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Final Report of the COMMITTEE TO STUDY COMPLIANCE WITH MAINE'S FREEDOM OF ACCESS LAWS

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Executive Summary

The Committee to Study Compliance with Maine's Freedom of Access Laws was created by Resolves 2003, chapter 83 of the 121st Maine Legislature. The Resolve called for appointment of a 16-member committee, including representatives from the Legislature, the Maine Press Association, the Maine Daily Newspapers, the Maine Association of Broadcasters, the Maine Freedom of Information Coalition, the Maine Municipal Association, the Maine Chiefs of Police Association, the Maine Sheriffs' Association, the Maine School Management Association, the Attorney General, the Commissioner of Public Safety, county commissioners and persons whose privacy interests are protected by the laws, and the public.

The current Freedom of Access laws require all governmental actions to be taken openly and the public to have access to governmental records. The Maine Freedom of Information Coalition undertook a "public records audit" in 2002 to determine if the intended openness was being realized across the state at the local level. The results of that audit prompted the introduction of LD 1079, Resolve, To Establish the Committee To Study Compliance with Maine's Freedom of Access Laws, which was passed by the 121st Legislature.

The Committee to Study Compliance with Maine's Freedom of Access Laws first convened in mid-November 2003. After establishing a process, which also included the creation of a subcommittee to address public records exceptions, and time frame for addressing the myriad of issues associated with the Freedom of Access laws, the committee focused deliberations on the issues of public records exceptions, training and assistance for public officials and citizens, and potential law changes to improve compliance and guidance for both public records & open meetings. The committee's recommendations include the following.

Assistance for citizens and public officials: *Direct the Attorney General to provide assistance, including mediation and training, on freedom of access laws to the general public and local public entities.*

Cost of reproduction and searches of public records: *Establish maximum charges per page for most copies of public records; authorize fees for staff time devoted to searching for and retrieving lengthy or complex requests for public records; authorize prepayment for large copying requests; prohibit charges for inspection of public records; urge the Judicial Branch to provide the opportunity for public input for proposed changes in court administrative fees relating to public access.*

Timeframe for public official response: *Require response to a public records request "within a reasonable period of time of the request."*

Public notice timing: *Retain the current requirement that notice be given in "ample time to allow public attendance."*

Manner of public notice: *Caution should be taken by public officials to not become overly reliant on technology, such as the Internet, to provide notice of meetings.*

Executive sessions:

- *Require citation of the correct statutory provision for going into executive session in the motion to enter executive session; and*
- *Provide education and training to local officials on appropriate uses of executive sessions.*

Public records exceptions:

- *Sunset all public records exceptions not listed in the Freedom of Access laws, and provide for review of the exceptions that balances the public's interest in having all governmental records be public against the interest in keeping the record confidential.*
- *Consolidate, or recodify, all public records exceptions into one section in statute.*
- *Establish a central location, such as the law library or the Secretary of State's office, for maintaining a list of all the exceptions.*

Public employee personal information: *Support and recommend expanding LD 1727, An Act To Amend the "Freedom of Access Laws" To Exclude Public Employees' Home Addresses (before the Judiciary Committee) to protect from disclosure public employees' home phone numbers and e-mail addresses, as well as home addresses.*

Continuation of Freedom of Access Laws study: *Extend the study deadline to allow the committee to continue work and address the following issues:*

- *Issues related to fees for Internet/remote access to public information;*
- *Whether to authorize collection of attorneys' fees and, if so, under what circumstances;*
- *The value of and need for changes to the penalties provision;*
- *Issues surrounding voice mail and electronic mail to ensure public access to public proceedings; and*
- *Issues surrounding the conduct of public proceedings through electronic means and the methods of ensuring public access to such proceedings.*

I. INTRODUCTION

> The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly.[1]

Since 1959, the Maine Legislature has recognized that the public is entitled to openness when it comes to governmental entities conducting "the people's business." Retaining the 99th Legislature's definition of "public proceeding" to include every transaction of functions affecting any or all citizens of the State, the current Freedom of Access laws require all actions to be taken openly, records to be open and deliberations to be conducted openly by a list of categories of governmental and quasi-governmental entities.

The Maine Freedom of Information Coalition undertook a "public records audit" in 2002 to determine if the intended openness was being realized across the state at the local level. The results of that audit[2] prompted the introduction of LD 1079, Resolve, To Establish the Committee To Study Compliance with Maine's Freedom of Access Laws[3], which the 121st Legislature finally passed as Resolve 2003, chapter 83[4]. The Committee to Study Compliance with Maine's Freedom of Access Laws consists of 16 members, representing the Legislature, the Maine Press Association, the Maine Daily Newspapers, the Maine Association of Broadcasters, the Maine Freedom of Information Coalition, the Maine Municipal Association, the Maine Chiefs of Police Association, the Maine Sheriffs' Association, the Maine School Management Association, the Attorney General, the Commissioner of Public Safety, county commissioners and persons whose privacy interests are protected by the laws, and the public[5]. Appointed members were selected by the Governor, the President of the Senate or the Speaker of the House of Representatives.

This report is submitted by the Committee to Study Compliance with Maine's Freedom of Access Laws pursuant to Resolve 2003, chapter 83.

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[1] Maine Revised Statutes, Title 1, section 401.
[2] The report describing the procedures and the results of the records audit is available on the website of the Maine Freedom of Information Coalition: www.mfoic.org.
[3] LD 1079 and the Committee Amendment and floor amendments are included as part of Appendix A.
[4] Resolve 2003, chapter 83 is included as part of Appendix A.
[5] A list of the members and their appointing authorities is included as Appendix B.

II. PROCESS

The Committee to Study Compliance with Maine's Freedom of Access Laws first convened in mid-November 2003 once all the appointments had been completed. The committee identified its process for working through the charge established by Resolve 2003, chapter 83, and decided to request an extension of the reporting date of December 5, 2003 contained in the resolve. The committee requested an extension of the deadline[6] and the Legislative Council authorized a new reporting date of January 9, 2004[7].

Resolve 2003, chapter 83 directed the committee to meet up to four times to study state and local compliance with Maine's freedom of access laws and other issues relating to citizens' access to public records and public proceedings. Specifically, the committee was charged to:

A. Review and analyze the Report on Public Records Audit, prepared by the Maine Freedom of Information Coalition in November 2002, and the recommendations made in the report;

B. Study what measures, if any, state and local governmental entities in Maine and in other states have taken to ensure their employees are knowledgeable about and comply with Maine's freedom of access laws or other comparable state laws;

C. Investigate and recommend ways in which governmental compliance with Maine's freedom of access laws may be meaningfully improved and calculate what, if any, costs may be associated with making such improvements;

D. Undertake a comprehensive inventory and review of the various exceptions to public access to records and proceedings found within the freedom of access laws and identify possible changes to these exceptions in order to streamline Maine law and thereby make it more easily understood and complied with by governmental employees;

E. Reconsider whether the need for any of the statutory exceptions, as currently worded, is outweighed by the State's general interest in ensuring citizens' access to public records and proceedings; and

F. Study whether and to what extent the freedom of access laws may be used as a harassment tool against local governmental entities and what remedies may be available and appropriate to deter any such harassment.

The committee initially convened on Wednesday, November 19, 2003 in the State House in Augusta. Full committee meetings were held on December 10 and 17, 2003 and January 6, 2004. A subcommittee charged with reviewing and making recommendations concerning exceptions from the definition of "public records" met on December 3 and 30, 2003.

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[6] The extension request is included as part of Appendix D.
[7] The extension memo is included as part of Appendix D.

III. COMMITTEE DUTIES AND ISSUES

A. Review and analyze the Report on Public Records Audit prepared by the Maine Freedom of Information Coalition and recommendations made in the report.

The committee reviewed the Report on Public Records Audit prepared by the Maine Freedom of Information Coalition, including the reasons for conducting the audit, the methodology, findings and conclusions/recommendations. Based on the audit report findings, the Coalition made the following three recommendations:

- The Legislature must address the cost of reproduction of public documents and develop standards for what is fair and reasonable;

- Maine Municipal Association, Maine School Management Association and Maine Chiefs of Police Association must make greater efforts to provide training and ensure members abide by Maine's Freedom of Access laws; and

- Administrators in municipal offices, police departments and school districts should consider adopting written polices for staff to properly respond to citizen request for information and regularly review policies with new employees.

The committee addressed each of these recommendations during the course of its deliberations.

1. Cost of Reproduction

The first recommendation from the Coalition tasked the Legislature with addressing reproduction costs. While current law allows public officials to charge fair and reasonable costs for reproduction, the public records audit revealed that copying fees vary significantly from town to town and high fees can create barriers to public access. Members received detailed information on what guidelines for reproduction costs other states have established. The committee debated a number of issues related to reproduction costs, including whether it made sense to distinguish between commercial and non-commercial requests; what is a reasonable fee per page; how should staff time be factored into the fees; and what is the need for waivers for certain individuals or organizations. While the committee was able to agree on uniform costs for reproduction, including per page fees and a method for incorporating staff time into the cost, it was unable to come to consensus on the issues of commercial versus non-commercial users and whether to grant waivers to certain groups or individuals. Ten members did not support creating a separate fee structure for commercial and non-commercial requests; two members supported a separate fee structure. In addition, eight members supported including language to allow waivers; four members did not support waivers.

The committee heard presentations from Lt. Colonel Jeff Harmon of the Maine State Police to shed light on State Bureau of Identification (SBI) fees for criminal history record information, the history of how the fees have evolved, and the current fees for the different

types of requests. In addition, the committee received information from Ted Glesner, State Court Administrator, who provided information on court records and search fees, including an explanation of recent fee changes. After further discussion, the committee recommended that courts provide an opportunity for public input on proposed changes in court administrative fees.

2. Training and education for public officials

The committee heard presentations from the Maine Municipal Association (MMA), Maine School Management Association (MSMA), and Maine Chiefs of Police Association (MCOPA) on what their organizations are doing to provide training and education to their constituents on compliance with freedom of access laws. Presenters provided committee members with detailed information on what type of training materials have been developed and outreach efforts to their members. In many cases, these efforts have targeted those individuals who are most likely to handle public records requests. All three organizations provide support for their constituents on how to handle public records requests. In some cases, public officials need to manage competing compliance requirements for which they may require additional guidance from their representative organization.

3. Adoption of written policies:

The committee members representing MMA, MSMA, and MCOPA discussed their organization's perspective on the value of model policies. Bob Schwartz, representing MCOPA, explained that MCOPA first developed a model policy for handling requests in 1999; this policy was recently revised.[8] The majority of law enforcement agencies have implemented this model policy, although they are not required to do so. Harry Pringle, representing MSMA, stated that MSMA puts out sample policies for school administrators. They are currently working to update and improve the sample policy to make it more user friendly. Richard Flewelling, from MMA, noted that many of its members are concerned that a model policy will only add a bureaucratic layer to this process. As a result, MMA has not pursued developing a model policy, although it does provide other public access related resources for member municipalities. Each member made a commitment to continued training and education for their members, including adopting the recommendation from the committee to create and disseminate model policies for their members.

B. Study public employee educational efforts by state and local entities in Maine and other states to ensure compliance with freedom of access laws.

The committee addressed what other opportunities there are for providing educational assistance to both public employees and the general public. Members acknowledged that providing assistance to the public and local entities may help to prevent disputes over public

[8] The model policy developed by MCOPA is included as part of Appendix E.

records requests. Currently, there is no agency or organization in Maine that provides this service. Review of other states' educational efforts revealed that a number of Attorney General's offices from other states have ombudsman offices or designated individuals to answer questions and, in some cases, provide mediation services.

Committee members discussed the possible benefits of appointing an ombudsman to answer questions and resolve disputes for public officials and the general public. Linda Pistner, representing the Attorney General's office, noted that the mission of their office is limited to providing legal services to state government. It does not have the resources to provide assistance or mediation services at the local level or to the general public. After considering the potential for resolving disputes before legal action is taken, the committee recommended that the Attorney General's office provide technical assistance to citizens and public officials. The committee recognized that expansion of the duties of the Attorney General's office will require additional resources.

C. Investigate and recommend ways in which government compliance with Maine's freedom of access laws can be meaningfully improved and calculate any costs for making such improvements.

Several members expressed concerns related to the lack of guidance on a timeframe for fulfilling records requests; the requirements for various aspects of open meetings; and how to enforce compliance with freedom of access laws. The committee addressed each issue by clarifying current law and discussing how it might be improved.

1. Timeframe for public official response:

Current law requires that a written denial to provide records requested be issued within five working days; however, it is silent on how much time officials have to complete a request. Federal law allows 20 working days for a denial but imposes no time limit for when records must be provided[9]. Members debated the merits of setting a specific time limit for providing records or requiring an estimated date for when a request must be fulfilled. Because of concerns about the potential burden on public officials of imposing a specific time limit, the committee recommended including language that required records to be provided "within a reasonable period of time".

The committee also discussed the feasibility of requiring denials to be accompanied with a statutory cite justifying the denial. Current law requires that a reason must be given for a denial; however, it does not require that the appropriate statute be cited.

2. Attorneys' fees

[9] Freedom of Information Act – United States Code, Title 5, section 552

Committee members were divided on the issue of whether to permit the collection of attorneys' fees. Several members contended that individuals are not stepping forward to challenge denials because of their inability to collect attorneys' fees. Some members believe that if individuals are permitted to collect attorneys' fees, public bodies should also be entitled to collect them. Currently, 32 states allow attorneys' fees. Several members expressed concern about a possible increase in frivolous lawsuits as a result and questioned how other states handle the potential for bad faith lawsuits. After reviewing possible options for authorizing the collection of attorneys' fees, the committee opted to not make a recommendation at this time to see whether education and technical assistance initiatives improve compliance. A number of committee members, however, voiced strong support for including attorneys' fees in the committee's recommendations.

3. Penalties

While state statute allows penalties to be imposed for noncompliance, members were unable to cite a case where a penalty had been levied. Ms. Pistner clarified that penalties can only be levied in an action brought by either the Attorney General's office or a District Attorney. According to Ms. Pistner, because of limited resources, this is not common. Committee members discussed whether a significant compliance issue exists and the potential for penalties to hinder recruitment efforts by schools. Committee members again noted the potential benefits of creating an ombudsman program for dispute resolution as a first option. In a number of states, the Attorney General's office or an independently created ombudsman office mediates disputes and answers questions for the public, which reduces the need to impose fines or penalties.

4. Open meetings

The committee discussed various aspects of open meeting requirements, including the timeframe for public notice, the manner of public notice, and the use and possible abuse of executive sessions.

> **Public notice timing:** Current law requires that meeting notices be posted in "ample time to allow public attendance". Several members expressed concern about the lack of clearer, more specific guidance for public officials and suggested that it would be helpful to require a minimum number of days for public notice posting. Members were reminded that any new requirement will apply to all public meetings including legislative and subcommittee meetings. While the committee discussed the option of requiring either 3-day or 7-day notice, the majority of members concluded that it would be difficult to set a specific number a days for every public meeting. Current language allows for the flexibility in timing to fit the type of meeting and circumstances.
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> **Manner of public notice:** In addressing the manner of public notice, the committee generally agreed that the current law is working well. The customary method for towns is to post meeting notices at public places. Members noted that

the Internet is now playing an important role in meeting notices but cautioned public officials to not become overly reliant on technology.

Executive Sessions: Discussion on executive sessions focused on the circumstances under which executive sessions are legitimate and the justification of the executive session for the public. Committee members acknowledged that competing privacy interests and a lack of understanding of the limits of executive sessions often leaves public officials uncertain on how to proceed when dealing with sensitive issues. It was suggested that the main problem is a lack of understanding of the law, not the intentional misleading or exclusion of the public. Most committee members agreed that public officials should be required to cite the specific statute that provides the justification for an executive session. The major concern of the committee was the consequences if the wrong statute is inadvertently cited. Members concluded that if this happens, the public body should not be considered in violation of the law if the reason for the executive session was legitimate, despite the fact that the proper authority was unintentionally misstated. This protects the rights of third parties that may have been implicated in the discussion in the executive session, and avoids conflicting with the current requirements under which an executive session is void if final action is taken while the meeting is closed to the public.

D. Inventory and review exceptions to public records and identify possible changes to streamline Maine law and increase understanding and compliance. Reconsider whether the need for an exception is outweighed by the State's general interest in ensuring access to public records and proceedings.

In the first meeting, the committee voted to establish a subcommittee to review exceptions to public records. The subcommittee, which consisted of six committee members, met twice. The subcommittee reviewed a document identifying approximately 450 exceptions to public records disclosure requirements and decided not to examine each one individually.[10] The subcommittee concluded that a more effective approach would be to develop a process for the Legislature to review all exceptions over a period of time. Legislation should be introduced directing the Joint Standing Committee on Judiciary, with input from the appropriate legislative policy committees, to review a certain number of exceptions during the second regular session of each Legislature. All exceptions should be reviewed every 10 years.

The subcommittee also set out criteria to be included as part of the exception review process by the Legislature. These criteria include the following:

Reasons for keeping information confidential:

[10] The list of exceptions is included as Appendix F.

1. *Personal information* – Will an individual's rights to privacy be compromised?
2. *Trade Secrets* -- Does making this information public put the company at a competitive disadvantage?
3. *Federal Law* -- Does federal law require this information to be private?
4. *Negotiations* – Does making this information public compromise the position of those in negotiations?
5. *Public Safety* – Does the release of information jeopardize the safety of the public?

Additional considerations in this evaluation should include the following:

1. Does this information still need to be collected by the agency or public body? What is the value in maintaining these files?
2. Is the exception as narrowly tailored as it could be?

The Legislature would be tasked with weighing these potentially competing interests against the public's right to know and determining whether these exceptions should be terminated, modified or continued.

The committee discussed the importance of putting all the exceptions in one place to make them easier to find. Currently, the exceptions are located throughout Maine statutes and, until the recent compilation by Office of Policy and Legal Analysis staff; the only other document that listed all the exceptions was prepared in 1992.[11] The committee recommended recodifying the statutes where the exceptions to the freedom of access laws are located into a single section. They also recommended creating a single location where a list of all the exceptions is maintained such as the Secretary of State's office or the Law Library.

E. Study how freedom of access laws are used to harass public officials and public entities, what remedies are available and appropriate to deter such harassment

The committee heard anecdotal information of instances where public officials had been harassed through excessively large public records requests. In one case, an individual requested a very large document that took significant staff time to complete. Although the town official fulfilled the request, the individual never picked it up. In order to discourage frivolous or harassing requests, the suggestion was made to require advance payment for records with an estimated cost of $250 or more and for an individual who has a history of nonpayment of fees.

F. Continuation of freedom of access study

[11] "Confidentiality of Public Records", prepared by OPLA staff, 1992.

There were several issues that committee members believed warranted further study. Therefore, members recommended that this committee be authorized to continue its work next interim. Issues to be addressed should include, but not be limited to, the following.

- **Internet access to public information:** After discussion about some of the sources of public information available in the Internet, the committee concluded that they did not have enough time to fully address all the issues and considerations to set fair and appropriate fees.

- **Attorneys' fees:** The committee was divided on whether to permit attorneys' fees. While no consensus emerged on this issue, all members supported utilizing mediation and training resources through the ombudsman program to prevent lawsuits. Through a continuation of this study, the committee will be able to evaluate what initiatives, if any, have been put in place, and the outcomes of the initiatives.

- **Penalties:** In the spirit of trying to resolve issues without resorting to punitive measures, the committee declined to make any recommendation on changing the penalties provision with the hope that implementation of the other recommendations will result in the resolution of disputes before there is a need to impose a penalty. The committee determined that this issue needs further consideration.

IV. RECOMMENDATIONS:

The committee made the following recommendations to improve the freedom of access laws and compliance with the law.

Assistance for citizens and public officials

- *The Attorney General's office is directed to provide information and mediation and training assistance on freedom of access laws to the general public and local public entities. The Attorney Generals office is also encouraged to work with state-wide professional organizations to help address concerns of constituents.*

Cost of reproduction and searches of public records

- *Public officials may charge up to 20 cents per page for paper that is 8 ½ inches by 11 (letter size) and 8 ½ inches by 14 (legal size). Traffic accident reports for commercial users and Register of Deeds documents should be exempt from this provision.*
- *Officials may charge for staff time after 2 hours at the rate of $10 per hour.*
- *Public officials may not charge for inspection only.*
- *Public officials are authorized to require advance payment for requests over $250 and when an individual has a history of nonpayment of fees.*
- *Urge the courts to provide the opportunity for public input for proposed changes in court administrative fees.*
- *Ten members did not support creating a separate fee structure for commercial and non-commercial requests; two members supported a separate fee structure.*
- *Eight members supported including language to allow waiver of fees; four members did not support waivers.*

Timeframe for public official response

- *The phrase " within a reasonable period of time of the request" should be added to the statute requiring public officials to provide access to these records. (1 MRSA § 408)*

Public notice timing

- *The language in current statute that requires notice be given in "ample time to allow public attendance" should be retained.*

Manner of public notice

- *While the Internet is a great tool for getting the word out, members expressed an interest in adding a cautionary note for public officials to not become overly reliant on technology.*

Executive Sessions

- *Education and training should be provided to local officials on appropriate uses of executive sessions. This could be one of the functions the Attorney Generals office, in conjunction with the professional organizations representing towns, schools and law enforcement agencies.*
- *Public officials must cite the correct statutory provision for going into executive session. If the incorrect statute is cited, it is not a violation of the law as long as the reason for the executive session is legitimate.*

Attorneys' fees

- *The committee was unable to come to consensus on whether to permit the collection of attorneys' fees. However, members were optimistic that mediation and training assistance could help reduce the number of conflicts and potential lawsuits.*

Public Records Exceptions:

- *All exceptions except those located in the Freedom of Access Law should have a sunset clause that terminates the exception unless the Legislature reenacts it.*
- *Each exception should be evaluated in a 10-year cycle according to the criteria set out by the committee. The same criteria would be applied by the Legislature to any new proposed exceptions.*
- *A staggered review process should be established in statute to review approximately one fifth of the exceptions every two years until all exceptions had been reviewed.*
- *Starting in 2006, the Judiciary committee, with input from each of the joint standing committee of jurisdiction, would be responsible for reviewing the designated exceptions during the second session of each Legislature. The envisioned process would be similar to the legislative budget review process.*
- *All exceptions should be consolidated, or recodified, into one section in statute.*
- *A central location, such as the law library or the Secretary of State's office, should be established for maintaining a list of all the exceptions.*

Additional Recommendations:

- *The committee recommended that the Judiciary committee expand LD 1727 (An Act To Amend the "Freedom of Access Laws" To Exclude Public Employees' Home Addresses), which it will take up this session, to also exclude public employees' home phone numbers and e-mail addresses from the freedom of access laws.*

Continuation of Freedom of Access Laws study:

The committee recommended that it be authorized to continue its work next interim. Issues to be addressed should include, but not be limited to, the following:

- *Address issues related to fees for Internet/remote access to public information.*
- *Consider whether to authorize collection of attorneys' fees and, if so, under what circumstances.*
- *Address the value of and need for changes to the penalties provision.*
- *Review the issues surrounding voice mail and electronic mail to determine whether statutory changes are necessary to ensure public access to records.*
- *Review the issues surrounding the conduct of public proceedings through electronic means and the methods of ensuring public access to such proceedings.*