

## On public records enforcement, Massachusetts is in bad company.

In every state except three, people who have been wrongly denied access to public records can recover attorneys' fees in some or all cases. The outliers? South Dakota, Wyoming and . . . Massachusetts. More than half of all states require courts to award attorneys' fees.

Today, Massachusetts agencies can deny a person access to public records without facing any consequences. Most people don't have the resources to hire a lawyer just to get records that were supposed to be public in the first place. So, a denial is typically the end of the road; the person simply does not get the public information she was seeking.

### In other states, attorneys' fees act as an important incentive to comply with the law and provide information to the public.

Attorneys' fees do not mean major government expenses; they are rarely awarded, and awards are relatively small. With increased public records law compliance, far fewer cases need to be resolved in court, and agencies save themselves the cost and trouble of unnecessary litigation.

## The 47 States with Attorneys' Fees Provisions

State	Statute	Statutory Language/Key Provisions
Alabama	Alabama Code § 36-12-40	<ul style="list-style-type: none"><li>• No statutory provision, but fee awards granted under case law. See e.g., <i>Tuscaloosa News v. Garrison</i>, CV-99-408 (Cir. Ct. of Tuscaloosa County, Ala., Jan. 15, 2001)(An award is appropriate when the trial court determines that a case will result in benefit to the general public).</li></ul>
Alaska	Alaska Civil Rule of Procedure 82	<ul style="list-style-type: none"><li>• Partial fees required if plaintiff prevails in whole or in part, unless the lawsuit "lacked colorable merit"</li><li>• Full fees if case deals with constitutional issues and is brought by public interest or news media litigants</li></ul>
Arizona	A.R.S. § 39-121.02(B)	<ul style="list-style-type: none"><li>• Optional if plaintiff "substantially prevails"</li></ul>
Arkansas	A.C.A. § 25-19-107	<ul style="list-style-type: none"><li>• Required if plaintiff substantially prevails</li><li>• Unless defendant was substantially justified</li><li>• May not be assessed against the state or any of its agencies</li></ul>
California	Cal. Gov't Code § 6259(d)	<ul style="list-style-type: none"><li>• Required if plaintiff prevails</li></ul>
Colorado	Colo. Rev. Stat. § 24-72-204(5).	<ul style="list-style-type: none"><li>• Required if plaintiff has been denied access and subsequently prevails in court</li></ul>

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<b>Connecticut</b>	Conn. Gen. Stat. § 1-206	<ul style="list-style-type: none"> <li>Required if appeal is frivolous or solely for the purpose of delay</li> <li>Optional if plaintiff prevails in appeal of request related to the state's hazardous waste program</li> </ul>
<b>Delaware</b>	29 Del. C. § 10005(d)	<ul style="list-style-type: none"> <li>Optional if plaintiff is successful in court action</li> </ul>
<b>Florida</b>	Fla. Stat. § 119.12	<ul style="list-style-type: none"> <li>Required if court finds that the agency "unlawfully refused" the request</li> </ul>
<b>Georgia</b>	O.C.G.A. § 50-18-73(b)	<ul style="list-style-type: none"> <li>Required if plaintiff shows that agency acted "without substantial justification"</li> <li>Unless court finds that special circumstances exist</li> </ul>
<b>Hawaii</b>	Haw. Rev. Stat. § 92F-15	<ul style="list-style-type: none"> <li>Required if plaintiff prevails</li> </ul>
<b>Idaho</b>	I.C. § 9-344	<ul style="list-style-type: none"> <li>Required if plaintiff prevails</li> <li>And court finds refusal was "frivolously pursued"</li> </ul>
<b>Illinois</b>	5 ILCS 140/11(i).	<ul style="list-style-type: none"> <li>Required if plaintiff prevails</li> </ul>
<b>Indiana</b>	Ind. Code § 5-14-3-9(i)	<ul style="list-style-type: none"> <li>Required if plaintiff "substantially prevails"</li> <li>But, administrative exhaustion requirement: plaintiff must first seek make an informal inquiry to a public access counselor</li> </ul>
<b>Iowa</b>	Iowa Code Ann. § 22.10	<ul style="list-style-type: none"> <li>Required if plaintiff successfully establishes a violation</li> </ul>
<b>Kansas</b>	Kan.Stat.Ann 45-222	<ul style="list-style-type: none"> <li>Required if denial was in bad faith and without a reasonable basis</li> </ul>
<b>Kentucky</b>	Ky. Rev. Stat. 61.882(5)	<ul style="list-style-type: none"> <li>Optional if plaintiff prevails and court finds records were "willfully withheld"</li> </ul>
<b>Louisiana</b>	LSA-R.S. 44:35(d)	<ul style="list-style-type: none"> <li>Required if plaintiff prevails in whole</li> <li>Optional if plaintiff prevails in part</li> <li>Plus, Optional <i>actual damages</i> if custodian acted "arbitrarily or capriciously"</li> </ul>
<b>Maine</b>	1 M.R.S.A. §409(4)	<ul style="list-style-type: none"> <li>Optional if plaintiff prevails and denial was in bad faith</li> </ul>
<b>Maryland</b>	Md. Code Ann. §10-623(f)	<ul style="list-style-type: none"> <li>Optional if plaintiff "substantially prevails"</li> </ul>

### Massachusetts? HELLO, MASSACHUSETTS?

<b>Michigan</b>	Mich. Comp. Law § 15.240(6)	<ul style="list-style-type: none"> <li>Required if plaintiff prevails</li> </ul>
<b>Minnesota</b>	Minn. Stat. §13.08, subd. 4	<ul style="list-style-type: none"> <li>Optional</li> <li>Optional civil penalty \$1000</li> </ul>
<b>Mississippi</b>	Miss. Code Ann. § 25-61-15	<ul style="list-style-type: none"> <li>Optional if public records are denied</li> <li>Optional \$100 civil penalty per violation</li> </ul>

<b>State</b>	<b>Statute</b>	<b>Statutory Language/Key Provisions</b>
<b>Missouri</b>	Mo.Rev.Stat. § 610.027.4	<ul style="list-style-type: none"> <li>Required if court finds a “purposeful violation”</li> </ul>
<b>Montana</b>	See <i>Billings v. Billings Gazette</i> , 2006 Mt 329	<ul style="list-style-type: none"> <li>Optional if plaintiff prevails in an action to enforce right to public records access in Montana state constitution, Article II, Section 9.</li> </ul>
<b>Nebraska</b>	Neb. Rev. Stat. § 84-712.07	<ul style="list-style-type: none"> <li>Optional if plaintiff “substantially prevails”</li> </ul>
<b>Nevada</b>	NRS 239.011	<ul style="list-style-type: none"> <li>“Entitled” to fees if plaintiff prevails</li> </ul>
<b>New Hampshire</b>	N.H. Rev. Stat. § 91-A:8	<ul style="list-style-type: none"> <li>Required if lawsuit was necessary to enforce compliance <i>AND</i> custodian knew or should have known that conduct was in violation</li> </ul>
<b>New Jersey</b>	N.J.S.A. 47:1A-6	<ul style="list-style-type: none"> <li>Required if plaintiff prevails</li> </ul>
<b>New Mexico</b>	NMSA § 14-2-12	<ul style="list-style-type: none"> <li>Required if plaintiff is “successful in court action”</li> </ul>
<b>New York</b>	N.H. Pub. Off. Law § 89(4)(c)	<ul style="list-style-type: none"> <li>Optional if plaintiff substantially prevails <i>AND</i> the agency had no reasonable basis for the denial <i>OR</i> the agency failed to respond within the statutory time frame</li> </ul>
<b>North Carolina</b>	G.S. § 132-9(c).	<ul style="list-style-type: none"> <li>Court “shall allow” fee recovery if plaintiff substantially prevails, unless agency was following court order, published appellate opinion, or written opinion from AG</li> </ul>
<b>North Dakota</b>	N.D.C.C. § 44-04-21.2(1)	<ul style="list-style-type: none"> <li>Optional if court finds a violation</li> <li>Optional civil penalties of \$1000 or greater if violation was “intentional or knowing”</li> </ul>
<b>Ohio</b>	Ohio Rev. Code Ann. 149.43	<ul style="list-style-type: none"> <li>Required if custodian failed to respond within statutory time frame <i>OR</i> custodian promised to allow inspection within a specified time frame and failed to do so.</li> <li>Otherwise, optional.</li> </ul>
<b>Oklahoma</b>	51 O.S. 24A.17	<ul style="list-style-type: none"> <li>“Entitled” to fees if plaintiff is successful in court action</li> </ul>
<b>Oregon</b>	Or. Rev. Stat. Ann. § 192.490	<ul style="list-style-type: none"> <li>Required if plaintiff prevails in whole</li> <li>Optional if plaintiff prevails in part</li> </ul>
<b>Pennsylvania</b>	65 Pa. Stat. § 66.1 et seq.	<ul style="list-style-type: none"> <li>Optional if denial was willful or in bad faith <i>OR</i> if the exemptions claimed were not based on a reasonable interpretation of the law</li> </ul>
<b>Rhode Island</b>	R.I. Gen. Laws § 38-2-9	<ul style="list-style-type: none"> <li>Required if plaintiff prevails</li> <li>Judgment in plaintiff’s favor not a prerequisite to receive attorneys’ fees if defendant lacked grounding in fact or law</li> </ul>
<b>South Carolina</b>	S.C. Code Ann. § 30-4-100(b)	<ul style="list-style-type: none"> <li>Optional if plaintiff prevails in whole or in part</li> </ul>

State	Statute	Statutory Language/Key Provisions
Tennessee	T.C.A. § 10-7-505(g)	<ul style="list-style-type: none"> <li>Optional if denial was knowing and willful</li> </ul>
Texas	Tx. Code. Ann. § 552.323	<ul style="list-style-type: none"> <li>Required if plaintiff substantially prevails</li> <li>Unless agency acted in reasonable reliance on court order, appellate opinion, or opinion by the AG.</li> </ul>
Utah	Utah Code Ann. § 63G-2-802(2), § 63G-2-405(2)	<ul style="list-style-type: none"> <li>Required if government asserts confidentiality despite lack of relevant exemption and court denies confidential treatment.</li> </ul>
Vermont	1 V.S.A. § 319	<ul style="list-style-type: none"> <li>Required if plaintiff substantially prevails</li> <li>Optional if agency, in a timely answer to plaintiff's complaint, concedes that record is public and provides the record</li> </ul>
Virginia	Va. Code Ann. § 2.2-3713(D).	<ul style="list-style-type: none"> <li>Required if petitioner substantially prevails, unless special circumstances would make an award unjust</li> <li>Special circumstances may include reliance on AG opinion or court decision substantially supporting agency's position</li> </ul>
Washington	RCW 42.56.550(4).	<ul style="list-style-type: none"> <li>Required if plaintiff prevails</li> <li>Optional civil penalty up to \$100 for each day plaintiff was denied the right to inspect</li> </ul>
West Virginia	W.Va. Code Sec. 29B-1-1	<ul style="list-style-type: none"> <li>"Entitled" to fees if plaintiff successfully brings suit</li> </ul>
Wisconsin	Wis. Stat. § 19.37(2)(a).	<ul style="list-style-type: none"> <li>Required where requester prevails "in whole or in substantial part"</li> </ul>

## Summary

### 31 states require fees in some or all circumstances:

- Plaintiff "substantially prevails" – 6 states
  - AK, AR, IN, TX, VT, VA
- Plaintiff "prevails" or similar generic language about succeeding in court – 18 states
  - CA, CO, FL, GA, HI, IA, IL, LA, MI, NJ, NM, NV, OK, OR, RI, WA, WI, WV
- Government denied records knowingly, intentionally, or in bad faith, or frivolously appealed – 5 states
  - CT, ID, KS, MO, NH
- Other government failure (missed statutory deadline; unreasonable interpretation of an exemption) – 2 states
  - OH, UT

### In 16 other states, fees are optional:

- Plaintiff "substantially prevails" – 6 states

- AZ, MD, NE, NY, NC, SC
- Plaintiff “prevails” or similar generic language about succeeding in court – 5 states
  - DE, MN, MS, MT, ND
- Government denied records knowingly, intentionally, or in bad faith – 4 states
  - KY, ME, PA, TN
- Case will result in benefit to the general public – 1 state
  - AL