

**Blueprint to Transparency:
Analyzing Non-compliance and Enforcement
of Open Records Laws in Select U.S. States**

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Why NFOIC did this study

We have a right to open government — to access government records and attend government meetings. This is why we call government records and proceedings “public” and “open,” because our government belongs commonly to the people. That right of access is at the heart of democratic practice in the United States and elsewhere — the government ought not to operate in the dark because it owes its authority and legitimacy to the public it serves.

But that right to access and transparency is a delicate one. At the press of a delete key, or the use of a private email account, a public record can be destroyed or hidden, and with it, your right to the record can be stripped away. By simply meeting without publishing an agenda, a school board may fail to disclose to the public that an important vote is occurring on the budget affecting your child’s school, denying your right to comment and participate in the public meeting. This fragile right to open government at all levels within a state — from the top of the governor’s office down to the secretary of the local water control board — is guarded and protected only by the ability to enforce the open government law and, if violated, hold the lawbreaker accountable. Transparency requirements are necessarily codified into laws precisely because the government cannot be fully and unwaveringly trusted to carry out that duty on its own, knowingly or unknowingly.

Therefore, each of the 50 states and the District of Columbia has codified civil or criminal penalties for government violations of transparency laws — a legal mechanism intended to make the laws more effective, just like any law dictating punishment for crime.

Unfortunately, what happens in reality when a government official violates those laws and takes away your right to know, our research suggests not much (and not often).

By analyzing the number of open records disputes, the prevalence of violations in those disputes, and interviews with both government officials and transparency activists, the results are scant enforcement of state open government laws despite a large number of violations and widespread noncompliance by public institutions throughout states and communities across the U.S.

The difficulties underlying enforcement of the laws include:

- Structural difficulties in enforcement models, where in some states the burden of enforcement of penalties after an open government violation falls on the victim of the violation rather than on the government.

- Some jurisdictions rely on enforcement of the law through litigation — lawsuits against offending government agencies — which tend to favor the governing body. Such suits are costly and discourage the public or news organizations from asserting their rights if they believe there is a chance they will be responsible for what could amount to tens of thousands of dollars in legal expenses.
- Criminally prosecuting a violation, which often carries the legal requirement of “scienter,” or having to prove that the violation was willful or intentional, in addition to the notion that a violation of transparency laws does not warrant jail time or fines.
- Many violations occur outside the public’s view, perhaps using new communication or information sharing technology that bypasses normal public channels and goes unnoticed or undetected.

How common is noncompliance?

To give a broad view of the compliance landscape of open records laws, we turn to an analysis of open record requests submitted through [MuckRock](#), a website that facilitates open records requests and tracks outcomes, whether they have been fulfilled or responded to, for each of the 50 states.

David Cuillier, professor of data journalism and public affairs reporting at the University of Arizona, and President of the National Freedom of Information Coalition, [compiled compliance data](#) from 50,433 requests made through MuckRock between 2010 and 2018. To calculate a compliance rate for records requests to state agencies, he compared the number of requests fulfilled to the number of requests made.

Compliance to public record requests ranged from a high of 65 percent in Washington and Idaho to a low of 10 percent in Alabama. The data was also analyzed for correlation to the strength of the state’s public record laws, finding that the overall strength of the public records law did not correlate to actual compliance. In fact, **the only legal provision in state laws that correlated to better open government compliance was mandatory attorney fee-shifting**, where the losing party (government) in a public records lawsuit must pay the attorney’s fees of the prevailing party (plaintiff).

Another important finding was that the strength of penalties for open government violations did not correlate with better compliance. Cuillier speculated that a possible explanation for the lack of correlation was that government officials are

rarely punished when the open government law is violated. After all, if penalties for noncompliance are rarely administered, it doesn't matter how harsh the penalties are to the government agency or official who may be unlawfully withholding records.

One caveat to this analysis is that requests that were lawfully denied were included in the counted tally of noncompliant responses to the records law, and the tally also counted requests partially fulfilled as noncompliant with the records law. Despite the noise introduced by these and other factors, like a broad variety of record types and requester types, the compliance rating still gives a sense of how likely a state will be to respond to a public records request in a full and satisfactory way.

After excessive delays, lack of enforcement of the existing laws was cited as the second most significant problem facing the administration of open government in a [2017 survey report](#) commissioned by the John S. and James L. Knight Foundation. The survey report attempted to canvas the landscape of freedom of information (FOI) around the U.S. The report interviewed and polled 336 transparency experts, including journalists, advocates, record custodians, technology companies and scholars. Of the 185 experts asked the particular question, lack of enforcement of the state's public records laws was identified as either very problematic or extremely problematic by 61 percent of respondents. Only 18 percent of respondents said a lack of enforcement was not at all problematic.

Meanwhile, examples of requesters who have had state government agencies and public officials ignore or illegally deny their requests abound.

In Birmingham, Ala., news station [WBRC recently attempted to find out](#) how much the City of Birmingham spends on gunshot detection systems, how much Jefferson County Sheriff's Office on its public relations agency, and how much the University of Alabama at Birmingham spends on bus system maintenance — these are among the countless requests for vital public information that WBRC files in its journalistic, investigative capacity. But those WBRC requests have gone mostly unanswered, despite the wording of [the public records law in Alabama](#) found in Ala. Code § 36-12-40, which states: "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." But the letter of the law is rarely the same as the law in practice.

In another case in 2019, when seeking municipal court records for a news story, WBRC was ultimately forced to speak through its attorney and send a letter to the agency to obtain records. A look at Alabama's history of transparency and accountability studies reveals why this is unsurprising. A 2007 study conducted by

the [Better Government Association](#) and the [National Freedom of Information Coalition](#) gave Alabama 0 of 100 possible points, a grade of “F,” and 49th out of 50 ranking. A 2008 study conducted by the Better Government Association, the [BGA - Alper Integrity Index](#), ranked Alabama 48th nationally, noting it was only about 40 percent transparent. By the time the BGA - Alper Integrity Index was updated in 2013, Alabama had fallen to last place: 50th. Seven years later, little has changed. The 2019 MuckRock compliance study found Alabama to be the least compliant of all states, giving it just a 10 percent compliance rating.

In New Mexico, a recent decision handed down by the New Mexico Court of Appeals in September 2019 illustrates how public records are often illegally kept from the public and how much of a struggle it can be to obtain the records. The Albuquerque Journal and The Santa Fe New Mexican were investigating settlement agreements between New Mexico prisoners and Corizon Healthcare, a contractor that provided healthcare in New Mexico prisons, after the company was sued by various inmates over allegations of malpractice and sexual abuse by a physician. The newspapers’ original request for records was denied. The news publications sought help from the New Mexico Foundation for Open Government, a state coalition member of the National Freedom of Information Coalition (NFOIC), which stepped in to assist. The district court ruled that the request for records was illegally denied, stating the settlement agreements were public records and ordering Corizon to pay the publications’ attorney’s fees, [according to a press release](#). Corizon appealed the decision, but the appeals court again sided with the news publications.

Enforcement mechanisms: Criminal, Civil and Fee Shifting

Every state has its own way of dealing with adjudicating disputes over an alleged violation of the state open government law by its agencies and officials. While some states simply rely on private individuals to bring their disputes to court — to sue the state agency to assert their right to the records or enforce a penalty under the law — there may be other stops along the way before a courtroom depending on the state. Varying methods of bringing a dispute have a profound impact on whether civil or criminal penalties are enforced as the requester may have a better chance of getting the records — rendering any further pursuit of fines, fees, or criminal penalties unnecessary.

But despite these [alternative dispute resolution models](#), state laws also differ widely in what penalties they map out for those who break the law. Penalties for violating the law fall into one of two broad categories: Civil or criminal. Attorney fee-shifting, a third form of “penalty,” is a kind of sanction also awarded in civil litigation.

Criminal Penalties

Criminal penalties are those that are enforced through imposition of fines or jail time, exclusively by the government — meaning only state prosecutors and attorneys general can pursue a criminal prosecution. For violations of public records laws:

- 17 states have criminal penalties with fines.
- 14 states have criminal penalties with jail time.
- Georgia, Maryland, New Hampshire and New Mexico are the only states with criminal fines but no jail time.
- Alabama is the only state with jail time but no criminal fines.

Georgia has a particularly strong criminal penalty for violating its open records law, which states that any person “knowingly and willfully violating the provisions of this article by failing or refusing to provide access to records not subject from exemption, ... [or] records within the time limits set forth ..., [or by intentionally] frustrating ... the access to records shall be guilty of a misdemeanor and upon conviction be punished by a fine not to exceed \$1,000,” pursuant to [Ga. Code § 50-18-74](#).

Since [Georgia law](#) uses a tiered, escalating punishment scale, the severity of the punishment increases to \$2,500 per violation for each additional violation within 12 months. To “alter” or “avoid” any public record is a felony and punishable by at least two years and up to 10 years imprisonment. Georgia law does not otherwise provide jail time for violators.

On February 11, 2019, the Atlanta Journal Constitution (AJC) reported the first criminal complaint was filed in the state of Georgia under the state’s open records law, the amended enforcement provisions of which first appear in the 2013 version of [Georgia code](#). Jenna Garland, press secretary for former Atlanta Mayor Kasim Reed, had earlier been the subject of an investigation by the Georgia Bureau of Investigation after reporting revealed that the City of Atlanta communications and law departments hindered the production of public records, [according to The Atlanta Journal Constitution](#). The public records requests were directed at Atlanta’s Department of Watershed Management (DWM), and sought the water billing records of the mayor and his brother, Tracy Reed. The records eventually revealed a disconnect notice at a property owned by Reed and a \$9,000 unpaid bill at a property owned by Tracy Reed, in addition to a history of outstanding balances owed by Keisha Lance Bottoms, a city councilwoman. In other words, the records revealed major discrepancies in the water bill payments of the mayor and his brother, with the troubling conflict of interest being the mayor’s influence and control of city utilities. The story broke, but obtaining the records took months. The

initial request was made by Channel 2 Action News in February 2017, and the station was eventually forced to hire an attorney to threaten legal action, at which point DWM fulfilled the request and delivered the records in mid-April of that year, according to the AJC.

Text messages later obtained by public records request showed Garland had instructed the communications director of the watershed to provide the records in the most confusing format possible, and to delay the request for as long as possible. Two criminal citations were filed in Fulton County State court after an investigation was started. Because she faces more than one charge and the second violation occurred within one year of the first, Garland could be criminally liable for up to \$3,500. In July, she rejected a plea deal from prosecutors, instead pleading not guilty, according to the AJC. The trial began on Dec. 16, 2019. After two days of testimony, the jury came back with a guilty verdict in the first trial involving violations of Georgia's Open Records Act. The ruling has been appealed and as of January 2020, Garland is seeking a new trial.

"It should put the fear of God into the public official that tries to dodge states' open records laws."

-Richard Griffiths, past president of the Georgia First Amendment Foundation, about the criminal complaints against Garland.

This incident being the first criminal prosecution under Georgia's public records law hints at the general reluctance of prosecutors to pursue criminal charges for transparency violations. Prosecutors in Florida, for example, hesitate to make examples out of public officials because of the large number of violations and their seemingly clerical insignificance, according to reporting by the Palm Beach Post, which detailed the rare prosecution of two officials for violating Florida's public records law.

"It's like trying to put someone in jail for driving over 55 mph on the highway," said Frank LoMonte, professor and director of the Brechner Center for Freedom of Information at the University of Florida. "The law is so widely winked at, prosecutors hesitate to single someone out and make an example of them."

Florida's open records law violations are punishable criminally. 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. An unintentional violation is a second degree misdemeanor with up to \$500 in fines and six months in prison.

Florida has rarely prosecuted an official for violating the open government law. For example, two Martin County Commissioners, Ed Fielding and Anne Scott, were charged with having illegally withheld consequential emails during a public records dispute in 2017 where the county was fined \$371,800 in attorney's fees.

The presiding judge ordered a new trial in a related lawsuit after it was discovered the commissioners buried relevant public business emails sent from private email accounts. Fielding, a graduate of Massachusetts Institute of Technology (MIT), claimed as an excuse that he "was not entirely proficient in computer usage," in order to delay producing the emails. Another commissioner, Sarah Heard, who was found by the arbitrator during the proceedings to have "scrubbed information and altered public records" still sits on the Martin County Board of Commissioners. In August 2019, charges against both Fielding and Scott were dropped after prosecutors gauged that they would not be able to prove their cases to a jury beyond a reasonable doubt, according to West Palm Beach NBC affiliate WPTV.

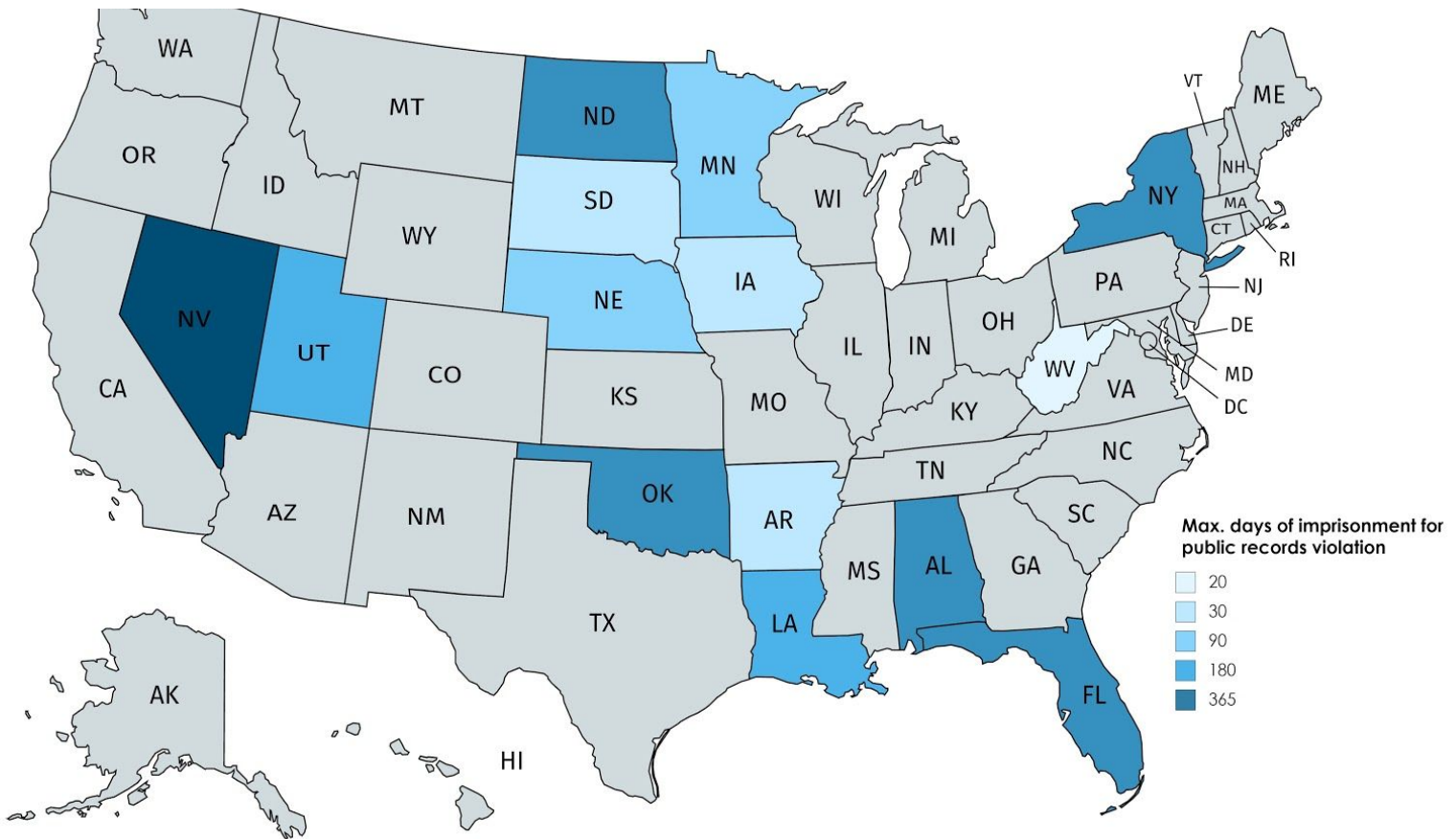
"Only two people have gone to jail in Florida history for intentional violations of open government laws," said Barbara Petersen, former executive director of the Florida First Amendment Foundation. "Many times a state attorney will allow offenders to admit culpability and pay a fine. It's rare (that) criminal cases go to court."

Prosecutors such as district attorneys and attorneys general are also put at an unfortunate crossroads given that they generally have broad discretion to charge or not to charge individuals with a crime, and prosecuting public records law violations means the criminal defendants are likely to be public officials or servants with whom the prosecutors know personally, according to a 2010 journal article in Communication Law and Policy, which evaluated the "teeth" of state FOI laws. Similarly, when prosecuting open government access disputes, there is potential for prosecutors to enforce the law against political rivals, as well as potential failure to prosecute against political allies, according to a 1996 journal article in The Urban Lawyer, which proposed reform in state sunshine law enforcement provisions.

Another potential barrier to criminal prosecutions stems from it being the prosecutor's responsibility to enforce criminal penalties. In some cases, the prosecutor's office, the attorney general or the district attorneys may not have the capacity to follow up with open records violations when other "more pressing" issues are at stake.

“One of the barriers to effective enforcement is lack of resources,” said Melanie Majors, Executive Director of the New Mexico Foundation for Open Government. “In New Mexico, the Attorney General and District Attorneys may bring an action for non-compliance with IPRA (the Inspection of Public Records Act), but they have limited budgets determined each year by a legislative appropriation. There never seems to be enough money to expand efforts to enforce IPRA.”

Despite how difficult criminal penalties might be to enforce, they still may not be the best deterrent to noncompliance. According to the earlier-referenced evaluation of state FOI law “teeth,” criminal penalties are seen as ineffective solutions for both individuals and society because they are complex and difficult to enforce.



(Figure 1) Criminal penalty landscape: A state-by-state analysis showing criminal penalty jail time provisions across the U.S. Only 14 states carry criminal penalties that involve jail time. Some records law provisions, like in Georgia, provide for additional criminal penalties for egregious crimes such as falsifying or destroying public records, codified under separate laws for conduct of public officials. Only jail time provided explicitly in the open records law itself were included so as to better approximate the FOI landscape where the common violations are those of knowing or purposeful withholding or avoidance of a record.

Civil Penalties

In some cases, transparency violators can face civil penalties — a non-criminal infraction involves the agency or public official merely paying a fee. Twenty-five states implement civil penalties for open records violations, ranging from \$100 in Mississippi, to \$5,000 in Illinois and Missouri.

Some jurisdictions allow the requester to file a lawsuit against the officer or public body, rather than a civil fine. In Arizona, “any damages resulting from the denial” can be assessed, pushing the limit of the recoverable amount to whatever harm was caused to the requester. But the statute fails to provide categorical sum which is payable to the person who was unlawfully denied records under Arizona law. In other words, if the requester cannot show specific harm, they cannot recover statutory damages.

A number of states also use penalties that accrue by day or month beginning with the date the requester was unlawfully denied records. Colorado, Kentucky, Louisiana, Massachusetts, Ohio and Washington use this time-based civil fee structure. This structure would seem to provide a strong incentive to the public agency that unlawfully denies records to provide them as timely as possible to avoid a large penalty. These time-based penalties range from \$20 per month (\$0.67 per day) in Massachusetts to up to \$100 per day in Washington and Louisiana. Some states provide a cap on the possible recovery from this time delay, such as Ohio, where the most in statutory damages that a requester can recover for the public agency’s delay is \$1,000, though the fee is \$100 per day of unlawful withholding.

An action for civil penalties is usually brought by the requester who was unlawfully denied records. But in Florida, state attorneys can bring an action for civil penalties against the violating agency, pursuant to a 1991 Attorney General Advisory Opinion.

In Massachusetts, a recent amendment to the public records statute provides for up to \$5,000 in civil punitive damages against a public agency to be directed not to the requester, but instead to a Public Records Assistance Fund, according to a 2017 legal advisory published by Mass. FOI attorneys. The fund can be expended by the chief information officer “to provide grants to municipalities to support the information technology capabilities of municipalities to foster best practices for increasing access to public records and facilitating compliance.”

But just like criminal penalties, there are serious enforcement issues with civil penalties. In Massachusetts, frustration from journalists stems from the failure of the Attorney General and the Secretary of the Commonwealth to coordinate on enforcement.

“In Massachusetts, the records law is routinely ignored because it is completely unenforced — so there’s zero penalty for agencies that either actively choose not to comply or simply don’t care enough to respond to requests,” wrote one journalist in 2018 of the “ongoing collapse of public records access in Massachusetts.”

Laws that open the records custodian to civil liability tend to put pressure on the point of violation — since the person who wrongfully denies access can no longer hide behind the shield and legal expense checkbook of the public agency, there is greater incentive for them to provide the public record. In Mississippi, “any person who shall deny to any person access to any public record which is not exempt ... **may be civilly liable in his personal capacity** in a sum not to exceed one hundred dollars per violation, plus all reasonable expenses incurred by such person bringing the proceeding.” Since monetary settlements for public records disputes are ultimately made from public funds when the violating state agency pays, public officials feel no sting when the public records law is violated.

Though public records custodians or officers can be liable in their personal capacity in Florida, there are still instances of taxpayers making up for FOI blunders. In one high profile case from 2015, former Florida Gov. Rick Scott agreed to pay \$700,000 in public funds to end a public records dispute.

“Too frequently there are violations of law and its us taxpayers who foot the bill,” said Barbara Petersen, formerly of the Florida First Amendment Foundation. Petersen cited the earlier instance, and another in which Scott settled a lawsuit alleging violations of Florida’s sunshine law (an open meetings law).

“Scott settled both cases for a total of \$1.3 million,” Petersen said. “Who paid? The taxpayers.”

Asked if harsher penalties might alleviate the noncompliance issue, Petersen said they would be useful only if the offender has to pay the fine and their attorney fees.

Civil penalty provisions in the public records law are not self-enforcing, of course, and still require the requester to sue the public agency or official.

The earlier-referenced BGA/NFOIC 2007 survey of the strength of state FOI laws gives insight on the strength of civil penalty provisions at the time. The survey lumped together all sanctions — criminal and civil — into one category. With the potential to earn four points total in the sanctions category, one point was awarded for the presence of criminal penalties, one for civil penalties, one for escalating penalties based on repeat offenses, and one for the potential of dismissal from position in the agency for the violation.

Only four states earned full points for sanctions: Nebraska, Utah, Iowa and Minnesota. Nebraska earned an “B” rating and tied for the most number of FOI strength points of any state. Utah earned a “C” and tied for the second-most number of points. Iowa and Minnesota both earned “F” ratings. In light of the four states earning perfect scores as to the strength of their sanctions yet receiving dramatically different FOI grades, the 2007 survey methodology tells us that sanctions are just one part of the bigger picture. In comparison, the relative strength of attorney fee shifting provisions was weighted at five points. The 2019 Muckrock FOI compliance report, by contrast, showed movement in those rankings: It ranked Nebraska fourth among the states at 59 percent compliant, Iowa fifth at 54 percent compliant, Minnesota 30th at 39 percent compliant and Utah 36th at 36 percent compliant.

According to the 2007 survey, the presence of civil penalties added to FOI strength was “without the possibility that individuals will be held accountable for undermining the statute, a public records statute means very little.” Statutory language which increased punishment for repeated violations earned another point as “these states recognize the problems with continued non-compliance.”

Two notable states exhibit escalating civil fines for repeated violations. New Jersey orders a \$1,000 penalty for a first offense, and raises the penalty to \$2,500 and then \$5,000 for second and third violations within 10 years. Virginia orders a penalty between \$500 and \$2,000 for a first offense, and raises the penalty to between \$2,000 and \$5,000 for any second or subsequent violation.

Attorney Fee-Shifting

Certainly, it is preferable that the governing body, whether state or local, offers some type of formal appeals process when a public record request is denied. Unfortunately this is not the case in all states. Only 28 states, and the District of Columbia, have a formal appeals process. In the other 22 states, a denied requester must go directly to court to defend their request.

Lawyers can be expensive. Hiring one to help enforce a public records dispute can be tough to accomplish since not all requesters can afford to advance the high out-of-pocket costs for an attorney. This includes individuals and news organizations. At the 2018 National FOI Summit, keynote speaker Tom Curley, Associate General Counsel at the Gannett Company, estimated their costs from filing an appeal until it is adjudicated to be \$42,000.

Without a way to pay, the citizen or news outlet is left to weigh the relative value of the requested records against the cost of litigation. Attorney fee-shifting attempts to solve the issue of costly attorney's fees so that requesters are not financially barred from seeking justice through the court system to enforce open government laws.

Attorney fee-shifting is a procedural feature of civil courts that allows, in certain cases, the party who wins in a court action to be reimbursed their fees and costs from the losing party — including the hourly or flat cost of the attorney who helped litigate the open government dispute. According to a 2010 examination of state transparency laws, the vast majority of state jurisdictions explicitly either allow for or mandate attorney fee shifting in open government dispute cases because these disputes confer a societal good, not just personal benefit.

The reasoning behind attorney fee-shifting provisions in state public records statutes is best summed up as working “to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to even the fight when citizens challenge a public entity,” as stated in a 2005 New Jersey court decision, *New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections*.

Statutory attorney fee-shifting generally takes one of two forms: 1) Mandatory fee-shifting, where fee-shifting is automatic or presumed for the winning party; or 2) Discretionary fee-shifting, where the decision to award fees is in control of the presiding court and judge based on a number of factors such as whether the denial of records occurred in good faith, with exceptions provided for when records are withheld on reliance of an attorney general or other commission.

Whether a requester “prevails” (wins on all points of the lawsuit) or “substantially prevails” (wins on most, or the most important points of the lawsuit) can be a factor in a court’s determination to award attorney’s fees and varies by state jurisdiction. A few notable states in which a requester need only substantially prevail to recover attorney’s fees and costs are New Jersey, Texas and North Carolina. The benchmark of “substantial” prevailing is friendlier to requesters because it triggers fee-shifting even when the requester does not prevail on all document requests.

New Jersey law provides for a public records counselor, but still provides for attorney fee shifting. The test that the court uses to determine whether a New Jersey requester has “substantially prevailed” is one in which the requester must show they received the records as a direct or indirect result of having filed the lawsuit, and the agency was under a legal obligation to have turned over the records.

In Texas, attorney fee shifting is the only penalty available for requesters who seek private civil enforcement — Texas does not provide for other civil penalties. Texas attorney fee shifting requires that a plaintiff only substantially prevail in order to be entitled to reimbursement of attorney's fees. The award of attorney's fees is contingent on the Court's determination of whether the defense of the action was "groundless in fact or law" and whether the governmental body's defense had a "reasonable basis" in law and whether the litigation was brought "in good faith," pursuant to Texas law and the 2000 decision of City of Garland v. Dallas Morning News.

But Texas' interpretation of the substantial prevailing test orders that when a Texas defendant turns over the documents and makes the litigation moot (legally unnecessary to decide under the circumstances), the Plaintiff does not substantially prevail because the legal relationship between the parties was not "substantially altered" by "relief on the merits," according to Elliot Engstrom, a legal method and communication fellow at Elon University School of Law, writing to contextualize the North Carolina Public Records Act within the national framework.

NCPRA is an example of how state courts might interpret attorney fee-shifting based on a Plaintiff's substantial prevailing. Where states lack guidance from appellate rulings in their own states, they look to federal rulings for guidance. This is also true of North Carolina courts, according to Engstrom. Federal rulings on the meaning of "substantially prevailing" understand it to mean that the responding agency made a "voluntary or unilateral change in position" under the 2015 case United States ex rel. Long v. GSDMIdea City, L.L.C. This is called the "catalyst theory" of fee-shifting, where the Plaintiff must show that their lawsuit was a catalyst of getting what was sought in order to recover attorney's fees.

Attorney fee-shifting is integral to the enforcement of open government laws in states that rely on private enforcement (a lawsuit) in some form, whether to appeal any agency denial or to enforce the decision of an ombudsman, attorney general, or freedom of information commission. In New Mexico, where no specialized governmental body handles open government disputes, attorney fee-shifting is a fundamental pillar of upholding the law.

"A system of private enforcement without a penalty fee would be meaningless," said Melanie Majors, executive director of the New Mexico Foundation for Open Government. "We have been and are seeing the court's granting of attorney's fees as a very real enticement for the state's legal community — and a deterrent against non-compliance."

The Connecticut Compromise

Connecticut provides a notable counterexample to the centrality of attorney fee-shifting to enforcement of open government laws. Connecticut state law does not provide for fee-shifting. In other words, in any civil litigation for public records, each party will have to bear its own fees and costs whether they win or lose. Connecticut also boasts an FOI Commission (FOIC) — an administrative body that handles public records dispute appeals.

The Connecticut FOIC issues opinions that carry the force of law. It is the body that hears appeals from requesters who have been denied records by a local or state agency. Once the FOIC issues a decision, however, it does not leave it to the requester to fight subsequent appeals.

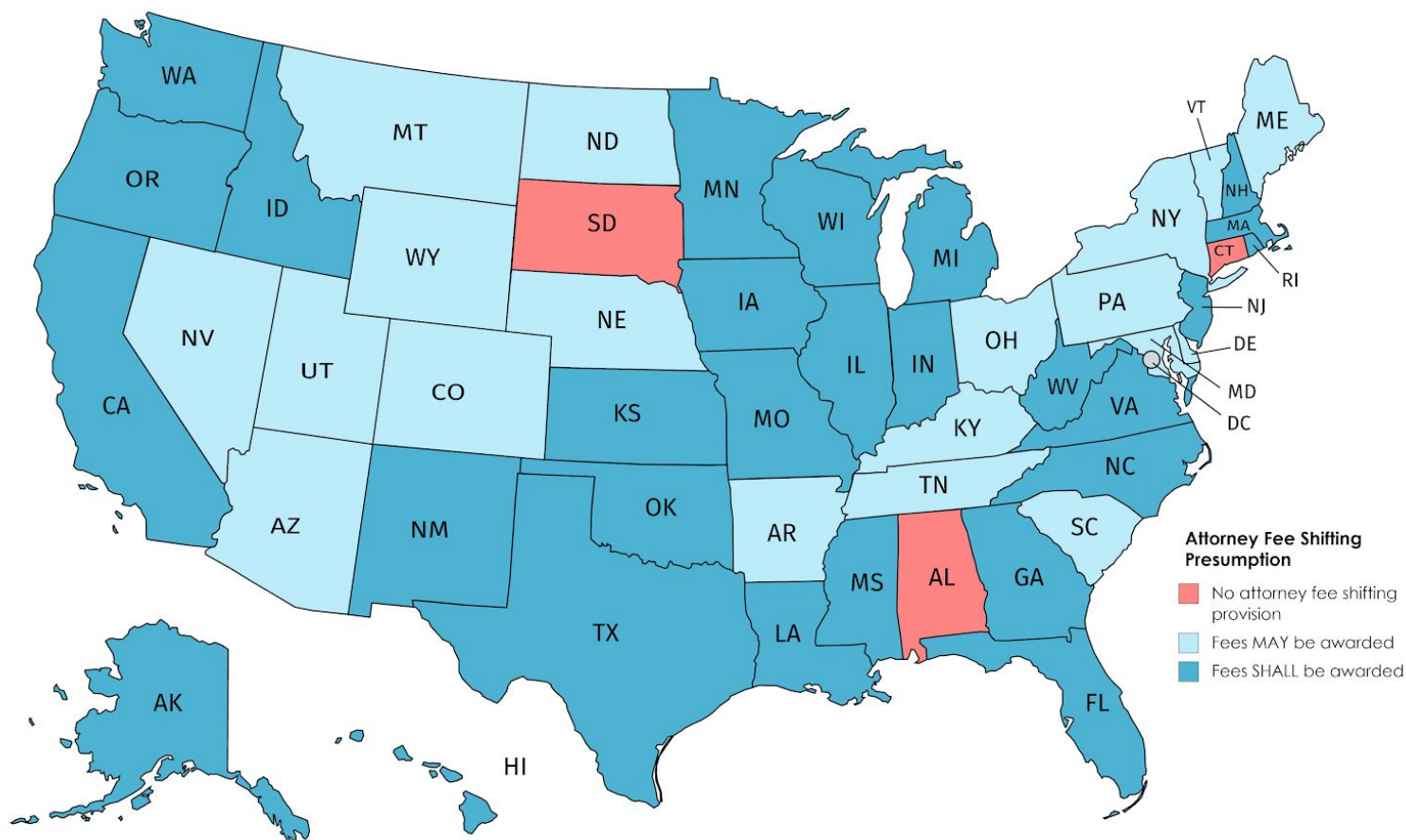
“After (the FOIC) decide(s) a case, if the loser appeals, (the FOIC) will defend their decision in the court system. So the winner, while they have the ability and the right to participate in the court process, can also ride the coattails of the FOIC, whose legal staff will defend their opinion,” said William S. Fish, Jr., a Connecticut public records attorney and author of the Reporter’s Committee for Freedom of the Press guide to the state’s records law.

According to Fish, less than half of the FOIC decisions are appealed. The lack of attorney fee-shifting in Connecticut is made up for by a dedicated staff of more than six lawyers that litigate on behalf of requesters when the FOIC initially rules in their favor.

Without the FOIC, requesters would face thousands of dollars in legal fees to have a chance at a favorable court outcome. This is especially true for high profile cases, which are litigated more intensely because of their importance to the agency. In short, the agency will more likely appeal that particular adverse decision.

“A cynic might say that the agency is taking advantage of the court system to delay the disclosure,” Fish said.

But when asked if attorney fee-shifting should be an explicit provision in state public records law, Fish said that many times agencies have legitimate arguments on legally complex exemptions, and that mandating attorney’s fees for a good faith denial would discourage state agencies from making such legitimate arguments.



(Figure 5) Attorney fee-shifting landscape: A state-by-state analysis showing attorney fee-shifting provisions across the 50 states. Two states — Indiana and Minnesota — mandate fee-shifting only when a requester seeks enforcement after a state agency fails to release records in violation of an administrative advisory opinion, like that from a public access counselor. Seven other states — Kansas, Maine, Mississippi, Missouri, New Hampshire and Rhode Island — allow or mandate fee-shifting only when the violating agency has withheld the records knowingly, willingly, or otherwise in bad faith.

Case Study: Kansas Open Government Enforcement

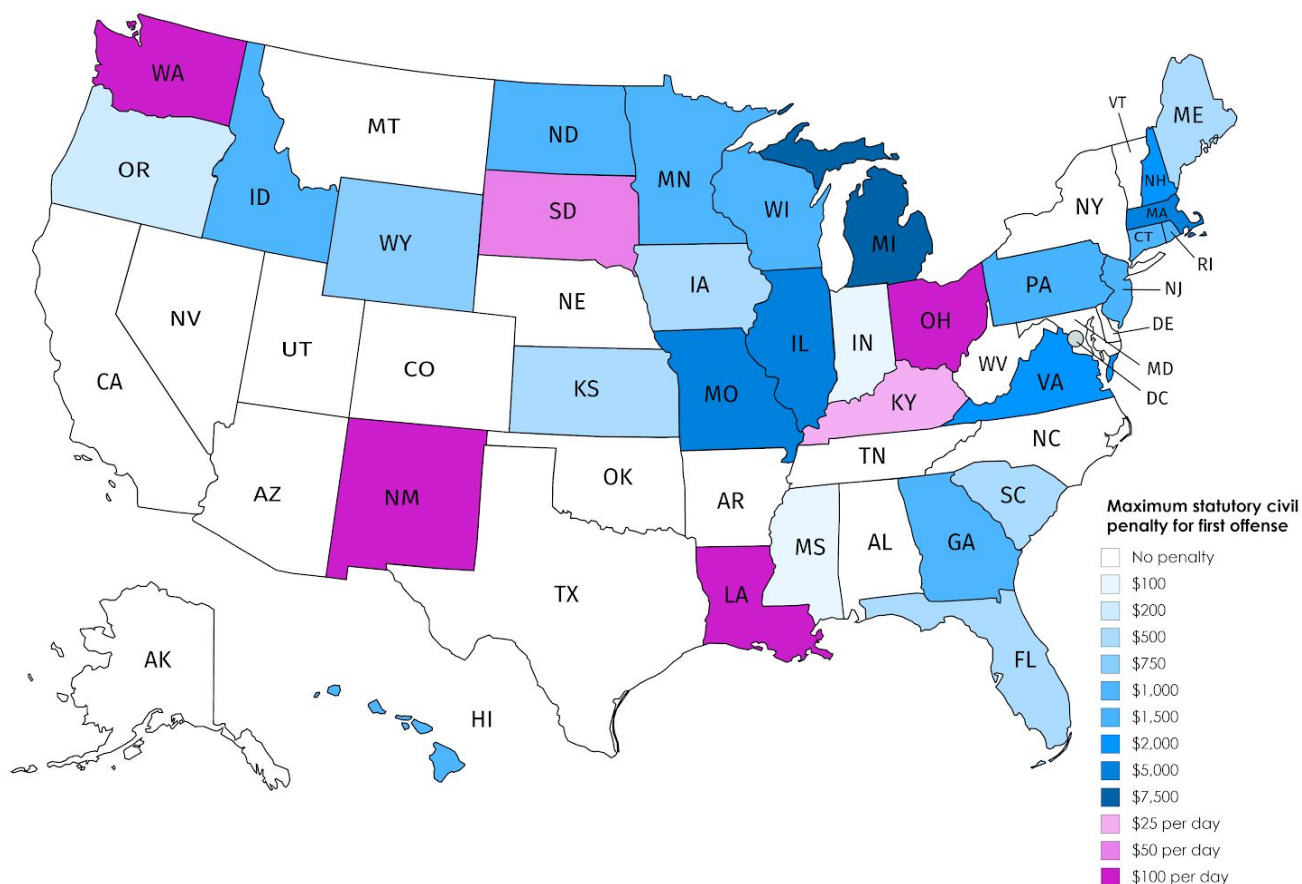
When a record request is denied by a public agency, many states have an administrative body of first resort to hear a public request appeal, like a state attorney general or ombudsperson. If that agency or person has a history of aversion to strong enforcement of the open government laws, such as Attorneys General who handle public records disputes risk politicizing the process because of the high-profile nature of the dispute, the necessity of attorney fee-shifting provisions is heightened.

One recent Kansas case provides a reason to be wary of the efficacy of public records adjudicating bodies when seeking enforcement of civil fines. In 2013, The Wichita Eagle sought records related to financial difficulties and layoffs at Hunter Health Clinic, a local clinic that uses a sliding fee-scale based on annual income and household size for uninsured and underinsured patients, according to reporting by the paper. The Eagle made a request for emails from clinic board members — who also worked at Wichita State University (WSU) — for emails stored on the WSU email servers. The emails, when later released and reported on by The Eagle, revealed the former CEO had concealed \$1 million in debt from the clinic's board of directors and endangered the clinic's contract with the Indian Health Service. To prevent the disclosure of the emails, WSU and Hunter Health Clinic (as a third party) then sued the Wichita Eagle under the Kansas Open Records Act (KORA). Though Hunter Health Clinic eventually lost the lawsuit on appeal, the Attorney General's role in the lawsuit was notable to judges as it aimed to prevent the disclosure of the records.

After losing at the district court level, the Wichita Eagle appealed, arguing that Hunter Health and Wichita State University did not have standing to sue under KORA because KORA was designed to provide records to citizens who requested them, not prevent the disclosure of records. The Court noted that because the only relief available under KORA was the disclosure of records, only a party seeking the disclosure of records has standing to sue as a Plaintiff under KORA, according to the 2015 appeals court decision, *Hunter Health Clinic v. Wichita State University and Wichita Eagle and Beacon Publishing Company, Inc.*

On appeal, WSU was not represented by its general counsel, but by the Attorney General's office. WSU had "changed its position, which it took before the district court and, for the first time on appeal, support(ed) Hunter's legal contentions," wrote Judge Michael B. Buser in the opinion. This change in position and representation was especially notable because of the egregious nature of what was eventually revealed in the emails and the effort by the Attorney General to prevent their disclosure.

State jurisdictions and civil penalties for public records law violations, 2019



(Figure 2) Civil penalty landscape: A map of civil penalties state-by-state showing the maximum civil fine for a first offense of the state's open records law. Only provisions which penalized under-disclosure (not providing requested records) were counted; provisions which penalized over-disclosure (e.g., disclosing confidential records), were not tabulated. Where a state prescribes increased penalties according to mental state, or scienter (defined by Black's Law Dictionary as "a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission") the punishment relating to the least restrictive mental state requirement was selected.

Under the Kansas Open Records Act, the Attorney General is also tasked with hearing the first appeal after a public records request is denied. In essence, it is tasked with acting as an impartial body to resolve disputes arising under KORA. By law, the attorney general is also mandated to publish findings of violation of both the records act and the meetings act and maintain them as public records.

From March 2016 to present date of publication, just over three years, the Kansas Attorney General has published 10 enforcement actions in total. Of the 10, only two concern violations of the Open Records Act. Both KORA violators were mandated one hour of mandatory open government training, and both violating agencies were assessed a fine, as civil penalties in Kansas are assessed against the agency, not the individual. Of the remaining eight Kansas Open Meetings Act (KOMA) violations, seven were mandated to open government training and seven were assessed a fine. The maximum fine received was \$250.

Case Study: Kentucky's Open Government Enforcement

An NFOIC review of decisions by the Kentucky Attorney General for two years (2016 and 2017) reveals a high prevalence of noncompliance by state government: 49 percent of 2016 open records decisions exhibited a violation of the records act, while 48 percent of 2017 open records decisions did.

Amye Bensenhaver, co-founder of the Kentucky Coalition for Open Government, and former assistant attorney general of Kentucky for 25 years, specializing in open records disputes, predicted that the rate of noncompliance would rise in the coming years.

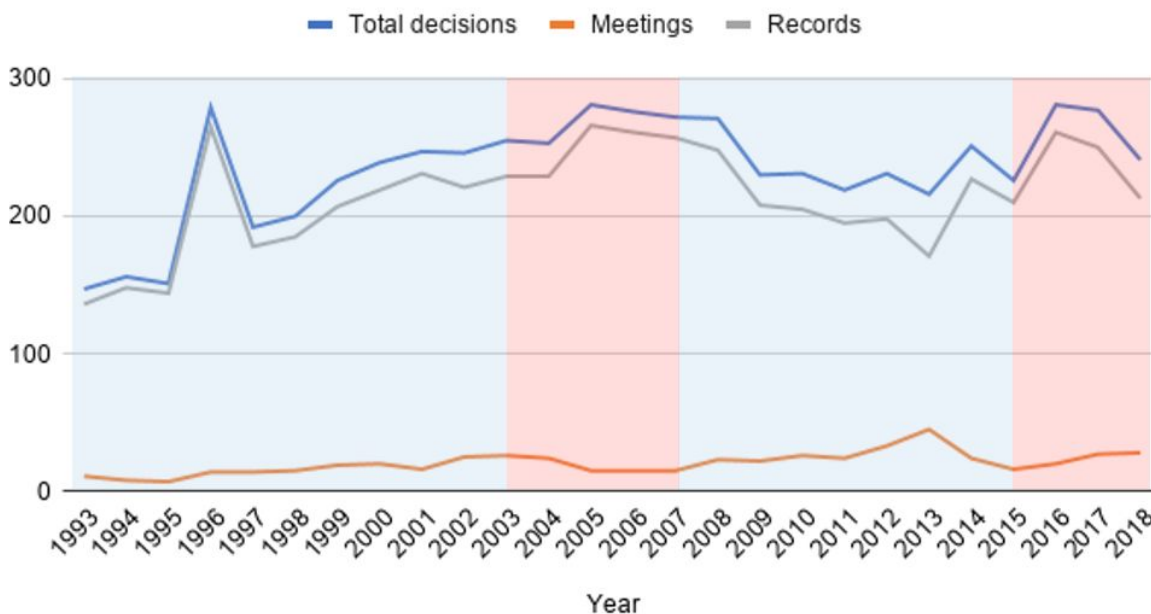
Sixty of the 511 records decisions (about 12 percent) included a violation for improperly stating an exemption. Jon Fleischaker, a Kentucky attorney who penned Kentucky's original open records law, stated the problem is public agencies often cite improper exemptions and ignore settled law in the process.

"You have public officials that are reaching," Fleischaker said. "And if they have a lawyer and they go to the books they'll figure out that there are a lot of cases that say 'No, they can't do that. This has already been decided.'"

Seventy-four of 511 (about 17 percent) of the records decisions exhibited an agency improperly withholding records.

"There are (officials) who misinterpret, people who don't understand... what their obligations are. I don't think (withholding records) rises, 90 percent of the time, to anything that's a knowing effort to avoid it," Fleischaker said.

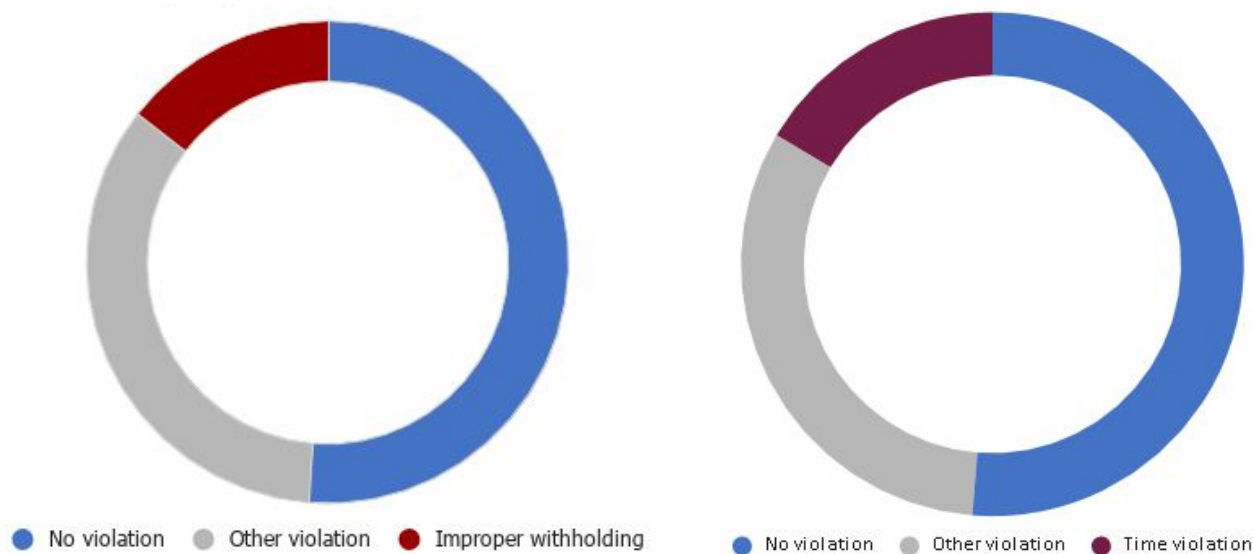
Kentucky Attorney General Open Government Decisions



(Figure 3) History of open government decisions : Kentucky Attorney General Open Government decision counts since 1993. The party of the governor at the time is shown either in red (Republican) or blue (Democrat). There was a decline in the overall number of decisions during the administration of Gov. Steve Beshear (D) from 2007 to 2015, and an increase in disputes under just defeated Gov. Matt Bevin (R), in 2015, which has since fallen.

Among the most common types of violations are those based on time, like failing to respond in a timely manner to a request or allow for the inspection of records. Eighty-four of the 511 records decisions (about 16 percent) exhibited a form of time-based violation. These violations are treated as procedural as opposed to substantive violations.

“I don’t consider, and I know Fleischaker doesn’t consider, a procedural violation a petty violation. It’s still a violation,” Bensenhaver said.



(Figure 4) Common violation types compared: These two charts illustrate the relative frequency with which improper withholding and time violations are found compared to decisions finding other types of violations and those in which no violation was found, reflecting combined yearly totals for 2016 and 2017.

Playing with public money

One other structural component of noncompliance in Kentucky is that civil penalties fall on the agency, not the individual. Because Kentucky will ultimately pay the bill, the agency has the resources — in the form of state attorneys — to devote toward litigation and the appellate process, allowing the state to appeal as many times as allowable to avoid disclosing the record. Unlike requesters, however, the public agency usually does not incur hourly attorneys fees.

“They’re using their time (on the public records dispute) instead of someplace else ... but it’s easy to hide that expense,” Fleischaker said. “It goes toward a different line item: Personnel. And nobody goes back to look at that stuff.”

Jason Riley, a Kentucky journalist, stated that some state agencies feel they are exempt from the law since penalties aren’t rigorously enforced against them.

“Some agencies know how to work the system in their favor so as to not have to provide records they don’t want to provide unless a citizen or media outlet is willing to pay a lot of money and wait,” Riley said.

According to Bensenhaver, no other state agency is as notorious for violating the state's open records act than Kentucky State Police (KSP). For all decisions where KSP was a party between 2016 and 2017, the Attorney General found them in violation of the Kentucky Open Records Act on 19 occasions, or 59 percent of the time.

Riley and WDRB, a Kentucky-based news service, found KSP was the most frequent violator of the Kentucky Open Records Act compared to any other state agency over the last five years after conducting a review of Attorney General decisions. According to Bensenhaver, Riley, and Fleischaker, the Kentucky State Police also frequently appeal those decisions where the Attorney General finds a violation, which simultaneously lengthens litigation and makes proceedings more expensive.

"We won about \$11,000 in fines and attorney fees earlier this year from Kentucky State Police," Riley said. "But they have appealed that ruling."

One obstacle for Kentucky requesters is retaining an attorney to enforce the Attorney General's decision — though enforcing the decision is simple in legal terms, according to Fleischaker: Members of the public who choose to represent themselves might struggle to get enforcement because of their lack of familiarity with legal procedures. More importantly, in order to appeal the decision of the Attorney General under state law, the agency is procedurally required to sue the requester to prevent the record from being released.

"This requires the citizen or news media to pay for an attorney, file motions, go to hearings and wait for a judicial ruling," Riley said.

"Many people give up, and those that don't may wait years to see the records."

Looking Ahead

This paper identifies both general and specific challenges in state and local public institutions when it comes to public access and accountability.

As addressed in the Introduction, there is a legitimate and legal right for open and transparent government at all levels within a state. Yet it is only ensured by the ability to enforce the open government laws and hold violators accountable. Structural, political, educational and legal difficulties attribute to causes surrounding violations. These same difficulties also account for the lack of enforcement of open government and the lack of punishment when they are violated.

Improving existing open government laws by strengthening penalties can be one solution to encourage agencies and officials to abide by them. However, if agencies and officials are not being charged when laws are violated, even extreme punishment measures will not improve compliance.

Clearly defined laws must be written and enforced. Charges must be filed when they are violated. Penalties for violations must be punitive to discourage compliance, and punishments must be leveled and carried out when violations occur.

The courts can help ensure compliance of the laws by enforcing penalties to the fullest extent. In each branch of government, better and ongoing training and education can take place around the state open government laws and policies for compliance. Agency policy reforms can be adopted that will ensure the public — not the institution — remains the authority and ensures the government be responsive and responsible stewards of their information and proceedings.

NFOIC has identified several areas of reforms around FOI enforcement that warrant further discussion and input from others in the FOI community:

- **Strengthening fee-shifting provisions** are paramount to ensuring compliance by allowing for any Plaintiff that substantially prevails to recover attorney's fees, and by making the award of fees mandatory.
- **Enforcing civil penalties that accrue from the date of unlawful withholding** and by enacting provisions that will make the responding public official or agency head personally liable for civil fines and escalating penalties for repeated violations can also encourage compliance.
- **Increase accountability** and powers among enforcement officials and agencies tasked with these roles, like attorneys general and ombudspersons, while considering new roles for inspectors general, public information officers and citizen oversight boards.
- **Initiate robust primary (alternative) dispute resolution solutions** that provide requesters the ability to appeal the decision without the need to hire a lawyer and remove this obstacle from being used to discourage appeals from members of the public and journalists.
- **Advocate for imposition of other sanctions**, like mandatory open government training, to prevent repeat violations, as well as institute mandatory open government law training for all public record stewards,

public employees and officials, to prevent violations from occurring in the first place.

Want to share this piece or cite it in your own research?

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ABOUT NFOIC

The National Freedom of Information Coalition protects your right to open government. Our mission is to make sure state and local governments and public institutions have laws, policies and procedures to facilitate the public's access to their records and proceedings.

We are a national nonprofit, nonpartisan organization of state and regional affiliates representing 35 states and the District of Columbia. Through our programs, services and national member network, NFOIC promotes press freedom, legislative and administrative reforms, dispute resolution, and litigation (when needed) to ensure open, transparent and accessible state and local governments and public institutions.

NFOIC is located at the University of Florida College of Journalism and Communications and works closely with its neighbor, the Brechner Center for Freedom of Information.