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DEFINING NORTH CAROLINA'S PUBLIC RECORDS AND OPEN MEETINGS FEE-SHIFTING PROVISIONS IN THE LARGER NATIONAL CONTEXT*

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North Carolina's Public Records and Open Meetings laws both provide for awards of attorney's fees in certain situations. The Public Records law awards fees to a plaintiff who "substantially prevails" and a government defendant who is sued in bad faith or on a frivolous basis. The Open Meetings law awards fees to any party that "prevails." These fee awards act as an incentive (or disincentive) for litigants to pursue these "open government" cases. Such awards are the exception to the general North Carolina rule that a party bears the burden of paying its own attorney's fees.

There is very limited appellate case law interpreting when a party should receive such an award of attorney's fees. This limited case law is exacerbated by the recent modification of the plaintiffs' fee-shifting provision in the Public Records law.

While appellate treatment of this issue is limited, there is a larger body of trial court decisions and persuasive case law on point. There are also materially similar fee-shifting provisions elsewhere in the North Carolina General Statutes that can provide guidance on how North Carolina courts treat fee shifting. This Article examines these and other sources in pursuit of a better understanding of when a plaintiff or defendant in an open government case might expect to receive an award of

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attorney's fees and, when appropriate, makes recommendations about how courts and practitioners should treat these provisions moving forward.

INTRODUCTION

The North Carolina Rules of Civil Procedure authorize an "award of costs" to a party where a court finds such an award to be "equitable and just."[1] However, this award of costs does not include attorney's fees.[2] The rule in North Carolina is that a party may only recover attorney's fees "when authorized by statute."[3] The only exception that spans across most subject matter is the court's discretionary power to "award a reasonable attorney's fee to the prevailing party" in a case where the losing party fails to raise "a justiciable issue of either law or fact . . . in any pleading."[4] Other statutory awards of attorney's fees tend to be narrow in scope.[5] Two of these narrower exceptions are found in North Carolina's open government laws.

North Carolina has two open government laws. The first is the Public Records Act, which provides for access to state and municipal government records.[6] The second is the Open Meetings law, which, with limited exceptions, requires that public bodies meet in the open and provides a cause of action to challenge violations.[7] Nearly every

1. N.C. GEN. STAT. § 1-263 (2017).

2. Swaps, LLC v. ASL Props., Inc., __ N.C. App. __, __, 791 S.E.2d 711, 712 (2016) ("Here, the General Assembly chose only to refer to 'costs' in Section 1-263 and not to specify that the term costs includes attorneys' fees. Thus, we hold that N.C. Gen. Stat. § 1-263 does not permit the trial court to award attorneys' fees.").

3. Hoke Cty. Bd. of Educ. v. State, 198 N.C. App. 274, 281, 679 S.E.2d 512, 518 (2009).

4. N.C. GEN. STAT. § 6-21.5 (2017).

5. *See, e.g.*, *id.* § 6-21.1(a) (allowing attorney's fees as part of costs in certain cases involving personal injury or property damage); *id.* § 6-19.1(a) (allowing a party defending against or appealing an agency decision to recover its attorney's fees where it prevails against the State); *cf.* Arnold v. Ariz. Dep't of Health Servs., 775 P.2d 521, 537 (Ariz. 1989) ("The private attorney general doctrine is an equitable rule which permits courts in their discretion to award attorney's fees to a party who has vindicated a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance.").

6. N.C. GEN. STAT. §§ 132-1 to -11 (2017).

7. *Id.* §§ 143-318.9 to -318.18.

state provides for some form of fee shifting in its Public Records and Open Meetings laws.[8] Such fee awards serve as an incentive for members of the public to keep governments open and accountable.[9] These awards can amount to thousands or even tens of thousands of dollars.[10] They are distinct from attorney's fees awarded as part of a sanction against a party bringing suit for an improper purpose.[11]

The goal of this research is to give definition to when a plaintiff or defendant might receive attorney's fees under North Carolina's Public Records or Open Meetings laws. While this research does provide persuasive examples from federal courts and other states, these examples are not intended to serve as an exhaustive survey of fee shifting across jurisdictions. Rather, these examples have been selected from jurisdictions that have materially similar provisions to those of North Carolina.

While this Article does not achieve absolute clarity as to the meaning of these provisions, it does provide useful guidance for litigants and judges who must deal with awards of attorney's fees under these open government provisions. As to North Carolina's Public Records Act, it seems likely that the State's courts will eventually have to decide how to interpret the plaintiff's fee-shifting provision in light of competing persuasive frameworks. Different jurisdictions have interpreted similar language in very different ways, giving North Carolina courts various examples to follow. Further, North Carolina Public Records defendants should rarely, if ever, expect to receive a fee award except when faced with the most egregious conduct by plaintiffs.

8. *See infra* Parts I.B.2, II.E.

9. *See, e.g.*, Cmty. Youth Athletic Ctr. v. City of Nat'l City, 164 Cal. Rptr. 3d 644, 694 (Cal. Ct. App. 2013) ("Indeed, the very purpose of the attorney fees provision is to provide 'protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure.'" (quoting Galbiso v. Orosi Pub. Util. Dist., 84 Cal. Rptr. 3d 788, 807 (Cal. Ct. App. 2008))); *see also* Frankel v. D.C. Office for Planning & Econ. Dev., 110 A.3d 553, 558 (D.C. 2015) (noting that the threat of having to pay a plaintiff's attorney's fees can incentivize agencies to respond to public records requests).

10. *See, e.g.*, Free Spirit Aviation, Inc. v. Rutherford Airport Auth., No. 06-CVS-106, 2009 WL 8660508, at *4 (N.C. Super. Ct. Apr. 6, 2009) (awarding a plaintiff $17,500 in an Open Meetings lawsuit), *aff'd in part, rev'd in part*, 206 N.C. App. 192, 696 S.E.2d 559 (2010); Lothrop v. Chatham Cty. Bd. of Elections, No. 06-CVS-239, 2006 WL 4526077, at *6 (N.C. Super. Ct. Sept. 12, 2006) (awarding a plaintiff $3,500 in attorney's fees for a partial Open Meetings victory); *see also* Wolf v. Grubbs, 759 N.W.2d 499, 529 (Neb. Ct. App. 2009) (awarding appellees $17,457.46 in an action for Open Meetings Act violations).

11. *See, e.g.*, Davis v. Durham Cty. Area Mental Health, No. 02-CVS-02211, 2002 WL 34202184, at *5 (N.C. Super. Ct. Aug. 15, 2002).

Regarding the Open Meetings law, it could at first be discouraging to see that the number of times North Carolina's appellate courts have interpreted the fee-shifting provision can be counted on one hand. However, these courts have made clear that they put a great amount of weight on persuasive authority from jurisdictions like the Fourth Circuit that already have a great wealth of case law on hand.[12] Courts and practitioners interpreting this provision, therefore, have substantially more material to work with than initially meets the eye.

I. FEE AWARDS UNDER THE NORTH CAROLINA PUBLIC RECORDS ACT

The North Carolina Public Records Act ("NCPRA") is codified at section 132 of the General Statutes of North Carolina.[13] It is North Carolina's state-level corollary to the federal Freedom of Information Act ("FOIA").[14] The statutory scheme provides for a broad policy allowing "the people [to] obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law."[15] Therefore, "any person" may examine and copy public records upon request.[16] A given record could potentially be partially public and partially confidential, and in such situations a government agency may not use this as a justification for denying access to public records.[17] Any person who is denied access to public records may file suit in the General Court of Justice "for an order compelling disclosure or copying."[18] It is in such actions that the questions surrounding fee awards are raised.

12. *See, e.g.*, Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 206 N.C. App. 192, 203, 696 S.E.2d 559, 567 (2010) (quoting Grissom v. Mills Corp., 549 F.3d 313, 318 (4th Cir. 2008)); H.B.S. Contractors, Inc. v. Cumberland Cty. Bd. of Educ., 122 N.C. App. 49, 57, 468 S.E.2d 517, 522 (1996) (citing Smith v. Univ. of N.C., 632 F.2d 340, 350, 352 (4th Cir. 1980)).

13. N.C. GEN. STAT. §§ 132-1 to -11 (2017).

14. *See* Freedom of Information Act, 5 U.S.C. § 552 (2012).

15. N.C. GEN. STAT. § 132-1 (2017).

16. *Id.* § 132-6(a).

17. *See id.* § 132-6(c) ("No request to inspect, examine, or obtain copies of public records shall be denied on the grounds that confidential information is commingled with the requested nonconfidential information. If it is necessary to separate confidential from nonconfidential information in order to permit the inspection, examination, or copying of the public records, the public agency shall bear the cost of such separation.").

18. *Id.* § 132-9(a).

A. The NCPRA provides for fee awards to plaintiffs who "substantially prevail," but the meaning of this language is less than clear.

A North Carolina plaintiff who "successfully compels" production of public records shall "recover its reasonable attorneys' fees if attributed to those public records" if the plaintiff "substantially prevails."[19] The award is mandatory rather than discretionary.[20] However, a court may not assess attorney's fees against a governmental entity where, in denying access to records, the agency relied on a judgment or order "applicable to the governmental unit or governmental body."[21] Further, fees may not be assessed where the governmental entity relied on "[t]he published opinion of an appellate court, an order of the North Carolina Business Court, . . . a final order of the Trial Division of the General Court of Justice," or "[a] written opinion, decision, or letter of the Attorney General."[22] Prior to the addition of this more specific "substantially prevails" language in 2010, a governmental defendant could avoid a fee award if it "acted with substantial justification in denying access" to records.[23] If the presiding court finds that the entity "acted in reasonable reliance," the court is prohibited from assessing attorney's fees against the entity.[24] North Carolina shares this concept with Massachusetts and Texas.[25]

19. *Id.* § 132-9(c).

20. *See id.*; *cf.* DEL. CODE ANN. tit. 29, § 10005 (2017) ("The court *may* award attorney fees and costs to a successful plaintiff of any action brought under this section, but only if the court finds that the action was frivolous or was brought solely for the purpose of harassment." (emphasis added)).

21. N.C. GEN. STAT. § 132-9(c)(1) (2017).

22. *Id.* § 132-9(c)(2)–(3).

23. Act of June 10, 2010, ch. 169, sec. 21(c), § 132-9(c), 2010 N.C. Sess. Laws 638, 660 (codified at N.C. GEN. STAT. § 132-9(c) (2017)).

24. *See id.*; *see, e.g.*, Brief of Defendant-Appellee at 5, Tillet v. Town of Kill Devil Hills, __ N.C. App. __, 809 S.E.2d 145 (2017) (No. COA 17-433) ("Defendant cited numerous Court of Appeals opinions . . . standing for the proposition that documents involving personnel matters and criminal investigative materials are not a matter of public record.").

25. MASS. GEN. LAWS ANN. ch. 66, § 10A(d)(2) (West, Westlaw through ch. 63 of 2018 Second Ann. Sess.) ("There shall be a presumption in favor of an award of fees and costs unless the agency or municipality establishes that . . . the agency or municipality reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts."); TEX. GOV'T CODE ANN. § 552.323(a) (West, Westlaw through 2017 Reg. Sess.) ("[T]he court shall assess costs of litigation and reasonable attorney fees incurred by a plaintiff who substantially prevails, except that the court may not assess those costs and fees against a governmental body if the court finds that the governmental body acted in reasonable reliance on . . . the published opinion of an appellate court . . . .").

Prior to the 2010 amendment, the statute merely awarded attorney's fees to a "prevailing" plaintiff.[26] The summary of ratified legislation for 2010 simply notes that the fee award is mandatory, but does not mention the change in language from "prevailing party" to "substantially prevails."[27] It is probable that the legislature would not have changed the words of the statute if it did not intend to change its meaning.[28] However, it is not immediately clear what it means for a plaintiff to "substantially prevail" versus merely "prevail," as both terms are used in different areas of the General Statutes.[29] The potential for ambiguity is increased by the possibility that a given record might be partially confidential and partially public.[30]

While there is no legislative history indicating what the General Assembly intended when it changed the wording from "prevailing party" to "substantially prevails," it certainly cannot be a coincidence that the 2010 amendment makes the North Carolina fee provision nearly identical to its Texas counterpart.[31] The Texas "substantially

26. Act of June 10, 2010, sec. 21(c), § 132-9(c), 2010 N.C. Sess. Laws at 660.

27. RESEARCH DIV. OF THE N.C. GEN. ASSEMBLY, SUMMARIES OF SUBSTANTIVE RATIFIED LEGISLATION 26 (2010) (noting that where a party "successfully compels the disclosure of public records, the court must allow that party to recover its reasonable attorneys' fees").

28. *See* State v. Davis, 198 N.C. App. 443, 452, 680 S.E.2d 239, 246 (2009) ("[I]n construing a statute that has been repealed or amended, it may be presumed that the legislature intended either to change the substance of the original act or to clarify the meaning of the statute." (quoting State v. Bright, 135 N.C. App. 381, 383, 520 S.E.2d 138, 139 (1999))). *But see* Ray v. N.C. Dep't of Transp., 366 N.C. 1, 21 n.3, 727 S.E.2d 675, 688 n.3 (2012) ("Whereas it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law, no such inference arises when the legislature amends an ambiguous provision." (quoting Childers v. Parker's, Inc., 274 N.C. 256, 260, 162 S.E.2d 481, 484 (1968))).

29. *Cf.* N.C. GEN. STAT. § 6-21.5 (2017) (awarding attorney's fees to a "prevailing party" in nonjusticiable cases); *see also id.* § 44A-35 (allowing attorney's fees for a "prevailing party" in certain cases involving statutory liens); *id.* § 113-391.1(e)(3) (providing that a party who "substantially prevails" in compelling disclosure of information that was alleged to have been a trade secret by another party "shall . . . recover its reasonable attorneys' fees if attributed to that information").

30. Section 132-6(c) prohibits a public entity from denying access to public information on the grounds that it is commingled with confidential information. However, this does not resolve whether a plaintiff who compels production of only a portion of a record may be considered to have "substantially" prevailed. *Id.* § 132-6(c).

31. *Compare* Act of July 10, 2010, ch. 169, sec. 21(c), § 132-9, 2010 N.C. Sess. Laws 638, 660 (codified at N.C. GEN. STAT. § 132-9(c) (2017)) (directing a court to allow a party who substantially prevails in an action to compel disclosure of public information to recover of its reasonable attorney's fees), *with* TEX. GOV'T CODE ANN. § 552.323(a) (West, Westlaw through 2017 Reg. Sess.) ("In an action brought under Section 552.321 or 552.3215, the court shall assess costs of litigation and reasonable attorney fees incurred by a plaintiff who substantially prevails, except that the court may not assess those costs and fees against a governmental body if the court finds that the governmental body acted in

prevails" standard was initially enacted in 1993 as part of a larger legislative package that the Texas legislature deemed "nonsubstantive."[32] In 1999, a decade before the North Carolina amendment, the provision went through its largest change, which mirrors today's North Carolina statute.[33] While this might be a reason for North Carolina courts to look to Texas case law for guidance, they are by no means bound to do so.[34]

The fee award to a substantially prevailing plaintiff is mandatory, as is the prohibition on such an award where the governmental defendant reasonably relied on one of the listed authorities in denying access to public records.[35] This mandatory fee award leaves no room for judicial discretion, meaning that whether a plaintiff has substantially prevailed is purely a question of law.[36] However, the definition of when a plaintiff has substantially prevailed is up for judicial interpretation. The words of a statute must first and foremost be given their ordinary meaning.[37] However, where a statute is ambiguous, a court may construe the statute to "ascertain the legislative will."[38] The phrase "substantially prevail" is ambiguous because it is "fairly susceptible of two or more meanings."[39] The mandatory nature of the fee award and ambiguity of the standard leave a prominent role for case law in determining when plaintiffs substantially prevail in North Carolina Public Records suits.

While North Carolina appellate case law provides some insight into defining when a plaintiff has substantially prevailed, there are limits to its usefulness. The most obvious limitation is timing—the

reasonable reliance on: (1) a judgment or an order of a court applicable to the governmental body; (2) the published opinion of an appellate court; or (3) a written decision of the attorney general, including a decision issued under Subchapter G or an opinion issued under Section 402.042.").

32. Act of May 22, 1993, ch. 268, sec. 1, § 552.323, 1993 Tex. Gen. Laws 583, 606 (codified at TEX. GOV'T CODE ANN. § 552.323 (West, Westlaw through 2017 Reg. Sess.)).

33. *See* Act of June 18, 1999, ch. 1319, sec. 28, § 552.323, 1999 Tex. Gen. Laws 4500, 4512 (codified at TEX. GOV'T CODE ANN. § 552.323 (West, Westlaw through 2017 Reg. Sess.)); *see also* N.C. GEN. STAT. § 132-9(c) (2017).

34. *See infra* Parts I.B.2, I.C.

35. § 132-9(c).

36. Cathey v. Cathey, 210 N.C. App. 230, 231–32, 707 S.E.2d 638, 640 (2011) ("Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo." (quoting *In re* Summons Issued to Ernst & Young, LLP, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009))).

37. Abernethy v. Bd. of Comm'rs of Pitt Cty., 169 N.C. 631, 635, 86 S.E. 577, 579 (1915).

38. Purcell v. Friday Staffing, 235 N.C. App. 342, 347, 761 S.E.2d 694, 698 (2014) (quoting State v. Beck, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005)).

39. *Abernethy*, 169 N.C. at 636, 86 S.E.2d at 580.

legislature only recently amended the NCPRA to its current "substantially prevails" framework.[40] This leads to problems for current practitioners, as any cases decided under the previous framework were interpreting different statutory language.

Even prior to 2010, the only relevant North Carolina appellate law directly interpreting the plaintiff's fee provision of the NCPRA was *North Carolina Press Association v. Spangler*.[41] There, the defendant, the President of the University of North Carolina, claimed that despite the trial court's order to release records, their release was actually the result of an internal decision.[42] The defendant went on to argue that "petitioners cannot be a prevailing party" because "the documents were released as a consequence of a decision made prior to the lawsuit, not as a consequence of the lawsuit."[43] In an attempt to harmonize federal case law as it stood at the time with that of North Carolina, the defendant claimed that "the moving party has the burden of showing that the lawsuit caused the agency to release the documents."[44]

The Court of Appeals rejected the defendant's attempt to harmonize state and federal law, reasoning that FOIA contained "language substantially different from [the North Carolina] Public Records Act."[45] The court found that, due to this difference, the federal case law was "not persuasive."[46] Therefore, the *Spangler* court drew a stark line between the fee provisions of the NCPRA and its federal counterpart as they existed in 1989. Were the text of the statutes today the same as in the past, this stark line would likely still

40. *See* Act of July 10, 2010, ch. 169, sec. 21(c), § 132-9, 2010 N.C. Sess. Laws 638, 660 (codified at N.C. GEN. STAT. § 132-9(c) (2017)).

41. 94 N.C. App. 694, 381 S.E.2d 187 (1989).

42. *Id.* at 697, 381 S.E.2d at 190 ("Here petitioners obtained an Order from the trial court directing respondents to release the records for inspection, examination and copying. That respondents were able to obtain a stay of the trial court's order pending appeal does not alter the fact that petitioners were the prevailing party in their action.").

43. *Id.* at 697, 381 S.E.2d at 189–90.

44. Brief of Appellant at 10, N.C. Press Ass'n. v. Spangler, 94 N.C. App. 694, 381 S.E.2d 187 (1989) (No. 8810 SC 1004) [hereinafter Spangler Brief] (citing Vt. Low Income Advocacy Council v. Usery, 546 F.2d 509, 510 (2d Cir. 1976) (interpreting the attorney's fees provision of the Freedom of Information Act), *abrogated by* Union of Needletrades, Indus. & Textile Emps., AFL-CIO, CLC v. U.S. Immigration & Naturalization Serv., 336 F.3d 200 (2d Cir. 2003)).

45. *Spangler*, 94 N.C. App. at 697, 381 S.E.2d at 190.

46. *Id.*; *cf.* Capitol Info. Ass'n v. Ann Arbor Police, 360 N.W.2d 262, 264 (Mich. Ct. App. 1984) ("Federal cases dealing with the analogous federal statute are highly persuasive in construing Michigan's Freedom of Information Act.").

be in effect as stare decisis.[47] However, both provisions contained different text at that point in time than they do today.

In 1989, FOIA provided courts with the discretionary power to award a plaintiff its "reasonable attorney fees and other litigation costs" where it had "substantially prevailed."[48] The statute provided no further guidance on what these words meant.[49] At the same time, the NCPRA's fee provision was split between two statutes. The relevant provision of the NCPRA provided a cause of action for access to public records.[50] Another statute then gave courts the power to award "reasonable attorney's fees" in "any civil action in which a party successfully [compelled] the disclosure of public records pursuant to" that cause of action.[51] However, such awards were only allowed where the governmental defendant "acted without substantial justification in denying access to the public records" and where there were "no special circumstances that would make the award of fees unjust."[52]

The defendant in *Spangler* argued that in order to be a prevailing party under the NCPRA, the plaintiff's lawsuit "not only must have induced the disclosure of the records, but must have been *necessary* to induce such disclosure."[53] There was some question as to whether this was a correct statement of the rule to which the defendant cited.[54]

47. *See, e.g.*, Musi v. Town of Shallotte, 200 N.C. App. 379, 383, 684 S.E.2d 892, 896 (2009) ("The judicial policy of stare decisis is followed by the courts of this state. Under this doctrine, '[t]he determination of a point of law by a court will generally be followed by a court of the same or lower rank[.]'" (quoting Dunn v. Pate, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992), *rev'd on other grounds*, Dunn v. Pate, 334 N.C. 115, 431 S.E.2d 178 (1993))).

48. Act of Nov. 21, 1974, Pub. L. No. 93-502, sec. 1, § 552(a)(4)(E), 88 Stat. 1561, 1562 (1974) (codified as amended at 5 U.S.C. § 552(a)(4)(E)(i) (2012)).

49. *Cf.* 5 U.S.C. § 552(a)(4)(E)(i) (2012) (providing that a plaintiff substantially prevails where it obtains relief through either "a judicial order, or an enforceable written agreement or consent decree," or "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial").

50. Act of June 24, 1975, ch. 787, § 3, 1975 N.C. Sess. Laws 1112, 1113 (codified as amended at N.C. GEN. STAT. § 132-9 (2017)).

51. Act of July 22, 1983, ch. 918, § 1, 1983 N.C. Sess. Laws 1266, 1266, *repealed by* Act of July 10, 1995, ch. 388, sec. 6, § 6-19.2, 1995 N.C. Sess. Laws 949, 954.

52. *Id.* at 1267.

53. Spangler Brief, *supra* note 44, at 10 (emphasis added) (citing Vt. Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 510 (2d Cir. 1976), *abrogated by* Union of Needletrades, Indus. & Textile Emps., AFL-CIO, CLC v. U.S. Immigration & Naturalization Serv., 336 F.3d 200 (2d Cir. 2003)).

54. The defendant in *Spangler* cited the federal rule as stating that a plaintiff's lawsuit "must have been necessary to induce" the disclosure of records. *Id.* However, the case to which the defendant cited states that "[i]n order to obtain an award of attorney fees in an FOIA action, a plaintiff must show at minimum that the prosecution of the action *could reasonably have been regarded as necessary* and that the action had substantial causative

Regardless, the Court of Appeals found that the "successfully compelled" language of the NCPRA as it existed in 1989 presented a more plaintiff-friendly standard than the "substantially prevails" language of FOIA as it existed at that same time.[55]

Despite the fact that the court declined to follow FOIA, *Spangler* still contains several propositions which could likely be useful in North Carolina Public Records litigation.[56] The Court of Appeals simply declined to consider federal case law as persuasive where the federal language was "substantially different" from the controlling state statute.[57] Implicit in this statement, though, is the idea that where statutes contain language *similar* to that found in the NCPRA, the statutes and their interpreting case law could be persuasive.[58] This implicit statement may now be of some use given that the current FOIA fee provision is similar to North Carolina's current fee provision.[59]

The federal FOIA provides for a discretionary award of fees where a plaintiff "has substantially prevailed,"[60] but that provision then goes on to provide further definition.[61] The provision is

effect on the delivery of the information. Vt. Low Income Advocacy Council v. Usery, 546 F.2d 509, 513 (2d Cir. 1976) (emphasis added), *abrogated by* Union of Needletrades, Indus. & Textile Emps., AFL-CIO, CLC v. U.S. Immigration & Naturalization Serv., 336 F.3d 200 (2d Cir. 2003).

55. N.C. Press Ass'n v. Spangler, 94 N.C. App. 694, 696–97, 381 S.E.2d 187, 189–90 ("Respondents cite several federal cases for the proposition that petitioners have the burden of showing that their lawsuit caused the agency to release the documents . . . . The cases that respondents cite interpret the Federal Freedom of Information Act which contains language substantially different from our Public Records Act. The cases are not persuasive here.").

56. *See, e.g.*, *id.* at 698–99, 381 S.E.2d at 191 ("[T]he Public Records Act does not give a governmental agency the discretionary authority to decline to comply with an order for release of records to the public until a time when the agency has determined that release would be prudent or timely."); *id.* at 697, 381 S.E.2d at 190 ("That respondents were able to obtain a stay of the trial court's order pending appeal does not alter the fact that petitioners were the prevailing party in their action.").

57. *Id.* at 697, 381 S.E.2d at 190.

58. *See, e.g.*, H.B.S Contractors, Inc. v. Cumberland Cty. Bd. of Educ., 122 N.C. App. 49, 57, 468 S.E.2d 517, 522 (1996) (interpreting North Carolina statutory language allowing a "prevailing party" its reasonable attorneys' fees in light of the Fourth Circuit's interpretation of a similar federal provision granting reasonable attorney's fees to a prevailing party (citing Smith v. Univ. of N.C., 632 F.2d 340, 350, 352 (4th Cir. 1980))).

59. *Compare* 5 U.S.C. § 552(a)(4)(E)(i) (2012) (allowing a court to assess reasonable attorneys fees in favor of a party who "has substantially prevailed"), *with* N.C. GEN. STAT. § 132-9(c) (2017) (allowing a party who "substantially prevails" in an action to compel disclosure of public information to recover its reasonable attorneys' fees).

60. § 552(a)(4)(E)(i).

61. It provides as follows:

therefore similar, though not identical, to its North Carolina counterpart. Thus, the *Spangler* court's rejection of federal case law as a persuasive source is likely no longer binding on North Carolina courts, for the simple reason that, under the modern, more similarly worded state and federal statutes, the court's reasoning no longer holds. Case law interpreting the federal provision is likely now persuasive in North Carolina.[62]

While less informative, an example of when a plaintiff substantially prevails in a Public Records action can be garnered from *Wilson v. North Carolina Department of Commerce*.[63] There, the plaintiff alleged that the North Carolina Department of Commerce was illegally withholding access to public notices.[64] The case was initially filed on February 18, 2014.[65] The trial court quickly granted the plaintiff's motion for a preliminary injunction compelling disclosure of unemployment hearing notices as public records.[66] The defendant appealed, but before the court of appeals could hear the case, the General Assembly amended the relevant statute to make confidential the information sought by the plaintiff.[67]

The court of appeals held that the legislative amendment did not moot the appeal because it did not "provide plaintiffs the relief they sought: compelled disclosure of the hearing notices prior to the August 2014 amendment and attorneys' fees for enforcing that right."[68] Therefore, even after the August 2014 amendment, the plaintiffs still could have, in theory, substantially prevailed for the purposes of receiving an award of attorney's fees. However, there would still be one more hurdle for the plaintiffs, who would have to show that the August 2014 amendment was "substantive" rather than

> For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either–
>
> (I) a judicial order, or an enforceable written agreement or consent decree; or
>
> (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

Id. § 552(a)(4)(E)(ii).

62. *See infra* Part I.B.1.

63. 239 N.C. App. 456, 768 S.E.2d 360 (2015).

64. Complaint at 2, Wilson v. N.C. Dep't of Commerce, No. 14-CVS-2499 (N.C. Super. Ct. Mar. 13, 2014).

65. *Id.* at 1.

66. Wilson v. N.C. Dep't of Commerce, No. 14-CVS-2499 (N.C. Super. Ct. Mar. 13, 2014) (granting preliminary injunction).

67. N.C. GEN. STAT. § 96-4(x) (2017) ("Confidential information is exempt from the public records disclosure requirements of Chapter 132 of the General Statutes.").

68. *Wilson*, 239 N.C. App. at 461, 768 S.E.2d at 364.

"clarifying."[69] The substantive versus clarifying framework would essentially decide whether the General Assembly's amendment retroactively applied to records requested by the plaintiff. In other words, the General Assembly has the power to clarify the public or confidential nature of a given record, and in this way throw an insurmountable wrench into a plaintiff's action and request for fees under the NCPRA.[70]

One other North Carolina statute to which courts may look for guidance is the North Carolina Oil and Gas Conservation Act.[71] That Act provides that a party who "substantially prevails" in compelling disclosure of information that was alleged to have been a trade secret by another party "shall . . . recover its reasonable attorneys' fees."[72] The General Assembly only added the language in June 2014, and it has yet to receive any appellate treatment.[73] However, future appellate treatment of when a plaintiff substantially prevails in that context could be persuasive for the Public Records provision.

The myriad of interpretive tools could be cast aside if the North Carolina appellate courts were given the opportunity to construe the fee provisions of the Public Records law. However, until that time comes, practitioners and courts will have to look to persuasive sources for guidance.

B. While there is a large body of persuasive case law determining whether a Public Records plaintiff has "substantially prevailed," the treatment of this language is not uniform across jurisdictions.

1. There is a large body of federal case law demonstrating when parties "substantially prevail" under a "catalyst" framework.

Where North Carolina appellate courts have not established sufficient precedent on an issue, they will turn to "federal decisions and opinions drafted by other jurisdictions."[74] Decisions by federal courts construing constitutional or statutory language do not control

69. *Id.* (citing Ray v. N.C. Dep't of Transp., 366 N.C. 1, 9, 727 S.E.2d 675, 682 (2012) (noting that clarifying amendments apply to cases brought after the statute's effective dates and to cases pending before the courts when the amendment is adopted, while substantive amendments apply when from the time of the effective date)).

70. *Id.* at 464, 768 S.E.2d at 366.

71. N.C. GEN. STAT. § 113-391.1 (2017).

72. *Id.* § 113-391.1(e)(3).

73. Act of May 29, 2014, ch. 4, § 8(a), 2014 N.C. Sess. Laws 57, 66 (codified at N.C. GEN. STAT. § 113-391.1 (2017)).

74. Brown v. Centex Homes, 171 N.C. App. 742, 744, 615 S.E.2d 86, 88 (2005).

the interpretations of similar language by North Carolina courts, but they are persuasive.[75]

The FOIA fee-shifting provision explains that a court "may" award attorney's fees to a plaintiff who "has substantially prevailed."[76] The statute goes on to define that a plaintiff "has substantially prevailed" where it "has obtained relief" through either "a judicial order, or an enforceable written agreement or consent decree" or "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."[77] This amendment, which was passed as part of the Open Government Act of 2007, embodies a "catalyst theory," under which a plaintiff who "obtains relief via a voluntary or unilateral change in position by" a governmental defendant has "substantially prevailed."[78] This is similar, though not identical, to the language of the North Carolina provision, which provides for a mandatory award of fees to a plaintiff who "substantially prevails," but provides no further definition.[79]

In order to make accurate comparisons between the NCPRA and FOIA, it is critical to first understand the difference between eligibility and entitlement in the federal FOIA scheme. Federal courts first look to whether a plaintiff has substantially prevailed, and is therefore eligible for attorney's fees, and only then do they proceed to decide whether an eligible plaintiff is entitled to a fee award.[80] This

75. McNeill v. Harnett Cty., 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990) ("Decisions by the federal courts . . . although persuasive, do not control an interpretation by this Court of the law of the land clause in our state Constitution.").

76. Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)(i) (2012).

77. *Id.* § 552(a)(4)(E)(ii).

78. Wildlands CPR v. U.S. Forest Serv., 558 F. Supp. 2d 1096, 1098 (D. Mont. 2008) (citing § 552(a)(4)(E)(ii)) ("The Act thus . . . revived the catalyst theory, i.e., where a complainant obtains relief via a voluntary or unilateral change in position by the agency, the complainant has substantially prevailed and is eligible for attorney fees."); *see also* Frankel v. D.C. Office for Planning & Econ. Dev., 110 A.3d 553, 558 (D.C. 2015) (noting that "Congress acted to 'clarif[y] that the Supreme Court's decision in *Buckhannon* . . . does not apply to [federal] FOIA cases'" (quoting 153 CONG. REC. S15,831 (daily ed. Dec. 18, 2007) (statement of Sen. Leahy))).

79. N.C. GEN. STAT. § 132-9(c) (2017).

80. *See, e.g.*, Church of Scientology of Cal. v. U.S. Postal Serv., 700 F.2d 486, 489 (9th Cir. 1983) ("A determination of eligibility does not automatically entitle the plaintiff to attorney's fees. Entitlement to attorney's fees is left to the discretion of the district court.") (citations omitted)), *abrogated on other grounds by* First Amendment Coal. v. U.S. Dep't of Justice, 869 F.3d 868 (9th Cir. 2017); Citizens for Responsibility & Ethics in Wash. v. FEC, 66 F. Supp. 3d 134, 140 (D.D.C. 2014) ("In this Circuit, the attorney-fee inquiry is divided into two prongs, the fee 'eligibility' and the fee 'entitlement' prongs." (citing Brayton v. Office of the U.S. Trade Representative, 641 F.3d 521, 524 (D.C. Cir. 2011))); Matlack, Inc. v. Envtl. Prot. Agency, 868 F. Supp. 627, 630 (D. Del. 1994)

entitlement analysis does not occur in North Carolina because once a court determines that a plaintiff has substantially prevailed, the award of fees is mandatory.[81] Therefore, federal case law is only useful as persuasive authority in North Carolina to the extent that it provides a framework for determining whether a plaintiff has substantially prevailed.[82]

In the federal framework, the most straightforward cases are those in which a court orders a FOIA defendant to produce records.[83] In the past, the United States Supreme Court has held that a plaintiff could not be considered a prevailing party without obtaining some sort of judicial relief.[84] However, "Congress amended the statute to encompass" a "catalyst theory," which allows a plaintiff to recover its

(providing a straightforward framework of the two-prong eligibility and entitlement analysis under the federal Freedom of Information Act).

81. § 132-9(c) (providing that a party that "successfully compels the disclosure of public records . . . *shall*" be allowed to recover its reasonable attorneys' fees (emphasis added)).

82. The eligibility analysis may be useful in providing a model of how to treat pro se litigants. The United States Supreme Court has generally found that individual pro se plaintiffs are not eligible for fee awards even if they are themselves practicing attorneys. Kay v. Ehrler, 499 U.S. 432, 438 (1991) ("A rule that authorizes awards of counsel fees to pro se litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf."); *see* Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312, 324 (D.C. Cir. 2006) ("We conclude that Baker Hostetler is eligible for attorney's fees because of (i) the plain text of the statute and (ii) the Supreme Court's decision in *Kay v. Ehrler* . . . particularly footnote 7 of that opinion. We note, moreover, that the two other Court of Appeals panels to consider the issue after *Kay* each unanimously concluded that a law firm representing itself is eligible for attorney's fees."); *see also* OFFICE OF THE ATT'Y GEN. OF TEX., PUBLIC INFORMATION HANDBOOK 63 (2016). However, law firms representing themselves have been allowed to recover their reasonable attorney's fees in some circuits. *Cf.* Fraser Trebilcock Davis & Dunlap PC v. Boyce Trust 2350, 870 N.W.2d 494, 497 (Mich. 2015) (holding that legal services performed for a law firm by its member lawyers "cannot . . . give rise to an 'attorney fee'"). This threshold determination does not go to whether the plaintiff substantially prevailed in its suit, but rather determines whether a substantially prevailing plaintiff is eligible for an award of attorney's fees. *Baker & Hostetler*, 473 F.3d at 326 (noting that a law firm is eligible for an award of attorney's fees and remanding to the trial court to determine whether the law firm "substantially prevailed" and is entitled to fees).

83. *See, e.g.*, Campaign for Responsible Transplantation v. FDA, 511 F.3d 187, 195 (D.C. Cir. 2007) ("[I]t is clear that a court order requiring a recalcitrant agency to release documents pursuant to the legal mandate of FOIA is sufficient to render the plaintiff a prevailing party.").

84. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 606 (2001), *superseded by statute*, Act of Dec. 31, 2007, Pub. L. No. 110-175, sec. 4, § 552(a)(4)(E), 121 Stat. 2525, 2525 (2007) (codified as amended at 5 U.S.C. § 552(a)(4)(E) (2012)).

fees where it is "the catalyst for change," even if it does not obtain a favorable judgment.[85]

While some cases do involve judicial relief on the merits, many situations are not so straightforward, such as those involving joint stipulations, scheduling orders, settlement agreements, or disclosure by defendants prior to judicial action. But federal courts have provided guidance on when a plaintiff in such situations substantially prevails under a catalyst framework. For example, where, after filing suit, a plaintiff and defendant jointly stipulated to production of the disputed records at a future date, a federal court of appeals found that judicial approval of the joint stipulation made the plaintiff a substantially prevailing party.[86] The court reasoned that, much like a "settlement agreement enforced through a consent decree," the joint stipulation and order "changed the legal relationship between [the plaintiff] and the defendant."[87] Similarly, a plaintiff can substantially prevail through a scheduling order requiring release of records, even where the order is proposed by the governmental defendant.[88] A settlement agreement between the parties can also result in a finding that a plaintiff substantially prevailed where the settlement would not have been achieved in the absence of litigation.[89]

Joint stipulations and settlements are not the only situations in which a federal plaintiff can substantially prevail despite obtaining no court-ordered disclosure of records. When no court ordered a government agency to produce records, a plaintiff nonetheless substantially prevailed where a court of appeals held that the plaintiff could proceed with its complaint in district court.[90] A plaintiff has also

85. United States *ex rel.* Long v. GSDMIdea City, L.L.C., 807 F.3d 125, 128 n.2 (5th Cir. 2015).

86. Davy v. CIA, 456 F.3d 162, 165 (D.C. Cir. 2006).

87. *Id.* at 165–66 (alteration in original) (quoting *Buckhannon*, 532 U.S. at 604); *see also* Judicial Watch, Inc. v. U.S. Dep't of Justice, 774 F. Supp. 2d 225, 228 (D.D.C. 2011) ("The Court concludes that Judicial Watch substantially prevailed by virtue of the Court's August 2006 acceptance of the parties' joint stipulation.").

88. *See* Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice, 820 F. Supp. 2d 39, 44 (D.D.C. 2011) ("Although Judge Leon adopted the schedule proposed by DOJ, the Order nonetheless required Defendant to complete processing of and produce all non-referred, non-exempt documents by a specified date."); *see also* Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 218 F. Supp. 3d 27, 40 (D.D.C. 2016) ("[T]he Scheduling Order changed the legal relationship between the parties and EPIC substantially-prevailed in this litigation as a result of its issuance.").

89. Consumers Union of U.S., Inc. v. Bd. of Governors of the Fed. Reserve Sys., 410 F. Supp. 63, 64 (D.D.C. 1975).

90. Citizens for Responsibility & Ethics in Wash. v. FEC, 66 F. Supp. 3d 134, 142 (D.D.C. 2014) ("[A] plaintiff in this Circuit may establish that he or she has substantially prevailed by obtaining a ruling that will force an agency to more fully comply with FOIA,

been found to substantially prevail simply by prompting "a speedier release of responsive records . . . as amply confirmed by the timing of the releases shortly after the initiation of [the] lawsuit."[91] One court has even held that two plaintiffs substantially prevailed when the records sought in their FOIA lawsuit were produced at the conclusion of an entirely separate lawsuit.[92] Finally, where a government agency produced a large amount of information voluntarily but withheld a small amount of important documents, the plaintiff substantially prevailed when a court ordered the defendant to produce those documents.[93]

Federal courts have also provided guidance on situations in which a plaintiff has *not* substantially prevailed. Where a FOIA plaintiff could not show a causal connection between its lawsuit and the production of records, it did not substantially prevail.[94] Even under the catalyst framework, the mere fact that a government agency produces records after the filing of a FOIA suit is insufficient to show that a plaintiff substantially prevailed where the agency promptly began procedures to respond to the request and it was reasonable for the agency to take several months to respond.[95] Put otherwise, while causing expedited production of records with a lawsuit may be enough for a plaintiff to substantially prevail, merely causing an agency to process a request is insufficient.[96] In this way, the

even if such a ruling does not require the actual release of the requested documents in that matter.").

91. Dorsen v. SEC, 15 F. Supp. 3d 112, 120 (D.D.C. 2014).

92. Sabalos v. Regan, 520 F. Supp. 1069, 1071 (E.D. Va. 1981) ("The [defendant] released [the sought-after records] at the conclusion of [other] litigation, and not as a result of any order promulgated by this court. A plaintiff, however, still may 'substantially prevail' on an FOIA issue, even though the government did not release the requested information pursuant to court order.").

93. Cazalas v. U.S. Dep't of Justice, 660 F.2d 612, 622–23 (5th Cir. 1981) ("If we accept the government's contention on its face, then the government could in any situation withhold the few 'smoking gun' documents, but release all other documents and argue that the complainant did not substantially prevail if it had to give up that 'smoking gun' as a result of the FOIA suit.").

94. *See* Duffin v. Carlson, 636 F.2d 709, 714 (D.C. Cir. 1980).

95. Am. Bird Conservancy v. U.S. Fish & Wildlife Serv., 110 F. Supp. 3d 655, 664 (E.D. Va. 2015) ("Courts that have considered this issue have uniformly held that the 'mere filing of the complaint and the subsequent release of the documents is insufficient to establish causation.'" (quoting Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1496 (D.C. Cir. 1984))).

96. Mobley v. Dep't of Homeland Sec., 908 F. Supp. 2d 42, 47 (D.D.C. 2012) ("The plaintiffs here argue that they are eligible for attorney's fees because, prior to this action being filed, the defendant refused to process the plaintiffs' FOIA/PA request, and the plaintiffs' first preliminary injunction motion caused the defendant to process the request . . . . The Court, however, cannot agree with the plaintiffs' novel interpretation of the term 'substantially prevailed.' . . . [T]he D.C. Circuit has interpreted the term 'substantially

catalyst test has been used to withhold "substantially prevailing" status from a plaintiff where other factors contributed to a defendant's delay in producing records.[97]

2. States with public records regimes similar to North Carolina's provide further examples of when a plaintiff might substantially prevail.

A number of other states award fees to plaintiffs who substantially prevail in freedom of information lawsuits. These states provide examples of different lenses through which a court could view a "substantially prevails" fee-shifting provision. For example, the Arizona Court of Appeals has read this language to be synonymous with "the successful party."[98] Where an Arizona plaintiff and defendant both prevail in part, the plaintiff has not substantially prevailed.[99]

An Arkansas Public Records statute provides for a mandatory award of attorney's fees to "a plaintiff who has substantially prevailed."[100] The Arkansas statute does not mention partial awards of attorney's fees.[101] Nonetheless, a trial court awarded a plaintiff "a fraction of" her attorney's fees because she prevailed on "only sections of her complaint."[102] The Supreme Court of Arkansas reversed.[103] The state's high court noted that the plaintiff did not substantially prevail, "as required by the state statute."[104] Under these interpretations, the words "substantially prevail" leave no room for a party to partially prevail and receive a partial award of attorney's fees.

prevailed' rather narrowly to require that a FOIA plaintiff relying on the catalyst theory must receive records responsive to its request in order for that plaintiff to have 'substantially prevailed.'" (citations omitted)).

97. Bigwood v. Def. Intelligence Agency, 770 F. Supp. 2d 315, 321 (D.D.C. 2011) (finding that a plaintiff did not substantially prevail where the agency "expended a considerable amount of time" processing the plaintiff's request prior to his filing suit, the request was extremely broad, and the agency "experienced a backlog of FOIA requests").

98. Arpaio v. Citizen Pub. Co., 211 P.3d 8, 10 (Ariz. Ct. App. 2008).

99. Democratic Party of Pima Cty. v. Ford, 269 P.3d 721, 725 (Ariz. Ct. App. 2012).

100. ARK. CODE ANN. § 25-19-107(d)(1) (LEXIS through 2018 Second Extraordinary Sess.).

101. *Cf.* LA. STAT. ANN. § 44:35D (West, Westlaw through 2018 First Extraordinary Sess.) (authorizing courts to award "reasonable attorney fees or an appropriate portion thereof" to any person who "prevails in part").

102. City of Little Rock v. Carpenter, 288 S.W.3d 647, 652 (Ark. 2008).

103. *Id.* at 652–53.

104. *Id.* (finding further that the plaintiff did not even partially prevail).

Maryland also allows for an award of attorney's fees to a plaintiff who "has substantially prevailed."[105] That state's highest court has held that though "an actual judgment in" the plaintiff's favor is not required to substantially prevail, there must at minimum be "a causal nexus between the prosecution of the suit and the agency's surrender of the requested information."[106] This is similar to the federal catalyst standard.[107] At least one Maryland court has found that the quality of documents is more important than the quantity.[108] Such an interpretation could be of interest in North Carolina cases where a court orders production of a small amount of documents, while a larger body of records is withheld.[109]

A number of New York cases construe its statute as providing a discretionary award of fees to a plaintiff who "has substantially prevailed under its Public Officers Law."[110] For example, where a defendant produced the sought records even before filing its answer, the plaintiff still substantially prevailed because it eventually "received the documents it sought."[111] Further, where a governmental defendant was ordered to produce only three of eighteen documents sought, the State's appellate division expressed doubt that the defendant substantially prevailed.[112] A New York plaintiff did not substantially prevail where the agency's claimed exemptions were "largely sustained," even though the plaintiff eventually obtained disclosure of certain records.[113]

105. MD. CODE ANN., GEN. PROVISIONS § 4-362(f) (West, Westlaw through 2018 Reg. Sess.).

106. Caffrey v. Dep't of Liquor Control, 805 A.2d 268, 284 (Md. 2002) (quoting Kline v. Fuller, 496 A.2d 325, 330 (Md. Ct. Spec. App. 1985)).

107. *See supra* Part I.B.1.

108. *See* Kline v. Fuller, 496 A.2d 325, 330 (Md. Ct. Spec. App. 1985).

109. *See, e.g.*, Deitz v. City of Belmont, No. 15-CVS-3203, at 1–2 (N.C. Super. Ct. Aug. 1, 2016) (order denying plaintiffs' motion for summary judgment in part and ordering the City of Belmont to produce twenty-two pages of a 160-page report as public records).

110. N.Y. PUB. OFF. LAW § 89.4(c) (McKinney 2018).

111. Acme Bus Corp. v. Cty. of Suffolk, 26 N.Y.S.3d 159, 161 (N.Y. App. Div. 2016); *see also* N.Y. State Defs. Ass'n v. N.Y. State Police, 927 N.Y.S.2d 423, 425 (N.Y. App. Div. 2011) (holding that defendant's production of records at the commencement of a lawsuit and without the need for further proceedings did not preclude a finding that the plaintiff substantially prevailed). *But see* William J. Kline & Son, Inc. v. Fallows, 478 N.Y.S.2d 524, 528 (N.Y. Sup. Ct. 1984) (holding that a plaintiff did not substantially prevail where the requested documents were released prior to the assertion of any defense by the agency).

112. Saxton v. N.Y. State Dep't of Taxation & Fin., 967 N.Y.S.2d 447, 449 (N.Y. App. Div. 2013) ("With respect to the request for counsel fees, we find no basis to disturb [the] Supreme Court's conclusion that, having secured the disclosure of only three additional documents out of the 18 sought, petitioners did not substantially prevail.").

113. Cook v. Nassau Cty. Police Dep't, 34 N.Y.S.3d 150, 151 (N.Y. App. Div. 2016); *see also* Mack v. Howard, 937 N.Y.S.2d 785, 787 (N.Y. App. Div. 2012) ("[I]t cannot be said

Texas provides for a mandatory award of fees to a plaintiff who "substantially prevails" in a Public Records action,[114] but its courts have interpreted the language very differently than their federal counterparts. Texas courts have cautioned that, where a governmental defendant voluntarily discloses some documents and a plaintiff files suit for the rest, the plaintiff must segregate out its non-recoverable fees concerning the originally disclosed documents.[115] However, failure to do so does not automatically mean a plaintiff does not substantially prevail.[116]

Texas is most notable for providing an example at the other end of the spectrum from the federal catalyst test. Where a Texas defendant voluntarily turns over documents and thus moots a Public Records lawsuit, this does not render the plaintiff a substantially prevailing party.[117] This is because a Texas plaintiff may only receive fees where it obtains "judicially sanctioned 'relief on the merits'" that "materially alters the legal relationship between the parties."[118] The Texas Attorney General cited such cases as examples of how fee awards are treated in Texas freedom of information cases.[119] As recently as April 2017, the Court of Appeals of Texas explicitly declined to adopt the federal catalyst framework.[120] However, this less plaintiff-friendly standard is paired with a mandatory award of attorney's fees.[121]

It is worth noting that during the summer of 2017, the Texas legislature attempted to amend its standard for awarding attorney's

that petitioner 'substantially prevailed' in this proceeding inasmuch as he established his entitlement to only one of the numerous videotapes requested in the petition.").

114. TEX. GOV'T CODE ANN. § 552.323(a) (West, Westlaw through 2017 Reg. Sess.).

115. City of Houston v. Kallinen, 516 S.W.3d 617, 629 (Tex. App. 2017); *cf.* Right to Know Comm. v. City Council, City & Cty. of Honolulu, 175 P.3d 111, 125–26 (Haw. Ct. App. 2007) (allowing a plaintiff to recover all of its attorney's fees even though it only prevailed on some of its claims because the "unsuccessful claims were sufficiently related to the successful ones" and the plaintiffs "achieved a level of success that made the hours reasonably expended a satisfactory basis for making a fee award").

116. *Kallinen*, 516 S.W.3d at 629.

117. Tex. State Bd. of Veterinary Med. Exam'rs v. Giggleman, 408 S.W.3d 696, 703–04 (Tex. App. 2013).

118. *Id.* at 703 (quoting Intercontinental Grp. P'ship v. KB Home Lone Star L.P., 295 S.W.3d 650, 654 (Tex. 2009)).

119. OFFICE OF THE ATT'Y GEN. OF TEX., *supra* note 82, at 58 n.269.

120. Nehls v. Hartman Newspapers, LP, 522 S.W.3d 23, 31–32 (Tex. App. 2017) (declining to adopt the federal catalyst framework when urged to do so by a Public Records plaintiff).

121. *See* TEX. GOV'T CODE ANN. § 552.323 (West, Westlaw through 2017 Reg. Sess.) ("[T]he court *shall* assess costs of litigation and reasonable attorney fees incurred by a plaintiff who substantially prevails.") (emphasis added)).

fees to a more plaintiff-friendly approach.[122] It did so by extending to courts the power to award attorney's fees "incurred by a plaintiff to whom a governmental body voluntarily releases the requested information after filing an answer to the suit."[123] However, Governor Abbott vetoed the bill, claiming that it gave "lawyers the ability to threaten taxpayer-funded attorneys' fee awards against governmental bodies that are just trying to follow the law."[124] North Carolina's courts might keep this policy dispute in mind if and when they look to Texas case law for guidance.

Other states take a more limited view of similar fee-shifting provisions. A Vermont court found that where records would not have been obtained without a plaintiff's lawsuit, that plaintiff substantially prevailed.[125] A Wisconsin court used a similar theory to deny "substantially prevailing" status to a plaintiff where "unavoidable delay," rather than the plaintiff's lawsuit, caused the governmental defendant's untimely delay in fulfilling a records request.[126]

None of these authorities are binding on North Carolina courts. However, they could prove useful should a factual situation arise in North Carolina that has already been litigated in another state.

C. When the time comes for North Carolina courts to interpret the plaintiff's fee provision of the NCPRA, they will be choosing between at least two competing frameworks.

As noted, there is no North Carolina appellate case law interpreting the "substantially prevails" language of the plaintiffs' fee-shifting provision in the NCPRA. When the time comes for a court to do so, there are at least two particularly relevant models from which North Carolina could borrow. One is the federal standard requiring that a plaintiff's suit be a "catalyst for change," even if it does not "obtain a judgment in [its] favor."[127] The other is Texas's rule that a

122. *See* H.B. 2783, 85th Leg., Reg. Sess. (Tex. 2017).

123. *Id.*

124. Proclamation by the Governor of the State of Texas (June 15, 2017), http://www.lrl.state.tx.us/scanned/vetoes/85/hb2783.pdf#navpanes=0 [https://perma.cc/C4HR-EA5U] (announcing his disapproval and veto of House Bill 2783).

125. Burlington Free Press v. Univ. of Vt., 779 A.2d 60, 64 (Vt. 2001).

126. Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist., 427 N.W.2d 414, 417 (Wis. Ct. App. 1988) ("If the failure to timely respond to a request was caused by an unavoidable delay accompanied by due diligence in the administrative processes, rather than being caused by the mandamus action, the plaintiff has not substantially prevailed.").

127. United States *ex rel.* Long v. GSDMIdea City, L.L.C., 807 F.3d 125, 128–29 n.2 (5th Cir. 2015); *see also supra* Part I.B.1.

plaintiff may only receive fees where it obtains "judicially sanctioned relief on the merits" that "materially alters the legal relationship between the parties."[128] The public records laws of North Carolina and Texas share nearly identical plaintiffs' fee-shifting provisions.[129] Both provide for a mandatory award of attorney's fees to a plaintiff who substantially prevails, but prohibit such an award if a defendant acted "in reasonable reliance on" a court order or judgment applicable to the defendant, the published opinion of an appellate court, or a written decision or opinion of the states' respective attorneys general.[130]

Despite the lack of statutory language paralleling the federal catalyst test, North Carolina courts still could choose to adopt that test in interpreting the "substantially prevails" language of the NCPRA. One rationale for doing so could be the North Carolina fee-shifting provision's title and legislative history.[131] The "substantially prevails" standard was first added as part of a bill entitled "An Act . . . to strengthen transparency . . . through increasing . . . accessibility to . . . public records."[132] The final session law striking the "prevailing party" standard and substituting in "substantially prevails" language retained a similar title.[133] This legislative history could be indicative of the General Assembly's intent to create a more plaintiff-friendly fee-shifting policy. Indeed, a contemporary commentator noted that the new language "enhanc[ed] the ability of a prevailing plaintiff to recover its fees."[134]

Under the former "prevailing party" standard, the Court of Appeals in *Spangler* rejected the argument that plaintiffs had "the burden of showing that their lawsuit caused the agency to release the

128. Tex. State Bd. of Veterinary Med. Exam'rs v. Giggleman, 408 S.W.3d 696, 703 (Tex. App. 2013) (citations omitted).

129. *See* N.C. GEN. STAT. § 132-9(c) (2017); TEX. GOV'T CODE ANN. § 552.323 (West, Westlaw through 2017 Reg. Sess.).

130. § 132-9(c); § 552.323 (Westlaw).

131. *See* Dickson v. Rucho, 366 N.C. 332, 342, 737 S.E.2d 362, 370 (2013) ("[T]he title of an act may be an indication of legislative intent."); *see also* Petty v. Owen, 140 N.C. App. 494, 500, 537 S.E.2d 216, 220 (2000) (using the title of an act as evidence of legislative intent to exempt general contractors from certain licensing requirements).

132. Act of Aug. 2, 2010, ch. 169, sec. 21(c), § 132-9, 2010 N.C. Sess. Laws 638, 660 (codified at N.C. GEN. STAT. § 132-9 (2017)).

133. *Id.*

134. Charles E. Coble, *N.C. General Assembly Amends Public Records Law*, BROOKS PIERCE: DIGITAL MEDIA & DATA PRIVACY BLOG (July 12, 2010), http://www.brookspierce.com/news-insights/nc-general-assembly-amends-public-records-law [https://perma.cc/TS96-42RT].

documents."[135] The federal case upon which the defendant principally relied stated that, while a judgment is not an absolute prerequisite to an award of attorney's fees, a plaintiff receiving an award of attorney's fees must at least "show . . . that the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information."[136] The North Carolina Court of Appeals did not enunciate a clear test for whether a plaintiff prevails.[137] It did, however, affirm the plaintiff's fee award in the face of the defendant's argument that the records would have been produced in a matter of days without the plaintiff's lawsuit.[138]

While the exact standard used by the *Spangler* court is not clear, that court did at least find that a plaintiff who obtained an order directing release of records was eligible for fees under the former "prevailing party" standard even where a defendant claimed that the release was for a reason other than the plaintiffs' lawsuit.[139] In doing so, the court rejected the defendant's argument that a plaintiff's lawsuit "must have been necessary to induce . . . disclosure" to qualify for a fee award.[140] In other words, the *Spangler* court, at bare minimum, at least rejected the sort of rigid test requiring "judicially sanctioned relief on the merits" that "materially alters the legal relationship between the parties" adopted by Texas courts.[141] Were North Carolina's courts to adopt the Texas standard, they would therefore be interpreting the "substantially prevails" language of an act intended to *increase* access to public records to be no more liberal than the previous "prevailing party" standard in terms of whether a plaintiff is eligible for attorney's fees.

One might respond that the change in North Carolina's fee award from discretionary to mandatory is enough for the act to

135. N.C. Press Ass'n v. Spangler, 94 N.C. App. 694, 696–97, 381 S.E.2d 187, 189 (1989).

136. Vt. Low Income Advocacy Council v. Usery, 546 F.2d 509, 513 (2d Cir. 1976), *abrogated by* Union of Needletrades, Indus. & Textile Employees, AFL-CIO, CLC v. U.S. Immigration & Naturalization Serv., 336 F.3d 200 (2d Cir. 2003).

137. *Spangler*, 94 N.C. App. at 698–99, 381 S.E.2d at 190–91.

138. *Id.*

139. *Id.* at 697, 381 S.E.2d at 190 ("Here petitioners obtained an Order from the trial court directing respondents to release the records for inspection, examination and copying. That respondents were able to obtain a stay of the trial court's order pending appeal does not alter the fact that petitioners were the prevailing party in their action.").

140. Spangler Brief, *supra* note 44, at 10.

141. Tex. State Bd. of Veterinary Med. Exam'rs v. Giggleman, 408 S.W.3d 696, 703 (Tex. App. 2013) (citing Intercontinental Grp. P'ship v. KB Home Lone Star L.P., 295 S.W.3d 650, 654 (Tex. 2009)).

increase access to public records. Indeed, the more restrictive "substantially prevails" definition used by Texas courts is in the context of a mandatory fee award.[142] Meanwhile, the more plaintiff-friendly federal catalyst standard operates in conjunction with a discretionary award of fees.[143] The argument would go that the General Assembly might have considered the less plaintiff-friendly "substantially prevails" standard to in fact increase access to public records when used in conjunction with a mandatory fee award. However, this argument assumes that the "substantially prevails" standard was added at the same time as the mandatory fee award, which is not the case. The "substantially prevails" language was added in 2010.[144] Meanwhile, the mandatory fee award was added five years earlier.[145] Therefore, one could not use the change to a mandatory fee award as evidence that the 2010 "substantially prevails" standard could increase access to public records while requiring judicially sanctioned relief as a condition for a plaintiff's fee award.

One might further argue that, had the General Assembly intended to adopt the catalyst standard when it added the "substantially prevails" language to the NCPRA, it would have adopted the same language that Congress used to adopt that standard in 2007.[146] However, the rule that the General Assembly acts with knowledge of past enactments does not necessarily apply to the enactments of every other jurisdiction. Further, at least one other jurisdiction—the District of Columbia—has continued to use the catalyst test after its federal adoption in 2007, despite the fact that the District of Columbia has not adopted the federal statutory language.[147] The District of Columbia's courts have done so in part

142. *See* TEX. GOV'T CODE ANN. § 552.323 (West, Westlaw through 2017 Reg. Sess.) ("[T]he court *shall* assess costs of litigation and reasonable attorney fees incurred by a plaintiff who substantially prevails.") (emphasis added)).

143. 5 U.S.C. § 552(a)(4)(E)(i) (2012) ("The court *may* assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the [plaintiff] has substantially prevailed." (emphasis added)).

144. Act of Aug. 2, 2010, ch. 169, sec. 21(c), § 132-9, 2010 N.C. Sess. Laws 638, 660 (codified as amended at N.C. GEN. STAT. § 132-9(c) (2017)).

145. Act of Aug. 26, 2005, ch. 332, sec. 2, § 132-9, 2005 N.C. Sess. Laws 1190, 1192 (codified as amended at N.C. GEN. STAT. § 132-9(c) (2017)).

146. OPEN Government Act of 2007, Pub. L. No. 110–175, sec. 4(a)(2)(II), § 552(a)(4)(E), 121 Stat. 2524, 2525 (2007) (codified as amended at 5 U.S.C. § 552 (2012)) (amending the federal Freedom of Information Act to clarify that a plaintiff substantially prevails where it receives judicial relief or where there is "a voluntary or unilateral change in position by the agency"); *see also* United States *ex rel.* Long v. GSDMIdea City, L.L.C., 807 F.3d 125, 128–29 n.2 (5th Cir. 2015) (noting that the 2007 amendment to the Freedom of Information Act instituted the catalyst theory).

147. Frankel v. D.C. Office for Planning & Econ. Dev., 110 A.3d 553, 558 (D.C. 2015).

because "the catalyst theory accurately reflects the purposes of the FOIA attorney's fee provision,"[148] which includes the "expansion of public access and the minimization of costs and time delays to persons requesting information."[149] This reads similarly to the purpose of the NCPRA, which is to "provide for liberal access to public records."[150] The NCPRA's purpose is supported by a "strong policy in favor of disclosure."[151] The catalyst theory could, therefore, work within the NCPRA framework without the addition of the federal language.

Depending on which of the two overarching models North Carolina follows, the world of Public Records law could look very different for plaintiffs and defendants. Should North Carolina follow the federal model, this could result in emboldened plaintiffs who know that they need not obtain formal judicial relief in order to receive an award of fees. Meanwhile, governmental defendants would likely feel the pressure of a system that, as they might see it, punishes them frequently and quickly for mistakes in responding to public records requests. On the other hand, should North Carolina courts opt to follow the Texas model requiring formal judicial relief before fees may be awarded, it is defendants who might be emboldened, and plaintiffs who may have to more seriously weigh the costs of litigation before filing suit for access to public records.

D. Under the NCPRA, governmental defendants may receive attorney's fee awards in relatively rare circumstances.

The NCPRA also provides for defendants to receive fee awards in certain situations. A governmental defendant "shall" recover its reasonable attorney's fees from "the person or persons instituting the action" where "the action was filed in bad faith or was frivolous."[152] "[A] claim . . . is 'frivolous' where its 'proponent can present no rational argument based upon the evidence or law in support of it.'"[153] It is the mandatory nature of this award that differentiates it from the

148. *Id.*

149. *Id.* (quoting D.C. CODE § 2-531 (LEXIS through Aug. 21, 2018)).

150. Jackson v. Charlotte Mecklenburg Hosp. Auth., 238 N.C. App. 351, 353, 768 S.E.2d 23, 25 (2014) (quoting Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999)).

151. N.C. Elec. Membership Corp. v. N.C. Dep't of Econ. & Cmty. Dev., 108 N.C. App. 711, 716, 425 S.E.2d 440, 443 (1993) (recognizing the strong policy in favor of disclosure of public records).

152. N.C. GEN. STAT. § 132-9(d) (2017).

153. Philips v. Pitt Cty. Mem'l Hosp., Inc., 242 N.C. App. 456, 458, 775 S.E.2d 882, 884 (2015) (quoting Rhyne v. K-Mart Corp., 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002)) (defining "frivolous" in the context of claims for punitive damages against hospitals).

generally available fee award for defendants where a plaintiff fails to raise a justifiable claim.[154]

Where a plaintiff files a Public Records lawsuit seeking access to records that are categorically exempt from disclosure, a court may at least reserve a defendant's request for fees for further consideration.[155] However, the exact language of the NCPRA has not been interpreted by any North Carolina appellate court. The United States District Court for the Middle District of North Carolina had the opportunity to comment on the issue in *Quality Built Homes, Inc. v. Village of Pinehurst*.[156] While the interpretation of a state law by a federal court is not binding, North Carolina courts may find the federal analysis persuasive.[157]

In *Quality Built Homes*, *Inc.*, the plaintiffs made a public records request in person to the Office of the Clerk of the Village of Pinehurst on December 22, 2006.[158] The clerk initially refused to produce the documents, but then produced them "no later than 13 days after the original request."[159] Over five months later, the plaintiffs amended an existing complaint to add an allegation that the defendant Village violated the NCPRA with its "initial refusal to produce the documents on the day they were requested."[160]

The court noted that the NCPRA "does not provide a claim for relief after documents have been produced, nor does it provide for a remedy that would prevent potential future violations."[161] It therefore disposed of the plaintiffs' claims under the NCPRA fairly quickly. However, that was not the end of the matter. The defendant Village requested its attorney's fees, claiming that the plaintiff's Public

154. *Compare* § 132-9(d) (stating that the court "shall" assess the attorney fees if the court determines that the case was brought in bad faith or frivolous), *with id.* § 6-21.5 (stating that the court "may" award attorney's fees to the prevailing party in nonjusticiable cases).

155. *See, e.g.*, Rothman v. Town of Elon, No. 05-CVS-122, 2005 WL 5368433 (N.C. Super. Ct. Apr. 27, 2005), *appeal dismissed*, Rothman v. Town of Elon, No. COA05-1151, 2006 WL 851766 (N.C. Ct. App. Apr. 4, 2006).

156. No. 1:06CV1028, 2008 WL 3503149 (M.D.N.C. Aug. 11, 2008). *But see* Davis v. Dep't of State, No. 4:13CV58, 2014 WL 11514765, at *2 (E.D. Va. Aug. 1, 2014) (noting that a federal court generally "lacks jurisdiction to consider or enforce" North Carolina's Public Records law), *aff'd*, 607 F. App'x 329 (4th Cir. 2015).

157. *See, e.g.*, Huggard v. Wake Cty. Hosp. Sys., Inc., 102 N.C. App. 772, 775, 403 S.E.2d 568, 570 (1991) ("As an interpretation of state law by a federal court this holding is not binding on us; however we find its analysis persuasive."), *aff'd*, 330 N.C. 610, 411 S.E.2d 610 (1992).

158. *Quality Built Homes, Inc.*, 2008 WL 3503149, at *13.

159. *Id.*

160. *Id.*

161. *Id.* at *14.

Records Act claim was "filed in bad faith or . . . frivolous."[162] The court agreed, finding that the "[p]laintiffs' claim was, at least, frivolous and, at most, brought in bad faith."[163] Not only did the defendant produce the records "within a reasonable time from the request," but "the request was made on December 22, the Friday before the week of Christmas."[164] The court further found that the defendant's decision to escort the original records requester off of its premises using police did "not negate the frivolous nature of Plaintiffs' claim."[165] The court ultimately awarded the defendant its reasonable attorney's fees "incurred in defending [the plaintiffs' NCPRA claim]."[166]

The *Quality Built Homes, Inc.* decision is not binding on North Carolina state courts, as it is a federal district court decision applying North Carolina law.[167] However, it does present a straightforward application of the defendant's fee provision under the NCPRA. Future litigants would be wise to think twice before filing a Public Records lawsuit in North Carolina after already receiving the disputed records, as they would risk being charged the attorney's fees of the defendant. Practitioners would further be wise to avoid bringing claims for relief that are not grounded in the language of the NCPRA.

Several other jurisdictions require some sort of higher standard for a defendant to recover its fees in a Public Records lawsuit than merely prevailing.[168] For example, California allows an award of

162. *Id.* (quoting N.C. GEN. STAT. § 132-9(d) (2017)).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *See* Self v. Yelton, 201 N.C. App. 653, 661, 688 S.E.2d 34, 39 (2010) (noting that an unpublished federal district court case "may sometimes be persuasive . . . [though] not precedential"); Shepard v. Ocwen Fed. Bank, FSB, 172 N.C. App. 475, 479, 617 S.E.2d 61, 64 (2005) ("Although we are not bound by federal case law, we may find their analysis and holdings persuasive."), *aff'd*, 361 N.C. 137, 638 S.E.2d 197 (2006).

168. *See, e.g.*, DEL. CODE ANN. tit. 29, § 10005(d) (2017) ("The court may award attorney fees and costs to a successful defendant, but only if the court finds that the action was frivolous or was brought solely for the purpose of harassment."); FLA. STAT. ANN. § 119.12(3) (LexisNexis 2017) ("The court shall determine whether the complainant requested to inspect or copy a public record or participated in the civil action for an improper purpose. If the court determines there was an improper purpose, the court may not assess and award the reasonable costs of enforcement, including reasonable attorney fees, to the complainant, and shall assess and award against the complainant and to the agency the reasonable costs, including reasonable attorney fees, incurred by the agency in responding to the civil action. For purposes of this subsection, the term 'improper purpose' means a request to inspect or copy a public record or to participate in the civil action primarily to cause a violation of this chapter or for a frivolous purpose.").

attorney's fees to a Public Records defendant only where "the plaintiff's case is clearly frivolous."[169] Where a plaintiff brought suit against a governmental defendant which inadvertently neglected to attach a few requested documents to an email, a California appellate court reversed the trial court's grant of attorney's fees in favor of the defendant.[170] This decision signaled a more stringent interpretation of "frivolous" than the NCPRA. In doing so, the appellate court noted that an action can lack merit, and it can even be "extremely unlikely" that the plaintiff will prevail, but this is not enough for a suit to be "frivolous."[171] The Ninth Circuit has noted that under the California Public Records Act, a plaintiff's claim is "clearly frivolous" only when it "lacks any merit" or is "prosecuted for an improper motive."[172] While interpreting a similar statute dealing with fee awards to governmental defendants in Open Meetings cases, California courts confirmed that it is very difficult for a government defendant to recover its fees.[173]

Minnesota allows "reasonable costs and attorney fees" to a governmental defendant when "the court determines" that a Public Records suit "is frivolous and without merit and a basis in fact."[174] In 2003, the County of Steele sought its fees under this statute after the Court of Appeals of Minnesota found that an architectural firm erroneously named the county as a defendant in its Public Records lawsuit.[175] The lower court declined to award the defendant county its fees, and the county appealed, claiming that the plaintiff's claim was "obviously frivolous" and had "no basis in fact."[176] Despite the fact that the plaintiff obtained no relief from the court and had in fact sued the wrong party, the appellate court found that the plaintiff's

169. CAL. GOV'T CODE § 6259(d) (West 2018).

170. Crews v. Willows Unified Sch. Dist., 159 Cal. Rptr. 3d 484, 494, 496 (Cal. Ct. App. 2013).

171. *Id.* at 494 (quoting Flaherty v. Flaherty, 646 P.2d 179, 187 (Cal. 1982) (en banc)).

172. Maryland *ex rel.* Doe v. Newport-Mesa Unified Sch. Dist., 840 F.3d 640, 644 (9th Cir. 2016) (quoting Bertoli v. City of Sabstopol, 182 Cal. Rptr. 3d 308, 320 (Cal. Ct. App. 2015)).

173. *See* Boyle v. City of Redondo Beach, 83 Cal. Rptr. 2d 164, 171 (Cal. Ct. App. 1999) (noting that when a defendant seeks attorney's fees under California's Open Meetings law, "a trial court must specify with particularity the basis for the awarding costs or attorney fees"); *see also* Frazer v. Dixon Unified Sch. Dist., 22 Cal. Rptr. 2d 641, 653 (Cal. Ct. App. 1993) (reversing a trial court's award of fees to a defendant in an Open Meetings suit after finding that the defendant prevailed on the majority of the plaintiff's claims).

174. MINN. STAT. ANN. § 13.08(4)(a) (West, Westlaw through 2018 Reg. Sess.).

175. WDSI, Inc. v. Cty. of Steele, 672 N.W.2d 617, 621–22 (Minn. Ct. App. 2003).

176. *Id.* at 622.

case "had a basis in fact and was not frivolous or without merit."[177] Therefore, the mere mistakes of the plaintiff were not enough to merit an award of fees to the defendant under statutory language similar to that in North Carolina.

Pennsylvania provides for a discretionary award of attorney fees to a requester of records where "the court finds that the legal challenge . . . was frivolous."[178] However, at the appellate level, the Commonwealth Court of Pennsylvania held that a losing plaintiff's case is not frivolous where the case presents a novel legal issue.[179] That same court has further found that an appeal is not frivolous simply because a plaintiff erroneously believes that a defendant is subject to the Public Records law.[180]

Ultimately, courts tend to be reluctant to award fees to defendants in Public Records actions brought under schemes that are similar to North Carolina's. This confirms the observation that, under such provisions, it is "likely that only the most outrageous kind of harassment [by a plaintiff] would ever be condemned."[181] Defendants in North Carolina should therefore rarely, if ever, expect to receive a fee award at the conclusion of Public Records litigation.

For plaintiffs, fee awards are intended to incentivize litigation[182] and increase access to public records.[183] This same policy rationale

177. *Id.* at 623. It is worth noting that the County of Steele's contract with a private party failed to state, as required by law, that all of the data held by the private party in connection with the contract was subject to the state's Public Records law. *Id.* at 621. While the court acknowledged that the plaintiff's claim was against the private party and not the county, the error in the contract between the county and the private party meant there was a genuine question of law as to whether the county was required to produce the information. *Id.* at 621–22.

178. 65 PA. STAT. AND CONS. STAT. ANN. § 67.1304(b) (West, Westlaw through 2018 Reg. Sess. Act 16).

179. Pennsylvanians for Union Reform v. Pa. Office of Admin., 129 A.3d 1246, 1264 n.23 (Pa. Commw. Ct. 2015) ("[S]ince none of [the Office of Open Records'] prior determinations regarding public access to records of PAC contributions made by Commonwealth employees via payroll deduction have been reviewed by this Court, the instant legal challenge is not frivolous."); *see also* Hearst Television, Inc. v. Norris, 8 A.3d 420, 428 (Pa. Commw. Ct. 2010) ("[T]he [government defendant's] request for costs and fees . . . is denied because the issue presented in this appeal is a novel issue and involves the interpretation of two complicated statutes."), *rev'd*, 54 A.3d 23 (2012).

180. Scott v. Del. Valley Reg'l Planning Comm'n, 56 A.3d 40, 47 (Pa. Commw. Ct. 2012) (finding that even though the plaintiff erroneously believed that the defendant was subject to the state Public Records Act, there was no evidence that the plaintiff's legal challenge was frivolous).

181. Lowell Thomas Lunsford II, *Unintended Consequences*, N.C. ST. B.J., Winter 2013, at 6, 7, https://www.ncbar.gov/media/121117/journal-18-4.pdf [https://perma.cc/568T-RWEN].

182. *See* Cmty. Youth Athletic Ctr. v. City of Nat'l City, 164 Cal. Rptr. 3d 644, 694 (Cal. Ct. App. 2013) ("Indeed, the very purpose of the attorney fees provision is to

underlies fee awards for defendants—not in incentivizing defendants to litigate, but rather in punishing only those plaintiffs who bring the most frivolous of suits. The goal of both the plaintiffs' and defendants' fee awards is to embolden plaintiffs to seek access to records, and in doing so, to keep government open, honest, and accountable. This approach is in line with the general policy rationale underlying the NCPRA.[184]

II. NORTH CAROLINA OPEN MEETINGS FEE AWARDS: "PREVAILING PARTIES"

In addition to the fee awards of the NCPRA, both plaintiffs and defendants can also seek attorney's fees in litigation under the Open Meetings law, which generally embodies North Carolina's public policy "that the hearings, deliberations, and actions of [public] bodies be conducted openly."[185] The law requires that all public bodies "be open to the public" and "any person [be] entitled to attend" such meetings.[186] Public bodies may only enter into closed sessions for a limited number of specifically enumerated purposes.[187] Additionally, they must further keep a regular schedule of meetings on file and post notices of any meeting times that deviate from the regular schedule.[188]

There are two remedies for violations of the Open Meetings law. The first is an injunction prohibiting threatened, recurring, or continuing violations.[189] The second is a declaration that an action was taken in violation of the Open Meetings law, upon entry of which a

provide 'protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure.'" (quoting Galbiso v. Orosi Pub. Util. Dist., 167 Cal. Rptr. 3d 788, 807 (Cal. Ct. App. 2008))).

183. *See* Frankel v. D.C. Office for Planning & Econ. Dev., 110 A.3d 553, 558 (D.C. 2015) (stating that fee awards will incentivize disclosure of documents).

184. N.C. GEN. STAT. § 132-1(b) (2017) ("[I]t is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law."); *see also* N.C. Elec. Membership Corp. v. N.C. Dep't of Econ. & Cmty. Dev., 108 N.C. App. 711, 716, 425 S.E.2d 440, 443 (1993) (noting that the NCPRA provides for a "strong policy in favor of disclosure").

185. N.C. GEN. STAT. § 143-318.9 (2017) ("Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.").

186. *Id.* § 143-318.10(a).

187. *See id.* § 143-318.11(a) (listing the ten purposes for which a public body may enter into closed session and describing the procedure for calling such a session).

188. *Id.* § 143-318.12(b).

189. *Id.* § 143-318.16.

court may declare the illegal action null and void.[190] An action seeking such declaratory relief "must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void."[191]

A. Comparison of the Open Meetings Law with the NCPRA

The Open Meetings law provides that a court "may award the prevailing party or parties a reasonable attorney's fee, to be taxed against the losing party."[192] This fee provision is noticeably different than that of the NCPRA in two immediately apparent ways. First, both the plaintiffs' and defendants' fee provisions in the NCPRA are mandatory, meaning a court must award fees if it finds that the conditions of the statute are satisfied.[193] In contrast, the Open Meetings law provides a court with the discretionary power to award attorney's fees when it so chooses.[194] Second, with its Public Records law, North Carolina makes fees more readily available for a plaintiff than a defendant.[195] The Open Meetings law, by contrast, provides the same standard for any party seeking fees.[196]

While today's fee award is discretionary, this was not always the case. The General Assembly changed the award from mandatory to discretionary in 1994.[197] Prior to this change, a prevailing party was "entitled" to a fee award.[198] But while the decision to award attorney's fees under the Open Meetings law is itself discretionary, the determination of which party or parties prevail is not. Rather, "[t]he designation of a party as a prevailing party . . . is a legal determination which [an appellate court reviews] de novo."[199] Therefore, a North Carolina appellate court has the power to

190. *Id.* § 143-318.16A(a).

191. *Id.* § 143-318.16A(b).

192. *Id.* § 143-318.16B.

193. *Id.* § 132-9(c)–(d).

194. Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 206 N.C. App. 192, 201, 696 S.E.2d 559, 566 (2010).

195. § 132-9(c)–(d) (providing that a plaintiff must receive attorney's fees if it substantially prevails, but a defendant only receives fees if the action "was filed in bad faith or was frivolous").

196. *See id.* § 143-318.16B.

197. *See* Act of June 23, 1994, ch. 570, sec. 3, § 143-318.16B, 1993 N.C. Sess. Laws 181, 186 (codified at N.C. GEN. STAT. § 143.318.16B (2017)) (changing "shall" to "may" in the Open Meetings fee award provision, thereby making the award discretionary).

198. Jacksonville Daily News Co. v. Onslow Cty. Bd. of Educ., 113 N.C. App. 127, 131, 439 S.E.2d 607, 609 (1993) ("We note . . . that plaintiff, as prevailing party, is entitled to a reasonable attorney's fee.").

199. *Free Spirit Aviation, Inc.*, 206 N.C. App. at 201, 696 S.E.2d at 566 (quoting Smyth *ex rel.* Smyth v. Rivero, 282 F.3d 268, 274 (4th Cir. 2002)).

determine that a party prevailed as a matter of law and order a trial court to consider awarding attorney's fees on remand.[200]

In making this legal determination, a court uses the "merits test," under which a party may only be considered "prevailing" if it won "on the merits of at least some of [its] claims."[201] The North Carolina courts have taken this "merits test" from the Fourth Circuit's treatment of fee awards in federal civil rights cases.[202] The term is not unique to the Open Meetings law, and should be read consistently as a term of art–"that is, without distinctions based on the particular statutory context in which it appears."[203] The treatment of the term by North Carolina courts in other contexts is therefore informative.[204]

In addition to its discretionary, rather than mandatory, fee award, the Open Meetings law also jettisons the NCPRA's distinction between defendant and plaintiff fee awards. The Open Meetings law simply provides that a court may award fees to a "prevailing party or parties."[205] It does not distinguish between prevailing plaintiffs and defendants.[206] In a given case, either party has the opportunity to prevail.[207] However, the Open Meetings law does not expressly provide for a partial award of fees to a party that partially prevails.[208]

200. *See* Knight v. Higgs, 189 N.C. App. 696, 704, 659 S.E.2d 742, 748 (2008) ("Knight's pleadings in Superior Court clearly sought to establish a violation of the Open Meetings Law. We have determined as a matter of law that such violations occurred. We hold that Knight is a prevailing party under the statute . . . and the taxing of attorney's fees should be considered by the trial court upon remand.").

201. H.B.S. Contractors, Inc. v. Cumberland Cty. Bd. of Educ., 122 N.C. App. 49, 57, 468 S.E.2d 517, 522 (1996) (citing Smith v. Univ. of N.C., 632 F.2d 316, 350 (4th Cir. 1980)).

202. *Id.* (citing *Smith*, 632 F.2d at 350 (applying the merits test in the context of an attorney's fees award to a "prevailing party" under Title VII of the Civil Rights Act of 1964)).

203. *Free Spirit Aviation, Inc.*, 296 N.C. App. at 203, 696 S.E.2d at 567 (quoting Grissom v. Mills Corp., 549 F.3d 313, 318 (4th Cir. 2008)).

204. *See infra* Part II.B.

205. N.C. GEN. STAT. § 143-318.16B (2017).

206. *See id.*

207. *Free Spirit Aviation, Inc.*, 206 N.C. App. at 203, 696 S.E.2d at 567 ("[W]e hold that more than one party—including both a plaintiff and a defendant in the same action—can be the prevailing party entitled to fees."); *see also* Hildebran Heritage & Dev. Ass'n. v. Town of Hildebran, No. 15 CVS 180, 2015 WL 11182441, at *4 (N.C. Super. Ct. Aug. 11, 2015) ("Applying the merits test for determining whether a prevailing party is entitled to attorney's fees under N.C.G.S. § 143-318.16B, the Court finds that the Plaintiffs and the Defendant Hildebran are both prevailing parties.").

208. *Compare* § 143-318.16B, *with* LA. STAT. ANN. § 42:26 (West, Westlaw through 2018 First Extraordinary Sess.) ("If a person who brings an enforcement proceeding . . . prevails in part, the court may award him reasonable attorney fees or an appropriate portion thereof. If the court finds that the proceeding was of a frivolous nature and was

In the most straightforward cases, a plaintiff who alleges a violation of the Open Meetings law and then establishes that such violation occurred has prevailed.[209] However, a plaintiff need not prevail on every claim in order to be a prevailing party eligible for an award of attorney's fees. For example, where a plaintiff sought both an injunction prohibiting future violations of the Open Meetings law and a declaration voiding the challenged action, but obtained only the injunction, the North Carolina Court of Appeals found that the plaintiff was a "prevailing party."[210] The court reasoned that prevailing on the "primary legal question in its cause of action" was a "significant success" for the plaintiff, making it a "prevailing party."[211] A plaintiff can therefore prevail even if it does not obtain "everything set out in its prayer for relief."[212]

There are no North Carolina appellate decisions finding that a defendant alone was the prevailing party in an Open Meetings lawsuit. However, despite the legislature's silence as to whether the partial fee awards are available,[213] the courts have made clear that both a defendant and a plaintiff can be prevailing parties. For example, the court of appeals recently affirmed a trial court's finding that both a plaintiff and a defendant prevailed.[214] The trial court found that the plaintiffs prevailed by succeeding "on a significant issue . . . by securing an adjudication that the Defendant . . . violated

brought with no substantial justification, it may award reasonable attorney fees to the prevailing party.").

209. *See* Knight v. Higgs, 189 N.C. App. 696, 704, 659 S.E.2d 742, 748 (2008) ("Knight's pleadings in Superior Court clearly sought to establish a violation of the Open Meetings Law. We have determined as a matter of law that such violations occurred. We hold that Knight is a prevailing party under the statute . . . and the taxing of attorney's fees should be considered by the trial court upon remand.").

210. H.B.S. Contractors, Inc. v. Cumberland Cty. Bd. of Educ., 122 N.C. App. 49, 58, 468 S.E.2d 517, 523 (1996).

211. *Id.*

212. *Free Spirit Aviation, Inc.*, 206 N.C. App. at 202, 696 S.E.2d at 566 (citing *H.B.S. Contractors*, 122 N.C. App. at 58, 468 S.E.2d at 523); *see also* Har-Mar Collisions, Inc. v. Scottsdale Ins. Co., 212 So. 3d 892, 906 (Ala. 2016) (noting that a plaintiff must "receive at least some relief on the merits of his claim before he can be said to prevail" (quoting Hewitt v. Helms, 482 U.S. 755, 760 (1986))).

213. *See* N.C. GEN. STAT. § 143-318.16B (2017).

214. *See* Hildebran Heritage & Dev. Ass'n, Inc. v. Town of Hildebran, __ N.C. App. __, __, 798 S.E.2d 761, 767 (2017) (affirming a trial court's finding that both parties succeeded on significant issues in the litigation and were, therefore, both prevailing parties); *Free Spirit Aviation*, *Inc.*, 206 N.C. App. at 203–04, 696 S.E.2d at 567 (finding that the trial court mistakenly believed that it was required to designate either the plaintiffs or the defendants as the prevailing party).

the Open Meetings Law in one of the ways contended."[215] The defendant likewise prevailed by succeeding "on several significant issues . . . by securing a directed verdict on all but one of the Plaintiff's claims."[216] Even though the fee award under the Open Meetings law is for any party that prevails, a court could still consider that fee awards assessed against plaintiffs could "have a 'chilling effect' and defer citizens from filing . . . suits in the future."[217]

North Carolina trial courts have provided further examples of prevailing plaintiffs under the Open Meetings law. Where the Chatham County Board of Elections illegally called an emergency meeting, failed to convene in open session, failed to go into closed session pursuant to motion, failed to keep proper minutes, and failed to provide timely notice of its meetings, the trial court found that the plaintiff was a prevailing party.[218] At the other end of the spectrum, where a plaintiff challenged two meetings of the Guilford County Board of Elections but both were found to comply with the law, the plaintiff did not prevail.[219] At least one trial court has found that a plaintiff who is able to show only a "very minor technical violation" of the Open Meetings law should not receive a fee award.[220]

B. North Carolina courts have provided examples of when a party prevails in other contexts.

There are only three published North Carolina appellate opinions providing guidance on when a party prevails in the Open Meetings context.[221] However, more on how North Carolina courts adjudicate "prevailing party" status can be learned from treatment of the term in other contexts.

215. Hildebran Heritage & Dev. Ass'n. v. Town of Hildebran, No. 15 CVS 180, 2015 WL 11182441, at *4 (N.C. Super. Ct. Aug. 11, 2015)

216. *Id.*

217. Kahana Sunset Owners Ass'n v. Maui Cty. Council, 948 P.2d 122, 126 (Haw. 1997) (considering a chilling effect on plaintiffs to be a factor weighing against assessing fee awards against plaintiffs under a scheme where the court was authorized to award fees to any prevailing party).

218. Lothrop v. Chatham Cty. Bd. of Elections, No. 06-CVS-239, 2006 WL 4526077, at *5 (N.C. Super. Ct. Sept. 12, 2006).

219. Sigma Constr. Co., v. Guilford Cty. Bd. of Educ., No. 00-CVS-5267, 2000 WL 35514250, at *7 (N.C. Super Ct. Apr. 24, 2000).

220. Womack Newspapers, Inc. v. Dare Cty. Tourism Bd., No. 09-CVS-473, 2009 WL 8634982, at *12 (N.C. Super. Ct. Jan. 1, 2009).

221. *See, e.g.*, Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 206 N.C. App. 192, 201–10, 696 S.E.2d 559, 565–67 (2010); Knight v. Higgs, 189 N.C. App. 696, 704, 659 S.E.2d 742, 748 (2008); H.B.S. Contractors, Inc. v. Cumberland Cty. Bd. of Educ., 122 N.C. App. 49, 56–58 468 S.E.2d 517, 522–23 (1996).

For example, where a party appeals or defends against an agency decision, it may receive an award of attorney's fees if it prevails.[222] In *North Carolina Alliance for Transportation Reform v. United States Department of Transportation*,[223] a North Carolina federal district court considered whether an environmental group could recover its attorney's fees from North Carolina state agencies.[224] The case was dismissed pursuant to a joint motion of all parties.[225] Nonetheless, the court found that the plaintiff had prevailed under both the state statute and its federal corollary.[226] The court reasoned that the order of dismissal "embodie[d] a significant portion of the relief Plaintiffs sought in filing the civil action in the first place," and the plaintiffs were therefore prevailing parties.[227]

However, simply arriving at a joint dismissal or settlement of a case is not enough for a party to prevail. Where a plaintiff entered into a final settlement agreement but did not succeed on "any significant issue in the litigation," the North Carolina Court of Appeals ruled that the plaintiff had not prevailed.[228] The court came to this conclusion by examining "the benefits sought by the plaintiffs in the complaint versus those actually obtained by settlement."[229]

The North Carolina Unfair and Deceptive Trade Practices Act also awards "a reasonable attorney fee to the duly licensed attorney representing the prevailing party" under certain circumstances.[230] In that context, where the trial court and court of appeals denied a plaintiff's motion for post-judgment interest but the motion was then granted by the Supreme Court of North Carolina, the plaintiff prevailed.[231] The court noted that attorney's fees are allowed "for services rendered at all stages of litigation, including appeals."[232] The Supreme Court of North Carolina has also clarified that a court may retain jurisdiction of a case even after dismissal for the purpose of ruling on post-dismissal motions for attorney's fees.[233]

222. N.C. GEN. STAT. § 6-19.1(a) (2017).
223. 151 F. Supp. 2d 661 (M.D.N.C. 2001).
224. *Id.* at 669.
225. *Id.*
226. *Id.* at 671.
227. *Id.* at 674.
228. House v. Hillhaven, Inc., 105 N.C. App. 191, 196, 412 S.E.2d 893, 896 (1992).
229. *Id.*
230. N.C. GEN. STAT. § 75-16.1 (2017).
231. *See* Custom Molders, Inc. v. Am. Yard Prod., Inc., 342 N.C. 133, 141, 463 S.E.2d 199, 204 (1995).
232. *Id.* (citing Cotton v. Stanley, 94 N.C. App. 367, 370, 380 S.E.2d 419, 422 (1989)).
233. Bryson v. Sullivan, 330 N.C. 644, 664, 412 S.E.2d 327, 338 (1992).

Combining these North Carolina cases with direct treatment of the Open Meetings law by the state's courts, North Carolina practitioners have a usable, if not dense, body of state case law from which they can work.

C. In the absence of binding case law, North Carolina courts may lean heavily on the Fourth Circuit's "prevailing party" jurisprudence.

In determining whether to award attorney's fees under the Open Meetings law, North Carolina courts may look to the Fourth Circuit's treatment of fee awards in federal civil rights cases.[234] The federal statutory language provides that a court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[235] While federal case law interpreting that statute is certainly not binding on North Carolina courts, the state's courts use federal decisions as persuasive guidance.[236]

The Fourth Circuit has held that, in order to prevail, a party "'need not prevail on all issues if a significant one is resolved' in its favor."[237] Where bringing a suit caused a governmental defendant to correct unconstitutional procedures during litigation, the plaintiffs were found to be prevailing parties.[238] A plaintiff can even prevail where its suit is voluntarily dismissed and other complaints contribute to a change in policy, so long as the plaintiff's suit makes a "major contribution" to the change.[239] By contrast, a plaintiff who failed to

234. H.B.S. Contractors, Inc. v. Cumberland Cty. Bd. of Educ., 122 N.C. App. 49, 57, 468 S.E.2d 517, 522 (1996) (applying the "merits test" in the context of an attorney's fees award to a "prevailing party" under Title VII of the Civil Rights Act of 1964 (citing Smith v. Univ. of N.C., 632 F.2d 316, 350 (4th Cir. 1980))).

235. 42 U.S.C. § 1988(b) (2012).

236. *See H.B.S. Contractors, Inc.*, 122 N.C. App. at 57, 468 S.E.2d at 522–23.

237. Lotz Realty Co. v. U.S. Dep't of Hous. & Urban Dev., 717 F.2d 929, 931 (4th Cir. 1983) (quoting Bonnes v. Long, 599 F.2d 1316, 1318 (4th Cir. 1979)), *overruled by* S-1 & S-2 by & through P-1 & P-2 v. State Bd. of Educ. of N.C., 21 F.3d 49, 51 (4th Cir. 1994) (overruling all cases that apply the "catalyst theory" in finding that a party is prevailing).

238. *See* Reigh v. Schleigh, 829 F.2d 1334, 1335 (4th Cir. 1987) ("[A]n award may be made even if plaintiff does not obtain a favorable judgment if it is found that plaintiff's actions caused defendant to remedy his errant ways.").

239. *See* DeMier v. Gondles, 676 F.2d 92, 93 (4th Cir. 1982) (finding that where the plaintiffs' class action suit was only one of several complaints that "contributed to [a] change in policy" relating to strip searches, the plaintiffs were nonetheless entitled to a fee award as prevailing parties because their suit made a "major contribution" towards that change).

state a claim on which relief could be granted was not allowed to recover its attorney's fees.[240]

While the Fourth Circuit's case law may be plaintiff-friendly in some respects, there is one bright-line limitation. The Fourth Circuit has rejected a catalyst theory that allows a plaintiff to recover fees as a prevailing party where its lawsuit does nothing more than "operate as a catalyst for post-litigation changes in a defendant's conduct."[241] The United States Supreme Court also rejected such a catalyst theory in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,[242] finding that a "defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change."[243] The *Buckhannon* decision thus "resolved . . . the issue of whether the catalyst theory was an appropriate means of determining if the plaintiff was a prevailing party."[244] Should the North Carolina courts follow the Fourth Circuit's lead, it would mean a rejection of the catalyst theory in the Open Meetings context.

D. In light of the Supreme Court's Buckhannon decision, jurisdictions outside the Fourth Circuit can also provide guidance to North Carolina courts on "prevailing party" status.

The D.C. Circuit's case law since the Supreme Court's holding in *Buckhannon* could be instructive to a court deciding which, if any, parties prevail under a system that rejects a catalyst theory of recovery. The D.C. Circuit has laid out three factors that must be considered when adjudicating prevailing party status: (1) "a court-ordered change in the legal relationship of the parties," (2) a judgment "in favor of the party seeking fees," and (3) a "judicial pronouncement . . . accompanied by judicial relief."[245] Where a defendant's prevailing party status is being adjudicated, only the last

240. *See* Davis v. Hudgins, 896 F. Supp. 561, 571–72 (E.D. Va. 1995), *aff'd*, Davis v. Hudgins, Nos. 95-2532, 96-1126, 1996 WL 327205, at *1 (4th Cir. 1996).

241. S-1 & S-2 by & through P-1 & P-2 v. State Bd. of Educ. of N.C., 21 F.3d 49, 51 (4th Cir. 1994).

242. 532 U.S. 598 (2001), *superseded by statute*, Act of Dec. 31, 2007, Pub. L. No. 110-175, sec. 4, § 552(a)(4)(E), 121 Stat. 2525, 2525 (2007) (codified as amended at 5 U.S.C. § 552(a)(4)(E) (2012)).

243. *Id.* at 605.

244. Project Vote/Voting for Am., Inc. v. Dickerson, 444 F. App'x 660, 663 (4th Cir. 2011).

245. Texas v. Holder, 63 F. Supp. 3d 54, 63 (D.D.C. 2014) (quoting Green Aviation Mgmt. Co. v. FAA, 676 F.3d 200, 203 (D.C. Cir. 2012)).

two factors are relevant.[246] Such a framework, in theory, may be used by North Carolina courts in deciding whether a party has prevailed in an Open Meetings lawsuit.

Examples from states with similar Open Meetings fee-shifting statutes can also prove instructive. The simplest cases are those where a plaintiff clearly succeeds or fails. For example, many California fee awards simply turn on whether the governmental defendant violated the state's Open Meetings law.[247] However, some cases from other states can provide insight into how more complicated situations are resolved. For example, where the Oregon Open Meetings law allows an award of fees to a "successful"[248] plaintiff, the Court of Appeals of Oregon held that a plaintiff seeking injunctive relief under that law is not "held to the exacting showings and standard of proof which apply to a party that seeks injunctive relief."[249] Rather, the plaintiff need only present a prima facie case under the law, and then the burden shifts to the government body to show that there was no violation.[250]

Arizona provides for a discretionary award of fees to a "successful plaintiff."[251] Its courts balance the extent to which the governmental defendant attempted to comply with the Open Meetings law with the extent to which a successful plaintiff's action was beneficial to others.[252] Nebraska similarly allows for a fee award to a "successful plaintiff."[253] Its courts have made clear that a party need not accomplish every objective of its lawsuit in order to qualify for a fee award.[254] Nebraska courts have further held that "success

246. *See id.*

247. *See* Galbiso v. Orosi Pub. Util. Dist., 384 Cal. Rptr. 3d 788, 798 (Cal. Ct. App. 2008) (noting that a violation of the Open Meetings law is a condition precedent to a plaintiff's recovery of attorney's fees); *see also* San Gabriel Tribune v. Superior Court of Cal., 192 Cal. Rptr. 415, 426–27 (Cal. Ct. App. 1983) (noting that a plaintiff could recover attorney's fees because the defendant city violated the state's Open Meetings law).

248. OR. REV. STAT. ANN. § 192.680(3) (West, Westlaw through 2018 Reg. Sess.).

249. Oregon Ass'n of Classified Emps. v. Salem-Keizer Sch. Dist. 24J, 767 P.2d 1365, 1368 (Or. Ct. App. 1989).

250. *Id.* at 1368–69.

251. ARIZ. REV. STAT. ANN. § 38-431.07(A) (West, Westlaw through 2018 First Special Sess.), *amended by* Act of Apr. 17, 2018, ch 229, sec. 3, § 38-431.07, 2018 Ariz. Sess. Laws __, __.

252. *See* Carefree Imp. Ass'n v. City of Scottsdale, 649 P.2d 985, 993–94 (Ariz. Ct. App. 1982).

253. NEB. REV. STAT. ANN. § 84-1414(3) (West, Westlaw through 2018 Second Reg. Sess.).

254. *See, e.g.*, Wolf v. Grubbs, 759 N.W.2d 499, 526 (Neb. Ct. App. 2009) ("The fact that the [plaintiffs] did not accomplish the full objective of their lawsuit does not prevent them from being 'successful plaintiffs,' but, rather, goes to the extent of an award for attorney fees, as the results obtained are an appropriate consideration on that issue."

can be measured in small ways."[255] The Court of Appeals of Maryland has agreed that a plaintiff need not obtain all of the relief that it seeks in any Open Meetings case in order to be considered a prevailing party eligible for attorney's fees.[256] These examples from other jurisdictions may prove useful to North Carolina practitioners, particularly if a factual scenario that has already been litigated under a similar fee-shifting scheme should arise.

E. Other jurisdictions can further guide North Carolina trial courts on how to exercise discretion in awarding attorney's fees.

Achieving prevailing party status is only half the battle for a party in a North Carolina Open Meetings case. The ultimate decision of whether to award attorney's fees lies within the discretion of the trial court.[257] It is inherently difficult to define how a court will exercise this discretion. However, tests formulated by other jurisdictions for when to award fees to a prevailing party could be useful for North Carolina trial courts in making this discretionary determination.

Similar to North Carolina, Montana's "Right to Know" provision provides that a court "may" award attorney's fees to "a plaintiff who prevails," and "therefore gives the district court the discretion to award attorney fees."[258] However, this discretion is "not unfettered."[259] While declining to articulate "firm guidelines" for when a trial court might deny attorney's fees, Montana courts nonetheless have noted that "outright denial of a motion for attorney fees without rationale, is 'not an exercise of discretion, but is an abuse of that discretion.'"[260] A trial court would do better to make its

(quoting Hansmeyer v. Neb. Pub. Power Dist., 578 N.W.2d 476, 485 (Neb. Ct. App. 1998))), *aff'd*, 588 N.W.2d 589 (Neb. 1999).

255. Hansmeyer v. Neb. Pub. Power Dist., 578 N.W.2d 476, 484 (Neb. Ct. App. 1998) (quoting Airport Inn, Inc. v. Neb. Equal Opportunity Comm'n, 353 N.W.2d 727, 734 (Neb. 1984)), *aff'd*, 588 N.W.2d 589 (Neb. 1999).

256. *See* Armstrong v. Mayor & City Council of Balt., 976 A.2d 349, 374–75 (Md. 2009) ("The Court of Special Appeals erred in the present case when it concluded that . . . a party bringing an action alleging an Open Meetings Act violation must obtain the relief it requests on the merits of its claim in order to be deemed the 'prevailing' party.").

257. *See* Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 206 N.C. App. 192, 201, 696 S.E.2d 559, 566 (2010) (citing Knight v. Higgs, 189 N.C. App. 696, 704, 659 S.E.2d 742, 748 (2008)).

258. *In re* Investigative Records of Columbus Police Dep't, 901 P.2d 565, 567 (Mont. 1995).

259. Yellowstone Cty. v. Billings Gazette, 2006 MT 218, ¶ 31, 143 P.3d 135, 142.

260. Shockley v. Cascade Cty., 367 P.3d 336, 338 (Mont. 2016) (quoting *Yellowstone Cty.*, 2006 MT 218, at ¶ 30, 143 P.3d at 142).

conclusions on the record, as this leaves less room for second-guessing of discretion at the appellate level.[261]

Further, South Carolina courts provide six factors to consider when awarding attorney's fees, one of which is the nature of the "beneficial results obtained" by the plaintiff.[262] In theory, a plaintiff who obtained only partial relief could still receive an award of fees if a court found that it made a strong showing on the other five factors.[263] A trial court who addressed these factors in a "conclusory" fashion was ordered to give them "full and proper consideration" on remand.[264]

Maryland's courts similarly provide factors for a trial court to use when deciding whether to exercise its discretion to award attorney's fees for an Open Meetings violation.[265] These factors, while providing some level of predictability, could also be viewed as robbing courts of the very flexibility that defines the exercise of discretion.[266]

Wisconsin courts consider a prevailing plaintiff in an Open Meetings case to serve as a "private attorney general . . . vindicating his or her own rights and the rights of the public to open government."[267] They therefore award attorney's fees "if an award would advance the purpose of the Open Meetings law: to ensure that the public has the fullest and most complete information possible

261. *See* Bell v. Katy Indep. Sch. Dist., 994 S.W.2d 862, 867 (Tex. Ct. App. 1999) (holding that the trial court did not abuse its discretion when it concluded that because both parties "had legitimate rights to pursue," each party should pay its own attorneys' fees).

262. *See* Burton v. York Cty. Sheriff's Dep't, 594 S.E.2d 888, 898 (S.C. Ct. App. 2004) (citing Jackson v. Speed, 486 S.E.2d 750 (S.C. 1997)).

263. *See id.* ("There are six factors for . . . determining an award of attorney's fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services.").

264. *Id.*

265. *See, e.g.*, Andy's Ice Cream, Inc. v. City of Salisbury, 724 A.2d 717, 737 (Md. 1999) ("Courts considering [Open Meetings Act] fee assessments need to take into account, among other things, whether, how, and when the issue of a closed session or other prospective violation was presented to the public body, the basis, if any, the public body gave for concluding that its action was permissible under the Act, whether that basis was a reasonable one under the law and the circumstances, whether the amounts claimed are reasonable, and the extent to which all parties acted in good faith." (quoting Wesley Chapel Bluemount Ass'n v. Balt. Cty., 699 A.2d 434, 446 (Md. 1997))).

266. *See, e.g.*, *Burton*, 594 S.E.2d at 898 (describing the trial court's determination on attorney's fees to be "conclusory" because it did not follow specific factors, despite such an award being up to the trial court's discretion).

267. Wisconsin *ex rel.* Hodge v. Town of Turtle Lake, 508 N.W.2d 603, 609 (Wis. 1993).

regarding the affairs of government."[268] The Court of Appeals of Arizona has similarly found that attorney's fees should be awarded where such an award would "[give] effect to the intent that the legislature has expressed in the Open Meeting law and which is set forth in the declaration of public policy."[269] If this condition is met, then an award of fees should only be denied where "special circumstances would render an award unjust."[270] However, it is worth noting that, unlike North Carolina, both Arizona and Wisconsin recognize the private attorney general doctrine.[271] Therefore, North Carolina courts and practitioners should look to states with more similar fee award schemes before turning to private attorney general jurisdictions.

California's appellate courts have taken the step of limiting the discretion of the trial court to the "fairly narrow" class of situations where "the defendant shows that special circumstances exist that would make such an award unjust."[272] This discretion does not come from the text of the California fee-shifting provision, which simply provides, like North Carolina, that a court "may award court costs and reasonable attorney's fees to the plaintiff . . . where it is found that a legislative body of the local agency has violated" the Open Meetings law.[273] Rather, California's courts reason that the fee-shifting provision was enacted "to encourage private enforcement

268. *Id.* (citing WIS. STAT. ANN. § 19.81(2) (West, Westlaw through 2018 Act 348)) (declaring the policy of Wisconsin to be that the public is entitled to as full and complete of information regarding the affairs of government as is compatible with the conduct of governmental business); *cf.* N.C. GEN. STAT. § 143-318.9 (2017) ("[T]he public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business," and therefore, "it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.").

269. Carefree Imp. Ass'n v. City of Scottsdale, 649 P.2d 985, 994 (Ariz. Ct. App. 1982).

270. *Hodge*, 508 N.W.2d at 609.

271. *Compare* Arnold v. Ariz. Dep't of Health Servs., 775 P.2d 521, 537 (Ariz. 1989) (en banc) ("The private attorney general doctrine is an equitable rule which permits courts in their discretion to award attorney's fees to a party who has vindicated a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance."), *and* Marquardt v. Milwaukee Cty., 639 N.W.2d 762, 769 (Wis. 2001) ("Generally, the 'private attorney general' doctrine permits an individual acting to enforce the public's rights to be awarded his or her attorney's fees from the losing party."), *with* Hoke Cty. Bd. of Educ. v. State, 198 N.C. App. 274, 283, 679 S.E.2d 512, 519 (2009) (noting that North Carolina does not allow recovery of attorney's fees under the private attorney general doctrine).

272. Galbiso v. Orosi Pub. Util. Dist., 84 Cal. Rptr. 3d 788, 799 (Cal. Ct. App. 2008) (quoting L.A. Times Commc'ns LLC v. L.A. Cty. Bd. of Supervisors, 5 Cal. Rptr. 3d 776, 785 (Cal. Ct. App. 2003)).

273. CAL. GOV'T CODE § 54960.5 (West 2018).

because lack of judicial interpretation hampered the act's effectiveness and penalties for noncompliance would otherwise be inadequate."[274] A California court will not award fees where it would be unjust to do so, but the "burden of showing such inequity [rests] on the defendant."[275] While North Carolina's fee-shifting provision does not share California's legislative history, it would be understandable for a North Carolina appellate court to limit the discretion of a trial court in denying attorney's fees on the basis that doing so will serve the underlying policy of the Open Meetings law "that the hearings, deliberations, and actions of [public] bodies be conducted openly."[276]

If there is a lesson for North Carolina courts to glean from these jurisdictions, it is that they will do best to make their discretionary findings in writing on the record with reasoning included. This avoids the criticism that a court acted in a conclusory fashion or abused its discretion by outright denying attorney's fees without giving the issue proper consideration.

F. Plaintiffs in North Carolina Open Meetings litigation should engage in a risk-reward analysis on fee awards before filing suit.

In the Open Meetings context, a defendant has no control over what issues are litigated. This is because the only proper defendant in an Open Meetings lawsuit is a "public body."[277] Using the merits test and looking to persuasive law from other jurisdictions, North Carolina courts will ask whether a plaintiff or defendant succeeded on significant issues in litigation when determining whether they prevailed and are therefore eligible for an award of attorney's fees.[278] Therefore, which party prevails will be determined by the resolution of the issues that the plaintiffs choose to present to the court.

If a plaintiff has a number of potential Open Meetings claims against a public body, it should consider how likely it is to succeed on each individual claim before filing suit. A party who brought forward only its strongest claims will be more likely to be considered prevailing by a court, given that a small amount of stronger claims will give the plaintiff a greater chance of achieving a "significant success"

274. *L.A. Times Commc'ns*, 5 Cal. Rptr. at 784 (quoting Common Cause v. Stirling, 174 Cal. Rptr. 200, 202–03 (Cal. Ct. App. 1981)).

275. Int'l Longshoremen's & Warehousemen's Union v. L.A. Exp. Terminal, Inc., 81 Cal. Rptr. 2d 456, 465 (Cal. Ct. App. 1999) (quoting Common Cause v. Stirling, 174 Cal. Rptr. 200, 204 (Cal. Ct. App. 1981)).

276. N.C. GEN. STAT. § 143-318.9 (2017).

277. *Id.* § 143-318.10(b).

278. *See* H.B.S. Contractors, Inc. v. Cumberland Cty. Bd. of Educ., 122 N.C. App. 49, 58, 468 S.E.2d 517, 523 (1996).

on the "primary legal question in its cause of action."[279] This will further put the plaintiff in a better position to receive attorney's fees were the court to examine "the benefits sought by the plaintiffs in the complaint versus those actually obtained by settlement."[280]

CONCLUSION

North Carolina's fee-shifting provisions have been the subject of limited judicial interpretation. However, there is still room to make observations and predictions about how courts have, and may, treat these provisions.

Between the Public Records and Open Meetings laws, the Open Meetings provision is the more predictable of the two. This is because North Carolina courts have demonstrated a willingness to borrow the principles of "prevailing party" jurisprudence from more well-established bodies of persuasive law, like that of the Fourth Circuit, rather than craft tests that are specific to North Carolina. While it is theoretically possible that this trend could change in the future, there is no reason right now to think that it will. Litigants and courts in Open Meetings fee disputes will likely, therefore, continue to apply broadly accepted principles in the specific context of their dispute with little room to make novel legal arguments.

However, the Public Records provision is a different story. On the plaintiffs' side, the "substantially prevails" language of section 132-9(c) is ripe for judicial interpretation. Even taking into account the persuasive landscape, it is far from certain how North Carolina's appellate courts will treat this language when the time comes. The two most likely possibilities are that these courts will either (1) adopt the "catalyst" framework used in the federal FOIA context or (2) opt for a more defendant-friendly standard like that of Texas. The Texas option is bolstered by the fact that the North Carolina and Texas statutes are almost identical. However, North Carolina courts are by no means bound to follow the Texas courts' interpretation of identical language. Indeed, the policy disputes that have arisen in Texas surrounding this defendant-friendly standard could cause North Carolina courts to think twice before following suit.

As far as the defendants' fee provision of the NCPRA is concerned, the law does have the benefit of treatment from at least

279. *Id.*

280. House v. Hillhaven, Inc., 105 N.C. App. 191, 196, 412 S.E.2d 893, 896 (1992).

one court—albeit a federal district court with no binding authority.[281] That decision should at least serve as a warning to plaintiffs who either (1) have already received the disputed records and are considering filing a Public Records lawsuit as a punitive measure or (2) are seeking to quickly file suit against a defendant that has not acted as swiftly as the plaintiff might like. This is not to say that a plaintiff could not successfully enforce the NCPRA's mandate that a defendant produce records "as promptly as possible."[282] Rather, this simply means that a plaintiff who jumps to file a Public Records lawsuit only a matter of days after making their requests risks being found to have filed suit in bad faith or on a frivolous basis.

Ultimately, the best way for these provisions to be more precisely defined is through further treatment by appellate courts. This can only occur as more litigation reaches the appellate level, as a North Carolina court will not issue a "purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise."[283] Unless and until such further litigation occurs, courts and practitioners will have to look to other jurisdictions for guidance on how they should treat these provisions.

281. *See* Quality Built Homes, Inc. v. Vill. of Pinehurst, No. 1:06-CV-1028, 2008 WL 3503149, at *11 (M.D.N.C. Aug. 11, 2008).

282. N.C. GEN. STAT. § 132-6(a) (2017); *see also* Elliot Engstrom, *"Tuning-Up" North Carolina's Public Records Act: A Brief Discussion of Problem Areas and Possible Solutions*, 9 ELON L. REV. 23, 44 (2017) (discussing the meaning of the "as promptly as possible" language in the NCPRA).

283. Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC, __ N.C. App. __, __, 808 S.E.2d 576, 580 (2017) (citing Town of Tryon v. Duke Power Co., 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942)).