[ATTACHMENT 2]

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Violating government-access laws rarely results in punishment for the offenders

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By Katrina Hull

Public officials who wrongly deny access to open meetings and records face a broad range of consequences, although being slapped with a whopping fine or thrown out of office or into jail are rare. The lack of serious sanctions for secretive behavior leaves many access advocates throwing up their hands.

A recent Kansas Supreme Court ruling is evidence of a reluctance to enforce sanctions for violating open records and meetings laws. After championing the "public policy of making public records open for any person" in one breath, the court's next breath was sweetest to the state agency that unlawfully denied access to public information.

Despite ruling that the state Department of Transportation had no reasonable basis for withholding safety information about railroad crossings from The Garden City Telegram, the court ordered the agency to pay only a fraction of the newspaper's legal fees.

"It's bad," the newspaper's attorney Mike Merriam said of the May 30 decision. "The court has really eliminated the threat of large monetary awards against agencies in the form of attorney's fees."

Kansas' highest court interpreted the attorney fee provision of the Kansas Open Records Act to apply only up until the point when a lawsuit has been filed, which also is usually when an attorney first gets involved in an open records suit, Merriam said. (Telegram Publishing Co. v Kansas Department of Transportation)

Although the Kansas law also provides for a $500 penalty for breaking the open records law, that fine is levied only when the attorney general or a county prosecutor brings the action. Litigating a private open records suit against a public official or agency usually costs from $7,000 to $15,000, Merriam said.

"I just don't think that private citizens can fund that kind of litigation," he said.

Atttorney fees can be key to encouragiing compliance

Missouri public officials learned a different lesson when the University of Missouri agreed to pay The Kansas City Star more than $77,000 in legal costs -- the largest known award against a state agency under the Sunshine Law. After five years of stonewalling, the university also allowed access to 10 years of internal audits. (Kansas City Star Co. v. Curators of the University of Missouri)

"That has sent a message to public governmental bodies that they need to be very considerate when they tread in the area of closing meetings and closing records," said Doug Crews, executive director of the Missouri Press Association.

Attorney fees can be hard to come by, even though at least 40 states have laws that provide for attorney fees and costs to a party who successfully brings an open meetings or records lawsuit. Most of the fee-awarding provisions are discretionary or require the official to intentionally deny access.

Florida is one of the few states that make the award automatic, even when officials believe they have a legitimate reason to withhold a document or keep the public out of a meeting. Jon Kaney, general counsel of the state's First Amendment Foundation, said the automatic award encourages compliance by public officers.

"It's simple," Kaney said. "If they don't produce the record before the requester produces a court suit, they are liable for attorney fees."

And if the requester does not have an attorney, the law still

demands a liberal interpretation of what is recoverable. On June 11, a District Court of Appeal in Tallahassee upheld

awarding a Florida prisoner the costs of postage, envelopes and copying in his quest for public information, even though such expenses are not normally recoverable. (Weeks v. Golden)

In Alabama, some creativity is needed to recover attorney fees for enforcing access laws. The state's open records and meetings laws are silent on attorney fees, but such expenses may be available under a public benefit doctrine.

A June 13 decision from a Court of Civil Appeals in Montgomery, however, appears to limit the doctrine's use. The court ruled that the Legal Environmental Assistance Foundation was not entitled to attorney fees despite its successful challenge of the Alabama Department of Environmental Management's practice of adopting new procedures for enforcing water quality standards without public comment. The court said the benefit to the public was not great enough to justify attorney fees, and making the environmental department pay would reduce its ability to regulate water quality. (Legal Environmental Assistance Foundation Inc. v. Alabama Dep't of Environmental Mgmt.)

Without readily available attorney fees, enforcement of open records and meetings laws often depends on private, self-financed lawsuits. Actions by prosecutors are rare.

"A district attorney has never done an effective job of enforcement because they are local politicians," said Bob Johnson, executive director of the New Mexico Foundation for Open Government.

New Mexico laws provide costs and attorney fees to successful plaintiffs in open records and meetings lawsuits, and Johnson said the state attorney general calls his foundation a "private attorney general" for its role in enforcing New Mexico access laws. Since 1990, the foundation has prevailed in every open records case that it has brought, Johnson said.

In Minnesota, a new law that took effect Aug. 1 makes attorney fees automatic in open records disputes when the requestor is required to go to court to enforce an advisory opinion from the state's Department of Administration. An advisory opinion takes only a letter to request, and is usually issued in 30 to 60 days, allowing those seeking access to avoid the time and expense of litigation.

"Mandatory attorney fees will be a breakthrough," said Mark Anfinson, general counsel for the Minnesota Newspaper Association.

The inspiration for the law stems from a small-town newspaper's bittersweet battle with a school board. The Caledonia Argus in southeastern Minnesota had been denied a detailed summary of the local school superintendent's performance evaluation it requested in April 2002. After an advisory opinion clarified that the information was public under the state's law, the school board continued to refuse to release the summary.

One year, one month and thousands of dollars in attorney fees later, a court ordered the board to comply with the advisory opinion and release the summary. But the court denied the newspaper's attorney fees -- they were discretionary under the state's old law. (Caledonia Argus v. Whitesitt)

"The sad experience all over the country is that the discretionary penalties are weak and most states refuse to enforce them," Anfinson said.

Removall from offfice a rare penallty, butt nott as rare as itts use

Only a handful of state laws enable a politician who wrongly closes a public meeting to be removed from office or for a recall election to be held. Out of that handful -- which includes Arizona, Georgia, Hawaii, Minnesota and Ohio -- openness advocates in only one state can recall the law ever being used successfully, and then only once.

The Minnesota Supreme Court in 1994 ordered that the mayor of Hibbing and two city council members be removed from office for at least three separate and intentional violations of the open meetings law. A district court and an appeals court had refused to apply the law that said after a third violation an official "shall forfeit any further right to serve." (Claude v. Collins)

Even if the law doesn't provide for removal, constituents may demand it. In Nowata, Okla., the mayor and two city council members pleaded no contest in October 2002 to violating the state's open meetings law. The illegal meeting was tape recorded, but the three survived a December recall election and violated the law again, a judge found on May 23. (State v. Maddox)

Hollie Manheimer, executive director of the Georgia First Amendment Foundation, said she thought removal from office was not a well-known remedy for violating open meetings law.

"It's a problem," Manheimer said. "On their face, the laws look good but the remedies over the years have proven to be inadequate."

Georgia law makes it a misdemeanor with up to a $500 fine for knowing violations of the open meetings law. That amount is

the median among the at least 35 states whose laws provide for either a criminal or civil penalty. The maximum statutory fines range from $100 in about seven states to $5,000 in Rhode Island. In Michigan, an institution of higher learning that makes its final selections for a president behind closed doors can be fined up to $500,000.

At least 25 states have laws that impose a criminal or civil fine for violations of open records laws with maximum fines between $100 and $1,000.

About seven states' statutes also authorize jail time for violations of open records and meetings laws. Potential sentences range from up to 30 days in Arkansas to a maximum of a year in Oklahoma and Florida. As an alternative to jail, Arkansas officials can be ordered to undergo training on access laws.

Florida a leader in slapping officials with sanctions

In Florida, there's no messing around with open government -- it's a state constitutional right. Just ask former state senator and suspended Escambia County Commissioner W.D. Childers. He recently became the first elected official in Florida to be jailed for violating the state's open meetings law.

A judge sentenced Childers to 60 days on one count and fined him $500 plus $3,600 in costs on another count. A jury convicted Childers last year of discussing redistricting by telephone with the county election supervisor while another commissioner listened on the speaker phone.

Childers sat in jail for the open meetings violation from May 13 until June 19, when he was released on $10,000 bond pending appeal of his convictions for open meetings violations and unrelated charges of bribery and unlawful compensation.

The jury declared Childers innocent of a third open meetings violation for discussing a county landfill contract over a meal at a Whataburger restaurant with County Commissioner Terry Smith, who was found guilty. Smith, who did all the talking at the Whataburger, was ordered to pay nearly $5,000 in fines and legal costs. (State v. Childers)

In an unrelated case in Escambia County, school board member Vanette Webb became the first elected official jailed for violating the state's open records law in 1999. Webb served one week of her 30-day jail sentence for intentionally withholding a public record before a judge threw out the conviction. (State v. Webb)

Though Webb's conviction was reinstated on appeal, a trial court judge granted her a new trial last year. On July 18, a prosecutor decided to drop the charge because the constitutionality of the law and its application had been upheld and Webb had not been re-elected.

Childers and Webb follow in the path of Melvin Meeks, who is thought to be the first American public official jailed for violating open meetings or records law. In September 1986, Meeks, a member of three city boards in Wister, Okla., spent the night in jail. He had been convicted of holding illegally closed sessions and failing to post agendas and keep minutes.

In 1988, Detroit Corporation Counsel Donald Pailen spent four nights in jail for refusing to release public documents relating to a $42 million land deal to the Detroit Free Press and The Detroit News. Pailen earned his freedom by turning over the documents.

Third party shares the blame and the pain of sanctions

Public officials may not be the only ones who have to worry about open-government laws. A California superior court judge ruled on June 17 that a state agency and four unions representing its employees must pay more than $42,000 in attorney fees to a Walnut Creek, Calif., newspaper that prevailed in an open records claim.

The ruling is likely the first in California to impose legal fees on a party other the government in an open records lawsuit, Contra Costa Times' attorney Karl Olson said.

The unions had filed a privacy lawsuit against the state Department of Health Services to stop the department's planned release of disciplinary records to the newspaper. The lawsuit delayed the open records request from April 2002 until early this year.

Sacramento Superior Court Judge Talmadge Jones acknowledged that the open records law provides only for fees against a public agency, but ruled "the necessity and burden of private enforcement" by the newspaper made the award of fees appropriate. (California Association of Professional Scientists v. Department of Health Services)

Olson said the decision had important implications for open government.

"With the privatization of things that had been government functions, you have private companies that fight public disclosure much harder than the government," Olson said. "It's tremendously important to send a message that if they want to get out there and fight against public disclosure, they are going to have to pay for it."

"Shame and embarrassment" effective sanctions in Virginia

A newly elected Purcellville, Va., mayor and three council members faced no consequences for a January meeting held at a council member's home in violation of Virginia's Freedom of Information Act.

A prosecutor said in March that legal action was unnecessary because the four officials -- who called the event a chance meeting of friends who happened to be public officials -- had all said they were sorry.

A new Virginia law that took effect July 1 increases the minimum civil penalty for willful and knowing violations of the state's Freedom of Information Act from $100 to $250 for the first violation and from $500 to $1,000 for any subsequent violation.

"Shame and embarrassment," however, may go a lot further than fines when it comes to enforcing open records and meetings laws, said Forrest "Frosty" Landon, executive director of the Virginia Coalition for Open Government. The Old Dominion state stiffened its fines four years earlier and that didn't significantly deter violations of the law, Landon said.

"The courts tend on a first violation not to see willful or deliberate attempts to circumvent the law, even though the law is very clear," Landon said. "For repeat offenders, stiffer fines could have a significant impact. As a practical matter in Virginia, folks clean up their act generally speaking."

Since its inception in 2000, the Virginia Freedom of Information Advisory Council has had a greater impact than other sanctions on deterring would-be and repeat breakers of the open meetings and records laws, Landon said. In line with its name, the legislatively created council issues non-binding advisory opinions about whether public bodies and officials are complying with the state's access laws.

"That office gets hundreds and hundreds of inquiries -- most from citizens," Landon said. "It provides a forum for working out some of the complex issues."

Glitches in the law can make enforcement difficult

In New Mexico, a stray horse and a school board's public confession of secretly spending money illustrate how the sanctions component of open records and meetings laws can break down.

New Mexican David Derringer just wanted to know who owned the stray horse that wandered onto his property in Fall 2000. When he asked the state's livestock board for its records, the board failed to reply within the law's 15-day requirement.

Derringer complained to the state's attorney general instead of filing a civil lawsuit against the board. The attorney general's office eventually agreed the board broke the open records law, but by then the livestock board had released the records. Though the law provides for fines of up to $100 per day for delays in releasing public information, the sanction is only available after a lawsuit is filed.

A district court and a state appeals court didn't budge on the literal interpretation that the open records law requires a lawsuit before sanctions are available, even when the law has clearly been violated. The New Mexico Supreme Court declined to hear Derringer's appeal on May 13. (Derringer v. State)

"What it amounts to is an invitation to the body to withhold the public records and meet you at the courthouse steps six months to a year later," said Johnson, of the New Mexico Foundation for Open Government.

A bigger priority for the foundation is adding civil penalties to New Mexico's open meetings law and personal liability for violators of the law. A legislative proposal that failed during the 2001 and 2003 sessions would have levied $1,000 fines against officials who unlawfully meet in secret.

"It would make members of public bodies much more conscious of the risks of violating the act," Johnson said. "I think there's a general attitude among public bodies that they'll just get a slap on the wrist."

The current law makes it a misdemeanor and imposes a $500 fine to violate the open meetings act, but enforcement of the law by a prosecutor is scarce. It took five members of the Las Cruces School Board to publicly admit they had violated the law 19 times by secretly providing about $390,000 in salary and benefits to a superintendent, before penalties were levied.

"That was so egregious that for the first time since 1976, the attorney general decided to file a criminal complaint," Johnson said.

When the board members finally received $500 fines, the school board paid the bill.

If the public is kept out, results may be thrown out

At least 42 states provide for some form of invalidation -- or throwing out the results of a meeting -- when public officials

wrongly keep the public out. But in Kansas, if a challenge to an illegally closed meeting doesn't arise within less than 10 days, the action taken behind unlawfully closed doors is allowed to stand.

In Wichita, Kan., city council members voted in an office suite after a closed meeting to add salary provisions to the city manager's contract. They gave notice that the public vote was to be held. By the time news of the April 1 vote surfaced, the 10-day limit to challenge the action under Kansas law had elapsed.

That's a sharp contrast to Washington's law, which provides no time limit for invalidating the results of an illegally convened meeting. On June 11, a U.S. Court of Appeals in Seattle (9th Cir.) upheld throwing out a 1998 settlement agreement between the city of Spokane, Wash., and a real estate developer worth hundreds of thousands of dollars because the Spokane City Council had approved the settlement during a closed session. (Feature Realty Inc. v. Spokane)

The law says actions not explicitly specified as an exception to the act must take place in public, or the actions are invalid. Although the law allows for private discussions with legal counsel about litigation, it does not allow for approval of a settlement in a closed session.

The opinion is a strong one, but in line with Washington law, said Stephen Eugster, an attorney and founder of the Spokane Research & Defense Fund. Eugster's nonprofit organization had sued the city in state court, but later joined the developer's lawsuit, which was in federal court because the company was from Nevada, on behalf of the public.

"It says that the open meetings act is to be honored and that the court can't make decisions to get around it," Eugster said of decision. "The point of the Washington act is that if a government action is to be taken at an open public meeting it has to be taken at an open public meeting."

Eugster, who is now a member of the Spokane City Council, said personally sending public officials the bill could encourage better compliance with open records and meetings laws.

"Some of these people who work for the government treat it as their own private fiefdom. They don't care if the government gets hit for fees," Eugster said. "If under extraordinary circumstances government officials would get hit with attorney's fees, maybe then some of these latter-day monarchists may think twice."

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