COMPLIANCE CONUNDRUM: THE USE OF PUNITIVE DAMAGE PROVISIONS IN STATE FREEDOM OF INFORMATION STATUTES

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ABSTRACT

Government compliance with Freedom of Information Act statutes, on both the local and national level, has always been a major issue. This Note first examines these compliance issues, then looks at specific solutions that have been developed over time to incentivize compliance. Three states—Minnesota, Michigan, and Wisconsin—have enacted punitive damage provisions as part of their Freedom of Information Act regimes. This Note, by analyzing legislative history, statutes, and conducting interviews, concludes that punitive damages are not effective tools to increase government transparency. Moving forward, this Note argues that solutions, particularly on the state level, need to account more for the local politics involved in Freedom of Information suits, the significance judicial backgrounds can have on the outcome of these suits, and need to focus on fostering a culture of compliance moving forward.

I. INTRODUCTION

Congress passed the Freedom of Information Act ("FOIA") almost fifty years ago in order to recognize and implement the public's "right to know"—a right that is necessary for both a well-informed electorate and free press. However, FOIA's success in achieving this lofty goal has been limited. Federal agencies often take over a year to respond to FOIA requests, if they answer them at

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all, and the answers are often incomplete or unsatisfactory. Agencies do not feel much pressure to comply with FOIA because only three percent of FOIA request denials are appealed, either administratively or in federal court.

State governments face a similar struggle in balancing the public’s right to know and the need for government secrecy. After the federal enactment of FOIA in 1966, each state passed its own version of FOIA to apply to state government records not covered by the federal FOIA. A few states, acknowledging the difficulty in incentivizing compliance with FOIA laws, passed laws with punitive damages provisions. This note argues that including punitive damage provisions within these statutes is not an effective strategy for compliance, because these provisions fail to take into account the politics associated with FOIA actions, the lack of judicial knowledge in the FOIA area, and the fundamental lack of a culture of compliance among government agencies.

In this note, I will first examine the historical background of the federal Freedom of Information Act (FOIA) and the development of state freedom of information regimes. I will provide a general overview of the different compliance mechanisms used in various state FOIAs, with a focus on punitive damage provisions. I will then turn to an overview of the history behind the punitive damage provisions in Michigan, Minnesota, and Wisconsin’s state freedom of information laws. This will include a comparison of the statutory text of each of these laws, a survey of the relevant case law invoking each of these statutes, and an analysis of the differences in these statutes and how well each functions in practice. I will conclude by identifying lessons from these three state FOIA regimes that can be applied to FOIA regimes generally, focusing in particular on the political, judicial, and cultural complexities involved in passing and implementing FOIA laws.

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3. See id. at 393.
4. Id. at 397.
II. FREEDOM OF INFORMATION REGIMES AT THE FEDERAL AND STATE LEVELS

A. FOIA's Development and Persistent Compliance Issues

The roots of the 1966 Freedom of Information Act can be traced back to the late 1930s and early 1940s. During the Second World War, the American public and national press were "hungry for news" about war efforts—in particular, information about the development of the atomic bomb. As an initial response to media pressure for more transparency, Congress passed the Administrative Procedure Act (APA) in 1946. The APA, however, was very vague in its references to agency disclosure requirements and included too many loopholes to provide for real transparency. Arthur T. Vanderbilt, writing generally about the APA after its enactment, described how early federal agencies had created "a system of law that was not only unknown but to a considerable degree unknowable" to ordinary citizens. After the APA was judged to be inadequate to compel government transparency, Harold Cross published The People's Right to Know, making a damning case against government secrecy.

As a result of these pressures and years of congressional deliberations—and despite opposition from the executive branch (neither executive agencies nor President Johnson were particularly enthusiastic about a new transparency law)—the Freedom of Information Act was passed in 1966. FOIA was one of the first laws of its kind; virtually no other government had a similar statute requiring government transparency at that time.

7. See id. at 523.
8. See id.; see also S. Rep. No. 89-813, at 5 (1965) (explaining that the APA was too vague and lacked standards regarding disclosures in the context of justifying the creation of FOIA).
12. Id. at 1796.
emphasized when passing FOIA that transparency is necessary to foster a well-informed electorate, and that a citizen's right to know and have access to government information is inherent in both the right to a free press and free speech.\textsuperscript{13} FOIA was meant to allow the public to "gain access to the information necessary to deal effectively upon equal footing with federal agencies."\textsuperscript{14} FOIA immediately increased public access to government information.\textsuperscript{15}

While proponents of the law were initially satisfied, many criticized the new statute, claiming that representative government should be independently accountable for being transparent, that foreign affairs and national security matters are not areas for judicial interpretation, and that disclosures of information could be procured through inter-branch conflict rather than the press.\textsuperscript{16} In addition to encountering heavy criticism, the first incarnation of FOIA found little support from either the Supreme Court or agencies. Agencies did not initially comply with requests made under the Act.\textsuperscript{17} The Court also read FOIA as narrowly as possible, allowing the executive branch to escape disclosure if documents were classified.\textsuperscript{18}

Since its initial passage, Congress has amended FOIA frequently in order to maximize compliance. The statute was overhauled in 1974, 1976, 1986,\textsuperscript{19} 1996,\textsuperscript{20} and 2007.\textsuperscript{21} The modern

\begin{itemize}
\item \textsuperscript{14} See S. Rep. No. 89-813, at 3, 8 (1966).
\item \textsuperscript{16} See Antonin Scalia, The Freedom of Information Act Has No Clothes, 6 Reg., 14, 19 (1982).
\item \textsuperscript{17} See Association of the Bar of the City of New York, Committee on Federal Legislation, Amendments to the Freedom of Information Act, No. 79-1, at 7 (1974); see also David M. O'Brien, The Public's Right to Know: The Supreme Court and the First Amendment 7–9 (1981) (explaining how the press in the 1970s pressured non-compliant agencies to comply with FOIA).
\item \textsuperscript{18} E.P.A. v. Mink, 410 U.S. 73, 82 (1973) (holding that courts could not question the appropriateness of a classification of a document once it had been classified pursuant to executive order, which exempted documents from disclosure).
\item \textsuperscript{19} The 1986 FOIA amendment made it cheaper and easier for individuals to make FOIA requests; see 5 U.S.C. § 552(a)(4)(A)(i)–(vii) (1986).
\item \textsuperscript{20} The 1996 Electronic Freedom of Information Act made it clear that all electronic information should be disclosed, not just the information published in the federal register. See H.R. Rep. No. 104-795, at 11–13 (1996).
\item \textsuperscript{21} The 2007 amendment implemented a system for citizens to track and process requests, created public liaison offices to process the requests, and prevented agencies from assessing search fees to requesters if the request is responded to late. 5 U.S.C. § 552(a) (2013).
\end{itemize}
FOIA performs three functions, as described by scholar Fred H. Cate: first, it acts as a watchdog against government overreach; second, it creates an informed citizenry that can better participate in shaping public policy; and third, it insures that the government does not pass any laws in secrecy.22

The functioning of FOIA is somewhat complex and opaque. Any person can have access to any record upon request, and the requester is not required to explain why he or she wants the information.23 Requesters do, however, have to reasonably describe the information sought so that the agency can adequately search its records.24 The agency has twenty days, or whatever reasonable amount of time it takes to use “due diligence” in the process, to respond to the request.25 This is the first step that encounters compliance issues. While the statute allows for twenty days, “in reality that deadline is frequently missed.”26 For the Department of Homeland Security (“DHS”), for example, the median processing time of simple requests is eighty-seven days and for complex requests it stretches even longer to 374 days—well beyond the twenty days allowable by statute.27 Forty percent of all DHS requests took over 400 days to get a response in 2008 alone.28 The State Department is almost as slow, with an average response time between 243 and 483 days. Immigration and Naturalization Services is a bit better, clocking an average response time of eighty-five days.29 The message is clear: agencies can take a long time to respond to requests and are certainly in no rush to answer inquiries.30

24. See Cox, supra note 2, at 391.
26. See Cox, supra note 2, at 394.
27. See id. at 395.
30. See Valerie Jablow, Delays, Fees Thwart Freedom of Information Act, Critics Say, Trial, June, 2005, at 12, 14 (noting that some FOIA requests have taken as long as 17 years to receive a response).
The next step in the process pertains to the type of information a requester actually receives when the agency responds. There are four potential responses to a request: 1) receiving the records; 2) being notified that no records exist; 3) claiming an exemption to answer the request; and 4) a "Glomar" answer. Frequently, even a response will contain little to no information. The general absence of agency review, as discussed in section two, "coupled with institutional demands to not only respond to timely incoming FOIA requests but to reduce accumulated backlog," results in "predictably cursory responses" to most requests. Agencies also often attempt to invoke exemptions to avoid providing documents or answering requests. The government can invoke nine different exemptions to disclosure that are both discretionary and narrowly construed by courts. The exemptions, however, are not mandatory bars against disclosure and are not meant to require withholding, although agencies often operate as such. The presumption of FOIA, as stated by courts, is in favor of disclosure. But while the statute may supposedly favor disclosure, agencies still rigorously use exemptions and often do not adequately respond to requests.

If a requester feels like the agency response was inadequate, the requester can administratively appeal the decision. The agency has twenty business days to adjudicate the appeal. If the agency does not respond to the request within a twenty-day period (which is often), then the requester has exhausted agency remedies and can

31. Glomar response: "[We] can neither confirm nor deny the existence or nonexistence of records responsive to your request." See Nathan Freed Wessley, Note, "[We] Can Neither Confirm Nor Deny the Existence or Nonexistence of Records Responsive to Your Request": Reforming the Glomar Response Under FOIA, 85 N.Y.U. L. Rev. 1381 (2010).
32. See Cox, supra note 2, at 396.
33. See id. at 398.
34. See 5 U.S.C. § 552(b)(1)-(9) (2013); see also Cox, supra note 2, at 391–93 (describing courts' application of the exemptions); see also Barry Sullivan, FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know", 72 Md. L. Rev. 1, 73–75 (2012) (describing the narrow construction of exemptions).
35. See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) ("Congress did not design the FOIA exemptions to be mandatory bars to disclosure"); see also Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) (FOIA's exemptions simply permit, but do not require, withholding).
appeal to Federal District Court.\textsuperscript{39} If the requester is found to have "substantially prevailed,"\textsuperscript{40} by either obtaining relief through judicial order or through voluntary agency change in position, the requester is entitled to reasonable attorney's fees and costs.\textsuperscript{41} However, even though FOIA technically provides for review, individuals very rarely exercise that right. Only three percent of FOIA requests are appealed either administratively or in federal court.\textsuperscript{42} In 2011, for example, there were 202,164 FOIA denials, and only between three hundred to five hundred lawsuits filed.\textsuperscript{43} Excessive fees act as a substantial barrier for requesters who feel wrongly denied. On top of attorney's fees, if they prevail, they may be charged huge amounts for the records they request.\textsuperscript{44}

Even if a requester is one of the three hundred to five hundred people appealing in federal court, agency claims rarely, if ever, get overturned. Technically, judges must apply de novo review over FOIA denials.\textsuperscript{45} A study of reversal rates over various standards of review, however, revealed that only 10% of FOIA claims are reversed on appeal—a rate much closer to the rate of reversal under arbitrary and capricious review, not de novo.\textsuperscript{46} The implications of national security interests, particularly when agencies are claiming exemptions, have caused courts to give much more deference to the decisions of agencies than normal under de novo review.\textsuperscript{47} Courts apply exemptions rigorously, and have essentially "created a de facto system of deference in its judicial review of FOIA cases while,"

\textsuperscript{42} See Cox, supra note 2, at 397.
\textsuperscript{43} See Margaret Kwoka, Deferring to Secrecy, 54 B.C. L. Rev. 185, 208 (2013).
\textsuperscript{44} See Jablow, supra note 30, at 14 (describing a case in 2004 where post-9/11 immigrant detainees were charged $370,000 by the Department of Justice to get access to their records).
\textsuperscript{46} For comparison, Social Security cases, which are also reviewed de novo, were found to have a reversal rate of near 50%. See Paul R. Verkuil, An Outcome Analysis of Scope of Review Standards, 44 Wm. & Mary L. Rev. 679, 713 (2002).
\textsuperscript{47} See Ctr. for Nat'l Sec. Studies v. U.S. Dept' of Justice, 331 F.3d 918, 926–27 (D.C. Cir. 2003) ("We have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated."); see also ACLU v. U.S. Dept' of Justice, 681 F.3d. 61, 76 (2d Cir. 2012) (articulating a deferential posture regarding national security).
according to some critics, "pay[ing] lip service to the de novo standard."

So while FOIA purportedly provides for open government, agencies often take extreme amounts of time to respond and, when they do respond, respond inadequately. Judicial review of these decisions is largely non-existent, with courts frequently deferring to agencies. Overall, FOIA compliance is severely lacking. This is due, in part, to "broad decentralization; relatively little oversight; institutional pressure to reduce backlogs; and chronic understaffing." Moreover, the lack of meaningful judicial review of poor responses provides little to no incentive for agencies to adequately comply with requests.

B. FOIA, Compliance Issues and All, Spreads to the States

While the federal government grappled with the delicate balance of government transparency and the amount of secrecy required to effectively protect national interests, states also struggled to implement effective FOIA statutes. Before 1966 and the passage of the federal FOIA, only twelve states had substantial public access statutes. By 1992, all fifty states had a FOIA statute. While every state has its own Freedom of Information Act to allow citizens access to state government records and to provide for transparency on the state level, these laws are far from uniform. State FOIA laws were passed individually and "because of the various influences present" at both the time of enactment and revisions over the course of years "few states have identical laws." States vary on who has the responsibility of responding to requests, what remedies are available, and what information must be disclosed. State FOIA laws, while

48. See Kwoka, supra note 43, at 188; see also Verkuil, supra note 46, at 718 (describing judicial review as "anemic" because of a "black box of inarticulate factors" that influence courts' decision making).
49. See Cox, supra note 2, at 399.
51. See Stewart, supra note 5, at 267.
Compliance Conundrum

obviously based on the federal Freedom of Information Act, also diverge from the federal FOIA in a few ways and deal with unique, state-level concerns. State laws have more delicate political considerations at play, as there are fewer actors involved in developing policy that must work together in numerous contexts, like the journalist lobby, which interacts with state senators in many different areas. State FOIAs are also often more expansive, covering not just records that individual agencies have control over, but all public records and government meetings. Lastly, state governments get fewer FOIA requests than federal agencies, resulting in an unfamiliarity with response procedures that actors at the federal level at least have a marginal level of familiarity with.

While all FOIAs have different provisions, they share a few common dimensions and problems. One issue each FOIA statute faces is assuring agency and government compliance with the statute. An Associated Press survey of all fifty states found that “[l]aws are sporadically enforced” and “violators almost always walk away with nothing more than a reprimand.” A 2007 study by the Better Government Association graded states' Freedom of Information Acts on five criteria related to responsiveness (response times, appeals process, expedited review availability, availability of fees, and availability and severity of possible sanctions), and thirty eight states scored an “F” grade.

C. Compliance Mechanisms used in State FOIAs Vary

As with the federal FOIA, state FOIAs do provide recourse for requesters who struggle to get the information they request, or whose requests are flat out denied. Unlike the federal FOIA, however,

54. See Cox, supra note 2, at 416.
55. See Davis, supra note 53, at 48.
56. See id. at 45.
57. See id.
60. See Davis, supra note 53, at 45.
there is wide variation in the types of remedies and mechanisms available to encourage compliance across the fifty states.\textsuperscript{61} First, it should be noted that states do differ somewhat on who can file an action. Most states allow "any person" to file an action,\textsuperscript{62} but a few states restrict who can bring claims.\textsuperscript{63} Many states allow for injunctions against meetings held in violation of sunshine laws and for invalidation of actions taken contrary to sunshine laws.\textsuperscript{64} Arizona, Michigan, Minnesota, North Dakota, Maryland, New Mexico, Ohio, and Wisconsin allow for some damages for a state violation of FOIA laws.\textsuperscript{65} Thirteen states allow for writs of mandamus, which are judicial orders that compel government actors to turn over the requested information, to be granted in extraordinary circumstances.\textsuperscript{66} Some states provide declaratory relief in addition to or in substitution of a writ of mandamus.\textsuperscript{67} Unlike a writ, declaratory relief does not require the state to comply; it just announces whether or not the individual is entitled to the record. In a handful of jurisdictions, requesters can ask for sanctions against the specific requester who violated the open records\textsuperscript{68} or open meeting laws.\textsuperscript{69} A

\textsuperscript{61} See Laura Danielson, Note, \textit{Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media's Use of FOIA Laws}, 2012 Mich. St. L. Rev. 981, 1010 (2012); see also Stewart, supra note 5, at 273 ("Three of these civil remedies—damages, injunctions and declaratory relief—are commonly available in public access laws. . . . These remedies are employed in different ways by jurisdictions as a means of enforcing the public access laws and deterring violations of them.").


\textsuperscript{63} Massachusetts, as an example, only allows groups of three or more registered voters to bring a challenge. Otherwise, a district attorney or the state attorney general must bring the challenge. See Mass. Gen. Laws ch. 39, § 23b (1994).

\textsuperscript{64} See Stewart, supra note 5, at 273–75.

\textsuperscript{65} See id. at 280.

\textsuperscript{66} See id. at 276.

\textsuperscript{67} The thirteen jurisdictions are Alabama, California, Delaware, Louisiana, Missouri, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, Texas, Wisconsin, and the federal government. For public records laws, thirteen also allow declaratory relief: California, District of Columbia, Delaware, Illinois, Louisiana, Missouri, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, and West Virginia. Id. at 277, n.78.

\textsuperscript{68} Eight jurisdictions allow for disciplinary sanctions when open record law violations occur: Florida, Iowa, Maryland, Minnesota, Missouri, Nebraska, Vermont, and the federal government. Id. at 288, n.165.

\textsuperscript{69} Seven states—Arizona, Hawaii, Iowa, Minnesota, Ohio, South Dakota, and Texas—allow for sanctions for violations of open meeting laws. Id. at 289.
good portion of states also allow for criminal penalties. Fourteen states allow for criminal fines to be imposed if open records laws are violated, and sixteen states allow for up to a year in county jail. While these penalties sound harsh in theory, they have been described as “laughable” by some because they are almost never enforced. Many states also allow for civil penalties to be imposed. There are two types of civil penalties that are particularly similar or draw comparisons to the punitive damage provisions examined by this note: attorney’s fees provisions and compensatory damages provisions.

1. Attorney’s Fees

Only ten states and the District of Columbia do not have attorney’s fees provisions in their open meeting laws, and only six states do not have attorney’s fees provisions in open records laws. Even within the three states surveyed in this note (Minnesota, Michigan, and Wisconsin), awards for attorney’s fees were much more common than awards of punitive damages, and even in the cases where punitive damages were awarded, attorney’s fees were always awarded. Since attorney’s fees are more commonly awarded, they are truly the chief monetary remedy often sought because requesters mainly care about getting their costs covered and receiving the records.

The most important variation amongst state open records laws in respect to attorney’s fees is when they are required. Some states, like Wisconsin, mandate attorney’s fees if the plaintiff

70. Id. at 292.
71. Id. at 293.
72. “[T]hese provisions become almost laughable when considering the rarity of prosecutions.” Id.
74. Alabama, Connecticut, Maine, Massachusetts, South Dakota, and Wyoming. See id. at 282, n.117.
75. Twenty-nine of the cases in Michigan resulted in the award of attorney’s fees compared to twelve cases where punitive damages were awarded, eight cases in Minnesota resulted in award of attorney’s fees compared to zero cases where there were punitive damages awarded, eighteen cases in Wisconsin resulted in the award of attorney’s fees compared to five where punitive damages were awarded.
“substantially prevails.” Seventeen states have these mandatory provisions in open meeting laws, and twenty-eight have mandatory attorney’s fees in open records laws. This makes a large difference in incentives. Requesters filing in Wisconsin are guaranteed to get some of their costs back if they win. In other states, like Minnesota, an individual can prevail and receive the record but still bear the brunt of the cost associated with bringing the suit. The mandatory fee shifting provision works to incentivize the bringing of good suits, but does not incentivize bad suits in the same way, because there is a requirement that the plaintiff must “substantially prevail” to get the fees. The provision just guarantees that a plaintiff will recoup some of the costs associated with the claim. Even in states where there is no mandatory fee shifting, courts seem more willing to award attorney’s fees, making attorney’s fees an option that requesters often pursue when bringing suit.

2. Compensatory Damages

Compensatory damages are awarded with the intention of compensating an individual for the economic harm of being denied access to the requested records for any period of time. Only a handful of states have compensatory damages provisions, the most notable being New Mexico and Washington. These two states are notable because they allow for a certain amount to be assessed for each day that a record was wrongly withheld. New Mexico allows a fee of up to $100 per day to be assessed if the denial was unreasonable. Washington, in particular, is known to consistently

78. See Stewart, supra note 5, at 282.
79. See generally Shade v. City of Farmington, No. Civ. 99-2067 (JRT/FLN), 2001 WL 50119787 (D. Minn. May 9, 2001) (finding plaintiff prevailed, but because the city had a well founded belief that the requested information was not public they were not ordered to pay attorney’s fees), aff’d, 309 F.3d 1054 (8th Cir. 2002).
80. See Webster v. Twp. of Spruce, 835 N.W.2d 292, 297 (holding that mandatory attorney’s fees must be given if a plaintiff substantially prevails).
81. Telephone Interview with Robert Dreps, supra note 76.
82. See discussion infra note 199.
83. See Stewart, supra note 5, at 280.
award large amounts of compensatory damages. The Washington statute is similar to New Mexico's in that it allows a fee of up to $100 for every day the requester was denied access to the record, but does not have a reasonability requirement.

Examining Washington case law, courts are incredibly willing to assess these compensatory damages, and in large amounts. The courts assess penalties to every case won because courts have interpreted the provision to require some penalty amount—even if only $1/day—be assessed against the violating government entity. These amounts assessed are also much larger than those in the punitive damage context. Awards are consistently in the thousands, rising as high as $90,560. The provision has worked to incentivize lawsuits, as almost four hundred suits under this provision have been filed. Though there are only two states in the country with these types of provisions, and Washington courts are unusually aggressive when assessing fines, compensatory damage provisions are another potential mechanism to incentivize FOIA compliance.

86. See Telephone Interview with Robert Dreps, supra note 76 (Mr. Dreps discussed how Washington was known for awarding large amounts of compensatory damages).

87. "It shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he/she was denied the right to inspect or copy such public record." See Wash. Rev. Code Ann. § 42.56.550(4) (West 2011) (the statute used to have a mandatory $5 per day minimum penalty, but was later amended to delete that requirement).

88. See Soter v. Cowles Pub. Co., 174 P.3d 60, 82 (Wash. 2007) (holding that courts must impose penalties if plaintiff was wrongfully denied access to records); see also King Cnty. v. Sheehan, 57 P.3d 307, 323 (Wash. Ct. App. 2002) (holding that even though the government acted in good faith, the plaintiff was still entitled to compensatory damages of five dollars per day).


D. Punitive Damages as a Potential FOIA Compliance Mechanism

Another unique type of remedy used at the state level is punitive damages. Only three states currently allow for punitive damages in response to FOIA violations: Minnesota, Michigan, and Wisconsin.91 Plaintiffs have used, or attempted to use, each of these statutes to recover damages against state governments in violation of FOIA laws.92 The use of punitive damages in a few state FOIAs could be very purposeful. Punitve damages are typically used to "provide a unique form of redress where citizens have suffered the indignity of a willful violation of their private rights."93 Legislatures draft statutes that include punitive damage provisions, and courts enforce them for a number of reasons. The damages are aimed at compensating victims for pain and suffering that they may have endured,94 to force the bad actors to internalize the costs of their bad actions and undercut bad actors' expectations of gain from said acts;95 and to deter future bad acts.96 While these are the consensus reasons justifying the use of punitive damages, courts and legislatures have engaged in a continuous discussion assessing the purpose of punitive damages and the amount that is sufficient to achieve these goals.97 Richard Craswell, in a foundational article about punitive damages, proposed a simple "multiplier principle." According to this principle, the ideal penalty to deter bad behavior (such as non-compliance with FOIA laws) "equals the harm caused by the violation multiplied by

91. Id. at 281.
95. See generally Keith N. Hylton, Punitive Damages and The Economic Theory of Penalties, 87 Geo. L. J. 421 (1998) (discussing whether punitive damages should primarily aim to internalize costs after the injury or to eliminate the offender's expectations of future gain from similar bad acts).
97. See Robert D. Cooter, Economic Analysis of Punitive Damages, 56 S. Cal. L. Rev. 79, 89 (1982) ("Punitive damages should be restricted to intentional faults, where it is gross or repeated.").
one over the probability of the punishment. The punishment is set at this level to discount the violator’s probability analysis pre-act. If there is a twenty-five percent chance of getting caught, for example, a potential violator will only be deterred if the penalty, discounted by the likelihood of getting caught, is just high enough to shape behavior. Thus, the actual penalty must be four times the amount required to deter, so that when discounted it is still effective. It is key to avoid setting the penalty too high, because that makes behavior too cautious, yet high enough to effectively shape behavior. Applying this to the context of FOIA violations, if the threat of paying a $1,000 penalty would be enough to get a local administrator to properly comply with FOIA, and there is only a ten percent chance of that administrator actually getting caught not complying, the penalty needs to be ten times that amount, or $10,000, to change that administrator’s decision calculus to comply.

While punitive damage provisions are primarily used for deterrence and retribution, they can serve a different function when applied to the context of punishing government actors. Punitive damage provisions, particularly those that only allow a small amount of damages, like those in state FOIA statutes, can be used to shame actors like the government for bad or reprehensible behavior. Shame sanctions are symbolic punishments that are primarily used to shape behavior and deter future behavior, and to express appropriate moral condemnation. They are “punishments that are directed primarily at publicizing an offenders’ illegal conduct in a way intended to reinforce the prevailing social norms that disapprove of such behavior.” The modern interpretation of these sanctions focuses on

99. See id. at 2190–91
100. See id. at 2189–91.
101. Craswell couches his argument, acknowledging that this principle is most effective when there is a 100% probability that once wrongdoing is discovered it will be prosecuted. See id. at 2237. He also recognizes the difficulty in calculating the correct amount of damages unilaterally for a statute, stating that the multiplier must be calculated on a case-by-case basis to be most effective. See id. at 2187–88.
humiliation. By forcing DUI offenders to wear bumper stickers announcing their crimes on their cars, requiring petty thieves to wear t-shirts or bracelets expressing the crimes they have committed, or requiring sex offenders to publicly register wherever they are living, modern statutes that shame use punishments that are meant to stigmatize to shape behavior. Shaming sanctions operate by engaging with the community and community expectations. They rely on community members responding negatively towards and isolating those punished through this method. In this way, the statutes “involve . . . lynch justice,” where there is a “complicity between the state and the crowd.” Without the negative response of the community, shaming sanctions would lack much of their deterrent impact.

Using shaming sanctions via small punitive damage provisions may be useful for shaping government behavior precisely because it relies on a community response to be effective. Shaming sanctions have been suggested and often used in the analogous situation of commercial offenses. Sandeep Gopalan suggests that shaming sanctions could mobilize the public and shareholders, in particular, to demand fewer bonuses and smaller salaries for CEOs. More generally, shaming sanctions that punish harmful corporate behaviors are extremely effective. This is because the “world of commerce is not an anonymous world,” so merchants and “participants in the world of business inevitably fear loss of reputation” that can follow from receiving a shaming sanction. Similarly, government actors and politicians make a living off of their reputations. Shame sanctions are most effective when the actors being punished are tied to and intertwined with a community. There is arguably no one more intertwined in the community than elected officials and other governmental actors. Therefore, the small

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106. Kahan, supra note 102, at 632.
108. See Kahan, supra note 102, at 631.
112. See Kahan, supra note 102, at 643–44.
amounts of punitive damages included in some state FOIA provisions can perhaps serve this shaming purpose; even if the damages are not large enough to effectively deter, the reality of getting publicly shamed and the fear of any surrounding backlash and fallout from that result may modify governmental actors' behavior. It does not seem unreasonable to take this principle from commercial scenarios and apply it to public officials and governmental actors, and this may be another potential explanation for the states' inclusion of damage provisions in their FOIA statutes.

III. EXAMINING PUNITIVE DAMAGE PROVISIONS IN FOIA STATUTES IN PRACTICE

A. Statutory Text and Intent of Michigan, Minnesota, and Wisconsin's State FOIAs

State open records laws are structured in one of two basic formats. The first type of statute is based on a broad presumption of openness, with a few basic exemptions that can be interpreted broadly or narrowly by the courts.\footnote{113} This is very similar to the federal FOIA structure. Both Wisconsin and Michigan's statutes are examples of this type. Wisconsin, for example, has only thirteen exemptions,\footnote{114} but one of those thirteen includes a broad public policy exemption that allows for law enforcement agencies to withhold records unless "the public interest in allowing a person to inspect, copy or receive a copy of such identifying information outweighs the harm done to the public interest by providing such access."\footnote{115} The second type of statute specifies every single record that must be disclosed in very explicit detail, leaving little room for interpretation by local record keepers.\footnote{116} This is the type of statute that Minnesota has.\footnote{117}

The differences in the general structure of the statutes trickle down to the structure of the remedy portion of each of the statutes. There are a few key differences between these statutes: principally,
the standard of review used, which impacts the ease of bringing a claim; the amount of damages; and the structure of the damages provisions themselves. These differences may impact the effectiveness of each statute. Wisconsin's provision provides for both punitive damages, which are awarded to the wronged plaintiff, and a general forfeiture penalty, which is paid to the county where the wronged plaintiff resides. There are a few noteworthy components of the provision. First, plaintiffs have a high bar to meet because the standard of review is that the government entity acted "arbitrarily or capriciously." Within the context of this provision, Wisconsin courts have interpreted "arbitrary and capricious" to mean that a government entity's action "[lacks] a rational basis or results from an unconsidered, willful and irrational choice of conduct." Second, damages are to be paid by the government entity itself, rather than the individual records keeper or custodian. This means that the very taxpayer who brings a suit against a local town would, in part, finance any award of punitive damages. Third, the damages can be awarded not only when a records request is denied, but also when there is an excessive wait for the record or an excessive fee imposed for access to the record. A requester cannot be awarded punitive damages by filing civil suit. In Wisconsin, a requester must file a mandamus action to get access to the record. Seeking punitive

118. Wis. Stat. Ann. § 19.37(3) (West 2013) ("If a court finds that an authority or legal custodian under s. 19.33 has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester.") (emphasis added).
119. Wis. Stat. Ann. § 19.37(4) (West 2013) ("Any authority . . . who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than $1,000 . . . [T]he Court shall award any forfeiture recovered together with reasonable costs to the county.").
121. See, e.g., Eau Claire Press Co. v. Gordon, 499 N.W.2d 918, 921 (Wis. Ct. App. 1993) (stating that punitive damages were not warranted because the town had a rational basis for initially denying the records request).
123. Dreps, supra note 76 (Mr. Dreps described how post-Watergate there was pressure to open up government records, and there were similarities between all state FOIAs. He speculated that Wisconsin drafters may have borrowed the damages provision from another state's statute because it appeared to be a good idea that warranted inclusion).
damages is a supplement to the remedy of mandamus, which is getting an actual copy of the record. 126

The purpose behind the punitive damages statute remains unclear. Wisconsin's open record law has a general presumption of disclosure, and making punitive damages available to requesters underscores that presumption. 127 The provision was drafted with the intent that a court could award damages in certain situations that were truly extraordinary, or where the denial was completely improper. 128 Most of Wisconsin's open records laws were written in an attempt to codify the common law—principally, the balancing test of the cost of disclosing a record against the benefits of open government. 129 The inclusion of punitive damages is surprising, however, because they were not a part of Wisconsin common law. Wisconsin's FOIA is also a patchwork of provisions inspired by similar provisions in other FOIAs. Some speculate that the punitive damages provision was included because another state had a similar provision, and drafters thought it might be beneficial to include. 130 For this reason, it is important to note the many similarities between Wisconsin's provision and Michigan's.

Michigan's statute is fairly simple, and similar to Wisconsin's. It allows for plaintiffs to seek injunction and punitive damages, and to compel compliance with the statute. 131 The punitive damages provision has an arbitrary and capricious standard of review, just as in Wisconsin's statute. 132 Michigan courts have interpreted this standard slightly differently. A government body is responsible for damages if the denial or delay was deemed to be "whimsical" and arrived to "without consideration of principles or circumstance." 133 There are a few other important aspects of the Michigan law. Like the Wisconsin statute, section 15.240 makes it very clear that the

126. See id.
129. Dreps, supra note 76.
130. See id.
132. Mich. Comp. Laws Ann. § 15.240(7) (West 2013) ("If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay . . . the court shall award, in addition to any actual or compensatory damages, punitive damages to the amount of $500 . . . ").
government entity—not the individual record keeper—will pay the fine, once again imposing the cost on taxpayers that may be bringing claims.\textsuperscript{[134]} But unlike the Wisconsin statute, it allows for damages only where the plaintiff was denied access or unreasonably delayed from access to the record.\textsuperscript{[135]} Also unlike the Wisconsin statute, the Michigan statute allows for \textit{actual} or \textit{compensatory} damages.\textsuperscript{[136]} However, the most significant difference between the Wisconsin and Michigan statutes is the cap on punitive damages built into the Michigan statute. While Wisconsin has no limit on damages (although the forfeiture penalty is limited to $1,000), Michigan limits damage amounts to $500.\textsuperscript{[137]}

The legislative history regarding the Michigan statute is scant. The law has been active since the late 1970s, but is only in its recent incarnation after an amendment in 1996. It should be noted, however, that in 2013 there was a proposal to amend the Michigan punitive damages statute, which would have raised the cap on damages from $500 to $5,000.\textsuperscript{[138]} This may be out of a recognition that the current provision does not provide enough of a consequence for misbehavior to change a government actor's decision calculus relating to disclosure.

Minnesota's statute has some commonalities with that of Wisconsin and Michigan. Like both Michigan's and Wisconsin's, Minn. Stat. 13.08 provides for not only damages, but also actions to compel compliance and issuance of injunctions.\textsuperscript{[139]} Similar to the Wisconsin forfeiture provisions, Minnesota's statute also has a $1,000 penalty that is paid to the state general fund, in addition to punitive damages that are awarded to the party bringing the complaint.\textsuperscript{[140]} Besides these few similarities, the Minnesota statute is significantly different—partly due to Minnesota's rejection of the broad structure of FOIA statutes embraced by both Wisconsin and Michigan.

\footnotesize{\textsuperscript{[134]} Mich. Comp. Laws Ann. § 15.240(7) (West 2013) ("The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record . . . .")

\textsuperscript{[135]} See id.

\textsuperscript{[136]} See id.

\textsuperscript{[137]} See id.


\textsuperscript{[139]} Minn. Stat. § 13.08 (2013).

\textsuperscript{[140]} See Minn. Stat. § 13.08(A) (2013) ("If the court issues an order to compel compliance under this subdivision, the court may impose a civil penalty of up to $1,000 . . . [P]ayable to the state general fund . . . .")}
legislatures.141 Minnesota does not have a hard cap like Michigan, or no cap at all like Wisconsin, but rather a range for punitive damages from $1,000 to $15,000.142 This is significantly more than Michigan's $500, but still provides a cap. Additionally, the standard for review of the government's actions is whether there is a "willful violation," not whether the action was arbitrary or capricious.143 Minnesota courts have interpreted willful violation to be an "express limitation" on the award of punitive damages, requiring that plaintiffs show that "the defendant intentionally violated the state law without legal justification or excuse."144 While this is not an arbitrary and capricious standard, it requires the showing of intent, which is a high bar to set for plaintiffs. Litigators, like Mark Anfinson, who represents Minnesota newspapers in suits they bring, still find this to be a very high bar to meet.145 The Minnesota statute also specifies that a "government entity," not an individual, is liable for the damages, once again passing the burden of the fee on to taxpayers.146

In short, Minnesota has a different structure to the damages, and a different standard of review for any violation of its open records law. The Minnesota law was drafted with the intent that media members would actively use the punitive damage provision, in addition to the other features of the law, to bring cases and enforce the law.147 Don Gemberling, who was president of the Minnesota Information Policy Analysis Division ("IPAD") and had been heavily involved in the drafting process, described how the damages were just a response to government reluctance to comply with the law.148 Journalists were heavily involved in the drafting of the law and in subsequent amendments (like the addition of an administrative remedy) to make it more attractive to file suits.149 The hope was that, combined with the very descriptive and narrow exemptions,
governments would not claim as many exemptions, and, if they did, they would be checked by the press who could easily bring suit.150

Table 1.0 below synthesizes the main differences between each of these statutes. The main similarities across all three are the high bar set by the statute to prove behavior outrageous enough to warrant punitive damages, and the insulation of private individuals from suit (so that, in reality, any damages are being paid by taxpayers). The biggest difference across all three statutes are the various limits on damages, with Wisconsin imposing no limits, Minnesota employing a range, and Michigan using a hard cap at $500. Each of these statutes seems to attempt to underscore the state’s commitment to open records laws. Wisconsin was also likely inspired by the inclusion of punitive damages provisions in other state FOIAs. Minnesota clearly anticipated, or at least hoped, that newspapers and the media would use the punitive damages provisions generally to check governmental actors.

TABLE 1.0: COMPARING MICHIGAN, MINNESOTA AND WISCONSIN’S OPEN RECORDS LAWS

<table>
<thead>
<tr>
<th>State</th>
<th>Standard for Assessing Punitive Damages</th>
<th>Cap on Punitive Damages</th>
<th>Number of Cases Brought Seeking Some Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minnesota</td>
<td>Willful Violation</td>
<td>$15,000</td>
<td>34</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Arbitrary and capricious denial or delayed response</td>
<td>No cap</td>
<td>43</td>
</tr>
<tr>
<td>Michigan</td>
<td>Arbitrary and capricious denial or delayed response</td>
<td>$500</td>
<td>6</td>
</tr>
</tbody>
</table>

150. See id.
B. Practical Impact of Punitive Damages in FOIA Statutes:
Examining the Relevant Case Law

While comparing the structure of each of the statutes and the purposes behind the damages provisions gives some context to these laws, how useful each of these provisions is (and how useful the punitive damages provisions could be in different contexts, like the federal FOIA) hinges on courts' interpretations of each statute and willingness to apply punitive damages in appropriate circumstances.

After a survey of all Wisconsin cases involving state records law claims, particularly those where the plaintiffs were attempting to get damages—either through attorney's fees, punitive damages, or the $100 forfeiture penalty—only five cases involved plaintiffs' prevailing under the punitive damage statute. Each of these five cases involved either a complete failure to respond to the request or to articulate any legal basis for the denial. The first case, Wisconsin State Journal v. University of Wisconsin-Madison, involved a request to the Office of International Studies at University of Wisconsin for payroll records, where the University had no legal basis to refuse the records. The Circuit Court found the decision to be arbitrary and capricious and awarded $100 in punitive damages. The second case, ECO, Inc. v. City of Elkhorn, involved a request for sewer plans, where the city never officially responded to the request. The Wisconsin Court of Appeals found that the failure to respond officially was arbitrary and capricious, entitling ECO to damages. The third case, State ex rel. Ledford v. Youngwirth, involved an inmate's request for prison records that went without response for months before he was informed no records existed. The court held that the plaintiff may be entitled to punitive damages. The fourth case, State ex rel. Lowe v. Frascht, involved a request for a traffic stop

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152. See id.
154. See id. at 520–21.
156. "Youngwirth having failed to fill Ledford's request or to notify him of her determination to deny the request, in whole or in part, 'as soon as practicable without delay' [requires] the trial court [to] determine whether she 'arbitrarily and capriciously denied or delayed response' to the request . . . [T]he court 'may' award punitive damages to Ledford." See id. at 474.
dashboard cam tape that, when eventually turned over, was "snowy" and completely indecipherable. The Court of Appeals remanded for a determination of the amount of punitive damages.\footnote{157}

The fifth and last case, Scheffler v. County of Dunn, is an outlier.\footnote{158} The Sheriff's office did not respond to the plaintiff's multiple requests over the course of a month and a half. When the office finally responded, it had recorded over the video requested.\footnote{159} The District Court held that a reasonable jury could find that the Sheriff's office acted arbitrarily and capriciously, and the jury awarded Scheffler $40,000 in punitive damages.\footnote{160} This is clearly the outlier, as the other cases involved minimal amounts of punitive damages. Additionally, this case went to a jury—which is rare for FOIA cases—and had extraordinary facts, where the Sheriff's office deliberately avoided answering the request.

Thirty-eight cases seeking punitive damages were denied. Eight of those cases resulted in other fees, like attorney's fees, ranging from $100 to a few thousand dollars.\footnote{161} The reasons for denial of punitive damages can be grouped into four categories. The first group is the cases where there is no evidence of improper conduct or withholding of records. Courts generally refuse to award damages if

\footnotetext[157]{See State ex rel. Lowe v. Frascht, 735 N.W.2d 192, 195 (Wis. Ct. App. 2007).}  
\footnotetext[159]{See id. at *4.}  
there is no evidence of bad conduct on the government's part.\textsuperscript{162} The second group is the cases where the plaintiff attempted to file a civil suit, not a mandamus action.\textsuperscript{163} Wisconsin courts require a plaintiff to file a mandamus action, not a civil suit, to receive punitive damages, so these claims are easily dismissed as procedurally unsound.\textsuperscript{164} The third group, which is very common, is cases where, once the plaintiffs filed suit, the government entity turned over the records.\textsuperscript{165} The Wisconsin courts do not usually award damages in cases where the government entity turns over the records because the eventual response, the receipt of the records, makes the government's conduct reasonable enough as to find their actions were not arbitrary and capricious.\textsuperscript{166}

The fourth and final category is the most interesting: meritorious claims for damages, where the court did compel the records but did not award punitive damages.\textsuperscript{167} The principal case is

\textsuperscript{162} State ex rel. Downing v. Middleton Police Dep't, 528 N.W.2d 91 (Wis. Ct. App. 1994); see also Curran v. Warren, 713 N.W.2d 191 (Wis. Ct. App. 2006) (finding records were timely delivered so plaintiff was not entitled to punitive damages); McCullough Plumbing, Inc. v. Vill. of McFarland, 707 N.W.2d 579 (Wis. Ct. App. 2005) (finding that documents were properly withheld and reversing all fees assessed against village by the lower courts); Wis. State Att'y v. Klaus, 502 N.W.2d 284 (Wis. Ct. App. 1993) (finding that records were properly withheld so plaintiff was not entitled to punitive damages).

\textsuperscript{163} See State v. Stanley, 814 N.W.2d 867 (Wis. Ct. App. 2012); see also Sutterfield v. City of Milwaukee, 2011 WL 2471750 at *1 (E.D. Wis. June 21, 2011) (dismissing claim in federal court because plaintiff failed to initially file for writ of mandamus); Wire Data, Inc. v. Village of Sussex, 751 N.W.2d 736 (Wis. 2008) (denying claim because records request had not even been denied yet); Capital Times Co. v. Doyle, 807 N.W.2d 666 (Wis. Ct. App. 2011) (where newspaper attempted to file a suit solely for damages, court held that plaintiffs must attempt to get the document through a writ to get punitive damages); Garner v. State, 749 N.W.2d 927 (Wis. Ct. App. 2010) (requiring plaintiffs to file for a writ of mandamus).

\textsuperscript{164} "A party seeking damages and costs under the open records law must show that the mandamus action could reasonably be regarded as necessary to obtain the records." State ex rel. Weissenberger v. Watters, 576 N.W.2d 99 (Wis. Ct. App. 1998).


\textsuperscript{167} See Watton v. Hagerts, 751 N.W.2d 369 (Wis. 2008) (granting writ of mandamus); Portage Daily Register v. Columbia Cnty. Sheriff's Dep't, 746 N.W.2d 525 (Wis. Ct. App. 2008) (granting writ of mandamus, but not granting any
Eau Claire Press Co., where a newspaper sought documents related to a confidentiality agreement. The Appellate Court described how "a decision is arbitrary and capricious if it lacks a rational basis or results from an unconsidered, willful and irrational choice of conduct." In that case, because the town had a reasonable concern about confidentiality, the court found it was rational for the town to refuse disclosure. While the court compelled the town to turn over the documents, the court did not award punitive damages because the town had a rational basis for its conduct. Wisconsin courts also deny punitive damages where the government entity was acting in good faith, and had a good faith belief in the legality of the denial of requests. Overall, plaintiffs often attempt to win punitive damages, but Wisconsin courts require a showing of some bad faith or intentionality on the part of the government to classify the actions as arbitrary and capricious and award punitive damages.

Michigan's statute seems to be used the most frequently, with fifty-six cases involving punitive damages compared to forty-three for Wisconsin and thirty-four for Minnesota. Additionally, twelve cases granted punitive damages, with most granting the statutory maximum of $500. In Krug v. Ingham County Sheriff's Office, the sheriff's office falsely indicated that records were exempt and concealed records from the plaintiff; the court awarded the statutory maximum of $500. In Meredith Corp. v. City of Flint, the court found that the city failed to articulate any reason for denial of the

damages); Kroeplin v. Wis. Dep't of Natural Res., 725 N.W.2d 286 (Wis. Ct. App. 2006) (mandating disclosure of records); State ex rel. Reimann v. Poliak, 546 N.W.2d 578 (Wis. Ct. App. 1996) (mandating disclosure of documents, but refusing to grant damages); Cubero v. Record Custodian, 539 N.W.2d 335 (Wis. Ct. App. 1995) (finding no willful refusal, court granted writ of mandamus but denied request for damages).

169. Id. at 921.
170. See id.
171. See State ex rel. Young v. Shaw, 477 N.W.2d 340 (Wis. Ct. App. 1991) (university acted in good faith and did not owe punitive damages, but was compelled to turn over records); see also State ex rel. Socha v. Forest Cnty. Sheriff's Dep't, 833 N.W.2d 873 (Wis. Ct. App. 2013) (police had a good faith belief that requested transcript did not exist, so they did not owe punitive damages); State ex rel. Zinngrave v. Sch. Dist. of Sevastopol, 431 N.W.2d 734 (Wis. Ct. App. 1988) (school board did not believe they had a duty to record minutes of meetings, plaintiff was denied punitive damages).

request, and awarded the statutory maximum of $500.\textsuperscript{173} On the outer limits of what is construed as arbitrary and capricious, in \textit{Walloon Lake Water System, Inc. v. Melrose Twp.}, the Michigan Court of Appeals held that even though the counsel incorrectly believed an exemption applied, this wrongful belief did not mean the government's actions were not arbitrary and capricious, and awarded the plaintiff $500 in punitive damages.\textsuperscript{174} In one particularly egregious case, the courts awarded the maximum punitive damages where the police department claimed a traffic stop recording was not available, although the recording was used by the prosecution at trial.\textsuperscript{175} Most of the other cases do not involve egregious violations by the government, but rather, untimely responses or improper denials of requests based on misapplication of exemptions.\textsuperscript{176} Overall, Michigan courts seem much more willing than Wisconsin courts to award punitive damages. While both states use an "arbitrary and capricious" standard, the threshold in Michigan seems to be lower. Additionally, Michigan courts almost always award the statutory maximum of $500, more than the average Wisconsin court.

The denials of punitive damages in the Michigan cases can be organized into the same four categories as the Wisconsin cases. In the first category, which is a denial because there is no basis whatsoever for plaintiff's case, there are five times as many denials in Michigan


\footnote{178}{See Scharrett, 642 N.W.2d at 690; see also Levitte v. Plymouth-Canton Comm’y School Dist., No. 246440, 2004 WL 2389997 (Mich. Ct. App. Oct. 26, 2004) (holding that no record need be disclosed, so plaintiff was not entitled to punitive damages); Easley v. Univ. of Mich., 444 N.W.2d 820 (Mich. Ct. App. 1989) (holding that because no records were compelled, no punitive damages were warranted); Bredemeier v. Kentwood Bd. of Educ., 291 N.W.2d 199 (Mich. Ct. App. 1980) (holding that because there were no records available to compel, no punitive damages were warranted).}

\footnote{179}{See Ritzer v. St. Joseph Cnty. Sheriff’s Dep’t, 674 N.W.2d 377 (Mich. 2004) (holding that findings of intentional destruction of documents after trial were so much larger number of cases awarding punitive damages would indicate that Michigan courts, at least, find that there are more meritorious cases when compared to Wisconsin). The second category—cases where the court dismisses because of procedural requirements—is much smaller than in Wisconsin.}\footnote{179}{This is likely because Michigan requires a plaintiff to be a “prevailing party” to receive punitive damages, non-prevailing parties are easily dismissed.\footnote{178}{See Hulshof v. Jurkas, No. 4:05-CV-152, 2006 WL 2443302 (W.D. Mich. Oct. 13, 2006) (holding that plaintiff had no FOIA request, and was not entitled to damages); Swiger v. City of Ludington, No. 313081, 2013 WL 5663137, at *3 (Mich. Ct. App. Oct. 17, 2013) (holding that since disclosure was not ordered, no punitive damages were warranted); Nichols Law Firm, PLLC v. City of Lansing, No. 310395, 2012 WL 6913788, at *6 (Mich. Ct. App. Nov. 20, 2012) (reversing trial court’s award of punitive damages because the city seemingly attempted to comply with FOIA); Simpson v. Washtenaw Cnty. Clerk, No. 271277, 2007 WL 2118786 (Mich. Ct. App. July 24, 2007) (holding that no records need be disclosed so no punitive damages may be rewarded); Local Area Watch v. City of Grand Rapids, 683 N.W.2d 745 (Mich. Ct. App. 2004) (government claimed a valid exemption); Scharrett v. City of Berkley, 642 N.W.2d 685, 689 (Mich. Ct. App. 2002) (holding that the plaintiff was not a prevailing party so was not entitled to punitive damages); Bisonet v. Bingham Twp., No. 290448, 2010 WL 2506909, at *5 (Mich. Ct. App. June 22, 2010) (holding that closed board meeting was exempt so no damages were warranted); Lakin v. Dep’t of Corr., No. 203450, 1998 WL 1989913, at *2 (Mich. Ct. App. Sept. 18, 1998) (holding that because no disclosure was mandated, punitive damages were not warranted); Steigerwaldt v. Town of King, 546 N.W.2d 580 (Mich. Ct. App. Jan. 30, 1996) (held that town repeatedly went out of its way to respond to requests, so a slightly tardy response was not enough to trigger a FOIA violation); Mich. Council of Trout Unlimited v. Dep’t of Military Affairs, 539 N.W.2d 745 (Mich. Ct. App. 1995) (holding that plaintiff was not entitled to the records); Hyson v. Dep’t of Corr., 521 N.W.2d 841, 843 (Mich. Ct. App. 1994) (holding that department of corrections properly claimed a public safety exemption).}
because Wisconsin requires a writ of mandamus action, which plaintiffs often failed to initiate, while Michigan has no such requirement. The third category, cases where the records were disclosed before trial, is around the same number as in Wisconsin—two cases compared to Michigan's five. The final category of cases—where the plaintiff had a solid claim for damages but the court did not find it to be arbitrary and capricious—is twice the size of Wisconsin: twenty-three compared to ten.

This last category is again the most interesting because some cases seem very similar to other cases in Michigan in which the court did award damages. In Walloon Lake Water, for example, the Michigan Court of Appeals allowed for punitive damages even though the town thought they had a valid exemption. In other cases, however, a reasonable belief in an exemption—even if legally wrong—was enough for a Michigan court to find that the government was not arbitrary and capricious. In Huron Restoration, Inc. v. Board of Control of Eastern Michigan University, for example, the Michigan Court of Appeals held that the plaintiff was entitled to documents, but not punitive damages, because the defendant had a legal foundation to believe there was an exemption and therefore had

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court made findings was too late to retroactively mandate punitive damages); see also Adamski v. Twp. of Addison, No. 259219, 2005 WL 1123911 (Mich. Ct. App. May 12, 2005) (holding that because plaintiff waived his right to punitive damages on appeal, there could be no review of trial court determination).

180. See Murray v. Cowell, 332 Fed. Appx. 24 (6th Cir. 2009) (request was satisfied after suit was filed); see also Kelpien v. City of Greenville, No. 285290, 2009 WL 1506884 (Mich. Ct. App. May 28, 2009) (finding that town complied after lawsuit was filed, was not entitled to punitive damages); Loud v. Lee Twp., No. 269256, 2007 WL 258312 (Mich. Ct. App. Jan. 30, 2007) (holding that plaintiff receives no damages because he was offered records before the action); Haley v. Nunda Twp., No. 211648, 1999 WL 33435757 (Mich. Ct. App. Sept. 17, 1999) (awarding no punitive damages because plaintiff was given documents after lawsuit was filed); Beatty v. Detroit Police Dep't, No. 179309, 1996 WL 33360683 (Mich. Ct. App. Aug. 9, 1996) (finding that documents were released before court ordered disclosure, so plaintiff was not entitled to punitive damages).


not acted arbitrarily or capriciously. The only distinguishing feature between this case and Walloon is that the court believed in Walloon that there was no possible exemption to be claimed, so a belief of legal exemption was completely unreasonable. The other major outlier is Patterson v. Allegan County Sheriff, wherein the Sheriff's department wrongfully denied access to mug shots. The Michigan Court of Appeals held that even though access to the mug shots was wrongfully denied, it was not arbitrary and capricious. There was no finding, however, that the Sheriff's department relied upon any legal basis. So, while Michigan courts do seem to be more open to finding damages, an examination of some past cases indicates that courts unpredictably apply the arbitrary and capricious standard. Michigan courts, like Wisconsin courts, also do not find arbitrary and capricious action when government entities are acting in good faith. This shows some consensus that, while it may be unclear what exactly constitutes arbitrary and capricious denial, if government entities are acting in good faith, courts usually will defer to the government entity and give them the benefit of the doubt.

Compared to Wisconsin and Michigan, Minnesota's open records law has been litigated significantly less, with only thirty-eight cases. Most tellingly, there is not a single case where punitive damages have been awarded. Though there are two cases in which large amounts of damages were awarded, they were unrelated to

185. Id. at 369.
186. Id.
187. See Hartsfield v. Mich. Dep't of Corr., No. 171571, 1996 WL 33362309 (Mich. Ct. App. June 25, 1996) (holding that mistakes were due to administrative oversight, not bad faith, and denying punitive damages); see also Gendler v. Flint Cnty. Sch., No. 252118, 2005 WL 1750768 (Mich. Ct. App. July 26, 2005) (holding that conferral with attorney general's office shows thoughtful consideration and denying punitive damages); Yarbrough v. Dep't of Corr., 501 N.W.2d 207 (Mich. Ct. App. 1993) (holding that delay due to ongoing investigation was reasonable and damages were not warranted); Wilson v. City of Eaton Rapids, 403 N.W.2d 433 (Mich. Ct. App. 1992) (holding that the town's attempt to reconcile contractual obligation with duty to disclose was reasonable and damages were not warranted); Jordan v. Martimucci, 300 N.W.2d 325 (Mich. Ct. App. 1990) (holding that an eight week delay was not in bad faith, punitive damages denied); Laracey v. Fin. Inst. Bureau, 414 N.W.2d 909 (Mich. Ct. App. 1987) (holding failure to disclose was administrative oversight, not whimsical or in bad faith, and, accordingly, punitive damages were not warranted).
punitive damages. In *Navarre v. South Washington County Schools*, the school released a teacher’s personal data in breach of the data privacy law, resulting in damages of $540,000.188 In *Star Tribune Co. v. University of Minn. Bd. Of Regents*, the University of Minnesota wrongfully disclosed student data and was penalized $300,000 in attorney’s fees.189 Neither of these cases, however, dealt with wrongful disclosure of information or the denial of information, and neither awarded punitive damages. All the cases dealing with punitive damage requests fall in the same four categories of denials as Wisconsin and Michigan cases. The first category, that there is no substantive case for a denial of access to records, has substantially more denials than Wisconsin—six compared to two—even though Minnesota has fewer claims.190 Courts in Minnesota seem eager to get cases out early on by finding no issue whatsoever. Minnesota courts also frequently dismiss cases under the second category, which is due to a procedural deficiency.191 Section 13.08(1) requires that a party sue the responsible government entity.192 A common lawsuit evasion

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190. See Shade v. City of Farmington, 309 F.3d 1054 (8th Cir. 2002) (holding that because plaintiff lost his claim he was not entitled to damages); see also Moubry v. Indep. Sch. Dist. 696, Ely, Minn., 9 F. Supp. 2d 1086 (D. Minn. 1998) (holding that a short delay in providing educational data does not provide a claim); Republican Party of Minn. v. O’Connor, 712 N.W.2d 175 (Minn. 2004) (holding party affiliation of judges is private data not subject to disclosure); Kobluk v. Univ. of Minn., 574 N.W.2d 436 (Minn. 1998) (holding that attorney-client privilege made materials exempt); Hennepin Soil & Water Conservation Dist. v. Harrod, No. C8-02-1616, 2003 WL 1908116 (Minn. Ct. App. Apr. 22, 2013) (holding that there was no claim sufficient to warrant damages or any remedy); Schocker v. State Dep’t of Human Rights, 477 N.W.2d 767 (Minn. Ct. App. 1991) (holding that human rights data was exempt and plaintiff was not entitled to damages).
strategy for government departments in Minnesota is to claim that a
different entity is responsible and that the suit was improperly
filed.\textsuperscript{193} However, because Minnesota courts do not dismiss claims on
procedural grounds as frequently as Wisconsin courts do, the claims
must be disposed of at a different stage.

The third category, that the records were disclosed before the
trial, is fairly consistent with the results from Wisconsin and
Michigan: two in Minnesota, as compared to two in Wisconsin and
five in Michigan.\textsuperscript{194} This shows that, across states, courts generally
dismiss cases when the individual has the records, because courts
generally recognize that the purpose of the proceedings is about
obtaining the records, not awarding monetary fees.

The last category, that the court does not find the appropriate
standard met, is where most of Minnesota's cases get resolved. In
twenty-five of the cases, Minnesota courts found that records needed
to be turned over, but did not find a willful violation of the statute as
required by section 13.08.\textsuperscript{195} The foundational case is \textit{Backlund v. City of
Duluth Minn}. There, the fire department wrongly refused to hire a

\textsuperscript{193} Ehling, supra note 116.

\textsuperscript{194} See Wash. v. Indep. Sch. Dist. No. 625, 610 N.W.2d 347 (Minn. Ct.


\textsuperscript{196} See CIV011737ADMAJB, 2002 WL 1364113 (D. Minn. June 20, 2002)

\textsuperscript{197} St. Peter Herald v. City of St. Peter, 496 N.W.2d 812 (Minn. 1993)
firefighter, and when the documents detailing the city's evaluation of applicants were requested, the fire department destroyed them.196 The court held that this deliberate destruction of documents was not a willful violation of the statute.197 The court required that there be clear and convincing evidence to bring a punitive damage claim, and that there be a "showing . . . made that the defendant intentionally violated the MGDPA without legal justification or excuse."198 If, however, the deliberate destruction of documents does not constitute a willful violation of the law, it is hard to imagine a case that would. The Minnesota court's definition and application of the willful standard may explain why there have been no punitive damage awards—even the grossest violations do not qualify as willful.

Figures 2.0 and 3.0 reflect an accurate summary of the breakdown of the case law in each state, and a breakdown of all the cases denying punitive damages by separating them out in the four categories used in this section. The charts reflect that Michigan courts seem to be the most aggressive in awarding damages, with Wisconsin courts also occasionally awarding damages, while Minnesota courts rarely do so. Figure 3.0 shows how Minnesota courts dismiss many cases because they do not meet the "willful" standard, particularly when compared to the other two states. Michigan has an interesting dichotomy—courts are aggressive up front about screening for meritorious cases, but if a case has merit, it is much more likely that plaintiffs will not only receive damages, but will receive the statutory maximum amount of $500.

197. See id.
198. Id. at 325.
FIGURE 2.0: COMPARING MICHIGAN, MINNESOTA, AND WISCONSIN CASE LAW

<table>
<thead>
<tr>
<th>State</th>
<th>Total Number of Cases</th>
<th>Result: Denial of records request and damages request</th>
<th>Result: Records request granted, damages request denied</th>
<th>Result: Records request granted, damages (penalty, attorney fees) awarded</th>
<th>Result: PUNITIVE damages awarded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minnesota</td>
<td>38</td>
<td>14</td>
<td>18</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>43</td>
<td>16</td>
<td>14</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>Michigan</td>
<td>57</td>
<td>22</td>
<td>11</td>
<td>12</td>
<td>12</td>
</tr>
</tbody>
</table>

FIGURE 3.0: CATEGORIES OF DENIALS OF PUNITIVE DAMAGES WHEN RECORDS WERE COMPELLED

<table>
<thead>
<tr>
<th>State</th>
<th>Total Number of Cases where writ was granted, but no punitive damages</th>
<th>Category One: Denial because of No Basis</th>
<th>Category Two: Denial on procedural grounds</th>
<th>Category Three: Records were disclosed before trial</th>
<th>Category Four: Lack of finding of appropriate standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wisconsin</td>
<td>22</td>
<td>3</td>
<td>7</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Michigan</td>
<td>45</td>
<td>15</td>
<td>2</td>
<td>5</td>
<td>23</td>
</tr>
<tr>
<td>Minnesota</td>
<td>38</td>
<td>6</td>
<td>6</td>
<td>2</td>
<td>25</td>
</tr>
</tbody>
</table>

C. Analysis

The three punitive damage statutes each have slightly different structures, and the application of these statutes varies wildly. This raises two separate questions: 1) what explains the wide differences in case law results in each of the states? And 2) what
general conclusions about the punitive damages statutes can be drawn from this analysis?

Michigan's higher number of successful cases could be due to the structure of the law—particularly the low cap on punitive damages. Unlike both Wisconsin and Minnesota, Michigan's law puts a $500 cap on damages. Courts may be more willing to award damages when the amount is fixed at a low amount because the damages condemn the government action, but do not levy a huge, disabling fine on the government entity. This is a self-perpetuating cycle: because courts are more willing to award the damages, plaintiffs respond by seeking those damages more. Since Michigan courts are receptive to claims of punitive damages, it is not seen as a waste of time or effort.

In Wisconsin, however, there is an established status quo that courts do not award damages unless the circumstances are extraordinary. Litigators within the state do not seek damages because it is seen as a "throwaway" claim or a "long shot." When lawyers include a claim for punitive damages, it is often used as a strategic tool to leverage a more favorable settlement, as they can easily drop the punitive damages claim they never had a hope of winning to appear more reasonable to the judge. This explains why Wisconsin plaintiffs do sometimes seek punitive damages, more frequently than Minnesota plaintiffs, and why they rarely win: the claims were never filed with the intention of winning the damages themselves, but merely as a tactic to increase the likelihood of recouping attorney's fees and receiving the requested document.

There are a few explanations for why Minnesota's statute, which was written by journalists with the intention that all of its provisions be utilized to check government actors, is used markedly less than the other two statutes. The first is Minnesota's courts' reluctance to find behavior willful and the high standard set for willful behavior. Minnesota courts have never awarded punitive damages before and litigants have merely responded to this

200. Dreps, supra note 76.
201. Mr. Dreps explained how he sometimes used punitive damage claims when appearing before an equitable judge, because in ruling against the punitive damages claim, the judge feels as though they are "helping both sides." Id.
203. See Backlund v. City of Duluth Minn., 176 F.R.D. 316 (D. Minn. 1997) (refusing to find willful violation of open records law even though there was evidence of deliberate destruction of requested documents).
reluctance by rarely seeking the awards. Attorneys generally do not want to waste clients' time, and attempting to win a punitive damages claim when a Minnesota court has never awarded them would seem to be inefficient. Another explanation is that Minnesota has something the other two states do not—alternative dispute resolution, where an administrative law judge issues a non-binding decision that, if the agency does not comply, can be used as support for the plaintiff's case when they file in state court.\textsuperscript{204} Plaintiffs using this separate dispute resolution mechanism do not seek punitive damages, and can more quickly resolve these issues.\textsuperscript{205} This would explain why there are fewer cases—they are being resolved outside of the courts. Another potential explanation is the background of the judges who adjudicate these disputes. Don Gemberling indicated that many of the judges who hear these cases were formerly public attorneys for bodies like small governments and are more sympathetic to those actors.\textsuperscript{206}

As to the second question, examining how these damages provisions work in practice illustrates that punitive damages do not work effectively to accomplish any of the intended purposes of these provisions. Punitive damages provisions can only serve a few purposes: to incentivize plaintiffs to bring suits against delinquent government actors, to punish and shame government actors, and to promote government compliance with open records laws. The only way the latter two purposes can be accomplished, however, is if wronged parties bring suit in the first place. In the freedom of information context, there are two types of actors that may bring a suit: newspapers and media organizations, and individual private citizens.

Punitive damages do not incentivize either of these actors to bring suits. Media members are chiefly concerned with getting the record, not profiting off of it.\textsuperscript{207} Media members do not bring suit

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{204} Ehling, \textit{supra} note 116.
\item \textsuperscript{205} Citizens can also receive a non-binding opinion from the Minnesota Information Policy Analysis Division (IPAD). While non-binding, agencies are guaranteed immunity from any court actions if they comply with the opinion, which incentivizes compliance. These proceedings are free to the public. Telephone Interview with Laurie Beyer-Kropuenske, President, IPAD (Jan. 16, 2014).
\item \textsuperscript{206} Gemberling, \textit{supra} note 148.
\item \textsuperscript{207} See Dreps, \textit{supra} note 76; see also Ehling, \textit{supra} note 116 (Describing how, oftentimes, media members do not bring suits because by the time they receive the record it would be old news).
\end{itemize}
\end{footnotesize}
either because the duration of the process would render the record defunct by the time they receive it, or because of the costs associated with bringing a suit.\textsuperscript{208} Punitive damages do not adequately address either of these concerns. It could be argued that damages help lower the costs of bringing an action, but attorney's fees provisions in FOIA actions already serve this purpose. The recent recession and the subsequent economic struggles of newspapers have impacted the number of state FOIA actions filed because newspapers can no longer afford to spend the resources required to file these actions.\textsuperscript{209} If they do file suit, the purpose is to either make a point or obtain the record, and they file \textit{in spite} of the costs, not to profit off of the action.\textsuperscript{210} In fact, most newspapers are hesitant to ask for more damages than necessary because any damages awarded come right from the taxpayers' pockets—the very same taxpayers whom they want to purchase their product.\textsuperscript{211} If anything, media organizations have an incentive \textit{not to} bring FOIA suits because of punitive damages, or at least hesitate to ask for punitive damages, because of the negative publicity associated with asking.\textsuperscript{212}

Individuals are similarly not incentivized by punitive damages provisions. Often, the cap on damages in Michigan and Minnesota is so low that it will not cover the cost of a lawsuit. Additionally, damages are only awarded if individuals \textit{win} their suit, which is impossible for a private citizen to evaluate beforehand. The costs associated with bringing a suit up front, sometimes a thousand dollars or more, deter individuals from filing even if they will eventually likely get those fees back.\textsuperscript{213} Finally, any damages are inadvertently coming from the taxpayers' pockets because the fines are levied against government entities, not individuals. So while individuals may win some damages, that money is just coming from their taxes and their neighbor's taxes, which acts as a deterrent towards seeking them in the first place.

While these provisions were drafted with the best intentions, a whole host of factors have rendered them likely useless. Though money can act as an incentive in many cases, damages are awarded so rarely—and in such small amounts—that individual actors do not file solely to obtain damages. There is no predictability—they would

\begin{flushleft}
208. See Anfinson, \textit{supra} note 145.
210. See id.
211. Dreps, \textit{supra} note 76.
212. See id.
\end{flushleft}
not be guaranteed damages—and, even if they were, the amount to be won is usually so low that it would not be worth the hassle. For these damages provisions to work as intended, courts would have to more routinely implement them and the amounts awarded would have to be higher.

IV. THE FUTURE FOR FOIA COMPLIANCE

While punitive damages provisions do not appear to increase the number of state FOIA actions brought or incentivize compliance, there are a few important lessons to be learned from their development. The first deals generally with the politics of FOIAs and of enacting various pieces of FOIA legislation. In developing FOIA statutes, the media lobby is incredibly influential. Mark Anfinson, a lawyer in Minnesota who represents many of the local newspapers there, described how local newspapers connect to have a statewide lobbying impact. 214 Due to the nature of the newspaper business, these papers have strong connections to each of their local representatives, which allow them to more easily mobilize a wider range of support for laws. 215 As a result, developments related to FOIA statutes within states often just reflect an active media lobby. 216 This means that many compliance mechanisms are developed not with easy access for members of the normal public in mind, but rather are aimed towards the media. 217

Perhaps in part because of this, media members are the primary filers of FOIA suits. Individuals who file normally do so in conjunction with other claims, often because the FOIA claims can provide attorney’s fees whereas the primary claims would not. 218 This has a number of consequences for the resolution of FOIA disputes. First, the number of actions brought has declined as newspapers are

214. Anfinson, supra note 145.
215. Id.
216. Gemberling, supra note 148.
217. In Minnesota, for example, a new remedy recently enacted allows individuals to file with an administrative law judge (ALJ), who then issues a binding opinion. This is a “pay as you play” system, requiring individuals to pay $1,000 up front to get their dispute resolved, which will be refunded if the individual prevails. This system is expressly aimed at members of the media because it allows quicker solutions than court proceedings. The filing fee, however, has deterred many private citizens from taking advantage. See Anfinson, supra note 145.
218. Beyer-Kropuenske, supra note 205.
consolidated and newspaper resources dry up. 219 Newspapers already rarely bring suits because any records they receive would be “old news” by the time they win. 220 If newspapers do file FOIA suits, they often file to prove a point. 221 Even when they file, however, newspapers are incredibly disinclined to seek any major damages, outside reasonable attorney’s fees, because of the negative public perception of these suits. When a town loses, that fine is often passed directly onto the taxpayers. These same taxpayers are the actual or prospective customers of the newspapers. Newspapers fear alienating their base by appearing greedy when they ask for any damages outside of attorney’s fees. 222 The politics associated with FOIA statutes result in media members having an unusual amount of say in shaping the law, and the politics associated with bringing suit results in media members rarely bringing these lawsuits. When they do bring suit, they very rarely seek punitive damages.

Another lesson can be found in how judges’ past experiences and expertise heavily influence the implementation of FOIA statutes. A common problem experienced by FOIA litigators, as described by Don Gemberling, is that many judges were public attorneys before becoming judges. 223 Judges who have previously worked as representatives for the same small towns or cities being sued in FOIA actions are often more likely to be sympathetic to the town, and are less likely to levy significant penalties or punitive damages against the town. 224 Even if a judge does not have a background as a public attorney, the lack of knowledge of FOIA statutes and cases also hinders a judge’s abilities to properly decide cases. 225 FOIA cases are typically very rare, so it is difficult for judges to even cultivate familiarity with the statutes. Even in Minnesota, for example, where there is a remedy that allows for administrative law judges to adjudicate these claims, those judges have not developed high levels of expertise due to the rarity of such cases. 226 Judges are understandably hesitant to levy large fines or to find against

219. Anfinson, supra note 145 (describing how there is no “fear factor” when the government declines to disclose information because suits are no longer filed); see also Gemberling, supra note 148 (describing how the consolidation of the media has led to a decline of resources being spent on FOIA claims).

220. Dreps, supra note 76.
221. Id.
222. Id.
223. Gemberling, supra note 148
224. Id.
225. Anfinson, supra note 145.
226. Id.
government actors, particularly in gray areas of FOIA disputes, when they are not well versed in the intricacies of the law. A lack of knowledge and familiarity with FOIA claims, coupled with many judges' backgrounds as attorneys for towns and cities, impacts how courts interpret FOIA statutes.

The general structure of a FOIA statute also has many implications for compliance with FOIA and development of the statute over time. This paper looked at two broad general structures of FOIAs. The first type involves a general presumption towards disclosure, and allows for various exemptions, particularly in cases where the cost of disclosing is higher than any potential benefits.227 The second system, found in Minnesota, involves classifying every single piece of information as either public or private information.228 Media organizations and lobbyists in favor of disclosure of information favor the latter regime for two reasons. First, it provides more opportunities for those organizations to lobby for information freedom. In Minnesota, for example, every bill has a FOIA component, which allows the newspapers to continually have a say in the freedom of information regime.229 Second, the latter type of system makes what should be disclosed more black and white. This makes it harder for government agencies to argue in favor of non-disclosure and makes it more difficult for judges to find that an agency did not have to disclose.230 The difference in the structure of a FOIA statute alone can influence, first, how much of a voice individuals have in the process and, second, how judges and governments interact with the FOIA regime.

Lastly, there is a lesson to be learned regarding the importance of a freedom of information culture that is developed both within a state but, more particularly, within the government agencies in that state. Often, government agencies can develop a culture of nondisclosure.231 Particularly where there are complicated statutes at play, individuals in government have a default answer of "no" to any request.232 Training and exposing officials to FOIA statutes is typically seen as an answer to this problem; however, without a culture of compliance, no amount of training will be effective. For

227. Dreps, supra note 76.
229. Gemberling, supra note 148.
230. Id.
231. Neumeister, supra note 228.
232. Anfinson, supra note 145.
instance, Don Gemberling, who trained hundreds of individual government officials over the course of his career as director of IPAD, frequently heard from those same officials that in their town, city, or government agency, officials higher up still were resistant to any sort of change because of that culture.\(^{233}\) Furthermore, training is ineffective because of high turnover rates in government agencies, particularly in the positions that handle FOIA requests.\(^{234}\) Simply put, there needs to be a change in governmental culture to encourage compliance with FOIA before any other mechanisms can be successful. The current default answer to requests is often “no” and until that default setting is altered, compliance mechanisms will only be able to do so much in forcing governments to disclose.

V. ARE PUNITIVE DAMAGES PROVISIONS WORTHWHILE IN THE FOIA CONTEXT?

Freedom of information regimes are critical to the well being of any democracy, and access to government records is a fundamental right of any citizen. Statutes like FOIA, however, are meaningless if the government has no incentive to comply with them. Punitive damages provisions, in theory, could serve to punish and shame government actors into complying with FOIAs and incentivize individual actors to bring suit. However, courts’ reluctance to grant punitive damages combined with the reluctance of many actors (particularly newspapers) to request punitive damages when they do sue undermine the effectiveness of punitive damages. While these provisions have not been used as aggressively as they were intended and have not been successful in encouraging government agencies to comply with FOIA requests, they can teach a number of important lessons about FOIA compliance generally. While attorney’s fees and compensatory damages, as mentioned in Part II, may provide one potential solution to compliance, this study, if anything, suggests that certain often overlooked factors need to be given serious consideration. More focus needs to be paid to the politics involved in FOIA, the impact a judge’s knowledge and background can have in the implementation of FOIA, how the general structure of FOIA impacts individuals bringing claims, and the general culture of

\(^{233}\) Gemberling, supra note 148 (describing how he was often told that people he trained were instructed that nondisclosure was still the default position, despite any training they received).

\(^{234}\) Anfinson, supra note 145.
noncompliance. Perhaps, keeping these concerns in mind, new solutions can be structured to ensure that citizens really are given access to the public records to which they are entitled.
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