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## A Tiger with No Teeth: The Case for Fee Shifting in State Public Records Law

Heath Hooper\* and Charles N. Davis\*\*

### I. INTRODUCTION

A federal lawsuit filed against the city of Columbia, Missouri, alleging police brutality seemed destined for headlines in 2010.<sup>1</sup> At its core was an incident in which a routine traffic stop for a broken taillight erupted into a “fracas” in which police allegedly both tased and beat a man and threw a woman to the ground.<sup>2</sup> A *Columbia Daily Tribune* reporter following the case filed a public records request for any documents concerning the incident.<sup>3</sup> A police spokesperson contacted him days later to let him know the records were ready for pickup.<sup>4</sup>

But when the reporter came for the records, he was in for quite a surprise: The Columbia Police Officers Association, aware of the public records request, had filed a temporary restraining order preventing the release of the records.<sup>5</sup>

At first glance, the law on the matter seemed fairly clear, but, as the paper would soon find out, appearances can be deceiving. Though the applicable law was easily identified – the city had adopted an open record ordinance a few months earlier – the language in the ordinance and a 2001 Missouri Supreme Court decision made the law’s application to these particular circumstances uncertain.<sup>6</sup> The applicable ordinance, Ordinance Section 21-54, provides that “all records pertaining to complaints filed against police officers alleging misconduct of the police officer shall be open records,” with excep-

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1. See T.J. Greaney, *CPD Incident Results in Court Complaint*, COLUM. DAILY TRIB. (Jan. 28, 2010), [http://www.columbiatribune.com/opinion/columnists/cpd-incident-results-in-court-complaint/article\\_0fcd65f7-1b0a-55ba-9adc-2ac69a2f20d0.html](http://www.columbiatribune.com/opinion/columnists/cpd-incident-results-in-court-complaint/article_0fcd65f7-1b0a-55ba-9adc-2ac69a2f20d0.html).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. T.J. Greaney, *Police Group Says Records Law Is Unfair*, COLUM. DAILY TRIB. (Jan. 28, 2010), [http://www.columbiatribune.com/news/local/police-group-says-records-law-is-unfair/article\\_f33c94de-e0f3-5f22-8784-b9f920b5d9de.html](http://www.columbiatribune.com/news/local/police-group-says-records-law-is-unfair/article_f33c94de-e0f3-5f22-8784-b9f920b5d9de.html).

tions for those closed by federal or state law and those that disclose the identity of an undercover officer.<sup>7</sup>

A similar issue was before the Supreme Court of Missouri in 2001. In *Guyer v. City of Kirkwood*, the court held that reports concerning an internal investigation into a complaint alleging criminal misconduct by a police officer are investigative reports, and therefore are public records that cannot be closed on the grounds that they are personnel records.<sup>8</sup> Columbia Ordinance Section 21-54 differs from the Supreme Court of Missouri's precedent in that it does not use the word "criminal."<sup>9</sup> Ultimately, there appeared to be an argument for keeping the documents secret, at least according to the Columbia Police Officers Association.<sup>10</sup>

The *Daily Tribune*, along with its counsel, Missouri Press Association ("MPA") attorney Jean Maneke, had limited options available to them. They could head in as an intermediary. Or, they could let the city and police officers decide just how the ordinance applied to state Freedom of Information ("FOI") law.

Although the *Daily Tribune*, like other papers across the nation, was managing its way through tough economic times, it didn't relish the prospect of a lengthy – and costly – trip through the courts in pursuit of the files. As *Tribune* Managing Editor Jim Robertson explained: "Unfortunately, we always have to weigh the potential cost in dollars against principal and the potential harm an adverse ruling could create on a larger scale. These days, we have to choose our battles very carefully."<sup>11</sup>

So the *Daily Tribune* turned to the National Freedom of Information Coalition ("NFOIC") and its Knight FOI Fund, which provided a grant to cover the upfront costs of the FOI litigation.<sup>12</sup> That the NFOIC's Litigation Committee could pay up to \$10,000 for legal fees soothed some fears as the paper made the decision to pursue the records.<sup>13</sup> The grant also encouraged the participation of the MPA, which took the case pro bono.<sup>14</sup>

It took about forty-five minutes for a Boone County judge to determine that the law mandated that the documents be released.<sup>15</sup> T.J. Greaney, the *Daily Tribune* reporter, now had access to the requested documents and videos, which told the story of the "fracas" through the statements of dozens of witnesses.<sup>16</sup>

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7. *Id.*

8. *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414-15 (Mo. 2001) (en banc).

9. Greaney, *supra* note 6.

10. Charles N. Davis, *A New Weapon in Sunshine Battles: The Knight FOI Fund*, NFOIC (Mar. 15, 2010), <http://www.nfoic.org/special-sunshine-week-2010>.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See id.*

15. *Id.*

16. *Id.*

The cost? More than \$12,000 – quite a chunk of change for a local daily.<sup>17</sup> Fortunately, the paper had the NFOIC’s support. The paper only had to pay out a far more affordable \$2,065.61.<sup>18</sup> But for the outside promise of fee payment, a vitally important case culminating in public access to the press may have never seen the light of day, simply due to a lack of funds to initiate litigation.

The Columbia case underscores one of the systemic weaknesses of state FOI laws: most provide little or no incentive for plaintiffs to seek legal redress for even the most blatant violations of the law. This Article seeks to examine the current state of the public records ecosystem and suggests a potential path through fee shifting to balance out the problematic incentives inherent in many state laws. Part II examines the development of fee-shifting laws in the United States, while Parts III and IV examine the rise, fall, and rise again of a particularly interesting form of fee shifting. Part V looks at the current state of those like Greaney and his compatriots, who man the front lines of the open records battlefield. Finally, the authors suggest a potential path, one already taken by federal lawmakers and some state lawmakers, that could benefit all involved in the open records field.

## II. FEE SHIFTING IN THE UNITED STATES

Civil rights enforcement in the United States has long depended on fee-shifting legislation.<sup>19</sup> This kind of legislation statutorily allows plaintiffs to collect attorney’s fees when they prevail in a court case, fostering greater use of the statutes to guarantee the rights enshrined in the law.<sup>20</sup> Such an arrangement is not the norm in the United States: under the “American Rule” each party pays for its respective attorneys’ fees regardless of who wins.<sup>21</sup> The problem with this arrangement is that if someone does not have the money to pay for an attorney, that person is less likely to engage in litigation to protect constitutional or statutory rights, even when those rights are plainly violated. The resultant lack of citizen-driven litigation in state public records and open meetings laws remains a noteworthy weakness in laws that are designed to protect citizen access to governmental proceedings and records.

Not all countries follow the American Rule.<sup>22</sup> Across the pond in England, for instance, courts have discretion to award such fees, and often do so.<sup>23</sup> Only one U.S. state, Alaska,<sup>24</sup> has retained the British notion of two-

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17. *See id.*

18. *Id.*

19. Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 695 (2008).

20. *Id.*

21. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 245 (1975).

22. *Id.* at 247.

23. *Id.* (“[F]or centuries in England there has been statutory authorization to award costs, including attorneys’ fees. Although the matter is in the discretion of the court, counsel fees are regularly allowed to the prevailing party.”).

way, “loser pays” fee shifting.<sup>25</sup> Most states and the federal government follow the so-called “private attorney general exception,” which only sometimes allows for one-way fee shifting.<sup>26</sup> The term “private attorney general” first made its appearance on the legal scene in *Associated Industries of New York v. Ickes*.<sup>27</sup> The exception, which was based on the notion that private lawyers should help enforce public laws, did not originate in that decision, however.<sup>28</sup> Long before *Associated Industries*, Congress passed legislation that allowed federal courts to award attorney’s fees, but that practice had by and large ended by the beginning of the nineteenth century.<sup>29</sup>

Six rationales have been put forward to justify the continued need for fee shifting:

- (1) that the losing litigant should pay the winner’s costs in the interest of fairness;
- (2) that the litigant should be made financially whole for the legal wrong suffered;
- (3) that fee-shifting may have deterrent and punitive value;
- (4) that suits by private attorneys general should be encouraged because of their public usefulness;
- (5) that the relative strengths of the parties should be equalized; and
- (6) that a fee-shifting scheme may have desired incentive effects.<sup>30</sup>

While the United States has not completely given up on the concept as part of the common law,<sup>31</sup> the U.S. Supreme Court has decided that, at least

24. The idea is certainly not without controversy even in that state, *see, e.g.*, Alaska S.B. No. 181, 28th Leg. (Alaska 2013), but the notion nonetheless remained popular among attorneys in a recent sample. Nancy Meade, *Attorney’s Fee Shifting: Perceptions on its Impact in Alaska*, NAT’L CTR. FOR STATE CT. 27 (May 2012), <http://www.ncsc.org/~media/files/pdf/education%20and%20careers/cedp%20papers/2012/attorneys%20fee%20shifting.ashx>. According to the study, two-way fee shifting does not seem to be a terribly strong deterrent for weak lawsuits, but might serve to encourage settlements. *Id.* at 41.

25. *See id.* at 2. This two-way fee shifting, which was a popular notion in the 1990s and remains viable today, has come up mostly in the context of tort reform. *See id.* at 15-16.

26. William B. Rubenstein, *On What a “Private Attorney General” Is – And Why It Matters*, 57 VAND. L. REV. 2129, 2147-48 (2004).

27. *Id.* at 2130 & n.2, 2131 (citing *Assoc. Indus. of N.Y. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943)).

28. *Id.* at 2134.

29. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247-49 (1975).

30. *Alabama v. Pope*, No. 08-345, 2008 WL 4678665, at \*19 (U.S. Oct. 17, 2008) (citing Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L. J. 651, 653 (1982)).

31. *See infra* Part III.

for federal courts, any decisions about such awards belong to the legislative branch.<sup>32</sup>

Modern fee-shifting statutes were initially intended to promote the private enforcement of federal civil rights statutes.<sup>33</sup> Generally speaking, such statutory exceptions still seek to “encourage actions that benefit public policy – either private enforcement actions, as in the area of civil rights litigation and environmental legislation, or social policies such as consumer protection and equal access to justice.”<sup>34</sup> Fee-shifting statutes are generally implemented “to encourage, typically, public interest cases that a plaintiff would not otherwise file unless he knew his attorney’s fees would be paid when he won.”<sup>35</sup> Of course, such provisions can also be punitive in nature.<sup>36</sup>

Fee-shifting legislation effectively empowers private plaintiffs to enforce their rights in court without having to concern themselves with litigation expenses because attorneys, seeing an opportunity for payment via the fee-shifting statutes, are much more likely to take on legitimate cases in expectation of winning.<sup>37</sup> Many states allow fee shifting in public records cases.<sup>38</sup> Not all public records laws, however, offer the same protections.<sup>39</sup> Legally, dubious deniers of public records under state law are often allowed to simply hand over the documents after a lawsuit is filed, suffering little to no penalty unless a judicial decision goes against them.<sup>40</sup> Nonetheless, the challenging party still has to pay the start-up costs for the lawsuit, and such costs can be prohibitive.

Perversely, such a situation disincentives challenging open record request denials while at the same time incentivizing officials to issue denials. There is hope, however. In regimes that recognize the so-called “catalyst theory,” a challenger can often recoup the costs of litigation so long as the denier changes her position due to the lawsuit, regardless of whether there has been some kind of judicial declaration.<sup>41</sup> Although such legislation exists on a federal level, state coverage is not as secure.<sup>42</sup> Yet, as shall be seen, such

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32. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 262 (“[T]he circumstances under which attorneys’ fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.”).

33. See Ian K. Peterson, *When “May” Means “Shall”: The Case for Mandatory Liquidated Damages Under the Federal Wiretap Act*, 35 STETSON L. REV. 1051, 1082 (2006).

34. Meade, *supra* note 24, at 12-13.

35. *Id.* at 12.

36. *Id.* at 13.

37. See *id.* at 116.

38. Katrina G. Hull, *Disappearing Fee Awards and Civil Enforcement of Public Records Laws*, 52 U. KAN. L. REV. 721, 727 (2004).

39. See *id.* at 728.

40. See *id.* at 732.

41. *Id.* at 734.

42. As of 2010, the highest courts in Alaska, California, Hawaii, New Jersey, and Pennsylvania, and appellate courts in Arizona, Kentucky, and Washington have

guarantees are sorely needed in an age of ever-shrinking budgets. Citizens seeking redress for legally dubious denials of access to public records would likely find it much easier to initiate litigation, especially in clear-cut cases, if costs were eliminated as a factor. Such a development would surely be a great boon to our current system of open government law.

### III. *BUCKHANNON* AND THE PREVAILING PARTY

As noted above, U.S. legislators in the last half-century have started to realize the value of fee shifting in limited circumstances.<sup>43</sup> The modern movement to enact fee-shifting litigation began with the Civil Rights Act of 1964<sup>44</sup> and picked up significant steam with the Civil Rights Attorney's Fees Act of 1976.<sup>45</sup> These acts introduced the notion of a private attorney general who steps in to defend citizens' civil rights, a notion that has been crucial to the enforcement of civil rights statutes.<sup>46</sup>

Congress saw fit to award such fees to the "prevailing party" in several different pieces of public interest legislation, including in the civil rights provisions mentioned above and in legislation such as the Voting Rights Act Amendments of 1975,<sup>47</sup> the Fair Housing Act,<sup>48</sup> and the Americans with Disability Act.<sup>49</sup> Some states, like California and Illinois, have also employed such language in their public interest statutes.<sup>50</sup>

This "prevailing party" language was once a great boon for plaintiffs. Under the so-called "catalyst theory" of fee shifting, a plaintiff could "obtain prevailing party status and therefore trigger statutory fee shifting if the suit is the 'catalyst' for action by the defendant that moots the suit."<sup>51</sup> So as long as a defendant changed its position because of the plaintiff's suit, attorney's fees

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continued to apply the catalyst doctrine to state law fee-shifting statutes. Bruce D. Ginsburg, *"Catalyst Doctrine" Applied to Statute That Awards Damages*, N.J. APP. L. (Dec. 31, 2010), <http://appellatelaw-nj.com/%E2%80%9Ccatalyst-doctrine%E2%80%9D-applied-to-statute-that-awards-damages/>.

43. See Meade, *supra* note 24, at 14.

44. See 42 U.S.C. § 2000e-5(k) (2012).

45. Roederer, *supra* note 19, at 695; see also 42 U.S.C. § 1988 (2012).

46. See Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L. J. 1057, 1074 (1997).

47. 52 U.S.C. § 10310(e) (2012) (formerly 42 U.S.C. § 19731).

48. 42 U.S.C. § 3613(b)(2) (2012).

49. 42 U.S.C. § 12205 (2012).

50. See, e.g., CAL. GOV. CODE § 6259(d) (West 2014) ("The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section."); 775 ILL. COMP. STAT. ANN. 35/20 (West 2014) ("A party who prevails in an action to enforce this Act against a government is entitled to recover attorney's fees and costs incurred in maintaining the claim or defense.")

51. WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 14:4 (4th ed. 2002).

could be awarded. Such action disincentivized stalling on the part of the defendant, and encouraged reticent plaintiffs who might have a good case but lacked the funds to pay for it.<sup>52</sup>

Some commentators have cited the 1970 Eighth Circuit case *Parham v. Southwestern Bell Telephone Company*<sup>53</sup> as the origin of the catalyst theory.<sup>54</sup> In that case, the court addressed “whether the plaintiff should be awarded attorney fees where there was no finding that he personally had been the victim of discrimination and a finding that the defendant had voluntarily undertaken policies and practices that would remedy the past discrimination against others.”<sup>55</sup> Because the “progress” – meaning the voluntary change in defendant’s conduct – in that case came after Parham filed the complaint, the court determined the litigation was the “catalyst” that caused the defendant’s change of heart, and thus, “Parham performed a valuable public service in bringing this action.”<sup>56</sup>

As scholar Lucia A. Silecchia points out in a history of the theory, this “catalyst” rationale soon became widespread, taken up by all federal courts of appeal aside from the Fourth Circuit.<sup>57</sup> The U.S. Supreme Court initially signaled potential acceptance of the catalyst theory as a legitimate rationale.<sup>58</sup> However, the Court, in *Ruckelshaus v. Sierra Club*, which interpreted authorization of fee awards “whenever . . . appropriate,”<sup>59</sup> held that the fee-shifting provision “requires the conclusion that some success on the merits be obtained before a party becomes eligible for a fee award.”<sup>60</sup> The Court in *Ruckelshaus* determined that “requiring a defendant, completely successful on all issues, to pay the unsuccessful plaintiff’s legal fees would be a radical departure from long-standing fee-shifting principles adhered to in a wide range of contexts.”<sup>61</sup> Commentators have noted that subsequent cases, such as *Farrar v. Hobby*,<sup>62</sup> demonstrated “the Court’s continuing ambivalence toward the recovery of attorney fees when the nature of the victory does not

52. See Meade, *supra* note 24, at 3.

53. 433 F.2d 421 (8th Cir. 1970).

54. Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 14 (2004) (citing Joel H. Trotter, Note, *The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 VA. L. REV. 1429, 1433-37 (1994)).

55. *Id.* at 15.

56. *Parham*, 433 F.2d at 429-30.

57. Silecchia, *supra* note 54, at 15.

58. See *id.* at 17-18.

59. 463 U.S. 680, 680 (1983).

60. *Id.* at 682. Silecchia notes that there is a difference of interpretation regarding the “whenever . . . appropriate” standard verses the “prevailing party” standard. As she notes, “[p]ost-Buckhannon litigation – particularly environmental litigation – interpreting [the “whenever . . . appropriate” standard] has allowed the continued use of the catalyst theory.” Silecchia, *supra* note 54, at 52-53.

61. *Ruckelshaus*, 463 U.S. at 683.

62. 506 U.S. 103 (1992).



fall squarely within the bounds of a clear and substantial judicial victory.”<sup>63</sup> Silecchia notes that *Farrar* contained dicta explaining that in order to be a “prevailing party,” a “plaintiff must obtain an enforceable judgment[,] . . . a consent decree[,] or a settlement.”<sup>64</sup> Silecchia further notes that the Court did “not clearly define these terms or articulate whether its list is illustrative or exhaustive.”<sup>65</sup>

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,<sup>66</sup> the U.S. Supreme Court put the final nail into the catalyst theory as a federal judicial rationale.<sup>67</sup> The Court in *Buckhannon* explicitly rejected the catalyst theory for federal courts interpreting “prevailing party” language.<sup>68</sup> Granting awards under such a theory, according to the Court, “allows an award where there is no judicially sanctioned change in the legal relationship of the parties,” which ran counter to prior Court precedent.<sup>69</sup> Instead, the Court held that a party must prevail judicially “on the merits of at least some of his claims,” to trigger most federal fee shifting statutes.<sup>70</sup>

Ultimately, as the decision has been interpreted, *Buckhannon* gave rise to the idea that the plaintiff who “prevails” only “because the lawsuit brought about a voluntary change in the defendant’s conduct – is not a permissible basis for the award of attorney’s fees. . . . Only a plaintiff who secures a judgment on the merits or a court-ordered consent decree is a prevailing party.”<sup>71</sup> As commentators like Silecchia have pointed out, the Court’s holding in *Buckhannon* was significant because it “changed the status quo everywhere except in the Fourth Circuit.”<sup>72</sup> *Buckhannon*, which concerned violations of the Fair Housing Amendments Act and Americans with Disabilities Act, determined “that a ‘prevailing party’ is one who has been awarded some relief by the court.”<sup>73</sup> The two categories that qualified for such relief included “enforceable judgments on the merits” and “settlement agreements enforced through a consent decree,” situations that involved a “court-ordered ‘chang[e] [in] the legal relationship between [the plaintiff] and the defendant.’”<sup>74</sup> Ulti-

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63. Silecchia, *supra* note 54, at 30.

64. *Id.* at 30 (quoting *Farrar*, 506 U.S. at 111) (internal quotation marks omitted).

65. *Id.*

66. 532 U.S. 598 (2001).

67. Silecchia, *supra* note 54, at 2.

68. *Buckhannon*, 532 U.S. at 605, 610.

69. *Id.* at 605 (“Our precedents thus counsel against holding that the term ‘prevailing party’ authorizes an award of attorney’s fees *without* a corresponding alteration in the legal relationship of the parties.” (emphasis in original)).

70. *Id.* at 603.

71. RUBENSTEIN ET AL., *supra* note 51.

72. Silecchia, *supra* note 54, at 35.

73. *Buckhannon*, 532 U.S. at 603.

74. *Id.* at 604 (alterations in original) (quoting *Tex. Teachers Ass’n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

mately, the relief must be of a kind “that changed the formal legal relationship between plaintiff and defendant.”<sup>75</sup>

Not included, as Silecchia points out, were “(1) cases in which ‘the plaintiff has secured the reversal of a directed verdict;’ (2) cases in which the plaintiff has ‘acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by judicial relief;’ and (3) cases in which there was a ‘nonjudicial alteration of actual circumstances.’”<sup>76</sup>

Silecchia further notes that the *Buckhannon* majority:

Dismissed as “speculative” and “unsupported by any empirical evidence” arguments that the catalyst theory would be necessary “to prevent defendants from unilaterally mooting an action before judgment in order to avoid an award of attorney’s fees” or to avoid “deter[ring] plaintiffs with meritorious but expensive cases from bringing suit.” The Court did not claim that rejecting the catalyst theory would never affect litigation behavior in either of these ways. However, it did not base its judgment on these predicted outcomes.<sup>77</sup>

Since *Buckhannon*, some lower courts have been creative in looking for ways to get around the ruling, often “search[ing] the facts of the individual cases diligently, looking for something that could be construed as a judicial imprimatur.”<sup>78</sup> So long as a court can find a judicial remedy of some sort, it can get around *Buckhannon* while still avoiding invoking the forbidden catalyst theory.<sup>79</sup>

Interestingly, after *Buckhannon*, Congress saw fit to explicitly include the ability to invoke the catalyst theory in federal Freedom of Information Act (“FOIA”) cases via the OPEN Government Act of 2007.<sup>80</sup> Congress, through OPEN, amended the substantially prevailing standard to “preclude[] the use of *Buckhannon* in determining whether a party is eligible for an award of attorney’s fees in a FOIA case and extinguish[] the need for a court to find a judicial *imprimatur* before awarding attorney’s fees when a defendant’s

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75. Silecchia, *supra* note 54, at 36-37.

76. *Id.* at 37 (citations omitted).

77. *Id.* at 37-38 (quoting *Buckhannon*, 532 U.S. at 608).

78. *Id.* at 50.

79. *Id.* at 48-50.

80. OPEN Gov. Act of 2007, Pub. L. No. 110-175, § 4, 121 Stat. 2524, 2525 (codified at 5 U.S.C. § 552(a)(4)(E)(ii)); S. REP. NO. 110-59, at 6 (2007); Justin B. Cox, *Maximizing Information’s Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387, 424 n.26 (2010) (quoting 153 CONG. REC. S15701-04 (daily ed. Dec. 14, 2007) (statement of Sen. Leahy)) (“[This section of the bill is intended] to clarify that a complainant has substantially prevailed in a FOIA lawsuit, and is eligible to recover attorney fees . . . if the pursuit of a claim was the catalyst for the voluntary or unilateral change in position by the opposing party.”).

conduct voluntarily changes.”<sup>81</sup> The amended standard allows relief when there is “a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.”<sup>82</sup> Courts have found the amendment:

essentially codifies the so-called “catalyst theory” for determining a fee request against the United States, under which a plaintiff is deemed to have “substantially prevailed” for purposes of § 552(a)(4)(E) if the “litigation substantially caused the requested records to be released.”<sup>83</sup>

Under the amended FOIA, a “plaintiff must first ‘prove that prosecution of the action could reasonably be regarded as necessary to obtain the information and that a causal nexus exists between that action and the agency’s surrender of that information.’”<sup>84</sup> That documents were released just because someone filed a complaint, however, would not be enough to justify fees.<sup>85</sup> Instead, “[c]ourts must look to a variety of factors, including the demands of the search, agency backlog of FOIA requests, and plaintiff’s attempts to resolve the issue out of court.”<sup>86</sup> Even after finding that the plaintiff qualifies for the fees, the court must then make another assessment to determine “whether a plaintiff is entitled to such fees, as the award of such fees is discretionary.”<sup>87</sup> Four factors go into this assessment – none of them singularly dispositive: “(1) the public benefit derived from the case; (2) the commercial benefit to the [plaintiff]; (3) the nature of the [plaintiff’s] interest in the records sought; and (4) whether the government’s withholding had a reasonable basis in law.”<sup>88</sup>

The *Buckhannon* ruling, which affected the FOIA fee-shifting provisions at the time, caused no little amount of concern. As one commentator put it:

[I]f *Buckhannon* were extended to FOIA fees, government defendants could moot virtually all FOIA claims on the eve of judgment and deny compensation to successful plaintiffs’ attorneys. Under such an ar-

81. JAMES T. O’REILLY, FEDERAL INFORMATION DISCLOSURE § 8:109 (West Group 2000).

82. *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, No. 08-2133, 2009 WL 1743757, at \*3 (D.D.C. June 15, 2009) (quoting 5 U.S.C. § 552(a)(4)(E)(ii) (2006)) (internal quotation marks omitted).

83. *Id.* (quoting *N.Y.C. Apparel F.Z.E. v. U.S. Customs & Border Prot. Bureau*, 563 F. Supp. 2d 217, 221 (D.D.C. 2008)) (internal quotation marks omitted).

84. *Id.* (quoting *Judicial Watch, Inc. v. Bureau of Land Mgmt.*, 562 F. Supp. 2d 159, 173 (D.D.C. 2008)).

85. *Id.*

86. *Id.* (quoting *Judicial Watch, Inc.*, 562 F. Supp. 2d at 173).

87. *Id.* (citing 5 U.S.C. § 552(a)(4)(E)).

88. *Id.* at \*3-4 (alterations in original) (internal citations omitted).

rangement, only parties capable of risking litigating without compensation would be able to enforce FOIA against intransigent government agencies. Furthermore, even in those cases, agencies would be able to prolong the litigation without fear of paying costs for their opponents. These bars to access, expediency, and enforceability directly contravene the purposes of amendments to FOIA and . . . would greatly diminish FOIA's value for public interest actions – the very claims that FOIA fees promote.<sup>89</sup>

Ultimately, it appears federal FOI laws escaped *Buckhannon*'s aftermath relatively unscathed. Fee-shifting legislation has long been crucial to the enforcement of First Amendment freedoms, and that remains the case. Indeed, Congress recently introduced legislation containing such fee-shifting language to ensure that First Amendment press and speech rights remain safe from international “libel tourism” practices following the advent of the Internet Age.<sup>90</sup>

State legislatures and courts, however, have not necessarily followed suit.<sup>91</sup> As discussed in the following section, much work remains to be done to ensure that the pursuit of access remains viable for all citizens, regardless of their means.

#### IV. FEE SHIFTING AND OPEN RECORDS LAWS AT THE STATE LEVEL

States have long used the idea of fee shifting to ensure press and speech freedoms to varying degrees.<sup>92</sup> Shortly after the *Buckhannon* ruling came down, six states had no explicit fee-shifting provisions for public records inquiries,<sup>93</sup> sixteen states and the District of Columbia allowed for discretionary awards,<sup>94</sup> and ten states allowed “semi-discretionary” awards, which are “automatically triggered by certain discretionary conditions, such as if the information was withheld without a reasonable basis in the law.”<sup>95</sup> Such awards often allow for “good faith” exceptions to the fee-shifting rule, ren-

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89. David J. Arkush, Note, *Preserving “Catalyst” Attorney’s Fees Under the Freedom of Information Act in the Wake of Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 37 HARV. C.R.-C.L. L. REV. 131, 138 (2002).

90. See 28 U.S.C. § 4105 (2012); ALAN M. AHART, CALIFORNIA PRACTICE GUIDE: ENFORCING JUDGMENTS AND DEBTS, 6J-5 (Rutter Group 2014).

91. See, e.g., Hull, *supra* note 38, at 722-23.

92. See, e.g., *id.* at 746-47 (“All the statutes include either that a court ‘shall’ or ‘must’ award attorney fees, or that a plaintiff is ‘entitled to’ attorney fees, when the plaintiff prevails in a public records lawsuit.”).

93. Hull, *supra* note 38, at 727.

94. *Id.* at 737-38.

95. *Id.* at 743.

dering confidence in such awards less than absolute.<sup>96</sup> Mandatory fees for parties that successfully litigated access issues existed in sixteen states.<sup>97</sup>

Of course, states don't necessarily have to follow federal courts' rationales when interpreting their own statutes, and indeed, some states have chosen a different interpretation of the "catalyst theory." In California, for instance, the "law continues to recognize the catalyst theory and does not require 'a judicially recognized change in the legal relationship between the parties' as a prerequisite for obtaining attorney fees under [the civil fee-shifting statute]."<sup>98</sup> Instead,

to obtain attorney fees without such a judicially recognized change in the legal relationship between the parties, a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense . . . ; and, (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit.<sup>99</sup>

California courts also disallow fees when a lawsuit merely expedites the issuance of regulations.<sup>100</sup> They do so to avoid public entities delaying necessary regulations.<sup>101</sup> The fear is that the entities will hold off on new regulations so that they do not appear to have introduced the regulations because of the lawsuit in question.<sup>102</sup> So long as "the process of issuing those regulations or undertaking those measures was ongoing at the time the litigation was filed," government agencies retain discretion as to when to introduce the regulations in question.<sup>103</sup> If "a government agency is given discretion as to the timing of performing some action, the fact that a lawsuit may accelerate that performance does not by itself establish eligibility for attorney fees."<sup>104</sup>

Still, the path forward can be a rocky one. A pair of recent Illinois cases demonstrates the confusion litigants face when seeking redress for illegitimate public records denials. In *Rock River Times v. Rockford Public School District 205*, the Illinois Court of Appeals for the Second District denied a newspaper's request for attorney's fees under the state's "prevailing party" standard for FOI request fee shifting.<sup>105</sup> *Rock River Times* concerned a newspaper's request for a "rebuttal letter" from a former principal regarding the

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96. *Id.* at 743-44.

97. *Id.* at 746.

98. *Tipton-Whittingham v. City of L.A.*, 101 P.3d 174, 177 (Cal. 2004).

99. *Id.*

100. *Id.*

101. *See id.*

102. *See id.*

103. *Id.*

104. *Id.*

105. 977 N.E.2d 1216, 1227 (Ill. App. Ct. 2012).

reasons the principal left his job.<sup>106</sup> The school notified the reporter that it planned to deny the request based on two exemptions to the state FOI law.<sup>107</sup>

After more than a month of wrangling and exemption denials by the Public Access Counselor, who served as a check on the school's claims,<sup>108</sup> the school claimed a third exemption.<sup>109</sup> Rather than continue to wait, the newspaper filed suit.<sup>110</sup> Twenty-two days later, the school turned the letter over and successfully moved to have the newspaper's case dismissed as moot.<sup>111</sup> The newspaper then unsuccessfully requested that the court award it attorney's fees.

The lower court denied the request due to the legislature's removal of the word "substantially" from the state FOI statute. As the reviewing court wrote:

While past case law made clear that the phrase "substantially prevails" was broad enough to encompass a plaintiff who had succeeded without court involvement (*i.e.*, the catalyst theory), the legislature was presumably aware of these cases and intended the deletion of the word "substantially" to effect a change in the law. The court reasoned that, because the newspaper had not achieved "judicially sanctioned relief," it had not prevailed in the instant action and thus was not entitled to attorney fees.<sup>112</sup>

The state appellate court agreed, finding that the removal of "substantially" narrowed the conditions under which attorney's fees must be awarded.<sup>113</sup> The court found it significant that the state legislature chose not to track the 2007 Federal FOIA amendment, which used the "substantially prevail" language.<sup>114</sup> Ultimately:

By deleting the word "substantially," which modified the verb "prevail," the legislature evinced an intent to require nothing less than court-ordered relief in order for a party to be entitled to attorney fees under the FOIA. Because the school released the rebuttal letter before

106. *Id.* at 1219.

107. *Id.* at 1220.

108. The Public Access Counselor ("PAC") is "a permanent part of the Office of the Attorney General[,] [who works] under the direction and supervision of the Attorney General and with a team of attorneys and professional staff . . . to help people obtain public documents and access public meetings." *Ensuring Open and Honest Government*, ILL. ATT'Y GENERAL, <http://foia.ilattorneygeneral.net/> (last visited Nov. 28, 2014). Part of the PAC's duties include issuing "advisory opinions on FOIA and OMA [the Open Meetings Act] in response to requests by public bodies." *Id.*

109. *Rock River Times*, 977 N.E.2d at 1219-20.

110. *Id.* at 1220.

111. *Id.*

112. *Id.* at 1222.

113. *Id.* at 1226-27.

114. *Id.* at 1226.

the court ordered any relief in this case, the newspaper was not a “prevailing party” as contemplated by the FOIA.<sup>115</sup>

However, another Illinois appellate court disagreed with the Second District’s reasoning. *Uptown People’s Law Center v. Department of Corrections*, concerned a January 4, 2012, complaint against the Illinois Department of Corrections (“IDOC”) for the IDOC’s non-response to a request for records “relating to prison conditions, facility maintenance and sanitation reports.”<sup>116</sup> The requests for the reports ran back as far as 2011 and were not granted until a year later.<sup>117</sup> Uptown requested attorney’s fees, but IDOC, citing *Rock River Times*, “argued that Uptown had not prevailed because all requested documents were tendered before litigation concluded.”<sup>118</sup> The trial court denied the fees request “because the IDOC tendered the documents of its own accord without an order by the court.”<sup>119</sup>

The Fourth District starkly disagreed with the Second District decision, stating that:

While we agree with the Second District that “substantially prevails” was modified to “prevails” to deliberately effectuate a change, we find the modification was intended to ensure that successful plaintiffs could obtain attorney fees regardless of the extent to which they had prevailed, no matter how slight. Thus, if a plaintiff files a FOIA action with respect to five documents and is successful with respect to only one, the plaintiff is entitled to the attorney fees incurred with respect to that document, despite having failed with respect to the remaining four. We find the removal of the word “substantially” was intended to increase the instances in which a plaintiff obtains attorney fees after receiving a requested document, not to decrease those instances. In addition, having incorporated the broader term “prevail,” the Illinois legislature would have no reason to adopt the definition of the federal FOIA’s more narrow language, “substantially prevailed.”<sup>120</sup>

The decision left significant “uncertainty” for Illinois FOIA litigants, with local commentators noting the need for the state’s supreme court to weigh in on the issue.<sup>121</sup> Such clarity is sorely needed, in Illinois and else-

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115. *Id.* at 1227.

116. 7 N.E.3d 102, 103 (Ill. App. Ct. 2014).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 108.

121. Timothy J. Clifton, *Uncertainty Regarding Attorney’s Fees for FOIA Request Without a Court Order*, ZUKOWSKI, ROGERS, FLOOD & MCARDLE (Mar. 18, 2014), <http://www.zrfmlaw.com/uncertainty-regarding-attorneys-fees-for-foia-request-without-a-court-order/>.

where. As discussed in the next section, properly drafted fee-shifting legislation could greatly benefit a news industry in dire need of the help.

## V. THE ISSUES FACING NEWSPAPERS<sup>122</sup>

Recent surveys of newspaper editors have noted that open records requests were a fairly common practice and appear to be on the rise, despite the fact that resources for litigation are stagnant or falling for many news organizations. The question remains, however, as to how many of these initial requests are completed, and if not, how many are challenged legally.

In an open-ended question to a 2009 survey<sup>123</sup> by the authors, respondents who indicated a rise in record requests were asked to identify the factors they attributed to the shift. Many stated routine circumstances for increases, citing either a specific open-records heavy investigation that resulted in a number of requests or a new aggressive editorial hire. Others attributed increases to the enactment of liberal open records statutes.

Still, a few respondents cited increasing stonewalling on the part of officials, with responses ranging from “[d]ifficulty in getting routine information from city government” to a “[s]ecretive government.” One respondent was concerned about “[a] number of ‘closed-door’ deals,” and stated a belief that “there is more the government is doing – and trying to keep it out of the public’s view.” Others, however, disagreed, chalking up the increases to circumstance: “[T]here are more issues arising, but only by chance. I see no change in government responsiveness.”

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122. The majority of the information in this section comes from a survey conducted by the authors explained *infra*, at note 123, unless otherwise noted.

123. The survey instrument, available from the authors, was designed by the authors and fellow scholar Dr. Michael Martinez, in consultation with journalism educators, graduate students, and industry professionals. The instrument employed open-ended questions, specific questions, yes/no responses, and questions that required a response on a 5-, 6- or 7-point scale. The survey was administered during the second half of 2009 using the SurveyMonkey web-based survey tool, a link to which was sent out via an email burst using the email database of the American Society of Newspaper Editors. The database was chosen because it allowed researchers the broadest respondent reach possible. A cover letter explaining the survey and its purposes accompanied the link. One follow-up email in the months following the initial burst re-alerted non-respondents to the survey. There were 122 respondents to the survey, of whom 102 completed the survey. Of those who identified their position, respondents ranged from desk editors to publishers and general managers. The majority of respondents (61.3%) worked at papers that had a circulation of 35,000 or less. Just under 10% (9.4%) worked at papers with circulations from 35,001 to 50,000, while just over 11% (11.3%) worked at papers with circulations from 50,001 to 75,000. Over 7% (7.5%) worked at papers with circulations from 75,001 to 100,000, and about 10% (10.4%) worked at papers with a circulation larger than 100,000. Papers in thirty-three states sent responses. The survey can be viewed online at the following link: [https://www.surveymonkey.com/s.aspx?sm=dU1mgSblz6u\\_2bYJSR4WD9CA\\_3d\\_3d](https://www.surveymonkey.com/s.aspx?sm=dU1mgSblz6u_2bYJSR4WD9CA_3d_3d) (last visited Dec. 7, 2014).



At papers where open government requests declined, the reasoning wasn't necessarily favorable to government responsiveness. Unsurprisingly, budget tightening was cited as a reason for decline. "We have fewer reporters," said one respondent. "Less staff available to cover issues has led to less issues being covered," said another.

Respondents were also asked later in the survey for a specific circumstance from their newsrooms that illustrated how the open government landscape has changed in recent years. The responses ranged from hopefulness about new state laws and public education efforts to concerns about smaller newsroom staffs. As one respondent described his experience:

There are fewer reporters to hold public agencies accountable, and many of those agencies stall or inflate fees. I[t] took me personally 13 months to gather all the names, titles and salaries of 18,000 local government workers in our circulation area. I had to threaten to sue several times.

A pattern similar to that of submitted requests emerged when respondents were asked about the number of requests that had been turned down over the past two years. Only about five percent of respondents saw a decrease.<sup>124</sup> Likewise, the perceived number of open records violations rose over the past two years. Almost half of respondents stated that, in their opinion, violations had increased,<sup>125</sup> while about one-third felt violations had stayed about the same.<sup>126</sup> Less than five percent of respondents believed violations had decreased.<sup>127</sup>

Respondents were again asked to write about what factors they felt contributed to any shift. Some of the respondents attributed the increase in refusals to more aggressive reporting.<sup>128</sup> Several respondents cited simple ignorance or a lack of understanding of the law for increases in denials, while

124. This figure includes those respondents who reported a slight decrease (4.5%) and those who reported a substantial decrease (0.9%). Furthermore, 9% of respondents stated they either had no opinion on the subject (0.9%), or did not know if the number of turned-down requests had increased or decreased (8.1%).

125. A total of 49.5% of respondents perceived an increase in open records violations, with 11.2% reporting a substantial increase and 38.3% reporting a slight increase.

126. The number of respondents reporting no real change in open records violations was just above one-third at 37.4%.

127. A total of 4.7% reported that they perceived a decrease in open records violations over the past two years, with 2.8% reporting a slight decrease, and 1.9% reporting a substantial decrease.

128. "We are asking more often and public officials are testing the boundaries (not to mention our willingness to take them to court)," stated one.

others acknowledged there might be purposeful stonewalling.<sup>129</sup> One respondent said the economy was hurting those on both sides of the issue.<sup>130</sup>

Respondents were split on a question regarding government officials' understanding of and voluntary compliance with open records violations. About one-third stated understanding and compliance stayed about the same. Another one-third believed it increased,<sup>131</sup> while the final one-third believed it had decreased.<sup>132</sup>

A majority of respondents said legal resources available to reporters for open government purposes had not changed over the previous two years. Almost one-quarter of respondents stated available resources had decreased,<sup>133</sup> while fewer than ten percent of respondents said legal resources had increased over the past two years.<sup>134</sup> Litigation also remained unchanged for the majority of respondents, with sixty percent of respondents stating the number of times they had sued stayed the same. Roughly fourteen percent stated that litigation by their organization on open government requests rose,<sup>135</sup> while a similar number stated litigation decreased.<sup>136</sup>

The majority (61.3%) of respondents had no specific budget for open government litigation, while about twenty-two percent (21.7%) did budget for such litigation. For those with no budget, more than forty percent said their newspaper would definitely provide legal support for an open records request. For those less sure, almost half said funding for such litigation would be decided on a case-by-case basis. Only about three percent (3.1%) of respondents did not think their organization would provide legal services, while just over six percent did not know whether their paper would provide legal support.

Interestingly, the economy does not appear to be dissuading editors from pursuing their requests. More than half of the editors who responded said the cost of litigation has never factored into their decision to pursue open government litigation. If respondents indicated that concerns over the cost of

129. According to one respondent, "In some cases people simply don't understand the law. In others, there's a disregard for the law."

130. "Cutbacks in all levels of government means more difficulty in getting copies of documents, hiring inexperienced staff, staff doing jobs with which they are unfamiliar and unfamiliarity with inspection of public records laws."

131. A total of 29.5% believed it increased, with 25.7% noting a slight increase and 3.8% noting a substantial increase.

132. Just under one-third of respondents, 28.6%, believed that it had decreased, with 23.8% reporting a slight decrease and 4.8% reporting a substantial decrease.

133. A total of 24.3% reported a decrease in available resources, with 16.8% reporting a slight decrease, and 7.5% reporting a substantial decrease.

134. A total of 6.5% of survey respondents indicated a slight increase, while 2.8% indicated a substantial increase.

135. A total of 13.3% of survey respondents indicated a slight increase, while 1.0% indicated a substantial increase.

136. A total of 8.6% of survey respondents indicated a slight decrease, while 5.7% indicated a substantial decrease.

litigation had factored into a discussion to pursue an open government act, they were asked to describe the situation and its tipping point. Some were specific. For example, one respondent provided, “Brief was \$1500. Court appearances (by phone) took us to \$6500 and \$20,000 more for an appeal on a narrow ruling wasn’t worth losing a reporter position over!”

Some said they were now more likely to try non-legal methods before pursuing litigation, while others said they now took more factors into consideration. One respondent stated:

We are much more likely now to consider up front our chances of winning and the likelihood that we will end up in costly litigation than we were in the past. This does not always preclude going after records and violations, but it is more of a factor because of budget cuts and downsizing. There are many examples – this is a daily ongoing conversation. That said, we may try to be strategic, but we don’t shy from fighting.

Another respondent indicated that setting a bad precedent was a major factor in whether they would pursue litigation: “[The p]rimary issue is the likelihood that we would win – we would not want to establish ‘bad law’ with a loss.”

Respondents who felt there had been a significant change in the number of open government matters their paper had pursued over the prior two years were invited to state the factors they felt primarily attributed to the change. Aggressive reporting, new laws and governmental ignorance were again cited as large factors, but some said a lack of newsroom resources played a part in the shift. “Local government is reacting to the economic pressures facing newspapers by being less transparent,” wrote one respondent. “The single, largest factor is that we have fewer available reporters, because of layoffs,” wrote another.

A 2013 survey by the National Freedom of Information Coalition (“NFOIC”) and the Media Law Resource Center (“MLRC”) painted a similar picture.<sup>137</sup> That survey, “of leaders of NFOIC member organizations and members of MLRC’s Defense Counsel Section, suggest[ed] there is a greater inclination among government officials for gaming the system than complying with existing disclosure and accountability laws.”<sup>138</sup>

## VI. DISCUSSION

The economic problems facing the news industry have certainly affected news organizations, but they clearly have not stopped those organizations

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137. See Amaris Elliott-Engel, *2013 NFOIC/MLRC Open Government Survey Showed Troubling Trends for Transparency*, NAT’L FREEDOM INFO. COALITION (Dec. 12, 2013, 3:30 PM), <http://www.nfoic.org/2013-nfoic-mlrc-open-government-survey-showed-troubling-trends-transparency>.

138. *Id.*

from filing open records requests. However, while opposition to such requests appears to be on the rise, funds for such litigation are often less forthcoming.

Newspaper editors may say that their newsroom policy regarding open records litigation has not been affected by the economy, but factors far beyond individual newsroom budgets remain in play. Newspapers, once the bastions of truth-tellers charging out as stand-ins for the masses, have been handicapped to a large degree by a troubled industry and economic expectations that are simply no longer realistic.<sup>139</sup> Survey respondents clearly indicated that budget restrictions are a large part of the problem. Government budgets around the country have been slashed. Adding to the already difficult situation, some officials express outright hostility at the idea of openness.

Short of public funding for newsrooms, little can be done from the outside regarding internal budget problems. This does not mean, however, that nothing can be done about the financial factor. Despite the fact that the majority of editors say the cost of litigation is not a factor in pursuing open records requests, it seems reasonable to think that the pursuit of such litigation would increase if the cost calculus was changed in their favor.

While recently instituted programs like alternative dispute resolution options and Public Access Counselors help, it is clear that more is needed. Insuring that state governments enshrine catalyst theory protections for litigants in their FOI statutes could go a long way toward easing the financial burden many newsrooms face when considering FOI litigation. Although some states have certainly made efforts to do so, as demonstrated by the Illinois decisions mentioned above, too often the protections are too vague and permissive to be of much comfort to reporters.

Of course, the cost of litigation would cease to be a factor if officials would just hand over documents without a fight. As the survey indicates, several editors believe that erroneous denials of record requests stem not from a conspiracy to hide information but from simple ignorance of open records law. As the responses indicate, cutbacks often result in uninformed public servants examining unfamiliar documents, with the ultimate outcome being that the worker denies the request out of fear and in hope that such a denial will be sufficient.

Thus, there is a curious disincentive at work in states where catalyst theory is not recognized. Other than the threat of a lawsuit, public employees have little to lose when they withhold documents. Further, public officials may often simply be unaware of the laws they break. However, due to various factors – including an already significant workload – non-mandated training efforts often fall flat.<sup>140</sup>

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139. See Leonard Downie Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. J. REV. (Oct. 19, 2009, 1:00 PM), [http://www.cjr.org/reconstruction/the\\_reconstruction\\_of\\_american.php](http://www.cjr.org/reconstruction/the_reconstruction_of_american.php), for a great analysis of this shift.

140. See, e.g., Ric Anderson, *Column: Open Government Event Underscores Need for Education*, TOPEKA CAP. J. (June 29, 2009, 9:28 PM), <http://cjonline.com/>

Government entities also often have little to lose when they fail to properly educate their employees. Should a case appear to not be going their way, they can simply turn over the documents some time before the real litigation starts, confident that their costs will be relatively minimal.<sup>141</sup> By disallowing this practice, states that recognize the catalyst theory encourage legislative and regulatory practices that promote adherence to FOI laws, further ensuring the proper training of public workers, which would likely go a long way toward eliminating the need to resort to litigation for open records enforcement.

Meaningful, mandated education on open records for public employees would be beneficial to both parties. Litigation pulls resources from cash-strapped government agencies just as it does from newspapers. An increase in open records violations, as indicated by the survey data, creates a ripple effect, taking up time and money on not only litigation, but also non-litigation processes such as appeals. All of these processes require both time and money that could be better spent elsewhere and create problems that could easily be avoided if officials were incentivized to better understand their role and the law.

## VII. CONCLUSION

Faced with increasing demands for their time, reporters often have little time to pursue denied open records requests, regardless of how egregious the denial or how flimsy the excuse for non-compliance. Likewise, public officials, receiving little training and mixed messages about government open records policy, have little incentive to comply with open records requests. The inevitable decline in news media-fueled FOI litigation occasioned by the economic downturn and the wrenching economic transformation of print media has not escaped the notice of governments large and small. The confluence of these circumstances results in a precarious situation, not only for reporters, but also for the general citizenry and the officials that serve it. Editors around the country, despite their best efforts to put an optimistic face on the situation, admit that there is an increasing open records problem.

With little hope for an economic improvement to alleviate the situation, other avenues must be pursued. New classes of FOI litigants must fill the breach, or state public records laws risk falling into disrepair. A healthy drumbeat of legal challenges – especially challenges to denials of public records requests – brings clarity to the law and serves an important educative effect for all involved with open government law.

Widespread application of the catalyst theory to FOI litigation is one such promising avenue. Such a change could lead to increased education for public officials regarding open records compliance, reinforcing the govern-

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news/2009-06-29/column\_open\_government\_event\_underscores\_need\_for\_education.

141. *See supra* Part II.

ment's dedication to the idea of openness while also reducing potential liability. Such a change benefits officials both on a public relations and budget level, as citizens will likely have greater trust in a government they believe is dedicated to transparency.

Recognition of the catalyst theory in FOI cases helps ensure that such a policy remains in place. It does so by handing both news outlets and concerned citizens an effective stick to enforce the policy. Fee-shifting statutes have long been an important tool in the enforcement of civil rights. Such statutes could go a long way in alleviating some of the budgetary concerns of newsrooms that wish to pursue wrongfully denied requests. Likewise, such statutes would benefit the government by ensuring that frivolous lawsuits against proper denials remain scarce, as the financial incentive to pursue such suits exists only if such claims are valid.

Given the precarious economic situation facing the news industry, the costly pursuit of government records could easily get lost in the shuffle. With fewer financial resources available to news outlets, it seems inevitable that the ability to pursue open government will be harmed. As suggested, however, such harms may be decreased, if not avoided altogether, with proper legislative action. Fee shifting and the recognition of the catalyst theory could offer hope to the private litigant and encourage a new class of participants in enforcement of the promises made by public records laws.