not compelling enough to outweigh the public’s interest in disclosure.

Invoking the existence of an active investigation does not always entitle law enforcement agencies to a blanket excuse for concealment. In a 2003 case, Manchester police were required to disclose photographs of people they had stopped to the New Hampshire Civil Liberties Union, which was investigating potential racial bias in traffic stops.¹⁰⁹ The court noted that “the trial court explicitly exempted from disclosure photographs that are or were part of police investigations, including pictures of victims, witnesses and suspects.”¹¹⁰ Because the photos “were of people the police, in their discretion, chose to encounter rather than who were the subject of a police investigation, no inference about the person's involvement with a crime can logically be drawn.”¹¹¹ After redacting identifying information accompanying the photos—such as names, addresses, and times of the stops—nothing barred disclosure.¹¹² The court noted that the photos themselves were not being published; they were sought for research purposes to compile statistics about the racial breakdown of traffic stops, not for public distribution.¹¹³

Similarly, the state high court ruled in the requester’s favor in a case involving the public’s ability to attend trial-like civil commitment hearings for criminals, specifically sex offenders.¹¹⁴ The court found that the public’s interest in knowing whether sex offenders are being held in custody or released into the community outweighs any privacy interest involved.¹¹⁵ The court explained that, in New Hampshire, the public’s right to attend court proceedings is rooted in state constitutional law, and that a First Amendment-like analysis applies in determining whether the state constitution requires opening a particular type of proceeding.¹¹⁶ Civil commitment hearings in New Hampshire have traditionally been open to the public¹¹⁷ and leaving them open serves the public’s best interest in being informed about a potential threat in their community, the court observed.¹¹⁸ Openness serves the public’s interest not just in knowing the whereabouts of particular people accused of sex offenses, the court said, but also in knowing the judiciary’s reasoning behind a decision to confine or to release.¹¹⁹

The opinion emphasized that the public has an interest in knowing “the factual basis that led the court to commit or release” an offender.¹²⁰ This can help to allay public fear of a possible reoffense—or allow the public to understand the circumstances of the crime in assessing their level

¹⁰⁷ *Id.* (Citing *Murray v. N.H. Div. of State Police*, 913 A. 2d 737 (N.H. 2006)).

¹⁰⁸ N.H. CONST. PT. I, ART. 8.

¹⁰⁹ *N.H. Civil Liberties Union v. City of Manchester*, 821 A.2d 1014, 1016 (N.H. 2003).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *State v. DeCato*, 938 A.2d 898, 904 (N.H. 2007).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 902.

¹¹⁷ *Id.* at 904.

¹¹⁸ Roger Przybylski, *Recidivism of Adult Sexual Offenders*, U.S. DEPT. OF JUSTICE (July 2015), <https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/recidivismofadultsexualoffenders.pdf>.

¹¹⁹ *DeCato*, 938 A.2d at 904.

¹²⁰ *Id.*

of concern with a released offender's presence in their community. Relying on the state constitutional right of access, the court found that the public's compelling interest in knowing of potential safety risks outweighed any privacy interest in individual criminal histories.

G. North Dakota

North Dakota's constitution contains both an open meetings clause and an open records clause.¹²¹ While little emphasis has been placed on these provisions in published case law, both have potentially strategic value in litigation.

The open meetings clause gives the public the right to access any meeting of groups funded by public funds or authorized to spend public money.¹²² This provision was heavily relied upon in *Dickinson Educ. Ass'n*, which challenged the closure of school board negotiation sessions at which teacher contracts were being considered.¹²³ The court analyzed these meetings under both the state open meetings statute and state constitution, finding that, because the school board was funded with public money, the meetings should be open to the public.¹²⁴ The statute and constitution were discussed in tandem, and there is no indication that the court regarded one as broader or more forceful than the other. While the court's majority deemed the closure to be a "harmless error" and not serious enough to require vacating the contracts,¹²⁵ a dissenting justice would have gone further and actually invalidated the contracts as the product of unlawfully closed negotiations.¹²⁶

Art. XI, § 6 of the North Dakota constitution reinforces the public interest in openness, providing that all records of government agencies or their affiliates must be open for public inspection.¹²⁷ These records include employees' personnel files¹²⁸ and other seemingly sensitive documents, even if they are held by a private party. This was the case in *Forum Publishing Company v. Fargo*, in which records held by a private company affiliated with the city of Fargo were determined to be open to public inspection.¹²⁹ The city hired a private company to help assess candidates for police chief, sending the company all of the applications they had received.¹³⁰ The court held that these materials were subject to release because they constituted public records that would have been accessible if held by the city, as they related to a public position funded with public money.¹³¹

The *Forum* court stated that the "purpose of the open-record law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records."¹³² The court interpreted the right of public access broadly, preventing government agencies from evading disclosure by

¹²¹ See N.D. CONST. ART. XI, § 5 (open meetings), N.D. CONST. ART. XI, § 6 (open records).

¹²² N.D. CONST. ART. XI, § 5.

¹²³ *Dickinson Educ. Ass'n v. Dickinson Pub. Sch. Dist.*, 252 N.W.2d 205, 212 (N.D. 1977).

¹²⁴ *Id.*

¹²⁵ *Id.* at 213.

¹²⁶ *Id.* at 216 (Vogel, J., dissenting in part).

¹²⁷ N.D. CONST. ART. XI, § 6.

¹²⁸ See *Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189, 190 (N.D. 1988) (holding a teacher's personnel file was a matter of public record and must be opened for inspection unless falling under an enumerated exception). See also *Grand Forks v. Grand Forks Herald*, 307 N.W.2d 572, 573 (N.D. 1981) (holding that the public has a right to inspect the personnel file of the police chief and records of his negotiated resignation as a matter of public record).

¹²⁹ 391 N.W.2d 169, 172 (N.D. 1986).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

transferring their records to private agents.¹³³ The court focused squarely on the document and the funding behind it instead of who physically held custody. This ruling stressed that government involvement, not the possessor of the document, is what is decisive in open records cases. The ability to gain access to records in the possession of private government contractors is a beneficial feature of North Dakota law, rooted both in the state open-records statute and in its constitutional guarantee of openness.

IV. Conclusion

The hoary joke about the Jewish mother at the funeral who suggests offering the dead man a bowl of chicken soup—“It couldn’t hurt!”—might be equally applicable to state constitutional rights guaranteeing access to information. There certainly is no indication that requesters in California, Florida, or the other states that memorialize a right of access in their constitutions fare any worse than requesters in states without such rights. At least on the margins, the existence of the right appears to do some work, if only as a make-weight factor when judges balance the interests of disclosure and concealment. Though it cannot be said that states with constitutionally based access rights are categorically “more open,” neither is there any evidence that the existence of the right is in any way detrimental; nothing in the appellate case law suggests that requesters frequently bring unfounded constitutional claims or otherwise leverage the existence of the right for improper purposes.

Although studies of the effectiveness of open government requests and the experience of requesters are not exhaustive, the few available data points do not indicate that the existence of a constitutional right produces categorically better outcomes for requesters, largely because so many other variables are at work. Statutory details vary widely between states, and the primary predictor of compliance—be it with a statute or a state constitutional provision—is the state’s political culture rather than the level of protection afforded to requesters.¹³⁴

States without constitutional provisions can be just as accessible to requesters because of their effective statutory protections, as is the case in Washington, Wisconsin, and Iowa, which all provided exemplary responses to an audit of state freedom of information laws conducted by researchers at Marquette University.¹³⁵ Nonetheless, constitutional protections are an important factor to be weighed by the courts in the complex balancing of the right to know and private interests, and should

¹³³ See *id.* (“We do not believe the open-record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in the possession of [the contractor].”).

¹³⁴ See David Cuillier, *Bigger Stick, Better Compliance? Testing Strength of Public Records Statutes on Agency Transparency in the United States*, GLOBAL CONFERENCE ON TRANSPARENCY RESEARCH (June 26, 2019), available at <https://www.documentcloud.org/documents/6182080-Sticks-and-Compliance-Cuillier.html>. Studying over 7,000 public records requests made across the country over five years, Cuillier found that traditionalistic states, largely those in the South, show less compliance than moralistic or individualistic states. These states, with the notable exceptions of Florida and Louisiana, do not have constitutional protections for public records requesters. Though this does not indicate causation, the correlation tends to show the political values of the state: Those with constitutionalized protections seem to embrace requesters more than those with statutory protections alone.

¹³⁵ A. Jay Wagner, *Probing the People’s Right to Know: A 10-State Audit of Freedom of Information Laws*, MARQUETTE UNIVERSITY (March 2020), <https://static1.squarespace.com/static/57c99b8829687f97347637d8/t/5e53f5c510f5de6af19b3414/1582560710809/10-State+FOI+Audit+Report.pdf>. This audit combed through over 1,000 public records requests in 338 counties across 10 states. The requests were submitted to a variety of state agencies, led by both appointed and elected officials. States were selected to account for differing geographic, demographic, and political profiles, as well as constitutional and statutory protections for public records requesters.

not be discounted. Indeed, state constitutions can serve as a source of substantive individual rights that courts may be willing to read more broadly than those enumerated in the U.S. Constitution.¹³⁶

There are obvious limits to the lessons that can be derived from judicial decisions applying state constitutions. First, only appellate rulings are typically accessible at the state-court level, so any sampling necessarily focuses on the small handful of cases that make it beyond the trial-court level without settling. It takes an especially determined requester to litigate a request through the appellate stage, because information will rarely have a useful shelf life motivating a litigant to devote years to battling for it. Second, it is possible that the very existence of a constitutional right of access results in fewer contested disputes, and there is no reliable way of measuring the number of cases *diverted from* court because the requester’s right of access is clearly established. Survey research about the experience of requesters and record custodians would be helpful in assessing whether amending state constitutions to recognize a right to government information has more than mere symbolic value.

Litigators have understandably focused primarily on statutory rather than constitutional bases when pursuing access to government meetings and records. As the Montana Supreme Court evidenced in its 1994 *Common Cause* decision, courts may shrink from difficult questions of constitutional interpretation if the more-specific terms of an on-point statute conclusively resolve the dispute.¹³⁷ Nevertheless, state constitutional rights have—or *should* have—at least persuasive value. When a legislative enactment constraining the public’s right to know collides with a constitutional presumption in favor of access, the constitutional imperative should prevail.

State constitutional guarantees of access do not seem to expand the public’s right to cover a broader range of government records or proceedings than would otherwise be accessible by statute.¹³⁸ This is perhaps to be expected. It would ask quite a lot for a court to find that, when the legislature has spoken directly to the set of records that should and should not be disclosed, a broadly worded constitutional directive overrides the legislature’s more specific choices addressing the same subject. Rather, the right seems to function as more of a “thumb on the scale” when balancing the public’s right of access against countervailing considerations.

Because a state constitutional right trumps a directly inconsistent state statute, the existence of a constitutional right of access to information could prove to be important as states feel increasing pressure to enact privacy legislation that removes access to formerly accessible data. In recent years, states have enacted a wave of “student privacy” statutes that imperil the public’s ability to gain access to public records from schools.¹³⁹ A wave of new statutory open-records exemptions has challenged the accessibility of long-public documents, such as autopsy reports, death certificates, and jail mugshots.¹⁴⁰ Florida and South Dakota have recently added “victim-rights” provisions to their state

¹³⁶ Mindy L. McNew, *Moresi: Protecting Individual Rights Through the Louisiana Constitution*, 53 La. L. Rev. 1641, 1662 (1993).

¹³⁷ *Common Cause v. Statutory Committee*, 868 P. 2d 604, 607 (Mont. 1994).

¹³⁸ *See, e.g., Sander*, 314 P.2d at 494 (noting trial court’s conclusion that the 2004 enactment of California’s constitutional right of access “did not create any new substantive rights, but simply constitutionalized existing rights of access”).

¹³⁹ *See* Dylan Peterson, *Edtech and Student Privacy: California Law as a Model*, 31 BERKELEY TECH. L.J. 961, 968 (2016) (stating that 28 states enacted student privacy statutes in 2014 alone, and that “nearly all” have considered such legislation in recent years as a result of concerns that federal law insufficiently protects the confidentiality of data identifying students).

¹⁴⁰ *See* Jeffrey R. Boles, *Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns*, 22 CORNELL J. OF L. & PUB. POL’Y 237, 286-87 (2012) (describing growing trend of removing autopsy reports from the public record on the grounds that family members might be traumatized by publication of graphic photos, but calling for a more narrowly tailored approach than total concealment). *See also* Clay Calvert, Austin Vining & Sebastian Zarate, *Reining in Internet-Age Expansion of Exemption 7(C): Towards a Tort Law Approach for Ferreting out Legitimate Privacy Concerns and Unwarranted Intrusions Under FOIA*, 70 SMU L. REV. 255 (2017) (exploring growing

constitutions, resulting in the withdrawal of access to information from law enforcement agencies on the grounds that the information might point to an identifiable crime victim (even, in some disputed instances, to the identity of police officers who use deadly force in the line of duty).¹⁴¹ There is little indication in contemporary case law that challengers are using constitutional access rights to facially challenge these types of open-records exemptions. But even if newfound exemptions are unlikely to be declared “unconstitutional,” it is at least possible to argue for a narrowing construction where necessary to reconcile those exemptions with preexisting constitutional rights.

The vast majority of states have yet to enshrine a right of access in their constitutions. Should state legislators move to enact such an amendment, there are two important considerations to keep in mind. First is Florida’s supermajority vote requirement for a legislative exemption to freedom of information laws,¹⁴² which, while not a ‘silver bullet’ to any restrictive legislation, would require a higher margin of approval and would make legislators think more critically when analyzing such possible exemptions. Second is Montana’s “clearly outweigh[ing]”¹⁴³ standard that applies when balancing public and private interests. This standard would again require more critical thought and provide protections where necessary but ultimately favor disclosure. Including these kinds of provisions in any open-records legislation, be it a constitutional amendment or statutory change, would help to provide further security for requesters and place clear limits on overzealous legislators.

It is perhaps surprising that the case law reflects little indication that people aggrieved by undue government secrecy have brought facial constitutional challenges to state statutes that abridge the right of access to information. Arguably, the foundational purpose for which state constitutions exist is to constrain overreaching by the legislative and executive branches of state government. If the purpose of a state constitutional right of access is not to prohibit the enactment of legislation compromising the public’s right to know, one might defensibly ask why the constitutional provision exists at all. In contexts outside of freedom-of-information, courts have not hesitated to declare legislative enactments unconstitutional when they conflict with other fundamental rights guaranteed by state constitutions.¹⁴⁴ Until more frustrated requesters attempt facial challenges to legislation that narrows the availability of information, the promise of state constitutions will remain incompletely fulfilled.

judicial willingness, in light of advent of online publishing, to allow for concealment of booking photos on the grounds of personal privacy).

¹⁴¹ See Sophie Quinton, ‘Marsy’s Law’ Protections for Crime Victims Sound Great, but Could Cause Problems, PEW STATELINE (Oct. 12, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/12/marsys-law-protections-for-crime-victims-sound-great-but-could-cause-problems> (describing history of national “Marsy’s Law” amendment campaign, and how amendment has been invoked in South Dakota to shield names of police officers involved in shootings); see also Tony Marrero, *Florida cops who use force keep names secret with Marsy’s Law*, TAMPA BAY TIMES (Feb. 6, 2020), <https://www.tampabay.com/news/2020/02/06/florida-cops-who-use-force-keep-names-secret-with-marsys-law/> (explaining that law enforcement officers have been able to claim “victim” status under Florida’s 2018 constitutional amendment to have their names withheld from police reports).

¹⁴² FLA. CONST. ART. 1, § 24(a)-(c).

¹⁴³ *T.L.S.*, 144 P.3d 818, 825 (Mont. 2006).

¹⁴⁴ See, e.g., *Calif. Redevelopment Assn. v. Matosantos*, 267 P.3d 580 (Cal. 2011) (striking down statute exacting payments from community redevelopment agency as inconsistent with state constitutional limitations on state’s authority over redevelopment agencies); *Sullivan v. Sapp*, 866 So.2d 28 (Fla. 2004) (holding that statute empowering courts to grant visitation rights to grandparents violated Florida Constitution’s right to privacy, which protected parents’ right to raise children as they see fit); *Chiles v. State Employees Attorneys Guild*, 734 So.2d 1030 (Fla 1999) (finding that statute interfering with public employees’ right to collective bargaining failed to satisfy the strict scrutiny required when legislative enactments collide with Florida Constitution’s right to work); *American Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (deciding that California statute requiring minors to obtain parental consent or judicial decree before obtaining abortion contravened state constitutional right to personal privacy).