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Secrecy on Steroids: How Overzealous State Confidentiality Laws Expose Leakers and Whistleblowers to Retaliatory Prosecution

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Secrecy on Steroids: How Overzealous State Confidentiality Laws Expose Leakers and Whistleblowers to Retaliatory Prosecution

FRANK D. LOMONTE* & ANNE MARIE TAMBURRO**

It is well-documented that the federal government has a secrecy problem. Thousands of times a year, inconsequential documents are needlessly stamped “classified,” which can mean prison for anyone who leaks them. But the addiction to secrecy doesn’t stop with the Pentagon. State public-records statutes are riddled with their own local version of “classified information” that puts people at risk of prosecution even for well-intentioned whistleblowing.

The problem is particularly acute in Florida, where one of the state’s highest-ranking elected officials spent almost two years as the target of a criminal investigation for releasing records about an unresolved sexual harassment complaint against a state regulator. While the case was ultimately closed without charges, merely being the target of a pro-

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longed criminal investigation can itself be profoundly intimidating—particularly for low-level public employees who lack the resources to defend themselves.

This Article describes the results of a research project by the Brechner Center for Freedom of Information at the University of Florida, which found more than 400 categories of records that state law treats as “confidential,” meaning that a person who releases the record is potentially committing a crime. These categories go well beyond the narrow handful of sensitive documents that everyone agrees cannot safely be publicly disseminated, such as medical records, and encompass entirely mundane information, including the identities of donors to performing-arts venues, or the names of horses that are banned from racing.

The needless proliferation of confidentiality laws creates an intimidating climate for whistleblowers. The fear of a retaliatory prosecution is no illusion: The authors examine a recent Texas case, Villarreal v. City of Laredo, in which a journalistic blogger was arrested and charged with violating a state confidentiality law analogous to Florida’s, demonstrating that overzealous use of “state classification” can empower government officials to make selective, viewpoint-based enforcement decisions. The authors conclude that “confidential” designation should be applied advisedly to only the narrowest subset of information that would genuinely cause harm if disclosed—and even then, only after the public’s countervailing interest in transparency is considered.

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INTRODUCTION

It is well-documented that the federal government, especially its national security and intelligence agencies, has a secrecy problem.¹ As one leading expert in the field has written: “Washington’s out-of-control classification system has long interfered with the public’s understanding of government actions and efforts to impose accountability for policies gone wrong.”² Thousands of times a year, harmless documents are needlessly stamped “classified,” which can mean prison for anyone who leaks them.³

But the addiction to secrecy doesn’t stop with the Pentagon. State public records laws are riddled with their local version of

¹ See Elizabeth Goitein, *Washington’s Secrecy Bubble Needs to Be Popped*, FOREIGN POL’Y (Dec. 23, 2021, 6:18 AM), <https://foreignpolicy.com/2021/12/23/classification-secrets-government-intelligence-reform/>.

² *Id.*

³ See Kai McNamee, Ailsa Chang & Ashley Brown, *The U.S. has an Overclassification Problem, says one Former Special Counsel*, NPR (Jan. 17, 2023, 5:00 AM), <https://www.npr.org/2023/01/17/1149426416/the-u-s-has-an-overclassification-problem-says-one-former-special-counsel> (quoting legal expert, Oona Hathaway, who decries “out of control” system that results in some fifty million documents being classified every year); see also Mark Norris, *Bad “Leaker” or Good “Whistleblower”? A Test*, 64 CASE W. RESV. L. REV. 693, 703 (2013) (stating that “[m]uch of [the] material and information classified by the U.S. government is undeserving of protection” and citing estimates that as many as ninety percent of classified documents may not deserve classification).

“classified information” that puts people at risk of criminal prosecution even for well-intentioned whistleblowing.⁴

The problem is particularly acute in Florida, where one of the state’s highest-ranking elected officials recently spent almost two years as the target of a criminal investigation for releasing records about an unresolved sexual harassment complaint against a state regulator.⁵ A state prosecutor decided in May 2021 that Chief Financial Officer Jimmy Patronis would not face charges for disclosing confidential records, which under Florida law is a crime punishable by up to a year in jail and a \$1,000 fine.⁶ But merely being the target of a prolonged criminal investigation, especially for an elected official whose continued employment depends on maintaining a favorable public image, can itself be profoundly intimidating.

Concededly, Patronis falls short of most people’s idea of a “whistleblower.” He was accused of leaking the harassment complaint for political reasons, to help get rid of an unwanted appointee in the state’s bank regulatory agency—and, not selflessly, to call public attention to government wrongdoing.⁷

⁴ See Katherine Barrett & Richard Greene, *Access to Public Records is ‘Deteriorating Terribly,’* ROUTE FIFTY (Oct. 31, 2023), <https://www.route-fifty.com/management/2023/10/access-public-records-deteriorating-terribly/391652/>.

⁵ See Lawrence Mower, *Criminal Investigation of Florida CFO Given to State Attorney*, TAMPA BAY TIMES (Jan. 24, 2020), <https://www.tampabay.com/florida-politics/buzz/2020/01/24/criminal-investigation-of-florida-cfo-given-to-state-attorney/>.

⁶ Lawrence Mower, *Prosecutors Won’t Charge Florida CFO for Releasing Confidential Complaint*, TAMPA BAY TIMES (May 28, 2021), <https://www.tampabay.com/news/florida-politics/2021/05/28/prosecutors-wont-charge-florida-cfo-for-releasing-confidential-complaint/>; see also NAT’L FREEDOM OF INFO. COAL., BLUEPRINT TO TRANSPARENCY: ANALYZING NON-COMPLIANCE AND ENFORCEMENT OF OPEN RECORDS LAWS IN SELECT U.S. STATES 6–7 (2020), https://www.nfoic.org/wp-content/uploads/2020-02/Blueprint%20to%20Transparency_%20Enforcing%20Open%20Records%20Laws-4.pdf (“Florida Statute Section 119.10(1)(b) provides that a public officer who knowingly violates the provisions of Section 119.07(1) commits a first degree misdemeanor, punishable by one year in prison, a \$1,000 fine, or both.”).

⁷ See Jim Turner, *State Attorney Jack Campbell May Review FDLE Investigation of CFO Jimmy Patronis*, TALLAHASSEE DEMOCRAT (July 18, 2019, 1:34 PM), <https://www.tallahassee.com/story/news/local/2019/07/18/patronis-facing-fdle-probe-blasts-suspended-banking-regulator/1755701001/>.

But change the scenario just a bit. Suppose the leaker is not the state treasurer but a concerned employee (“Jane”) in the state treasurer’s office who believes the agency has been sitting on a sexual harassment complaint to protect a powerful politician, leaving her female coworkers at risk. Should Jane be subject to criminal prosecution if she takes the months-old complaint to an investigative reporter to expose her agency’s foot-dragging—even if (as Patronis did) she takes the precaution of removing the complainant’s name?

It’s not just harassment complaints that are arguably “over-classified” under Florida law. As this Article describes, researchers at the Brechner Center for Freedom of Information have found more than 400 categories of records that state law treats as “confidential,” meaning that a person who releases the record may be committing a crime.⁸ These categories go well beyond the narrow handful of sensitive documents that everyone agrees cannot safely be publicly disseminated (such as documents that would facilitate identity theft, compromise medical privacy, or give away the identity of confidential police informants). Instead, Florida law extends “confidential” status to dozens of categories of mundane records that pose no meaningful danger if disclosed—for instance, records containing the identities of donors to performing arts venues⁹ or the names of horses banned from racing because of controlled substances.¹⁰

Keep in mind that Florida is renowned for its forceful open-records laws, which entitle the public to see just about any document or database that a government agency maintains.¹¹ Florida courts have always said that, when in doubt, agencies should disclose the maximum amount of information possible because honest government requires informed scrutiny.¹²

⁸ See discussion *infra* Part III.

⁹ FLA. STAT. § 265.7015 (2023).

¹⁰ *Id.* § 550.2415(1)(a).

¹¹ See Joseph T. Eagleton, *Walking on Sunshine Laws: How Florida’s Free Press History in the U.S. Supreme Court Undermines Open Government*, 86 FLA. BAR J. 22, 24 (2012) (“Florida’s open government laws are widely regarded as some of the broadest and most all-encompassing in the country.”).

¹² See *Rameses, Inc. v. Demings*, 29 So. 3d 418, 421 (Fla. Dist. Ct. App. 2010) (“In light of the policy favoring disclosure, the Public Records Act is construed liberally in favor of openness, and exemptions from disclosure are construed narrowly and limited to their designated purpose.”).

But when state legislators sprinkle the codebooks with confidentiality clauses, Florida's open-records law becomes a minefield. It creates an intimidating climate for true whistleblowers, who may believe that going public with a hidden scandal is the only way of provoking reform. Even though prosecutions for releasing public records appear to be rare,¹³ simply depriving custodians of the ability to make document-by-document situational judgments about whether or not to release documents by imposing impenetrable confidentiality provisions exacts a real cost on the public's right to be informed.¹⁴

Although the terms "exempt" and "confidential" might be interchanged informally in conversation, there is a legally decisive difference between the two.¹⁵ When a record is treated as "exempt," that gives the agency discretion whether to release or withhold it. If a government employee makes an ill-advised judgment call and discloses too much, no legal jeopardy attaches. But if a government employee makes a poor judgment call and discloses "confidential" records, the result can be jail time.¹⁶ Because of the dire consequences of disclosing a confidential record, legislators should use the designation sparingly, reserved only for the most highly sensitive records. That is not the way the law is working in Florida.¹⁷

This Article builds on the considerable body of scholarship about the overclassification of federal documents by examining America's *other* overclassification problem: criminalizing disclosure of harmless state and local government records. Part I discusses foundational concepts regarding open-government laws: why they exist, how they work, and when they yield to countervailing public

¹³ See BLUEPRINT TO TRANSPARENCY, *supra* note 6, at 6 (citing "the general reluctance of prosecutors to pursue criminal charges for transparency violations.").

¹⁴ See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (recognizing that "[the] right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society").

¹⁵ See Ralph A. DeMeo & Lauren M. DeWeil, *The Florida Public Records Act in the Era of Modern Technology*, 92 FLA. BAR J. 33, 34 (2018).

¹⁶ See discussion *infra* Part III (explaining how Florida courts have interpreted "confidential" to mean the custodian has no discretion to disclose).

¹⁷ See discussion *infra* Part III.

policy imperatives.¹⁸ Part II describes how, at the federal level, transparency has been frustrated by agencies' pervasive use of the "classified" stamp to evade their disclosure obligations under the Freedom-of-Information Act ("FOIA").¹⁹ Part III looks at "over-classification" at the state level, with a focus on Florida, where otherwise forceful open-government laws are being undermined by dozens of categories of records being legislatively designated "confidential" and ineligible for release to the public, under penalty of prosecution.²⁰ Part IV then looks at how Florida's dubiously broad confidentiality laws might fare in a constitutional challenge, looking to the analogous body of federal leak-prosecution caselaw.²¹ Part V turns to Texas, where an especially aggressive use of "state classification" resulted in the arrest of a colorful police watchdog for the routine journalistic act of publishing information obtained from a police source.²² That case, which spiraled into a long-running civil damages case under the First Amendment, stands as a cautionary tale of the downside risks when state records are over-designated as confidential.²³ Part VI contrasts the Florida statutory scheme with narrower approaches taken in most other states.²⁴ The contrast demonstrates that it is eminently possible to craft better-targeted confidentiality laws that protect only records that might realistically cause serious harm if disclosed, leaving the remainder accessible for public use.²⁵ The Article concludes that Florida—and any other state with a "release a confidential record and go to jail" statute—is on questionable constitutional footing, replicating the federal overclassification problem without the federal safeguards that put custodians on notice that they are handling extra-sensitive documents, allow them to challenge ill-founded classification decisions, and protect them against prosecution for mishandling inconsequential records.²⁶

¹⁸ See discussion *infra* Part I.

¹⁹ See discussion *infra* Part II.

²⁰ See discussion *infra* Part III.

²¹ See discussion *infra* Part IV.

²² See discussion *infra* Part V.

²³ See *Villarreal v. City of Laredo*, 44 F.4th 363, 369 (5th Cir. 2022).

²⁴ See discussion *infra* Part VI.

²⁵ See discussion *infra* Part VI.

²⁶ See discussion *infra* Conclusion.

I. WHEN IN DOUBT, DISCLOSE: FREEDOM OF INFORMATION
LAW AND POLICY

The federal government and every U.S. state and territory maintain freedom-of-information statutes entitling the public to inspect and copy records maintained by government agencies in the course of transacting public business.²⁷ These laws go by varying names—public records acts, open records acts, freedom-of-information acts—but are generically referred to by the umbrella term of “FOI” laws.²⁸ The scope of the laws varies, but their common purpose is to allow the public to review recorded information, in all formats, memorializing the transaction of public business.²⁹ Many of these statutes begin with sweeping declarations of their remedial civic purpose in checking government overreach, such as Texas’s:

Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for

²⁷ Jeffrey R. Boles, *Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns*, 22 CORNELL J.L. & PUB. POL’Y 237, 240 (2012).

²⁸ See Karrie Kehoe, *Top Tips and Tricks for Going Global with FOI*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (July 16, 2019), <https://www.icij.org/inside-icij/2019/07/top-tips-and-tricks-for-going-global-with-foi/> (“FOI or Freedom of Information is an umbrella term for a range of transparency or open data laws in dozens of countries around the globe.”).

²⁹ See Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know,”* 72 MD. L. REV. 1, 9 (2012) (“Legal recognition of the people’s ‘right to know’ serves two separate democratic values: governmental accountability and citizen participation.”).

them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.³⁰

Because access to information is considered fundamental to a well-functioning system of governance, public records laws are given a broad construction, and statutory exemptions to disclosure are construed narrowly.³¹ Anyone making an FOI request is entitled either to receive the responsive documents or an explanation of the legal basis for refusing to honor the request fully.³²

The federal FOIA statute identifies nine categories of records that are exempt from mandatory disclosure.³³ For example, federal agencies may withhold records of law enforcement investigations if disclosure would interfere with ongoing proceedings, compromise the right to a fair trial, unduly invade personal privacy, or reveal confidential police informants or techniques.³⁴ Many states have comparable exemptions; for example, information that would give away the identity or location of sex-crime victims is commonly declared to be exempt from disclosure under FOI laws.³⁵

³⁰ TEX. GOV'T CODE § 552.001(a) (2023); *see also* RCW § 42.56.030 (2023) (“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.”).

³¹ *See* *Bowling v. Off. of Open Recs.*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd*, 75 A.3d 453 (2013) (“As the [FOI law] is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions, the exemptions from disclosure must be narrowly construed.”); *State ex rel. Thomas v. Ohio State Univ.*, 643 N.E.2d 126, 128 (Ohio 1994) (stating that the Ohio Public Records Act “generally is construed liberally in favor of broad access, and any doubt must be resolved in favor of disclosure of public records”).

³² *See* FLA. STAT. § 119.07(1)(f) (2023) (explaining that a requester may ask to receive “in writing and with particularity” an explanation for decision to withhold records).

³³ Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1427 (2015).

³⁴ 5 U.S.C. § 552(b)(7).

³⁵ *See* Erin K. Coyle, *Evaluating Methods to Protect Sex Crime Victims' Privacy: A Legal Analysis of States' Attempts to Protect Victims' Identities*, 27

Federal privacy law recognizes that, in certain narrow contexts, information has such potential to cause harm that the custodian should be under an affirmative legal duty to refrain from disclosing it. In other words, especially sensitive information should not just be discretionarily “exempt” from public disclosure but should be “confidential,” with the potential of penalties for unauthorized disclosure.³⁶ For example, the federal Driver’s Privacy Protection Act (“DPPA”)³⁷ has been interpreted to forbid disseminating personally identifiable information collected from driver’s license records, not just by a government custodian but even by an outside third party who comes into possession of the information.³⁸ Similarly, the federal Health Insurance Portability and Affordability Act (“HIPAA”)³⁹ is understood to forbid public entities from honoring FOI requests for medical records created in connection with the provider-patient relationship that disclose individually identifiable health information.⁴⁰

But even seemingly ironclad federal privacy laws have situational workarounds. For example, the Family Educational Rights and Privacy Act (“FERPA”) is widely considered to excuse an educational institution’s obligation to release otherwise-public student records, but a release is authorized in a number of specified situations, including where necessary in the interest of public safety.⁴¹ Thus, federal law recognizes that confidentiality is not an all-or-nothing proposition and that public-policy imperatives can justify disclosing even highly sensitive documents.

COMMC’N L. & POL’Y 102, 119–22 (2022) (comparing state statutory approaches).

³⁶ See generally Miranda Fleschert, *FERPA, HIPAA & DPPA: How Federal Privacy Laws Affect Newsgathering*, REPS. COMM. FOR FREEDOM PRESS 1, 1, <https://www.lb7.uscourts.gov/documents/14-22952.pdf> (last modified Feb. 6, 2015) (explaining interaction between FOI laws and federal privacy statutes).

³⁷ 18 U.S.C. § 2721.

³⁸ *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 952 (7th Cir. 2015).

³⁹ 42 U.S.C. § 1320d-6.

⁴⁰ *Or. Health & Sci. Univ. v. Oregonian Publ’g Co.*, 403 P.3d 732, 740 (Or. 2017).

⁴¹ See 34 C.F.R. § 99.31 (2024) (specifying scenarios in which custodians may disclose contents of otherwise-confidential education records).

II. THE CHALLENGE OF CLASSIFICATION: A CAUTIONARY FEDERAL TALE

When a document has been designated “classified” by federal authorities, it is statutorily exempt from the Freedom-of-Information Act.⁴² But the government notoriously over-categorizes even harmless documents as “classified.”⁴³ Experts have been sounding alarms over the misuse of classification authority for generations. A retired Pentagon security officer told Congress in 1972 that “at least 99.5 percent” of classified documents could be disclosed without harming national security, and in 1982, a U.S. House study committee reported that “abuse of classification authority and overclassification of government information continues to be a serious problem.”⁴⁴ Overclassification slows down FOIA compliance and undermines the legitimacy of the classification system. As Justice Potter Stewart memorably wrote in the Supreme Court’s landmark “Pentagon Papers” case regarding the leak of classified federal documents, “when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion.”⁴⁵ The standard for categorizing documents as classified—that disclosure would pose a “reasonable expectation of harm to national security”—has been criticized as “vague and amorphous.”⁴⁶

⁴² 5 U.S.C. § 552(b)(1)(A).

⁴³ See Alexander M. Taber, *Information Control: Making Secrets and Keeping Them Safe*, 57 ARIZ. L. REV. 581, 583–84 (2015) (asserting that “[t]he current classification system has grown out of control” and describing how concerns about overcategorization of documents as classified dates back to the 1950s).

⁴⁴ Theodore F. Kommers, *Increased Press Access to Information—Limiting the Range of Government Classification*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 217, 224–25 (1992).

⁴⁵ *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

⁴⁶ Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL’Y REV. 185, 192 (2007).

Classification is a creature of executive order, largely unconstrained by statute.⁴⁷ It is unclear where the power to classify actually resides, as it is not enumerated anywhere in the Constitution.⁴⁸ Nevertheless, since at least 1940, presidents have long assumed that the executive branch can declare sensitive documents implicating national security interests off-limits to public inspection.⁴⁹ While classification originally was understood to encompass only military secrets, the understanding of what constitutes a risk to “national security” has broadened over time beyond just security against enemy military attacks.⁵⁰ There are three recognized categories of classified federal records, depending on the perceived sensitivity of the documents and the potential for their disclosure to harm the nation’s interests: Top Secret, Secret, and Confidential.⁵¹ The universe of people eligible to review classified records, and the precautions they must take in doing so, tightens with each level of classification.⁵²

Concerns regarding the overuse of classification, in ways that frustrate public oversight of federal policymaking, are nearly as old as the classification system itself. It is widely asserted that most of the documents designated as “classified” today could be released without harm to U.S. national security interests.⁵³ Documents are

⁴⁷ See *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (stating that authority to determine access to classified documents “flows primarily from [the] constitutional investment of power in the President and exists quite apart from any explicit congressional grant”); see also Keltin L. VonGonten, *Big Bad Wolf Edward Snowden v. NSA’s Cottage: How Whistle-Blowers Remain Vulnerable & Neglected by the Federal Government*, 10 CREIGHTON INT’L & COMPAR. L.J. 1, 6 (2019) (“[S]cholars contend that the executive has the sole power and unfettered discretion in making decisions such as the classification of information.”).

⁴⁸ Taber, *supra* note 43, at 587.

⁴⁹ See *id.* at 591 (noting that President Franklin D. Roosevelt signed “the first executive order on classification,” recognizing a system of classified military documents, in 1940).

⁵⁰ Christina E. Wells, “National Security” Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1200 (2004).

⁵¹ Taber, *supra* note 43, at 593–94.

⁵² *Id.*

⁵³ See *id.* at 594 (quoting co-chair of the federal commission investigating September 11, 2001, terror attacks as stating that “[e]asily [sixty] percent” of classified government records “have no reason to be classified”).

regularly withheld for self-serving reasons wholly unrelated to national security, as one commentator has observed: “History is rife with examples of executive officials classifying information in order to avoid embarrassment, protect political agendas, or hide affirmative government misconduct.”⁵⁴ Overclassification can even be counterproductive to its stated national security objectives, by inhibiting agencies from sharing documents with other governmental bodies.⁵⁵ Even experienced U.S. intelligence officials have declared that the classification system is “broken.”⁵⁶

Overclassification has real costs to democracy. When the government has a monopoly on information, the public’s ability to effectively challenge the basis for government decisions is limited, meaning that agencies can largely insulate themselves against second-guessing by taking a heavy hand with the “classified” stamp.⁵⁷ With so much information classified, government officials can manipulate the public discourse by selectively planting information that favors the government’s narrative.⁵⁸ For instance, former government contractor Edward Snowden’s much-decried leak of national security documents to journalists in 2013 demonstrated that the government had been deceptive in denying that the National Security Agency (NSA) was collecting data not just on overseas operatives but on U.S. citizens as well.⁵⁹ In an oft-cited D.C. Circuit case about the constitutionality of contracts that restrict employees of intelligence agencies from publishing official secrets after leaving the

⁵⁴ Wells, *supra* note 50, at 1203.

⁵⁵ Taber, *supra* note 43, at 595.

⁵⁶ Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL’Y REV. 399, 400 (2009).

⁵⁷ James A. Goldston, Jennifer M. Granholm & Robert J. Robinson, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409, 451 (1986) (“As increasing numbers of important decisions are made on the basis of information to which the public is denied access, the accountability of elected officials declines, the distance between the governed and their servants grows ever larger, and our nation becomes less and less ‘secure.’”).

⁵⁸ See Sasha Dudding, *Spinning Secrets: The Dangers of Selective Declassification*, 130 YALE L.J. 708, 713 (2021) (describing instances in which presidents have “used their declassification authority to shape politics and public opinion in their favor while concealing undesirable truths”).

⁵⁹ Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 467–68 (2014).

government, Judge Patricia M. Wald questioned why the classification system—and the jurisprudence interpreting it—failed to assign value to the public’s interest in disclosure.⁶⁰

Leaked classified documents have been credited with provoking societally beneficial discussions, including exposing mistreatment of federal detainees in overseas detention centers and revealing the NSA’s practice of wiretapping U.S. citizens without obtaining warrants.⁶¹ Yet despite decades of authoritative criticism, it is widely perceived that overclassification continually gets worse, not better.⁶² In recent decades, particularly since the September 11, 2001, terrorist attacks on New York City and Washington, D.C., federal secrecy has grown exponentially.⁶³ Once a document is marked “classified,” it is rare for a frustrated FOIA requester to convince a judge to second-guess the agency’s categorization, no matter how thinly justified.⁶⁴

Despite repeated attempts, Congress has never enacted a general “official secrets” statute providing penalties for disclosing confidential records.⁶⁵ A handful of narrowly targeted federal statutes criminalize the release only of specific types of information, such as

⁶⁰ See *McGehee v. Casey*, 718 F.2d 1137, 1150 (D.C. Cir. 1983) (separate statement of Wald, J.) (“By not weighing the value to the public of knowing about particularly relevant episodes in the intelligence agencies’ history, we may undermine the public’s ability to assess the government’s performance of its duty.”).

⁶¹ Norris, *supra* note 3, at 703; see also Kwoka, *supra* note 33, at 1389 (“[T]here is powerful evidence that leaks form the basis of or contribute to a substantial amount of mainstream news media reporting.”).

⁶² Aftergood, *supra* note 56, at 401.

⁶³ See Dudding, *supra* note 58, at 722 (“The number of classified documents has ballooned since 9/11 and the advent of digital communications.”).

⁶⁴ See Aftergood, *supra* note 56, at 407 (noting federal courts’ deferential attitude toward agency classification decisions and stating that, as of 2009, “no more than a few dozen” FOIA rulings went against an agency’s assertion of classification).

⁶⁵ See Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT’L SEC. L. & POL’Y 409, 412 (2013) [hereinafter Kitrosser, *Leaky Ship*] (“The United States does not have an ‘official secrets’ act that makes it categorically illegal to retain or disseminate classified information.”).

codes or cryptography used in intelligence,⁶⁶ or the identities of intelligence operatives.⁶⁷ Consequently, leak prosecutions typically must proceed under other legal vehicles, principally the Espionage Act, which has been applied to criminalize leaking government documents even beyond the classic “spying” setting associated with the term “espionage.”⁶⁸ Historically, the government has been hesitant to prosecute leakers, in part because bringing a case to court would itself risk amplifying the very information that the government seeks to conceal.⁶⁹ However, the Obama Administration—in what was widely viewed as a “war on leakers”—ramped up the use of criminal laws to go after those accused of mishandling classified records, at times targeting the recipients as well.⁷⁰

Significantly, presidential directives provide several pathways by which classification can be challenged if a document was miscategorized or if the reason for classified status has ceased to apply.

⁶⁶ 18 U.S.C. § 798.

⁶⁷ 50 U.S.C. § 421.

⁶⁸ See Heidi Kitrosser, *Leak Prosecutions and The First Amendment, New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 WM. & MARY L. REV. 1221, 1231 (2015) [hereinafter Kitrosser, *Protecting Leakers*] (stating that the Espionage Act is “most heavily relied upon” absent an umbrella statute that criminalizes leaking official secrets); see also VonGonten, *supra* note 47, at 13 (stating that “charges for Espionage and Larceny are commonly brought against federal whistleblowers”); *United States v. Morison*, 604 F. Supp. 655, 660 (D. Md. 1985) (agreeing with prosecutors that federal espionage statute, 18 U.S.C. §§ 793(d)-(e), can apply beyond “classic espionage” scenarios and encompass unauthorized leaking).

⁶⁹ See Kwoka, *supra* note 33, at 1414 (commenting that federal authorities have brought “shockingly few prosecutions” against leakers).

⁷⁰ See Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL’Y J. 51, 53 (2012) (observing that “the Obama [A]dministration has been accused of conducting a ‘war on whistleblowers,’ because of its aggressive prosecution of leaks related to national security”); Jesselyn Radack & Kathleen McClellan, *The Criminalization of Whistleblowing*, 2 AM. U. LAB. & EMP. L.F. 57, 57–58 (2011) (asserting that “[t]he Obama [A]dministration has pursued a quiet but relentless campaign against the news media and their sources” and that more Espionage Act prosecutions were brought under Obama “than all other presidential administrations combined”).

Anyone can initiate a “Mandatory Declassification Review” proceeding with the agency that initially classified a document.⁷¹ If the agency refuses to reverse declassify the record, the decision can be appealed to the Interagency Security Classification Appeals Panel (ISCAP), made up of appointees from six federal agencies responsible for maintaining national security secrets.⁷² Internally, the custodian of a government record can instigate a challenge to ask that the document’s classification be revisited.⁷³ Denial is appealable to ISCAP, and ultimately, to the president.⁷⁴ These safety valves help mitigate the otherwise-absolute impenetrability of classification, enabling experts to apply individualized judgment to distinguish between high-risk and low-risk records.⁷⁵

III. “CONFIDENTIALITY CREEP” IN FLORIDA LAW

In an indelible scene from the Academy Award-winning 1976 motion picture *All the President’s Men*, actors Robert Redford and Dustin Hoffman—portraying *Washington Post* investigative reporters Bob Woodward and Carl Bernstein—painstakingly thumb through countless slips of paper obtained from the Library of Congress, hoping to find evidence that President Nixon was improperly using White House aides to dig up scandalous material about a potential campaign rival.⁷⁶ But if a modern-day Woodward and Bernstein re-created such research today at a Florida public library, it

⁷¹ MICHELLE D. CHRISTENSEN, CONG. RSCH. SERV., R41528, CLASSIFIED INFORMATION POLICY AND EXECUTIVE ORDER 13526 14 (2010), <https://crsreports.congress.gov/product/pdf/R/R41528> (explaining that, as with FOIA, any member of the public may initiate review).

⁷² Exec. Order No. 13,526, § 5.3(b)(3), 79 Fed. Reg. 44093 (July 30, 2014); see also Aftergood, *supra* note 56, at 407 (characterizing creation of ISCAP as “a successful secrecy reform” and noting that the panel has overturned agency classification decisions in “a clear majority” of cases).

⁷³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-294, NATIONAL SECURITY: DOD AND STATE HAVE PROCESSES FOR FORMAL AND INFORMAL CHALLENGES TO THE CLASSIFICATION OF INFORMATION 5–6 (2021).

⁷⁴ *Id.* at 5–6 n.14.

⁷⁵ See CHRISTENSEN, *supra* note 71, at 14.

⁷⁶ Ann Hornaday, *How ‘All the President’s Men’ went from Buddy Flick to Masterpiece*, WASH. POST (June 9, 2022), <https://www.washingtonpost.com/>

would not be corrupt White House aides going to jail; it would be the librarian, for sharing library circulation records that state law makes “confidential,” under penalty of prosecution.⁷⁷

The strength of Florida’s open-government laws has been widely recognized and acclaimed.⁷⁸ Florida is one of just seven states that guarantees the public access to information about governance as a constitutional entitlement.⁷⁹ But over time, Florida legislators have riddled the Public Records Act with special-interest carve-outs, so much so that the once-formidable law has more than 1,100 exemptions today.⁸⁰ In a 2015 report, the nonprofit Center for Government Integrity rated Florida among forty-four out of fifty states to earn a failing “F” grade for the quality of public access to information.⁸¹

magazine/interactive/2022/all-the-presidents-men-robert-redford-woodward-bernstein/.

⁷⁷ FLA. STAT. § 257.261 (2023).

⁷⁸ See Cheryl Cooper, *Sending the Wrong Message: Technology, Sunshine Law, and the Public Record in Florida*, 39 STETSON L. REV. 411, 420 (2010) (“Florida’s Public Records Act defines the public record broadly and strictly limits an agency’s authority to deny a public records request”); see also Kyle Munzrieder, *How Florida’s Proud Open Government Laws Lead to the Shame of “Florida Man” News Stories*, MIA. NEW TIMES (May 12, 2015), <https://www.miaminewtimes.com/news/how-floridas-proud-open-government-laws-lead-to-the-shame-of-florida-man-news-stories-7608595> (describing how “proud tradition” of making records publicly accessible in Florida leads to disclosure of colorful crime stories that capture national attention).

⁷⁹ See Jessica Terkovich & Aryeh Frank, *Constitutionalizing Access: How Courts Weigh State Constitutional Claims in Open-Government Litigation*, 3 J. CIVIC INFO. 1, 2 (2021) (identifying California, Florida, Illinois, Louisiana, Montana, New Hampshire, and North Dakota as states memorializing the right of access to information in their constitutions).

⁸⁰ Gina Jordan, *First Amendment Foundation Tracks New Public Record Exemption Bills*, WSFU PUB. MEDIA (May 9, 2019, 11:49 AM), <https://news.wfsu.org/state-news/2019-05-09/first-amendment-foundation-tracks-new-public-record-exemption-bills>.

⁸¹ Ashley Harrell, *Florida Gets D- Grade in 2015 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY, (Nov. 9, 2015), <https://publicintegrity.org/politics/state-politics/state-integrity-investigation/florida-gets-d-grade-in-2015-state-integrity-investigation/>; Nicholas Kusnetz, *Only Three States Score Higher Than D+ in State Integrity Investigation; 11 Flunk*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2015), <https://publicintegrity.org/politics/state-politics/state-integrity-investigation/only-three-states-score-higher-than-d-in-state-integrity-investigation-11->

As with all FOI statutes, Florida law contemplates certain categories of documents that are so sensitive that government records custodians are given discretion to withhold them where necessary to serve important public purposes.⁸² These documents are statutorily declared “exempt” from the Public Records Act.⁸³ But some records are not merely “exempt” from production but are made affirmatively “confidential,” which is a legally decisive designation.⁸⁴ A record that is “exempt” can be disclosed in the custodian’s discretion; for instance, police might discretionarily choose to release “exempt” records of an ongoing criminal investigation, such as an artist’s sketch of a suspect, to enlist the public’s help in solving a crime. But there is no statutory discretion to release a “confidential” record, as a Florida appellate court explained in a 2004 interpretation:

There is a difference between records the Legislature has determined to be exempt from The Florida Public Records Act and those which the Legislature has determined to be exempt from The Florida Public Records Act and confidential. If information is made confidential in the statutes, the information is not subject to inspection by the public and may only be released to the persons or organizations designated in the statute.⁸⁵

Indeed, confidentiality is so powerful that, when a document is categorized as confidential under Florida law, it can be withheld in discovery in civil litigation, even when there is a protective order in place.⁸⁶

flunk/ (stating that forty-four states received an “F” in the category of public access to information, “making this the worst performing category in the State Integrity Investigation”).

⁸² See DeMeo & DeWeil, *supra* note 15, at 34 (“Even though Florida’s Public Records Act is broad, there are many exemptions.”).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ WFTV, Inc. v. Sch. Bd. of Seminole, 874 So. 2d 48, 53 (Fla. Dist. Ct. App. 2004).

⁸⁶ See Dep’t of Health v. Poss, 45 So. 3d 510, 514 (Fla. Dist. Ct. App. 2010) (concluding that a physician disputing disciplinary sanctions was not entitled to discovery of confidential complaint files involving other physicians).

Under Florida law, there are three primary ways that a government records custodian can get into legal trouble for disclosing confidential records or their contents. First, Florida outlaws misusing nonpublic information obtained in the course of government employment for “personal gain or benefit.”⁸⁷ This is a commonplace prohibition throughout the country,⁸⁸ though there is scant legal authority clarifying what “gain” would be sufficient to trigger liability (i.e., whether the gain must be financial). Second, the Florida Public Records Act itself contemplates criminal penalties for violating any of its provisions, including the confidentiality provisions that reside in multiple statutory exemptions.⁸⁹ This is the provision that Florida’s state treasurer was accused of violating in disclosing records of an ongoing investigation into a sexual harassment complaint.⁹⁰ Third, many of the confidentiality provisions scattered throughout Florida statutes contain their own penalty provisions.⁹¹

Because of the dire consequences associated with releasing confidential records, “confidentiality” logically should be reserved for records where disclosure would significantly harm unsuspecting people or vital government interests, and where there is no overriding public interest in disclosure. That is not how Florida has used the “confidentiality” designation.⁹²

For this study, a team from the Brechner Center for Freedom of Information at the University of Florida used keyword searches to compile every instance throughout Florida statutes in which documents are categorized as “confidential and exempt,” the phrasing that Florida legislative drafters have adopted to indicate that govern-

⁸⁷ FLA. STAT. § 112.313(8) (2023).

⁸⁸ *See, e.g.*, DEL. CODE ANN. tit. 29, § 5805(e) (2024); MD. CODE ANN. § 5-507 (2023); RCW § 42.52.050(2) (2023).

⁸⁹ FLA. STAT. § 119.10(1)(b).

⁹⁰ *See Mower, supra* note 6.

⁹¹ *See, e.g.*, FLA. STAT. § 112.533(4) (providing that it is a misdemeanor to “willfully” disclose information gained while participating in an internal investigation before the investigation is concluded); FLA. STAT. § 284.45(2) (providing that it is a misdemeanor for an employee of the state’s risk-management agency to release personally identifiable information about sexual harassment complainants, if the disclosure is “willful and knowing”).

⁹² *See infra* notes 96–104.

ment custodians have an affirmative legal duty to maintain secrecy.⁹³ The search disclosed 414 instances throughout the codebook. An examination of these instances leads to the conclusion that there is little rhyme or reason between legislators' choice of "exempt" (which carries discretion to disclose without penalty) versus "confidential and exempt" (for which disclosure is a punishable offense).

Dozens of categories of confidential government records encompass routine information that is widely publicly available through other means.⁹⁴ For instance, it is a violation of Florida law for a records custodian to disclose the name, address, or telephone number of a person whose information appears in filings made with state utility regulators.⁹⁵ But that same information—name, address, and phone number—has been routinely published in publicly distributed phone books for nearly 150 years.⁹⁶ No one familiar with the universal availability of telephone directories would reasonably anticipate that divulging a person's phone number contained in filings made with a government agency may lead to jail time.

Other such examples of seemingly inconsequential records designated "confidential" abound throughout Florida statutes, including:

- Application materials submitted by candidates seeking the presidency of public universities.⁹⁷

⁹³ See *infra* notes 96–104.

⁹⁴ See, e.g., FLA. STAT. § 119.07(3)(r) (Supp. 1996).

⁹⁵ *Id.* ("All records supplied by a telecommunications company, as defined by s. 364.02, to a state or local governmental agency which contain the name, address, and telephone number of subscribers are confidential and exempt . . .").

⁹⁶ See Jeff Nilsson, *The Book of Numbers: A History of the Telephone Book*, SATURDAY EVENING POST (Feb. 20, 2010), <https://www.saturdayevening-post.com/2010/02/book-numbers/> (explaining that the first telephone directory was published in Connecticut in 1878, not long after phones became available to the general public).

⁹⁷ FLA. STAT. § 1004.098 (2023).

- “Proprietary” information about state-regulated boxing matches, including the number of tickets sold.⁹⁸
- Applications for grants to obtain state funding for Alzheimer’s disease research.⁹⁹
- Marketing plans for services provided by university-affiliated hospitals.¹⁰⁰
- The names of people who donate to a state-affiliated veterans’ charity.¹⁰¹
- Unpublished research data maintained by the Florida Department of Citrus, which promotes consumption of Florida agricultural products.¹⁰²
- Balance sheets and other financial statements of businesses located on property that the government is planning to condemn.¹⁰³
- The name of a dead worker whose family is receiving workers’ compensation benefits.¹⁰⁴

Many of these confidentiality designations are simply ponderous; why would the records of pets receiving care at university veterinary clinics (“confidential and exempt”)¹⁰⁵ be more secretive than “criminal intelligence” information,¹⁰⁶ or people’s bank account numbers (merely “exempt”)?¹⁰⁷ But some are potentially deleterious to public welfare because they afford no leeway for a safety-moti-

⁹⁸ *Id.* § 548.062(1)(e).

⁹⁹ *Id.* § 381.82(3)(d).

¹⁰⁰ *Id.* § 1004.30(2)(b).

¹⁰¹ *Id.* § 292.055(9).

¹⁰² *Id.* § 601.10(8)(b).

¹⁰³ FLA. STAT. § 73.0155(1).

¹⁰⁴ *Id.* § 440.1851(1).

¹⁰⁵ *Id.* § 474.2167(1)(a).

¹⁰⁶ *Id.* §§ 119.071(2)(a)–(b).

¹⁰⁷ *Id.* § 119.071(5)(b).

vated disclosure, such as reports of adverse incidents involving patients at nursing homes.¹⁰⁸ In a controversial new provision added in 2023, lawmakers sympathetic to the movement against COVID-19 vaccines secured passage of a new law declaring that complaints against any entity, governmental or private, for violating a state law against compelling people to get vaccinated must be kept confidential until the investigation ends—which, as one prominent critic pointed out, could mean that schools or other vulnerable targets are bombarded with ideologically motivated complaints of doubtful merit, with no way to publicly defend themselves.¹⁰⁹

Many of Florida’s confidentiality designations pertain to various types of business secrets in documents submitted to the state, such as applications for licenses or permits.¹¹⁰ Florida law defines a “trade secret” in broad terms, so that the designation can apply to anything of economic value not generally known to the public that its owner has made reasonable efforts to keep undisclosed.¹¹¹ The state has even extended “trade secret” protection to records of privatized governmental functions that implicate fundamental health and safety concerns, such as the management of prison inmate work programs.¹¹² Critics have decried industries’ expansive claims of trade-secret protection to sequester information from the public that might shed light on damaging environmental practices, workplace

¹⁰⁸ *Id.* § 400.119(1).

¹⁰⁹ See Martin Dyckman, *With 18 New Public Records Exemptions Enacted, DeSantis is Flying Florida into the Dark*, FLA. CTR. FOR GOV’T ACCOUNTABILITY (May 22, 2023), <https://flega.org/with-18-new-public-records-exemptions-enacted-desantis-is-flying-florida-into-the-dark/>.

¹¹⁰ See, e.g., FLA. STAT. § 440.108(2) (declaring that trade secrets in state records of investigations into companies’ workers’ compensation compliance remain confidential permanently, even after state investigation concludes); FLA. STAT. § 499.051(7)(b) (providing that trade secrets in complaints filed against state-regulated businesses that handle prescription drugs must be kept confidential as long as the state possesses them); FLA. STAT. § 288.075(3) (extending confidentiality to any trade secret maintained by the state’s business development agency or any state-created local entity that promotes economic development).

¹¹¹ *Id.* § 688.002(4).

¹¹² See *id.* § 946.517 (declaring that trade secrets maintained by corporations managing inmate work programs are confidential and exempt).

safety hazards, and other matters of public concern.¹¹³ Florida lawmakers had a chance in their 2020 session to address the state's overclassification problem, by repealing the law that makes the release of "trade secrets" a crime, but a curative bill by Rep. Tommy Gregory, R-Sarasota, died in the state Senate.¹¹⁴

Criminalizing the disclosure of trade secrets is especially problematic because what qualifies as a trade secret is a broad and amorphous concept.¹¹⁵ The U.S. Supreme Court's trade-secret jurisprudence has been roundly criticized for enabling companies to obstruct government disclosure of information that has minimal intellectual property value and is of great public interest.¹¹⁶ In an especially expansive application of the concept of a trade secret, the Court held in *Food Marketing Institute v. Argus Leader Media* that even the dollar amount that grocery chains receive from taxpayers in federal food-stamp subsidies could be withheld from FOIA requesters.¹¹⁷ But the trade-secret status of a document may not be readily apparent from its face, since a records clerk at a state agency cannot reliably know whether a business does or does not take precautions to

¹¹³ See Charles Tait Graves & Sonia K. Katyal, *From Trade Secrecy to Seclusion*, 109 GEO. L.J. 1337, 1352 (2021) ("In an increasing array of contexts, companies or government agencies use trade secrecy and confidentiality agreements to prevent investigations by journalists, employee-whistleblowers, research scientists, and private parties.").

¹¹⁴ Sabrina Conza, *Florida Trade Secret Bills Fail For The Third Consecutive Session*, WUFT (Mar. 17, 2020, 2:57 PM), <https://www.wuft.org/news/2020/03/17/florida-trade-secret-bills-fail-for-the-third-consecutive-session/>.

¹¹⁵ See Andrew B. Campbell, *The Federal Defend Trade Secrets Act: Keeping Secrets a Secret*, 53 TENN. L. BLOG 12, 13 (2017) (commenting that trade-secret law "has been one of the most vaguely defined, amorphous areas of intellectual property law").

¹¹⁶ See Daxton "Chip" Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1 J. CIVIC INFO. 1, 3 (2019) (asserting that the Supreme Court's ruling in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2361–62 (2019), departed from nearly half a century of precedent by finding that "trade secrets" could be exempted from FOIA even without showing substantial competitive harm); see also Campbell, *supra* note 115, at 16 (stating that "the use of the trade secrets exemption has flourished in a number of states in part because of lax definitions that provide little guidance").

¹¹⁷ *Argus Leader Media*, 139 S. Ct. at 2366.

keep the information nonpublic. It is no wonder that requesters report growing difficulty prying routine documents out of Florida agencies, when the penalty for guessing wrong can be jail.¹¹⁸

Illustrating how forcefully Florida confidentiality law protects even secrets that have no impact on public welfare, a utility company was able to secure a court order blocking disclosure of public records containing salaries of its executives.¹¹⁹ Although the information was contained in filings made with the state utility-regulating board—and the board had decided that the information should be released—a state appellate court decided that the board had no discretion to make that decision, because the salaries were, statutorily, entitled to “confidential” treatment.¹²⁰

On occasion, the addition of new confidentiality measures has provoked public controversy. During their 2018–19 term, Florida legislators debated creating a new confidentiality carve-out for photos or videos depicting scenes of “mass violence,” which was motivated by the shooting deaths of seventeen people at Marjory Stoneman Douglas High School in Parkland, Florida, in February 2018.¹²¹

¹¹⁸ See Katherine Barrett & Richard Greene, *See Public Records? Governments Are Making it Harder*, GOVERNING (May 21, 2018), <https://www.governing.com/archive/gov-limiting-public-record-access.html> (“Even Florida, long known for its open public records law, has begun pulling back.”); Glenn Garvin, *Orlando Police’s Refusal to Turn Over 911 Records Reveals Larger Problem*, GOVERNING (July 6, 2016), <https://www.governing.com/archive/tns-florida-sunshine-records-911.html> (quoting news media lawyer’s observation, in reaction to the city of Orlando’s stonewalling in honoring a request for recordings of 911 police emergency calls: “All around Florida, government agencies are showing an increasing disinclination to turn over documents that are just obviously, inarguably public.”); Topher Sanders, *Public Records Sometimes Costly - And Can Take Months to Receive*, FLA. TIMES-UNION (Mar. 15, 2015, 8:42 AM), <https://www.jacksonville.com/story/news/politics/2015/03/15/public-records-sometimes-costly-and-can-take-months-receive/15654788007/> (quoting longtime Florida open-records, an attorney observes that cost and delay have “become more and more of a problem” for records requesters).

¹¹⁹ Fla. Power & Light Co. v. Fla. Pub. Serv. Comm’n, 31 So. 3d 860, 862 (Fla. Dist. Ct. App. 2010).

¹²⁰ *Id.* at 862, 864, 866.

¹²¹ Elizabeth Koh, *Bill that Blocks Public Records on Florida Mass Shootings on Fast Track*, TAMPA BAY TIMES (Mar. 6, 2019), <https://www.tampabay.com/florida-politics/2019/03/06/bill-that-blocks-public-records-on-mass-shootings-on-fast-track/>; see also Emily Shaprio et al., *Parkland School Shooting 6 Years*

Transparency advocates questioned the decision to wall off access to images that might shed light on police incompetence and also galvanize public outrage behind gun reforms.¹²² Nevertheless, the measure passed overwhelmingly, so that law enforcement agencies now have no discretion to release such images, even if there is a compelling public interest in disclosure.¹²³

During their 2023 session, Florida lawmakers added eight new categories of “confidential and exempt” documents, including augmenting the preexisting “Parkland exemption” with a new confidentiality provision that applies to photos of deceased minors of all kinds, not just those victimized by mass killings.¹²⁴ The exclusion became law despite concerns that it was motivated by the state’s desire to conceal ineptitude within the state Department of Children and Family Services (“DCF”).¹²⁵ The DCF had faced accusations for decades that its child-welfare caseworkers failed to protect abused children and, at times, covered up their failings.¹²⁶

Later: Remembering the 17 Victims, ABC NEWS (Feb. 14, 2024, 8:10 AM), <https://abcnews.go.com/US/teacher-coach14-year-freshman-florida-high-school-massacre/story?id=53092879>.

¹²² See Lucy Morgan, *The Public’s Right to Know is Threatened in the Florida Legislature*, FLA. PHOENIX (Mar. 13, 2019, 7:00 AM), <https://floridaphoenix.com/2019/03/13/the-publics-right-to-know-is-threatened-in-the-florida-legislature/> (branding proposed exemption a “gift” to lobbyists opposed to gun control).

¹²³ See FLA. STAT. § 119.071(2)(p)(2)(a) (2023) (declaring photos or videos depicting killing of law enforcement officer or victim of mass violence to be “confidential and exempt”); *Public Records Exemption Approved from ‘Mass Violence,’* NEWS4JAX (Mar. 27, 2019, 6:20 PM), <https://www.news4jax.com/news/2019/03/27/public-records-exemption-approved-from-mass-violence/> (reporting that legislation passed state Senate 40–0).

¹²⁴ FLA. STAT. §§ 119.071(2)(p)(1)(b), (2)(p)(2)(b).

¹²⁵ Camellia Burris, *Newly Proposed Public Records Carve-Out Could Protect Florida DCF from Scrutiny, Critics Say*, MIA. HERALD (Apr. 19, 2023, 3:19 PM), <https://www.miamiherald.com/news/politics-government/state-politics/article274287380.html>.

¹²⁶ See, e.g., Libby Hendren & Tim Burquest, *\$28 Million Verdict Reached in Civil Lawsuit Against Florida Department of Children and Families*, WTSP-TV, <https://www.wtsp.com/article/news/local/sarasotacounty/sarasota-jurors-reach-28-million-verdict-dcf-case/67-ab42bdfc-e9ad-4a34-bf75-36a879462119> (Mar. 15, 2022, 7:34 PM) (reporting that DCF was successfully sued over failure to remove six-year-old from abusive home, where mother nearly killed her); Eric

To be sure, some types of information categorized as confidential are genuinely so sensitive that they merit heightened protection, and there is minimal loss to the public discourse if they are made inaccessible. For instance, a videotaped statement given to law enforcement by a minor identified as a victim of a sex crime is statutorily designated both exempt and confidential.¹²⁷ But when disclosing the identity of child sex-crime victims carries the same potential penalty as disclosing email correspondence between employees of a college athletic department,¹²⁸ the overbreadth of Florida’s “state classification” system becomes readily apparent. And when laws burden speech more broadly than necessary to serve a legitimate purpose, the First Amendment is implicated.¹²⁹

IV. CONSTITUTIONAL CONSTRAINTS ON CONFIDENTIALITY

A. *Is There a First Amendment “Right to Leak?”*

Florida’s confidentiality regime is so broad that any criminal prosecution for disclosing confidential records would invite a First Amendment challenge.¹³⁰ Laws restricting speech are vulnerable to constitutional challenge when they are either unduly vague (so that a person regulated by the law would have difficulty figuring out

Pera, *Ex-DCF Worker Admits False Report on Dead Boy*, TAMPA BAY TIMES (Sept. 21, 2002), <https://www.tampabay.com/archive/2002/09/21/ex-dcf-worker-admits-false-report-on-dead-boy/> (Sept. 3, 2005) (reporting that DCF investigator admitted falsifying report about child beaten to death by babysitter, falsely claiming to have checked on child’s welfare); *see also* Christopher Tremoglie, *The Failures of Florida’s Department of Children and Families Continue to Endanger Children*, WASH. EXAMINER (Aug. 15, 2022, 9:56 AM), <https://www.washington-examiner.com/opinion/the-failures-of-floridas-department-of-children-and-families-continue-to-endanger-children> (asserting that “incompetence seems to be a recurring pattern” in DCF’s failure to protect children from violent abuse).

¹²⁷ FLA. STAT. § 119.071(2)(j)(2)(a).

¹²⁸ *See id.* § 1004.28(5)(b) (making records of direct-support organizations, including college athletic associations, confidential and exempt).

¹²⁹ *See* discussion *infra* Part IV.

¹³⁰ *See* discussion *infra* Part IV.

what is prohibited) or unduly broad (penalizing far more speech than is necessary to achieve the government's stated objective).¹³¹

A state legislature's decision to criminalize disclosure of particular types of documents raises potential issues under both the First Amendment and the Due Process Clause. For example, suppose a state decides that it will be a felony to disclose an advance copy of a school lunch menu, because students will bring their own food and deprive the cafeteria of revenue if they are forewarned of an unappetizing choice. No one would seriously contend that such an irrational and overzealous penalty scheme is impervious to constitutional scrutiny. The question, therefore, is not whether a person confronting the threat of prosecution for leaking confidential documents has a constitutional argument. The only question is what rigor of scrutiny a reviewing court will apply.¹³²

In the federal context, commentators have persuasively argued that the First Amendment should recognize the right to release government documents when the motive is to bring attention to a matter of public concern (i.e., "whistleblowing") and no damage is done to national security interests.¹³³ As Professor Mary-Rose Papandrea has written, "unauthorized leaks provide a wealth of valuable information essential for government oversight and accountability. The nation's deeply flawed classification system makes it hard to know

¹³¹ See *Jordan v. Pugh*, 425 F.3d 820, 827–28 (10th Cir. 2005) (explaining interrelatedness of vagueness and overbreadth doctrines, which require similar analyses).

¹³² See, e.g., *Stilp v. Contino*, 613 F.3d 405, 415 (3d Cir. 2010) (applying strict scrutiny in holding that Pennsylvania statute outlawing disclosure of pending state ethics complaints was unconstitutional: "A blanket prohibition on disclosure of a filed complaint stifles political speech near the core of the First Amendment and impairs the public's ability to evaluate whether" ethics complaints are being processed fairly).

¹³³ See Goldston et al., *supra* note 57, at 456–57 (urging Congress to tighten espionage statutes so that disclosing government documents is criminally punishable only if there is "direct and irreparable" harm to national security, done with an intent to cause such harm, that "clearly outweighs" the public's interest in disclosure); see also Kitrosser, *Leaky Ship*, *supra* note 65, at 424 ("The First Amendment's promise would be empty indeed if its protections did not extend to information that the President wishes to keep secret.").

what truly needs to be kept secret, and leaks help combat the executive's tendency to err on the side of secrecy."¹³⁴

Rigid laws against the release of confidential documents may actually make the government operate less effectively by withholding information even from people whose job includes government oversight.¹³⁵ Professor Papandrea and others have argued that the First Amendment should be understood to require narrowly interpreting anti-leaking laws, so that only leaks intended to assist enemies of the United States can be criminally penalized.¹³⁶ As Professor Geoffrey Stone has maintained, leaking documents that disclose serious government wrongdoing should not be grounds for prosecution, because "the government has no legitimate interest in keeping secret its own illegality"¹³⁷

¹³⁴ Papandrea, *supra* note 59, at 455.

¹³⁵ *See id.* at 469 (noting that congressional staffers sometimes rely on leaked information, and commenting that "[l]eaks and the accompanying media analysis help government officials within the political branches do their job better").

¹³⁶ *See id.* at 453 ("The First Amendment should support the common sense distinction between those who leak information with the purpose and effect of contributing to the public debate, and those who engage in espionage or even treason by giving national security information to foreign countries or organizations."); *see also* Kitrosser, *Protecting Leakers*, *supra* note 68, at 1246 ("Given their crucial constitutional role as uniquely informed potential speakers, leakers must have robust First Amendment protections."). Professor Kitrosser has proposed that courts adapt the jurisprudence governing public employees' right to freedom of speech to also cover leaks by employees who have been entrusted with government records: To demonstrate the constitutionality of a prosecution, "I propose that efforts to impose severe sanctions—for example, prosecutions with the possibility of several years in prison or potentially bankrupting monetary penalties—require a showing that the leaker lacked an objectively *reasonable* basis to believe that the public interest in disclosure outweighed identifiable national security harms. Efforts to impose less severe sanctions . . . may warrant a lesser standard." Kitrosser, *Leaky Ship*, *supra* note 65, at 441.

¹³⁷ Stone, *supra* note 46, at 195. As Stone points out, agencies are forbidden from using classification to conceal "violations of law, inefficiency, or administrative error." *Id.* at 195 n.34 (citing Exec. Order No. 13,292, 68 Fed. Reg. 15315, 15318 (Mar. 28, 2003)).

Courts have yet to embrace a broad constitutionally protected right to leak confidential documents.¹³⁸ In the published case that came closest to teeing up this issue, *United States v. Morison*, the Fourth Circuit concluded that the First Amendment did not foreclose prosecuting a naval intelligence employee for furnishing classified photographs to a journalistic publication, because the act of leaking the photos was conduct rather than speech.¹³⁹ “The mere fact that one has stolen a document in order that he may deliver it to the press, whether for money or for other personal gain, will not immunize him from responsibility for his criminal act,” the judges wrote.¹⁴⁰ Courts have, however, recognized that the First Amendment forbids retaliating against a public employee who shares information of public concern learned in the course of employment that reflects unfavorably on the employer.¹⁴¹ And outside the setting of a government workplace, it is beyond dispute that sharing a document is “speech” for purposes of a First Amendment analysis.¹⁴²

Even in the case of federal classification, where national security concerns are at stake, federal courts have declined to give the government a blank check of authority to punish leaking.¹⁴³ As a federal judge stated in the espionage trial of lobbyists accused of conspiring

¹³⁸ See, e.g., *Boehner v. McDermott*, 484 F.3d 573, 579 (D.C. Cir. 2007) (stating that “those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information”).

¹³⁹ *United States v. Morison*, 844 F.2d 1057, 1068 (4th Cir. 1988).

¹⁴⁰ *Id.* at 1077.

¹⁴¹ See *Lane v. Franks*, 573 U.S. 228, 231 (2014) (ruling in favor of a college employee who was fired after testifying about political corruption and misspending within his agency); see also *Andrew v. Clark*, 561 F.3d 261, 268–69 (4th Cir. 2009) (refusing to dismiss First Amendment claims brought by a Baltimore police officer who was demoted after furnishing a newspaper reporter with a copy of his internal memo to supervisors criticizing his department’s handling of an officer-involved shooting).

¹⁴² See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (observing that “[i]f the acts of ‘disclosing’ and ‘publishing’ information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct”) (quoting *Bartnicki v. Vopper*, 200 F.3d 109, 120 (3d Cir. 1999)).

¹⁴³ See, e.g., *Morison*, 844 F.2d at 1081 (Wilkinson, J., concurring) (“The First Amendment interest in informed popular debate does not simply vanish at the invocation of the words ‘national security.’”).

to leak classified information in furtherance of their lobbying practice, “the mere invocation of ‘national security’ or ‘government secrecy’ does not foreclose a First Amendment inquiry.”¹⁴⁴ A restriction on the release of classified documents—even a restriction that an employee accepts as a condition of employment—must be narrowly tailored to protect a “substantial” or “important” government interest.¹⁴⁵ While federal courts are typically deferential to national security agencies’ classification decisions, they can at least review whether information that a former federal employee seeks to release has already become public through other means, relieving the former employee from the obligation to maintain confidentiality.¹⁴⁶

Government workers do surrender some degree of free-speech protection as a condition of employment, particularly if they are speaking as part of a work assignment or speaking to advance a personal grievance.¹⁴⁷ But First Amendment rights still apply in the

¹⁴⁴ *United States v. Rosen*, 445 F. Supp. 2d 602, 630 (E.D. Va. 2006) (quoting *Morison*, 844 F.2d at 1081).

¹⁴⁵ *See* *McGehee v. Casey*, 718 F.2d 1137, 1142–43 (D.C. Cir. 1983) (rejecting former CIA officer’s First Amendment challenge to requirements that employees maintain confidentiality of all classified information and submit any work-related publications after leaving CIA employment to agency censors for review). In *Morison*, the Fourth Circuit rejected a convicted leaker’s vagueness and overbreadth challenge to the espionage statute as the judge explained it to the jury. The appellate court found no constitutionally significant lack of tailoring because the jury instructions provided that the defendant could be convicted only if the government proved (1) that the information “would be potentially damaging to the United States or might be useful to an enemy of the United States,” and (2) that the information was “closely held” and not otherwise publicly available. *Morison*, 844 F.2d at 1071–72.

¹⁴⁶ *See* *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) (explaining, in case brought by a former federal employee who sought to publish recollections about his work for the CIA, that courts’ review is limited to “whether or not the information was classified and, if so, whether or not, by prior disclosure, it had come into the public domain”); *see also* Wells, *supra* note 50, at 1208 (commenting on the generally deferential approach taken by judges, who rarely second-guess agencies’ classification decisions).

¹⁴⁷ *See* *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (finding that a government employee had no First Amendment right to write a memo contrary to their supervisor’s instructions); *Connick v. Myers*, 461 U.S. 138, 142 (1983) (holding

government workplace.¹⁴⁸ Significantly, the cases recognizing a stepped-down degree of First Amendment protection in the employment context are about disciplinary action, not about criminal prosecution.¹⁴⁹ There is no reason to believe that the constitutional safeguards that protect against overzealous criminal prosecution for speech—as opposed to punishment by way of personnel action—diminish because the speaker is a public employee.¹⁵⁰

B. *Do Florida's Secrecy Statutes Overreach?*

By making it a crime to disseminate documents maintained by the government, Florida's confidentiality laws uniquely target speech addressing matters of public concern.¹⁵¹ The Supreme Court has long shown special solicitude for speech that addresses contemporary social and political issues, even where the speech makes only a minimal contribution to the public discourse.¹⁵² As the Court wrote in broadly striking down regulations on third-party advertisements advocating for or against a federal candidate on the eve of an election:

that First Amendment did not protect workers whose speech advanced purely personal interests rather than addressing matters of wider concern).

¹⁴⁸ See *Lane v. Franks*, 573 U.S. 228, 236 (2014) (stating, in a ruling in favor of a public college employee fired for whistleblowing speech, that “public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights”).

¹⁴⁹ See *Garcetti*, 547 U.S. at 415 (explaining that plaintiff alleged various retaliatory personnel actions including transfer to less-desirable duty and denied promotion); *Connick*, 461 U.S. at 141 (explaining that plaintiff was fired after disseminating questionnaire to co-workers that supervisor perceived as disruptive).

¹⁵⁰ See *Kitrosser, Leaky Ship*, *supra* note 65, at 442 (stating that “the government as employer is very differently situated from the government as prosecutor” and that there is “much narrower discretion on the government’s part to prosecute its employees under the criminal law than to punish them through the terms and conditions of their employment”).

¹⁵¹ See discussion of statutes and penalties *supra* Part III.

¹⁵² See *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding that anti-gay picketing by Westboro Baptist Church members outside military funerals could not be limited by judicial imposition of civil damages: “Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to ‘special protection’ under the First Amendment.”).

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.¹⁵³

Because of its connection to participation in the democratic process, the Court has held for decades that “expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values.”¹⁵⁴

The First Amendment disfavor for overbroad speech-restrictive laws is especially acute when the law carries criminal penalties.¹⁵⁵ One reason is that criminal penalties for releasing information invite selective prosecution, in which disclosures considered benign—or strategically advantageous—go unpunished.¹⁵⁶ Examples abound of Florida government agencies voluntarily disclosing “confidential” information when it behooves their self-interest.¹⁵⁷ For instance, Florida agencies have fiercely resisted public records requests for footage from surveillance cameras, arguing that disclosure would give away the location of security cameras, which Florida law

¹⁵³ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010).

¹⁵⁴ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (internal quotations omitted).

¹⁵⁵ *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (explaining that, while facial constitutional challenges to statutes normally are disfavored, courts “have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions”); *Winters v. New York*, 333 U.S. 507, 515 (1948) (explaining, in reviewing bookseller’s conviction under statute making it a crime to distribute magazines graphically depicting violence or sex, that “[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.”).

¹⁵⁶ *See Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) (finding ordinance outlawing gatherings on sidewalks that are “annoying” to passersby to be unconstitutional and remarking that an ordinance that “contains an obvious invitation to discriminatory enforcement against those whose association together is ‘annoying’ because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens”).

¹⁵⁷ *See, e.g., Cent. Fla. Reg’l Transp. Auth. v. Post-Newsweek Stations*, 157 So. 3d 401, 404 (Fla. Dist. Ct. App. 2015).

makes “confidential.”¹⁵⁸ Yet police routinely disclose surveillance footage to the public when doing so might bring forward information about unsolved crimes.¹⁵⁹ There is no indication that any employee of a Florida law enforcement agency has ever been prosecuted for giving away the location of security cameras, despite its purported confidential status.

Since it appears likely that “confidential” information is in fact being released with some regularity without any apparent consequences, the decision to single out a person for prosecution raises the obvious concern that confidentiality law can be weaponized to penalize only disclosures unfavorable to the government.¹⁶⁰ Professor Pozen has pointed out that, since leaking is silently countenanced throughout the highest levels of government, the people prosecuted for an unauthorized release of documents will dispropor-

¹⁵⁸ See *id.* at 405 (agreeing with government agency that footage from surveillance camera inside transit bus was “confidential and exempt” from disclosure to news media under Florida law).

¹⁵⁹ See, e.g., Ryan Mackey & Samiar Nefzi, *Surveillance Video Released of Fatal Hit-and-Run in Opa-Locka*, LOCAL10 (Oct. 25, 2023, 12:51 PM), <https://www.local10.com/news/local/2023/10/25/surveillance-video-released-of-fatal-hit-and-run-in-opa-locka/>; Amanda Batchelor, *Surveillance Video Released of Subject Fleeing Scene After NW Miami-Dade Shooting*, LOCAL10 (Oct. 17, 2023, 10:33 AM), <https://www.local10.com/news/local/2023/10/17/surveillance-video-released-of-subject-fleeing-scene-after-nw-miami-dade-shooting/>; *St. Pete Police Release Video of Suspect in Downtown Shooting That Injured 7*, FOX 13 NEWS (Oct. 11, 2023), <https://www.fox13news.com/news/st-petersburg-police-department-downtown-shooting-suspect-identification-crime-pinellas-county>; Senait Gebregiorgis & Chelsea Robinson, *Apopka Police Release Surveillance Video, 911 Calls in Rec Center Shooting*, WESH (Oct. 3, 2023, 8:40 PM), <https://www.wesh.com/article/apopka-football-practice-shooting/45427071>.

¹⁶⁰ See *Cox v. Louisiana*, 379 U.S. 536, 557–58 (1965) (stating, “[i]t is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or . . . the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.”); see also *Frederick Douglass Found., Inc. v. D.C.*, 82 F.4th 1122, 1138–39 (D.C. Cir. 2023) (recognizing a colorable claim of selective enforcement by graffiti artists who were prosecuted for anti-abortion painting on public thoroughfare while city tolerated similar painting carrying pro-civil-rights message).

tionately be “radically disaffected” employees who have views contrary to agency orthodoxy—arguably, the voices the public needs to hear most.¹⁶¹ The mere existence of a criminal penalty may inflict a severe chill on would-be speakers.¹⁶² There is evidence that, when federal prosecutors began more aggressively pursuing leakers during the Obama Administration, journalists’ sources felt the chill and became less willing to share information, even information in a gray area that was not explicitly classified.¹⁶³

A federal district court in Pennsylvania recently provided a roadmap for what a constitutional challenge to Florida’s confidentiality laws might look like. In *Doe v. Schorn*, a citizen who had filed a misconduct complaint against a school employee with the Pennsylvania Department of Education was fearful of speaking publicly about the complaint because of a state confidentiality law that carried misdemeanor criminal penalties.¹⁶⁴ The statute—reminiscent of Florida’s recently enacted confidentiality law regarding complaints

¹⁶¹ David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 534 (2013); see also Pozen, *supra* note 161, at 594 (commenting on double-standard under which top officials are told not to leak in ways damaging to president’s agenda, which lower-level employees are told “[d]on’t disclose confidential information, period”).

¹⁶² See *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003) (stating that, for purposes of establishing standing to challenge a statute without first having suffered prosecution for violating it, “a First Amendment plaintiff who faces a credible threat of future prosecution suffers from an ongoing injury resulting from the statute’s *chilling effect* on his desire to exercise his First Amendment rights”) (internal quotations and citation omitted); see also Pozen, *supra* note 161, at 553 (recognizing, in the context of federal leaker prosecutions, that even if prosecutors ultimately lose their case, “the very act of seeking criminal penalties can still have significant retributive and deterrent effects.”).

¹⁶³ See Kitrosser, *Protecting Leakers*, *supra* note 68, at 1249 (citing journalists’ comments that government’s attempt to prosecute Edward Snowden and other high-profile leakers was “having a deterrent effect” on journalists’ access to information from government sources).

¹⁶⁴ *Doe v. Schorn*, No. 23-3252, 2024 WL 128210, at *1–2 (E.D. Pa. Jan. 10, 2024).

about vaccine mandates¹⁶⁵—made it a misdemeanor to publicly disclose anything about an educator misconduct complaint, unless the state upheld the complaint and imposed discipline.¹⁶⁶

The court agreed that Pennsylvania’s confidentiality statute violated the First Amendment as a content-based restriction on speech that was not narrowly tailored to accomplish its purported privacy objectives.¹⁶⁷ The prohibition was deemed both overinclusive (because it forbade disclosing any information at all, not just the identities of the people involved in the case) and underinclusive (because the complainant was free to share personal knowledge about the underlying misconduct, including the names of the people involved, as long as he did not mention filing a complaint).¹⁶⁸ The court observed that the statute would silence critics of the state, who would be forbidden from complaining about the handling of their complaints if—as in Doe’s case—the complaints were dismissed without disciplinary action.¹⁶⁹ Additionally, the court found, the statute lacked narrow tailoring because there was no showing that the drastic measure of criminal prosecution was necessary to achieve the state’s objectives.¹⁷⁰

While prosecutions under the Florida criminal code are extraordinarily rare, that rarity may cut against the constitutionality of criminal penalties for disclosure, since the state plainly does not regard arresting and jailing custodians to be necessary to address an overriding public need.¹⁷¹ The dearth of charges could also mean that the law is effectively chilling people from releasing documents, even if the documents would not actually qualify as confidential.¹⁷² Understandably, custodians may find the proliferation of confidentiality

¹⁶⁵ See *supra* note 109 and accompanying text.

¹⁶⁶ *Schorn*, 2024 WL 128210, at *1.

¹⁶⁷ *Id.* at *20–21.

¹⁶⁸ *Id.* at *21.

¹⁶⁹ *Id.* at *19.

¹⁷⁰ *Id.* at *21.

¹⁷¹ Jeffrey Schweers, *In the dark: Florida Lawmakers Creating New Ways to Keep Public Records Private*, TALLAHASSEE DEMOCRAT (Jan. 20, 2022, 8:38 AM), <https://www.tallahassee.com/story/news/local/state/2022/01/20/florida-lawmakers-want-keep-more-info-hidden-public-view-sunshine-act/6510414001/>.

¹⁷² *Id.*

provisions confusing,¹⁷³ and hesitate to produce records without exhaustive and time-consuming review, when there are more than 400 ways to get into legal jeopardy.¹⁷⁴

Whether a document qualifies for inclusion within an FOI exemption is not always clear-cut even to those with legal training.¹⁷⁵ Because the exempt status of any particular document is a fact-specific and context-specific question, it would be harsh medicine to criminally prosecute a records custodian for making a mistaken judgment call. When a statute criminalizing speech does not unmistakably put the speaker on notice of what conduct is proscribed, the statute is vulnerable to challenge under the Due Process Clause.¹⁷⁶

Florida's proliferation of statutes that make records "confidential and exempt" is inherently confusing to records custodians, because "exempt" seems to be doing no work in that passage.¹⁷⁷ Once a record is confidential, it is immaterial whether it is also exempt; confidential status completely subsumes exempt status.¹⁷⁸ The phrasing presents a classic trap for the unwary, as "exempt" might be reasonably interpreted to signal discretion to voluntarily disclose.

The sheer breadth of documents made confidential under Florida law raises fundamental fairness concerns.¹⁷⁹ It is categorically less fair to hold a state government employee criminally liable for disclosing one of hundreds of categories of confidential records than to hold a federal government employee responsible for revealing clas-

¹⁷³ *Id.*

¹⁷⁴ *Id.* (quoting attorney from the pro-transparency organization First Amendment Foundation: "[a]ny exemption adds to the amount of information that may or must be redacted from a public record, increasing the amount of time it takes to access the record and increasing the costs an individual must pay to (get) the documents.") (parenthetical in original).

¹⁷⁵ *See* *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. Dist. Ct. App. 2004).

¹⁷⁶ *See* *United States v. Cook*, 914 F.3d 545, 549 (7th Cir. 2019) (stating, "[t]he void-for-vagueness doctrine requires that a criminal statute define an offense with sufficient clarity that an ordinary person has fair notice of what conduct is prohibited so as to avoid arbitrary and discriminatory enforcement.").

¹⁷⁷ *See* *WFTV, Inc.*, 874 So. 2d at 53.

¹⁷⁸ *See id.*

¹⁷⁹ *See* *Jordan*, *supra* note 80.

sified documents. Federal classification applies only to records relating to national defense and security,¹⁸⁰ a relatively discrete topic that a custodian can readily recognize.¹⁸¹ But the scope of what qualifies as confidential under Florida law is much less self-evident, because confidentiality laws permeate essentially every activity of state and local government, from citrus marketing to college fundraising. In a federal leak prosecution case, a U.S. district court stated that the federal statute making it a crime to retain national defense documents for unauthorized use was not unconstitutionally broad or vague because a federal employee will easily recognize what qualifies as a protected document “based on its content, markings or design.”¹⁸² Implicitly, then, it would be constitutionally problematic to hold an employee liable for releasing a record that was not recognizable as confidential by content, marking, or design.¹⁸³

Moreover, federal employees go through formal screening to obtain security clearances enabling them to handle classified documents, which are supposed to be marked to indicate their level of sensitivity.¹⁸⁴ By contrast, a low-level clerk in a Florida state agency might easily come into possession of a memo exchanged between two university administrators with no outward indication that the material is considered so confidential under state law that disclosing it might be a crime. Unlike the federal employee, who obtains access

¹⁸⁰ See Exec. Order No. 13,526, 32 C.F.R. § 2001.21(a)(3)(i) (2010) (enumerating eight federally approved reasons for classification, all of which relate to national security).

¹⁸¹ *United States v. Drake*, 818 F. Supp. 2d 909, 918 (D. Md. 2011).

¹⁸² *Id.* at 917.

¹⁸³ On this point, see *United States v. Morison*, 844 F.2d 1057, 1073–74 (4th Cir. 1988), in which the Fourth Circuit rejected a defendant’s constitutional challenge to his leaking prosecution, noting that the defendant “knew that he was dealing with national defense material” and that the documents at issue were “marked plainly ‘Secret.’”

¹⁸⁴ See *United States v. Rosen*, 445 F. Supp. 2d 602, 624 (E.D. Va. 2006) (stating, “[a]ll classified documents are clearly marked with a classification level and are often marked classified or unclassified at the paragraph level.”); Exec. Order No. 13,526, § 1.6(a) (Dec. 29, 2009) (specifying that classified documents should be marked “in a manner that is immediately apparent”).

to classified documents only after voluntarily submitting to a background check,¹⁸⁵ an unwitting state employee might become the custodian of “state-classified” records without ever having sought any enhanced access permissions.

Requesters habitually complain that agencies are so slow to produce public records that the responses often are of no practical use by the time they arrive.¹⁸⁶ Delays are a recurring problem even in Florida, which is generally thought to have one of the nation’s stronger FOI statutes.¹⁸⁷ One way to guarantee that the state FOI fulfillment process will work inefficiently is to litter the law with hundreds of landmines, exposing custodians to the possibility of

¹⁸⁵ See JENNIFER K. ELSEA, CONG. RSCH. SERV., *THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK 2* (2017) (stating, “Congress has directed the President to establish procedures governing the access to classified material so that generally no person can gain such access without having undergone a background check.”).

¹⁸⁶ See Kaylee Tornay, *Primate Research Center in Oregon Leads Nation in Violations*, INVESTIGATEWEST (Jan. 19, 2023), <https://www.invw.org/2023/01/19/primate-research-center-in-oregon-leads-nation-in-violations/> (reporting that Oregon legislator was forced to wait seventeen months to receive records from state university regarding deaths of animals in research lab); Jenna Greene, *Wait What? FDA Wants 55 Years to Process FOIA Request over Vaccine Data*, REUTERS (Nov. 18, 2021, 4:31 PM), <https://www.reuters.com/legal/government/wait-what-fda-wants-55-years-process-foia-request-over-vaccine-data-2021-11-18/> (reporting that scientists using federal FOIA to ask drug regulators for data used in approving COVID-19 vaccine were told fulfillment would take more than half a century). In 2015, journalist and author, Sharyl Attkisson, testified at a congressional hearing that the Defense Department once took ten years to fulfill one of her FOIA requests, and that she was currently eight months into waiting for records requested from the Centers for Disease Control about a life-threatening viral outbreak. *Ensuring Transparency Through the Freedom of Information Act (FOIA): Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. 8 (2015) (statements of Sharyl Attkisson, investigative reporter).

¹⁸⁷ See Mike DeForest, *DeSantis ‘Review’ of Public Records Can Add Months of Delays, Newly Uncovered Log Reveals*, CLICK ORLANDO (May 8, 2023, 2:17 PM), <https://www.clickorlando.com/news/politics/2023/02/28/desantis-review-of-public-records-can-add-months-of-delays-newly-uncovered-log-reveals/> (reporting that Florida agencies have been instructed to send sensitive requests to governor’s office for additional layer of review, where they can sit for as long as nine months).

criminal prosecution if they mistakenly honor a seemingly harmless records request.¹⁸⁸

Criminalizing the disclosure of public records is constitutionally problematic if it is construed as a prior restraint. Rules that forbid government employees from disclosing information to the press or public are typically viewed as prior restraints when challenged in court.¹⁸⁹ Even in the workplace context, broad prior restraints are unconstitutional and must be tailored to accomplish a legitimate government objective without spilling over into penalizing benign speech.¹⁹⁰ While public employees can contract away some free-speech rights in exchange for employment—for instance, a high school principal would not have a First Amendment right to release federally confidential education records—the government cannot extract a blanket waiver of constitutional rights beyond what is necessary for the employee’s agency to function.¹⁹¹ Harking back to the hypothetical case of a public employee who releases a confidential document to expose foot-dragging in the government’s response to sexual harassment by a public official, there is growing recognition that even freely bargained confidentiality agreements ought not to

¹⁸⁸ See Jordan, *supra* note 80.

¹⁸⁹ See *Harman v. City of New York*, 140 F.3d 111, 119 (2d Cir. 1998) (finding that city agency’s regulations requiring official approval before employees may speak to the news media “run afoul of the general presumption against prior restraints on speech”); *Alderman v. Phila. Hous. Auth.*, 496 F.2d 164, 174 (3d Cir. 1974) (holding that housing authority’s requirement that employees sign confidentiality agreement forbidding discussion of tenant advisory board elections violated the First Amendment and commenting that “precious little in the case law supports the imposition of a restraint on all the speech of public employees, even concerning a particularized topic”).

¹⁹⁰ See *United States v. Nat’l Treasury Emp. Union*, 513 U.S. 454, 466–67 (1995) (holding, in a First Amendment challenge to place a ban on federal employees receiving honorarium compensation for speaking engagements, that “wholesale deterrent to a broad category of expression by a massive number of potential speakers” carries a “heavy” burden of justification).

¹⁹¹ See *Agency for Int’l Dev. v. All. for Open Soc’y Int’l Inc.*, 570 U.S. 205, 218–19 (2013) (holding that receipt of a government grant—even a wholly discretionary benefit to which there is no entitlement—cannot be conditioned on wholesale waiver of a recipient’s First Amendment rights); see also Stone, *supra* note 46, at 188 (stating, “the government cannot condition employment on the waiver of constitutional rights.”).

be enforced when disclosure is necessary to bring sexual misconduct to light and perhaps prevent future victimization.¹⁹²

At least one federal court has said outright that, while there is no constitutional right to leak classified documents, it would violate the First Amendment to constrain public employees from disclosing information that is unclassified.¹⁹³ Florida's confidentiality laws lack tailoring in several obvious ways: They penalize the release of records even without a showing that disclosure will harm substantial public interests, and they lack any safety-valve exception for records whose contents have already become public knowledge or would be readily publicly accessible through other means.¹⁹⁴ Unlike federal classification, which requires a document-by-document balancing of interests, Florida confidentiality law is categorical, lacking even the federal fail-safe that forbids classifying documents for the purpose of concealing wrongdoing.¹⁹⁵ Turning back to Florida's Patronis scenario, there is no allowance under Florida law for a person prosecuted for leaking records of an unfinished sexual harassment investigation to defend himself on the grounds that the records were concealed only for the purpose of covering up official misconduct; Florida law makes concealment absolute, regardless of motive.¹⁹⁶

If the federal government seeks to punish an employee for disclosing classified information, the government must surmount certain threshold burdens by showing that the disclosure had the potential to harm national security and that the information was not already in the public domain.¹⁹⁷ A state anti-disclosure statute that

¹⁹² See Emily Otte, *Toxic Secrecy: Non-Disclosure Agreements and #MeToo*, 69 U. KAN. L. REV. 545, 554 (2021) (noting that twelve states have enacted legislation in recent years limiting use of nondisclosure clauses to settle claims of sexual misconduct, as a result of public outrage generated by #MeToo awareness movement, and one state—New Jersey—has banned them entirely).

¹⁹³ *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972).

¹⁹⁴ See *supra* notes 139–40 and accompanying text (discussing Fourth Circuit's *Morison* decision, which suggested that these showings—that release of information would be potentially harmful to national interests, and that the information was not otherwise publicly accessible—were required to make a leak prosecution constitutional); see also Kitrosser, *Leaky Ship*, *supra* note 65, at 413–14 (discussing *Morison* standard); Stone, *supra* note 46, at 193–94.

¹⁹⁵ Stone, *supra* note 46, at 195 n.34.

¹⁹⁶ See FLA. STAT. § 119.10(1)(a) (2023).

¹⁹⁷ Stone, *supra* note 46, at 193–94.

lacks such guardrails might well be unconstitutional.¹⁹⁸ Florida's primary records confidentiality law provides for prosecution based merely on a showing that confidential records were "knowingly" disclosed,¹⁹⁹ but requires no showing that the disclosure was harmful, or that the custodian knew or intended for harm to result from the disclosure.²⁰⁰

Even if no heightened First Amendment scrutiny applies, laws criminalizing the disclosure of confidential information must, at bare minimum, pass the test of reasonableness.²⁰¹ Given the hundreds of run-of-the-mill categories of records that Florida law declares confidential, it is not at all certain that a reviewing court would find criminal prosecution to be a reasonable response to disclosure.

V. THE *VILLARREAL* CASE: "OVERCLASSIFICATION" MAKES JOURNALISM A CRIME

While Florida's law criminalizing the disclosure of confidential state records remains largely an inchoate threat, the same cannot be said in Texas. In December 2017, Laredo police cited a colorful lo-

¹⁹⁸ See *United States v. Hung*, 629 F.2d 908, 918–19 (4th Cir. 1980) (observing that the scienter requirement in the federal espionage statute, which requires the government to prove that information was leaked "with intent or reason to believe" that it would harm U.S. interests or aid a foreign adversary, may be necessary to save the statute from being unconstitutionally overbroad).

¹⁹⁹ See FLA. STAT. § 119.10(1)(a) (providing that a "knowing" violation of Florida's Public Records Act, including its confidentiality provisions, is punishable as a first-degree misdemeanor). Under Florida law, a first-degree misdemeanor is punishable by up to a year in jail and/or a fine of up to \$1,000. FLA. STAT. §§ 775.082(4)(a), 775.083(1)(d).

²⁰⁰ *Id.* § 119.10(1)(a).

²⁰¹ See Stone, *supra* note 46, at 192 (observing that federal court rulings regarding disclosure of confidential government information "do not give the government carte blanche to insist on secrecy. The government's restrictions must be reasonable.").

cal news blogger (who uses the screen name “La Gordiloca,” translating to “the crazy fat lady”) for two counts of violating a Texas statute outlawing “misuse of official information.”²⁰²

To understand how a reporter asking a police officer a question could result in an arrest requires untangling a series of missteps that left Texas with arguably the nation’s most overzealous confidentiality law.²⁰³ The Villarreal story is an object lesson in what happens when legislators and courts are careless in failing to differentiate between records that are discretionarily exempt from production versus records that are non-discretionarily confidential.²⁰⁴

The statute under which Villarreal was charged, Texas Penal Code § 39.06, is titled “Misuse of Official Information.”²⁰⁵ The first two sections of the statute are directed to the misuse of confidential information by public employees.²⁰⁶ But the third section is directed to non-employees, and it provides:

(c) A person commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that:

- (1) the public servant has access to by means of his office or employment; and
- (2) has not been made public.²⁰⁷

The statute seems clearly to be directed toward the invidious misuse of *illicitly obtained* information. But the drafters critically erred in defining the scope of proscribed behavior. The statute is triggered by soliciting or receiving information that “has not been made public,” which is defined as: “any information to which the public does

²⁰² Leif Reigstad, *Lagordiloca’s Arrest Raises Constitutional Concerns*, TEX. MONTHLY (Dec. 21, 2017), <https://www.texasmonthly.com/articles/lagordilocas-arrest-laredo/>.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ TEX. PENAL CODE §§ 39.06(a)–(b).

²⁰⁷ TEX. PENAL CODE § 39.06(c).

not generally have access, and that is prohibited from disclosure under” the Texas public records statute.²⁰⁸ The problem is that the referenced statute, the Texas Public Information Act (“TPIA”), does not contain any prohibitions on disclosure.²⁰⁹ To the contrary, TPIA states: “[t]his chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.”²¹⁰ In other words, the legislature made it a crime to disclose records made confidential by the TPIA, but the TPIA statute itself makes no records confidential.²¹¹ That is not, however, how the Texas courts have interpreted the penal code.²¹²

In a 2005 case, *State v. Ford*, a Texas appellate court acknowledged the legislature’s apparent drafting misstep—criminalizing the disclosure of an empty set of records²¹³—but then filled that empty set, to the point of overflowing.²¹⁴ The court decided that, when the legislature referred to records “prohibited from disclosure” under the TPIA, that must mean records *exempted* from disclosure.²¹⁵ In other words, a person could commit a crime in Texas simply by requesting a document from a government employee that the employee had statutory discretion to withhold.²¹⁶ The result transforms

²⁰⁸ TEX. PENAL CODE § 39.06(d).

²⁰⁹ TEX. GOV’T CODE § 552.007(a).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *See State v. Ford*, 179 S.W.3d 117, 123 (Tex. App. 2005).

²¹³ *See id.* (stating that “nowhere in the Open Records Act does it *prohibit* the disclosure of any information; rather, it provides a set of *exceptions* to required disclosure for certain categories of public information”) (emphasis in original); *see also* Tidwell v. State, No. 08-11-00322, 2013 WL 6405498, at *12 (Tex. App. 2013) (observing that, if the penal code’s reference to documents that the TPIA prohibits disclosing were interpreted literally, the penal code “could never be satisfied and no one could ever be prosecuted” for misuse of government information).

²¹⁴ *Ford*, 179 S.W.3d at 123.

²¹⁵ *Id.*

²¹⁶ *Id.*

every request for public records into a potential crime, since agencies routinely respond to requests by citing an exemption that allows discretionary withholding.²¹⁷

Even with the Texas courts' expansive understanding of non-public information, one fail-safe remained: A requester could not be prosecuted unless the motive for obtaining the information was "to obtain a benefit" or "to harm or defraud another."²¹⁸ But in the case of Villarreal, Laredo police plowed through that final barricade.²¹⁹ They took the position that Villarreal was motivated by personal gain in the form of increased traffic to her Facebook page and, occasionally, a free meal purchased by an appreciative fan.²²⁰ The combined effect of these interpretations produced the result that a journalist could be charged with a crime for asking a government employee for any information that the employee was not statutorily required to produce, so long as the journalist stood to receive some form of compensation for the article.²²¹

When Villarreal's case was called for trial, a state court judge summarily dismissed the charges, ruling from the bench that it would not be constitutional to apply the statute to her conduct.²²² But when Villarreal then sued police and prosecutors over the arrest—among other manifestations of official hostility toward her assertive coverage—a federal district court threw out her case, finding that police could reasonably have relied on the plain wording of the statute to treat Villarreal's newsgathering as a crime.²²³ A panel of the Fifth Circuit U.S. Court of Appeals reversed the district court and reinstated Villarreal's First Amendment lawsuit, with a 2–1 majority concluding that no reasonable officer could believe it was a crime for a journalist to ask a police officer to disclose information

²¹⁷ *Id.* at 124.

²¹⁸ TEX. PENAL CODE § 39.06(b).

²¹⁹ Billy Binion, *This Court Case Could Make It a Crime To Be a Journalist in Texas*, REASON (Nov. 4, 2022, 10:03 AM), <https://reason.com/2022/11/04/this-court-case-could-make-it-a-crime-to-be-a-journalist-in-texas/>.

²²⁰ *Id.*

²²¹ *Id.*

²²² Villarreal v. City of Laredo, 44 F.4th 363, 369 (5th Cir. 2022).

²²³ Villarreal v. City of Laredo, No. 5:19-cv-48, 2020 WL 13517246, slip op. at *24 (S.D. Tex. May 8, 2022).

about a newsworthy event.²²⁴ However, the full circuit vacated the panel opinion and agreed to rehear the case en banc.²²⁵

In a 9–7 ruling in January 2024, the full court overturned the panel decision and ruled in favor of Laredo police.²²⁶ The majority opinion found that the Laredo officers were entitled to the benefit of qualified immunity on several grounds: There was no caselaw finding unconstitutionality in a factually analogous situation; the Texas confidentiality statute was not plainly unconstitutional on its face, and the officers were entitled to rely on a judicially signed warrant finding probable cause for Villarreal’s arrest.²²⁷ While the majority acknowledged that Supreme Court cases such as *Florida Star v. B.J.F.*²²⁸ clearly establish a constitutionally protected right to *publish* news, the court distinguished the right to *publish* from the right to *gather* news, which (in the majority’s view) may be regulated more readily.²²⁹ Four judges wrote strongly worded dissenting opinions, including original panel member Judge James C. Ho, who—noting that the Texas code contains “countless” public-records exemptions—wrote that the majority opinion “disrespects the rights of every citizen in our circuit who might wish to seek information from public officials.”²³⁰ He continued:

[T]he take-away from today’s ruling is this: Any citizen who wishes to preserve her liberty should simply avoid asking public officials for information outside of the formal (and time-consuming) channel of the Public Information Act. But if you ask for public information using the wrong mechanism, you may go to prison.²³¹

²²⁴ See *Villarreal*, 44 F.4th at 373 (“It should be obvious to any reasonable police officer that locking up a journalist for asking a question violates the First Amendment.”).

²²⁵ *Villarreal v. City of Laredo*, 52 F.4th 265, 265 (5th Cir. 2022).

²²⁶ *Villarreal v. City of Laredo*, No. 20-40359, 2024 WL 244359, at *1 (5th Cir. Jan. 23, 2024).

²²⁷ *Id.* at *9–12.

²²⁸ *Fla. Star v. B.J.F.*, 491 U.S. 524, 524 (1989).

²²⁹ *Villarreal*, 2024 WL 244359, at *13.

²³⁰ *Id.* at *35 (Ho, J., dissenting).

²³¹ *Id.* at *36.

Although Priscilla Villarreal is unlikely to ever receive a penny in damages, the summary dismissal of criminal charges against her at the trial-court level ultimately discredits the use of the Texas code to criminalize routine acts of news reporting. Even in the civil damages case, the government's position was not that it is constitutional to prosecute people for exchanging mundane information about government affairs, but that the officers would not have been on notice at the time the law was unconstitutional.²³² Still, the statute was not struck down as facially unconstitutional, and it remains on the books today.²³³ Police believing they had the power to prosecute someone for receiving a “benefit” as insubstantial as Facebook traffic is a danger signal for states other, such as Florida, where public employees can be prosecuted for sharing confidential documents for “personal gain or benefit,” a formulation that implicitly goes beyond just financial gain.²³⁴

The chilling effect of the Texas statute made itself felt in Uvalde, where an eighteen-year-old shot twenty-one people to death at an elementary school in May 2022 in one of the worst mass shootings in United States history.²³⁵ For months afterward, law enforcement agencies delayed releasing recordings, videos, and other documentation that journalists sought to help explain why police hesitated to enter the classroom for more than an hour, and whether that hesitation resulted in preventable deaths.²³⁶ The town's mayor defended

²³² See Brief of Respondent-Appellee at 20, *Villarreal v. City of Laredo*, No. 20-40359 (5th Cir. Nov. 2, 2020) (arguing that, although Tex. Penal Code § 39.06(c) was ultimately held unconstitutional, it “was not only valid at the time it was enforced against Plaintiff but had been successfully used by the State of Texas to prosecute misuse of public information”).

²³³ *Villarreal*, 2024 WL 244359, at *9–11.

²³⁴ FLA STAT. § 112.313(8) (2023).

²³⁵ Acacia Coronado & Jim Vertuno, *Gunman Kills 19 Children, 2 Adults in Texas School Rampage*, ASSOCIATED PRESS (May 25, 2022, 12:05 AM), <https://apnews.com/article/uvalde-texas-school-shooting-may-24-584466945120>.

²³⁶ Zach Despart, *Coalition of News Organizations Sues Texas Department of Public Safety over Withheld Records on Uvalde Shooting*, TEX. TRIB. (Aug. 1, 2022, 5:00 PM), <https://www.texastribune.org/2022/08/01/uvalde-dps-texas-records-lawsuit-media-organizations/>; J. David Goodman, *Aware of Injuries Inside, Uvalde Police Waited to Confront Gunman*, N.Y. TIMES (June 9, 2022), <https://www.nytimes.com/2022/06/09/us/uvalde-shooting-police-response.html>.

the secrecy by saying police authorities could face prosecution under Texas law if they defied the district attorney's directive to withhold details of the case.²³⁷ Even though the trial court in the *Villarreal* case recognized the unconstitutionality of Texas' criminal "official information" law, the threat of prosecution continues to cast an intimidating shadow.²³⁸

The ordeal of "citizen journalist" Villarreal, forced to obtain counsel and mount a defense without the financial backing of a media company and its in-house legal department, stands as a cautionary tale for Florida about the mischief that can result by equipping police and prosecutors with open-ended confidentiality statutes that can be selectively applied. At least some of the time, those prosecuted will not be people who are profiteering from ill-gotten information; they will be journalists, commentators, and activists who anger the wrong law enforcement agency. We do not have to speculate whether vague confidentiality statutes will lead to misguided or bad-faith prosecutions because the experience of Priscilla Villarreal makes the threat alarmingly concrete.²³⁹

VI. A LIGHTER TOUCH WITH THE "CLASSIFIED" STAMP

Although seldom discussed outside of exceptional cases such as those of *Patronis* and *Villarreal*, laws punishing public employees for improperly disclosing information are common throughout the country.²⁴⁰ These laws vary in scope, both as to what type of records are off-limits to disclosure and as to how an unauthorized disclosure is penalized.²⁴¹ Florida and Texas are in a relative minority with

²³⁷ Uriel J. Garcia, "Nobody's Giving Us Any Answers": Uvalde Families Demand Details of Shooting Investigation at City Council Meeting, TEX. TRIB. (June 30, 2022, 6:00 PM), <https://www.texastribune.org/2022/06/30/uvalde-shooting-investigation-city-council/>.

²³⁸ *Villarreal v. City of Laredo*, 44 F.4th 363, 384 (5th Cir. 2022) (noting the trial court's finding that the statute in question was unconstitutionally vague) *rev'd en banc*, 94 F.4th 374 (5th Cir. 2024).

²³⁹ *See Villarreal*, 44 F.4th at 367 ("If [Villarreal being put in jail for asking a question to a police officer] is not an obvious violation of the Constitution, it's hard to imagine what would be."), *rev'd en banc*, 94 F.4th 374 (5th Cir. 2024).

²⁴⁰ *See generally* Papandrea, *supra* note 59, at 525.

²⁴¹ *See generally id.*

catch-all statutes that broadly criminalize the release of confidential information, but virtually every state has a law that criminalizes disclosure of some category of particularly sensitive information.²⁴²

A. *States Following the Florida/Texas Broad Approach*

A handful of states have catch-all confidentiality statutes resembling those in Florida and Texas, which state that disclosure of confidential records is a crime, without enumerating the categories of records that the law regards as “confidential.” Among these are Hawaii, Indiana, and Utah.²⁴³ While these states’ penalty schemes are broad, they have safeguards missing from the Florida and Texas approaches.²⁴⁴

Hawaii’s confidentiality laws are both analogous to, but distinctive from, Florida’s. They are analogous because the criminal penalty for disclosing confidential records appears in one catch-all statute, but the identification of what is “confidential” must be found by searching throughout the statute books.²⁴⁵ They are distinctive because Hawaii, unlike Florida, specifies a heightened mens rea standard, requiring proof that a public employee actually knew that disclosure was prohibited to support a conviction for unlawful disclosure.²⁴⁶

Indiana’s broad disclosure statute assigns prosecutors a relatively low burden of proof, specifying that it is a crime to recklessly, knowingly, or intentionally disclose confidential information.²⁴⁷ But the scope of confidentiality under Indiana law is significantly narrower than in Florida. Rather than incorporating by reference hundreds of confidentiality provisions throughout the Indiana code, the statute references just two confidentiality provisions, making it

²⁴² See, e.g., FLA. STAT. § 601.76 (2021).

²⁴³ HAW. REV. STAT. ANN. § 92F-17 (West 2009); IND. CODE ANN. § 5-14-3-10 (West 2022); UTAH CODE ANN. § 63G-2-801 (West 2019).

²⁴⁴ See, e.g., FLA. STAT. § 601.76 (failing to define what qualifies as confidential information).

²⁴⁵ HAW. REV. STAT. ANN. § 92F-17.

²⁴⁶ *Id.*

²⁴⁷ IND. CODE ANN. § 5-14-3-10.

somewhat fairer to hold government custodians responsible for knowing what qualifies as confidential.²⁴⁸

Utah's catch-all confidentiality statute penalizes the intentional disclosure of three categories of records: "private," "controlled," and "protected."²⁴⁹ Each category is statutorily defined within the same code section, giving a custodian of records some degree of notice as to what is and is not confidential.²⁵⁰ As in Florida, Utah legislators have applied the confidentiality stamp with a heavy hand.²⁵¹ Dozens of categories of documents are made off-limits to disclosure, even when there is no risk remotely comparable to the disclosure of national security secrets.²⁵² For example, it can be a misdemeanor to release correspondence between two state legislators who are formulating drafts of legislation,²⁵³ or records held by legislative staffers reflecting how a legislator is contemplating voting before the decision has been publicly announced.²⁵⁴ Such provisions seem calculated to prevent mere political embarrassment, rather than injury to fundamental state interests that could justify prosecuting a leaker.

In other instances, determining whether the document qualifies for confidential handling under Utah law requires so much subjective analysis and expertise that it would be unfair to hold a custodian responsible for not intuiting the document's confidential status. For example, records concerning the potential sale or lease of state property that would give away the value of the property are designated as "protected," except if there has already been a disclosure to some-

²⁴⁸ *Id.*

²⁴⁹ UTAH CODE ANN. § 63G-2-801 (West 2019) ("A public employee . . . who intentionally discloses, provides a copy of, or improperly uses a *private, controlled, or protected* record knowing that the disclosure or use is prohibited under this chapter, is . . . guilty of a class B misdemeanor.") (emphasis added).

²⁵⁰ *See, e.g.*, UTAH CODE ANN. § 63G-2-302 (West 2023) (describing private records); UTAH CODE ANN. § 63G-2-303 (West 2019) (describing private records); UTAH CODE ANN. § 63G-2-304 (West 2008) (describing controlled records); UTAH CODE ANN. § 63G-2-305 (West 2023) (describing protected records).

²⁵¹ *Id.* § 63G-2-305 (imposing criminal penalties on those who release protected information).

²⁵² *Id.* § 63G-2-305(19) (delineating a long list of categories that are prohibited from disclosure).

²⁵³ *Id.* § 63G-2-305(19)(b)(i).

²⁵⁴ *Id.* § 63G-2-305(54).

one outside the agency, or if the public's interest in disclosure outweighs the government's interest in concealment.²⁵⁵ On its face, such a provision would seem to expose a public employee to punishment simply for making an unwise calculation on the public interest balancing test.

However, Utah ameliorates the risk of a misfired prosecution in important ways. Disclosure is criminally punishable only if the release is intentional, with knowledge that release is legally prohibited—a demanding mens rea burden for a prosecutor to meet.²⁵⁶ And a custodian accused of unlawfully releasing records has several statutory defenses, including demonstrating that the record was miscategorized as confidential, showing that the disclosure was made in good-faith belief that it was lawful, or establishing a whistleblower justification—that disclosure was “necessary” to expose government waste or illegality.²⁵⁷ Fewer safety measures protect against prosecution for well-intentioned disclosures in Florida, where it is generally enough for prosecutors to show that a disclosure was made knowingly.²⁵⁸

A 2008 Utah Supreme Court ruling underscores the distinction between Utah's more lenient approach to confidentiality versus Florida's absolutist approach.²⁵⁹ The *Deseret Morning News* newspaper sued for access to an investigative report into accusations of sexual harassment within a county court clerk's office.²⁶⁰ The county categorized the document as “protected” under the state's FOI law, arguing both that disclosure would invade personal privacy and that it would interfere with a disciplinary investigation.²⁶¹ The Utah Supreme Court determined that the county erred in asserting that all reports of sexual harassment are categorically confidential;

²⁵⁵ *Id.* § 63G-2-305(9).

²⁵⁶ UTAH CODE ANN. § 63G-2-801(2)(a) (West 2019); *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (defining “willfulness” as acting with knowledge that one's conduct is unlawful).

²⁵⁷ UTAH CODE ANN. §§ 63G-2-801(1)(b)-(d).

²⁵⁸ FLA. STAT § 119.10(1)(b) (2023).

²⁵⁹ *See Deseret News Publ'g Co. v. Salt Lake Cnty.*, 182 P.3d 372, 384 (Utah 2008).

²⁶⁰ *Id.* at 375–76.

²⁶¹ *Id.* at 375.

rather, Utah's FOI law (the Government Records Access and Management Act) requires custodians to make an individualized determination based on the contents of each requested record.²⁶² In making that individualized determination, the county was required to consider not just the sensitivity of the record, but also any counterbalancing public interest in disclosure.²⁶³ The appeals court then conducted its own balancing of interests, and concluded that the newspaper was entitled to the record, finding an overriding interest in disclosure because the records concerned allegations of work-related misconduct by government officials.²⁶⁴ The outcome of the *Deseret News* case—and the path that the court took in reaching it—contrasts sharply with the absolutist approach in Florida law, which contemplates no exceptions to confidentiality regardless of the public's interest in access.

B. *States with Narrowly Targeted Confidentiality Laws*

In contrast with Florida and Texas, most states do not categorically assert that disclosure of anything confidential is a crime. Rather, the majority approach is, first, to penalize misusing confidential information for personal gain,²⁶⁵ and second, to attach penalties to disclosing specific types of extra-sensitive records.²⁶⁶ Common categories of information that must be kept confidential include: personal financial and tax information;²⁶⁷ records related to health

²⁶² *Id.* at 378.

²⁶³ *Id.* at 379.

²⁶⁴ *Id.* at 381–82.

²⁶⁵ *See, e.g.*, ALA. CODE § 13A-10-82 (2009) (creating misdemeanor offense of misusing confidential information acquired in an official capacity); MO. ANN. STAT. § 576.050 (West 2017) (providing misdemeanor penalties for knowingly misusing nonpublic information for pecuniary gain); N.C. GEN. STAT. § 14-234.1 (1987) (making it a misdemeanor for government employee to trade on nonpublic information acquired in employee's official capacity).

²⁶⁶ *See, e.g.*, N.C. GEN. STAT. ANN. § 153A-148.1 (West 2016) (addressing sensitive information such as tax records).

²⁶⁷ *See, e.g.*, ALA. CODE § 40-2A-10 (2019); ARIZ. REV. STAT. § 11-505 (LexisNexis 2022); N.C. GEN. STAT. ANN. § 153A-148.1 (West 2016).

and psychological care;²⁶⁸ records related to receipt of social-welfare services, particularly by child clients;²⁶⁹ and, records containing businesses' trade secrets.²⁷⁰ To cite just one example, a statute governing how the Georgia Department of Labor handles records of applications for unemployment benefits provides that—except for specified official-business uses—the records must be kept confidential, with misdemeanor penalties for disclosing records for unauthorized purposes.²⁷¹ By signaling within the subject-matter-specific statute that release of particular records is punishable, these statutes give custodians clearer notice of their obligations and risks, as compared with the Florida approach of broadly characterizing records as “confidential” and expecting custodians to understand the legal significance.

Comparing statutes from Florida and Montana with similar purposes—the protection of agribusiness trade secrets—illustrates states' varying approaches. Montana Code § 80-9-304, which covers the formula of animal feed, states that:

A person who . . . reveals to persons other than officers of the department or to the courts when relevant in a judicial proceeding any information acquired under this chapter concerning any method, records, formulations, or processes which as a trade secret is entitled to protection *is guilty of a misdemeanor and shall be fined not more than \$300 or imprisoned for not more than 1 year, or both.*²⁷²

²⁶⁸ See, e.g., 410 ILL. COMP. STAT. ANN. 325/8 (West 1995); VA. CODE ANN. § 54.1-2525 (West 2024).

²⁶⁹ See, e.g., MO. REV. STAT. § 189.085 (2023); N.Y. PUB. HEALTH L. § 2782 (McKinney 2020); N.Y. SOC. SERV. L. §§ (3), (4) (McKinney 2023); VA. CODE ANN. § 63.2-104 (West 2023).

²⁷⁰ See, e.g., MISS. CODE ANN. § 75-45-191 (2023); MONT. CODE ANN. § 80-9-304 (2023); 35 PA. CONS. STAT. §§ 7311(f), (g) (2023).

²⁷¹ See GA. CODE ANN. §§ 34-8-121(a), 125(f) (2023) (providing that Labor Department records regarding individuals or employers are “private and confidential” and that willfully releasing them for purposes unrelated to official state business is a misdemeanor).

²⁷² MONT. CODE ANN. § 80-9-304 (2023) (emphasis added).

By comparison, Florida Statute § 601.76, which applies to the formula for citrus fruit coloring, provides that:

Any formula required to be filed with the Department of Agriculture and Consumer Services shall be deemed a trade secret . . . , is confidential and exempt from the provisions of s. 119.07(1), and shall only be divulged to the Department of Agriculture and Consumer Services or to its duly authorized representatives or upon orders of a court of competent jurisdiction when necessary in the enforcement of this law.²⁷³

In contrast with the Montana law, the Florida statute fails to immediately put the reader on notice of the possibility of criminal penalties. And it is not intuitively obvious—as it would be with national defense secrets—that disclosure of agribusiness practices is a sufficiently serious transgression to warrant jail time.²⁷⁴

In view of the prevailing practice nationally, it is eminently possible for states to identify, with specificity, a relatively narrow set of “classified” documents with clearly enumerated penalties for unauthorized disclosure that can be imposed only for intentional (or perhaps reckless) disclosures. Florida’s aggressive approach of “classifying” some 400 categories of documents, without tightly constraining the ability of prosecutors to pursue only the most damaging and ill-motivated disclosures, runs counter to the consensus approach.

CONCLUSION

In September 2023, Nevada’s police union took the *Las Vegas Review-Journal* newspaper to court, alleging that the newspaper violated state confidentiality laws by posting jail surveillance video footage on its website.²⁷⁵ The video accompanied a *Review-Journal*

²⁷³ FLA. STAT. § 601.76 (2010).

²⁷⁴ *See id.*

²⁷⁵ Briana Erickson, *Police Union Sues Review-Journal over Henderson Jail Video*, LAS VEGAS REV.-J. (Sept. 29, 2023, 11:46 AM), <https://www.reviewjournal.com/investigations/police-union-sues-review-journal-over-henderson-jail-video-2913167/>.

investigation into how law enforcement officers' practice of working substantial overtime hours without time off might compromise jail safety.²⁷⁶ The police union insisted that—the First Amendment notwithstanding—the newspaper was bound by the same state confidentiality laws that apply to the public employees entrusted with safeguarding the videos and demanded that the videos either be taken offline or the officers' faces obscured.²⁷⁷ The insistence that confidentiality laws might trump journalists' constitutional right to publish documents of obvious public concern demonstrates, yet again, the dangerousness of unclear state “classification” statutes that can be weaponized as tools of concealment.

While Florida and Texas provide dramatic examples of the downside risks of overcategorizing documents as confidential, overuse of “confidential” status is not limited to those jurisdictions.²⁷⁸ Professor David S. Levine has decried what he terms “confidentiality creep” in jurisdictions across the country, largely by way of categorizing records as “trade secrets” even when they pertain to matters of paramount public concern, including the cleanliness of groundwater and the reliability of voting machines.²⁷⁹

The primary danger of “state overclassification” is not that government employees will be jailed, since prosecutions appear to be rare, but that the public will be deprived of useful information in which there is no particularly compelling confidentiality interest.²⁸⁰ When custodians are told that they have no discretion to make even a well-motivated decision to disclose—and when the penalty for

²⁷⁶ Briana Erickson, *Henderson Jailers get Millions in Overtime but Still Make Critical Mistakes*, LAS VEGAS REV.-J. (Sept. 20, 2023, 9:00 AM), <https://www.reviewjournal.com/investigations/henderson-jailers-get-millions-in-overtime-but-still-make-critical-mistakes-2907703/>.

²⁷⁷ *Id.*

²⁷⁸ See David S. Levine, *Confidentiality Creep and Opportunistic Privacy*, 20 TUL. J. TECH. & INTELL. PROP. 11, 22 (2017) (emphasizing how “United States trade secrecy law [as a whole] has remained largely ignorant of the potential ill-effects of the secrecy it protects.”).

²⁷⁹ See *id.* at 22 (arguing that “trade secrecy has morphed into a shape-shifting doctrine that can create a safe harbor from public oversight and knowledge,” and furnishing examples).

²⁸⁰ See Herbert Lin, *A Proposal to Reduce Government Overclassification of Information Related to National Security*, 7 J. NAT'L SEC. L. & POL'Y 443, 445 (2014).

noncompliance can be jail—custodians logically will err on the side of nondisclosure. Just as in the federal system, custodians predictably err on the side of overclassifying rather than underclassifying documents.²⁸¹ As Professor Heidi Kitrosser has observed to be true at the federal level, when government employees see people being prosecuted for leaking, they tend to become over-compliant with confidentiality, hesitant to share even information that is not legally subject to classification at all.²⁸² The same, predictably, will be true in states like Florida: “Just to be on the safe side,” uncertainty about what is confidential will lead to over-withholding of harmless documents even beyond those that the law was intended to cover.

In a case recognizing that a veteran police officer could pursue a First Amendment retaliation claim after being demoted for leaking a copy of an internal agency memo to a news reporter, a Fourth Circuit judge expounded on the growing importance of leaks given the diminishing capacity of traditional mainstream news organizations to effectively cover the workings of government:

[T]he First Amendment should never countenance the gamble that informed scrutiny of the workings of government will be left to wither on the vine. That scrutiny is impossible without some assistance from inside sources(.) . . . Indeed, it may be more important than ever that such sources carry the story to the reporter, because there are, sad to say, fewer shoeleather journalists to ferret the story out.²⁸³

Since Judge J. Harvie Wilkinson III wrote those foreboding words in 2009, the news industry’s decline has only accelerated.²⁸⁴ A re-

²⁸¹ *Id.* at 462 (observing that “excessive classification is essentially never penalized”).

²⁸² See Kitrosser, *Protecting Leakers*, *supra* note 68, at 1231 and accompanying text.

²⁸³ *Andrew v. Clark*, 561 F.3d 261, 273 (4th Cir. 2009) (Wilkinson, J., concurring).

²⁸⁴ See Mason Walker, *U.S. newsroom employment has fallen 26% since 2008*, PEW RSCH. CTR. (July 13, 2021), <https://www.pewresearch.org/short-reads/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/> (citing federal

cent Northwestern University study found that newspapers were going out of business at a rate of two-and-a-half per week, a pace meaning that nearly one-third of remaining newspapers in the country would be closed by the end of 2024.²⁸⁵ It disserves society's interest in good government to place vast swaths of information irretrievably beyond the public's reach with a few legislative key-strokes, absent a showing that disclosure of the information threatens serious harm to comparably important societal interests.

The fact that there is little public record of people being prosecuted for violating "state classification" laws demonstrates the risk that—as appears to be true in the *Villarreal* case—irate government officials might selectively weaponize confidentiality laws when disclosures are embarrassing or incriminating.²⁸⁶ Because it is so easy for confidentiality laws to be misapplied—particularly those carrying criminal penalties—it is essential for legislators to tailor the laws narrowly to capture only those records whose release might threaten essential safety or personal-privacy interests.²⁸⁷ As lawmakers continue piling on new confidentiality provisions every year, the government is creating and saving exponentially more documents digitally than in the paper-and-ink age, meaning that it is easier than ever to commit an unwitting confidentiality violation.²⁸⁸ It is already un-

labor data indicating that, between 2008 and 2020, newsroom employment declined from 114,000 to 85,000, a reduction of some 30,000 positions); *see generally* CLARA HENDRICKSON, BROOKINGS INST., LOCAL JOURNALISM IN CRISIS: WHY AMERICA MUST REVIVE ITS LOCAL NEWSROOMS 1 (2019), <https://www.brookings.edu/wp-content/uploads/2019/11/Local-Journalism-in-Crisis.pdf> (documenting declines in newspaper readership and advertising revenue and tying erosion of local news coverage to diminishing participation in local elections and other civic ills).

²⁸⁵ Penelope Muse Abernathy, *The State of Local News: The 2023 Report*, NW. MEDILL LOC. NEWS INITIATIVE (Nov. 16, 2023), <https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/2023/report/>.

²⁸⁶ *See* Kwoka, *supra* note 33, at 1392 (noting potential for selective prosecution, with government choosing not to seek charges for leaks that are strategically beneficial).

²⁸⁷ *See id.* at 1455.

²⁸⁸ *See* Papandrea, *supra* note 59, at 458–59 (asserting, in the federal context, that “the government may simply be overwhelmed with the number of secrets it is trying to keep . . . The digital age has led to the collection of incredible amounts

duly difficult for requesters to obtain compliance with public records laws, without adding the inhibiting effect of potential criminal prosecution.²⁸⁹ Indeed, there is some school of thought that leakers are able to justify their transgressions because the FOI system is so widely recognized as broken that custodians feel virtuous taking matters into their own hands to make a broken system slightly less dysfunctional.²⁹⁰

Critics of the federal classification system have pointed out that one of its many flaws is the risk of selective declassification when the administration in the White House finds partial disclosure to be strategically advantageous.²⁹¹ This is a concern with the “overclassification” of state records as well. Not all leakers are benevolently motivated reformers; at least some are political opportunists.²⁹² When records are categorically off-limits to disclosure, the custodian of the records does not have the option of correcting a misleading partial leak by releasing the remainder of the documents to provide context.²⁹³

of data, much of which is accessible in digital form (and thus more easily copied and disseminated.)” (parenthetical in original).

²⁸⁹ See Barrett & Greene, *supra* note 4 (quoting experts commenting on “the steady erosion of public records laws in Florida and a number of states”).

²⁹⁰ See Pozen, *supra* note 161, at 581–82 (suggesting that overuse breeds disregard for classification: “Surely we would have less leaking of classified information if we had less classified information. Not only would there be fewer documents to pilfer, but people might treat the secrecy rules with more respect.”); see also Papanirea, *supra* note 59, at 474 (“[E]xcessive classification breeds distrust for the need for secrecy and a lack of respect for the classification stamp.”); Wells, *supra* note 50, at 1205 (commenting that overclassification “detracts from the purposes of keeping information confidential by diluting the value of legitimately secret information”).

²⁹¹ See Dudding, *supra* note 58, at 711–12 (citing partial disclosure of national security memos during George W. Bush Administration that appeared to support the administration’s rationale for invading Iraq, which was subsequently debunked); see also ELSEA, *supra* note 185, at 16 (stating that suspicions were raised in 2012 when the Obama White House officials had informally engaged in “instant declassification” by selectively releasing favorable information to journalists).

²⁹² See ELSEA, *supra* note 185, at 16.

²⁹³ See *id.*

But state “classification” is arguably even more dangerous than federal classification because federal classification is less permanent. Classified federal records eventually “age into” public accessibility.²⁹⁴ Traditionally, federal law provided that records were presumed to cease being classified twenty-five years after creation, unless the government proved the need for continued concealment.²⁹⁵ But President Obama’s 2009 omnibus executive order reduced that presumed turnaround time to just ten years.²⁹⁶ Any member of the public can obtain release before the age-out date by lodging a complaint with the classifying agency or the Archivist of the United States, which are directed to declassify records if they no longer meet the standard to qualify for classified status.²⁹⁷ The president has broad power to rescind classification and order documents released.²⁹⁸ State records, by contrast, do not automatically “age out” of confidentiality by statute, nor is there any routine mechanism by which a person aggrieved by the confidentiality could lodge a complaint to secure “declassification.” Once a category of records is classified as “confidential” under state law, it is unlikely that they will ever become publicly accessible, even if the reason for confidentiality has been mooted by the passage of time.

“Confidentiality” should be reserved for the handful of records containing truly harmful information in which the public has no legitimate interest, like Social Security numbers and medical files. The public has a right to know how complaints of official misconduct are handled—or mishandled—even if the case never reaches an official conclusion. Regardless of what anyone thinks of Jimmy Patronis’ decision, rank-and-file state employees should never face the choice between whistleblowing and arrest.

²⁹⁴ Exec. Order No. 13,526, § 7.24(b) (Dec. 29, 2009).

²⁹⁵ 32 C.F.R. § 2001.30(l) (2023).

²⁹⁶ Exec. Order No. 13,526, § 1.5(b) (Dec. 29, 2009).

²⁹⁷ *See id.* § 3.5 (providing process by which Archivist of the United States can declassify federal records either as a product of routine periodic review or in response to a request directed to a specific record).

²⁹⁸ *See Dept. of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (recognizing broad presidential authority to classify or declassify national security documents as necessary adjunct of president’s role as commander in chief of the armed forces).