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**Testimony of
Senator Richard Rosen
Joint Standing Committee on Judiciary
April 27, 2011**

LD 1465: An Act To Amend the Laws Governing Freedom of Access

Good afternoon Senator Hastings, Representative Nass and members of the Joint Standing Committee on Judiciary. I am Richard Rosen and I am honored to represent District 31 in the Maine Senate, which includes parts of Hancock and Penobscot Counties.

Today I present LD 1465: An Act To Amend the Laws Governing Freedom of Access.

LD 1465 is about one thing: expanding the public's right to know.

As elected officials serving Maine people, it is our responsibility to ensure government remains open and accountable. A strong Freedom of Access law is critical. We must provide citizens and taxpayers peace of mind that we respect their right to access public records, and we must seize any and all opportunities to strengthen that right.

LD 1465 achieves these very important goals.

This bill has obtained strong and diverse support. An informal coalition of open government advocates from across the ideological spectrum helped draft this proposal—loosely modeled after Texas' Right to Know laws—and it has earned the support of 30 Democratic and Republican cosponsors.

The provisions within LD 1465 go a long way toward making Maine government more open and accountable to the people.

It creates fair deadlines government must meet to comply with public records requests, requires sufficient notice before official proceedings can be held, expands accountability through the creation of trained public access officers, and funds the already-created position within the Attorney General's office to serve as a resource for government and the public to help resolve disputes without going to court. The bill also accounts for situations that may impact government's ability to comply with provisions included in the bill.

LD 1465 creates a more open government. I am open to revisions that address potential concerns and build even greater support for this proposal, but the goal of greater government transparency and accountability must remain.

I hope members of this Committee will continue to support open government, and help us lead the charge to protect and expand the public's right to know.

Thank you for your time. I am happy to answer any questions.

125th Legislature
Senate of
Maine
Senate District 1

Senator Dawn Hill
Appropriations and Financial Affairs, Member
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Testimony in Support of LD 1465, *An Act to Amend the Laws Governing Freedom of Access*

Presented Before the Joint Standing Committee on Judiciary
Wednesday, April 27, 2011

Senator Hastings, Representative Nass, and distinguished members of the Judiciary Committee; I am Senator Dawn Hill serving District 1 which includes York, Kittery, South Berwick, Eliot and Ogunquit. Thank you for the opportunity to speak in support of LD 1465, *An Act to Amend the Laws Governing Freedom of Access*. As a former member of the Right to Know Advisory Committee, I am pleased to be a co-sponsor to this bill.

LD 1465 is about increasing governmental transparency and enhancing the freedom of access laws for the public. I think we all can agree on the importance of an open government, especially in today's society. One just has to watch the news to see the public unrest and government secrecy in some countries around the world. We are fortunate to live in the United States of America where we believe in government transparency, access, and accountability. Even more so, our state has been a national leader in its ongoing efforts to ensure compliance with freedom of access laws. This is something to be proud of.

This bill will require a more reasonable deadline for responses to public information requests; it will improve access by requiring public information be provided in the preferred format (paper, email, etc); it will strengthen the paper trail of a request; and it will create greater accountability in every agency, department, and office.

Recently, a quasi-state agency has received a great amount of negative attention due to a lack of accountability and transparency. We do not want to see this happen again. LD 1465 has been appropriately labeled the "Time for Transparency Act" and I believe that it *is* the time for greater transparency in Maine.

Thank you.

Dwight E. Hines, Ph.D.
715 Green Woods Road
Peru, Maine 04290
207-562-4701

April 27, 2011

Judiciary Committee
State of Maine

I am Dr. Dwight Hines, Ph.D., University of Maine, 1976. I am a resident of Peru, Maine.

Thank you for allowing me to tell you my Three Reasons for Supporting LD 1465/SP0456: An Act to Amend the Laws Governing Freedom of Access.

The three reasons for my supporting the amendment are:

Human Rights,

Innovation, and

Citizen Engagement.

All three will be enhanced by the amendments to Laws Governing Freedom of Access.

Human Rights — From the Inter-American Court for Human Rights to the European Court on Human Rights and from Presidents Obama and Bush, from the Carter Center to the the American Bar Association Human Rights Committee, there is unanimous agreement that the right to know is a fundamental right. Indeed, the U.S. Supreme Court has stated clearly that the right to publish implies the right to gather information. I brought 16 and a half pages of references — with me that is a fair taste of the current academic and practical literature. It is not a fluke or an accident that those countries that have the most open governments are the ones that are the most developed. Development requires innovation, and that is where this amendment will help Maine build on its strengths.

Innovation: A) It was brilliant decision by the Maine government to provide Macintosh Laptops to all Maine students. B) Maine people are creative, that is a fact based on testing thousands of Maine college students on ideational fluency, remote associates, and other measures. They and their friends and family can compete with anyone in a fair market. C) Ready access to specific types of government collected information in electronic formats will allow for exploration and exploitation of data that are currently ignored. As a community, we could not ask for a better situation than creative people who know how to use basic information tools and can readily obtain oodles of information right in their own home town. It is not odd that most FOIA requests at the state and federal levels are made by businesses. A vote for this amendment will further our common goals of achieving healthy, vibrant communities.

Abraham Lincoln gave a speech in 1859, on the eve of a terrible war, about the genius of our system to encourage creativity. Patents protect and support the inventor but at the same time provide the information to the community so the device or process can be improved upon. Think about all the processes that the government has developed over the years and think about how making them public

will stimulate improvements. Those improvements will be in parallel with the third reason I hope you vote for this bill:

Citizen Engagement:

Our system needs citizen involvement because it's our system. This amendment will help reduce some of the information asymmetries that now exist between those who make decisions and those who are affected by the decisions. One of the positive side effects of passing this amendment for you personally will be that it gives you a valid way to respond to those people who complain to you about an agency or an official. Simply tell them that the information that the agency or person is acting on is public and if the one complaining has a better way, tell us about it. Please remember that complainers can be great sources of telling us where innovations are likely to occur.

Citizen engagement includes business and commercial interests who have to face the reality that technology evolves much more rapidly than regulations. An ongoing engagement is the best way to handle problems that will continue to arise because of the rate of change in the system of government and the market place.

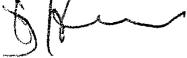
Overall, I do not see any technical or enforcement problems from this amendment.

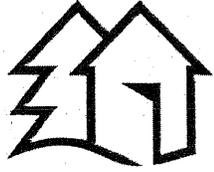
Including money for the Attorney General to act as an ombudsman will more than be repaid in increased trust in the system and in real returns due to increased innovation.

Because of the continuing deterioration in the world's food supply. Maine agriculture, with its established infrastructure, will most likely benefit from the increase in access to records and consequent innovations.

Thank you again for allowing me to comment.

Dwight Hines





MaineHousing
Maine State Housing Authority

Testimony of

PETER MERRILL

Director of Communications and Planning
MaineHousing

before the

The Joint Standing Committees On Judiciary

regarding

LD 1465 – An Act to Amend the Laws Governing Freedom of Access

APRIL 27, 2011

125th MAINE LEGISLATURE

FIRST REGULAR SESSION

The mission of the Maine State Housing Authority is to assist Maine people to obtain and maintain decent, safe, affordable housing and services suitable to their unique housing needs.

In carrying out this mission, MaineHousing will provide leadership, maximize resources, and promote partnerships to develop and implement sound housing policy.

Senator Hastings, Representative Nass, members of the Joint Standing Committees on Judiciary: I am Peter Merrill, Director of Communications and Planning at the Maine State Housing Authority.

The Maine State Housing Authority is Maine's housing finance agency, created by the legislature in 1969 to address the problems of unsafe, unsuitable, overcrowded, and unaffordable housing. We are authorized to issue bonds to finance single family and multi-family housing units for Maine's low and moderate income citizens. These bonds carry the moral obligation of the state. We are structured to utilize effective private methods of finance for public purposes, to be independent, nimble, and responsive.

We are authorized to act as the agent for the state in administering the federal weatherization and fuel assistance programs, a federal housing block grant, the federal low-income housing tax credit, and homeless grant programs. We collect and disburse federal rental subsidies, state general fund revenue for homeless programs, and receive a dedicated portion of the real estate transfer tax for the Housing Opportunities for Maine (HOME) Fund to support our programs.

MAINEHOUSING IS OPPOSED TO THIS BILL.

We Support access and transparency. But this bill is sweeping in its scope. It is an all-everything wish list of the organizations who do the asking. If there had been even one organization that does the responding involved, there might be a case, but this is dramatic and one sided.

First of all, we agree with those who propose referring it to the Right to Know committee which can take the time to consider it in more detail.

SOME AREAS OF CONCERN

Let me list a few of the concerns that we have:

TELEPHONE REQUESTS

The concern about these is misunderstanding and miscommunication. There is no he said-she said when it is in writing. It is very easy to simply call up and say, I'd like everything you can give me on issue X. Putting it in writing makes the request more clear.

PERMISSION TO USE A THIRD PARTY TO COPY.

We thought we could already do that. Of course, you cannot hire a temp for \$10/hour. You might think about indexing that charitable ten dollar rate.

REQUIRE AGENCIES TO INSTALL COMPUTER PROGRAMS

Every day we read about IT security breaches and yet we would be REQUIRED to install software at anyone's request and payment? Wikileaks asks for data and then recommends the software it wants installed? And if they're willing to pay, we have to accept it? Do we trust any comers to provide safe and secure software? Our IT security consultants and staff would go nuts. That doesn't seem like a very smart thing to do.

THREE DAYS TO ESTIMATE

The bigger the job, the less accurate the estimate will be if it must be done within three days. Or the higher it will be to cover the fact that it is a rough estimate.

TIMELINES

What does immediate mean? It seems pretty clear that you drop everything and respond to the request. There is nothing wrong with a defined timeframe. Immediate is neither defined nor reasonable.

If you cannot react immediately, you must certify that AND still respond within five days. That may make sense for a small request but seems a little tight for a large one. And the certification seems like a waste of time since you have to respond in five days anyway. Pretty bureaucratic.

And for the large ones, you have to provide the material on a piecemeal basis. That too needs some definition. Do we send out what we have at the end of each day or at the end of some logical break or when?

Also, as others have pointed out, this sets a priority for customer service over all other customers and clients.

INJUNCTION

As members of the Judiciary Committee you understand better than most the situation in our court system today. A couple of years ago the Legislature appointed a Landlord Tenant Working Group to address those issues and we looked at possible ways to improve the court process. What we learned was that they are living on a very tight budget and have set priorities for the cases they hear. It is remarkable that this bill proposes to insert itself in that process and deem a FOIA request to be the third most important thing the courts do. Is that the right priority and who should set it?

THE PUBLIC ACCESS OFFICER

If the goal is to make sure that someone in each agency has read the law, this might be a bit too formal.

FISHING EXPIDETIONS

There is one last issue we would like to raise that is perhaps an omission here: while reviewing this, please give some consideration to how fishing expeditions should be handled. This process is going to be used as often for non-press or individual information purposes as not. One way, of course is the current controversy over the registry of deeds. Another is the use of the process by advocacy groups to see what they can discover for their own organizational advocacy purposes. These might be broad and general such as, please provide all documents that relate to the production of multi-family housing. While there is no reason that they should not have the information, having to provide it 'immediately' or dropping everything to try to meet a five day deadline seems to allow the tail to wag the dog.

The complexity of all these issues suggests that at a minimum that this bill should be referred to the Right to Know Committee for a more in depth review.

Thank you for your consideration of our concerns.

To Senator Hastings and Representative Nass and distinguished members of the Judiciary Committee

My name is Susan Black and I am writing to you, wearing a couple of hats, in opposition to LD 1465. First, I am the Register of Deeds for Franklin County and secondly, I am a member of the finance committee for my town of Wilton.

As the Register of Deeds, I am fully aware that any document that is recorded in this office is open and available for copying to the public. We charge a copy fee for this service as does any branch of government.

When FOAA was created back in 1975, I believe they addressed all the issues in making government transparent. It has worked for over 35 years. Now that we are in the "computer age", the need to "enhance FOAA" has arisen. There are a lot of government offices that are very busy and under this bill, they will be forced to add extra work for their staff or even hire someone to handle the requests within ALL the timelines listed in section 408-A.

The means of copying documents is easier today than even 20 years ago, however, does that mean we have to virtually give the information away for little or nothing? To make this even harder to swallow, we have to give them the information in whatever format they want.

In a day of high identity theft, I would urge you to take a look at what truly is a public government record. Is it emails that people have given to the IFW for a hunting license, is it a deed from one private person to another private person, is it a mortgage by a private person to a bank and the list goes on. Just because it is housed in a government facility does not make it "public" in my opinion. Government cannot be in the business to set private people up in business. Government should not be forced to give email addresses out to other businesses for their mailing lists.

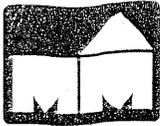
The taxpayers of my town cannot afford to hire anyone just to handle the potential FOAA requests. We as a state cannot afford to hire an Assistant Attorney General for this purpose at the cost of \$138,000 over a two year period.

Having a husband in the legislature, I know the committees get very busy, but I trust you will look very carefully, as I know you will, at this bill.

Thank you for your time and consideration.

Susan A. Black

May 5, 2011



Maine Municipal Association

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Testimony of the Maine Municipal Association

In Opposition to

LD 1465 – *An Act to Amend the Laws Governing Freedom of Access*

April 27, 2011

Senator Hastings, Representative Nass, members of the Judiciary Committee, my name is Greg Connors. I am testifying in opposition to LD 1465 on behalf of the Maine Municipal Association (MMA).

At a meeting on April 14th, MMA's 70-member Legislative Policy Committee (LPC) voted unanimously to oppose LD 1465.

LD 1465 would amend Maine's Freedom of Access Act (FOAA), or "Right to Know" law, in the following ways. The bill: (1) requires notices of public meetings to be provided at least 3 days prior to the meeting; (2) creates an affirmative duty for a governmental entity to provide copies of public records to people at their request rather than just providing an opportunity to examine those records; (3) provides the requestor with the right to obtain the copies of those records in all available formats, such as by photocopy or electronic or magnetic formats if available; (4) creates a duty for the governmental entity to explore obtaining assistance at a reasonable cost, to be borne by the requestor, so that the public record can be provided in the requested medium; (5) requires the public records to be mailed if so requested at a mailing charge no greater than actual mailing costs; (6) requires all records requested to be immediately provided unless the records have to undergo redaction or are not in public use or are in storage; (7) requires a certification be provided to the requestor if there will be any delay in immediately providing the public record and further provide the requestor with the right to copy or inspect the record within 5 business days or have the records mailed or e-mailed within that period of time; (8) creates a special standard for "large or multiple requests" which allows for the records to be provided as they become available if they cannot be provided "in the exercise of due diligence" within the 5-day period; (9) requires a cost estimate to be provided within 3 business days for any request that may exceed \$100 in costs calculated at the maximum \$10 per hour rate allowed under current law for searching for, retrieving and compiling requested records; (10) treats any failure to comply with the established response-time schedule to be considered a denial of the request and subject to enforcement procedures; (11) establishes a 10-day period of time for a requester to complete an inspection of records being reviewed, with extension periods provided according to a certain process; (12) prohibits a governmental entity from inquiring as to the purpose of a FOAA request; and (13) requires every governmental agency to designate a "public access officer" who must be certified to the FOAA according to the same certification program now required of various elected officials. The public access officer is charged with overseeing that governmental agency's response to FOAA requests.

Before getting into the issues the Policy Committee had with the various requirements under this bill, the first concern with LD 1465 was that it apparently did not go to the Right to Know Advisory Committee before being heard at a public hearing. It is our understanding that as a general rule any

amendments made to the FOAA are first vetted by this Advisory Committee. The other two bills heard today had the recommendation of this Advisory Committee and that was one of the reasons that the LPC decided to support those bills. The Advisory Committee's charge is to review and make recommendations to certain legislative committees about amending sections of the FOAA. If there was ever a piece of legislation that deserved to be thoroughly reviewed by the Advisory Committee, LD 1465 is that legislation.

That said, if the Right to Know Advisory Committee had decided to recommend this bill as currently written, MMA would strongly oppose the bill due to: (1) the unrealistic and unmanageable timelines established (e.g., the "immediate" response requirement except for special circumstances); (2) effectively requiring municipalities to provide documents in formats unavailable to the municipality; (3) placing municipal officials by default in the position of violating the Right to Know law simply because of an inability to comply with unreasonable response mandates; (4) the significant added costs to municipalities for complying with what would unquestionably be a new unfunded state mandate; and (5) the unreasonable prohibition, contradicting current law, on inquiring about the purpose of a request in order to clarify the issue being researched for both the public official and the requester.

Municipalities try very hard to comply with the requirements of the FOAA. They are increasingly being made subject to extremely large and sweeping FOAA requests. Similarly, MMA was presented with a sweeping FOAA request last year by the Maine Heritage Policy Center, originally asking to be provided or review approximately two million documents, so this organization has a sense of what impact large-scale FOAA requests can have on an organization. A summary of that request and MMA's response to that request, is attached to this testimony.

Thank you for your time and consideration.

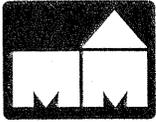
In April of 2010, the Maine Heritage Policy Center (MHPC) filed a FOAA request with MMA. One of the items requested was all public records subject to FOAA, including but not limited to emails, internal correspondence and other external correspondence with non-MMA third parties, related to "An Act to Provide Tax Relief (otherwise known as "TABOR II"). To follow is how this FOAA request played out:

- A FOAA request dated April 6, 2010 from the MHPC was received by MMA on April 8th. Of the 5 items requested, one asked for all public records related to TABOR II (see above).
- MMA responded to the MHPC on April 15th. Included in MMA's response was the information requested by the MHPC for three of the five items requested. MMA provided the MHPC with a very conservative estimate of time for the TABOR II information request of 750 hours. This estimate was based on the initial review that indicated that in order to comply with this specific request for information approximately 2,000,000 documents and records would need to be reviewed by certain personnel of the organization. MMA was willing to provide this information but requested a deposit of \$7,500 (750 hours @ \$10/hr.) prior to initiating the work related to MHPC's request.
- On May 3rd, the MHPC responded to MMA by narrowing the request from all public records to the Executive Director's and the Director of State and Federal Relations' email messages (incoming and outgoing) from April 1, 2009 to November 15, 2009.
- On May 10th, MMA again responded to the MHPC's modified and narrowed information request and provided them with an updated estimate of the time required to comply with this request of 100 hours and a deposit of \$1,000.
- Once MMA received the payment, the Association compiled the requested information and, on June 28th, informed the MHPC that the information would be available for review at its offices on or after the next business day, the 29th. A time log was kept and the number of staff time hours totaled 109 hours to compile the information requested.
- Based on this log and the individuals involved with the information collection exercise, the actual cost of performing this task was closer to \$8,000 rather than the \$1,090 actually billed to the requester of the information (not counting direct photocopying costs).

The above example highlights the issues with this bill.

1. Although LD 1465 makes mention of "large scale" or "multiple" requests, it does not define those terms and does nothing to appropriately address or control their impact on governmental entities.
2. Despite the best efforts of MMA, the Association could not have possibly complied with LD 1465's timeline requirements.
3. If MMA could not have entered into discussions about the true nature of the request, MHPC would have had to pay significantly more money to partially compensate MMA for its time to comply with the information request AND would have had to sift through significantly more information in their discovery process. Clarification as a result of questioning the requester of information can benefit the person requesting the information as it gets to the heart of the issue being researched. This can save the requester time by avoiding pouring over irrelevant public records.

4. The difference in the actual cost and the amount billed to the requester demonstrates how significantly expanded compliance requirements will lead to increased municipal expenditures.



Maine Municipal Association

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To: Senator Hastings
Representative Nass
Members of the Judiciary Committee

From: Greg Connors, Maine Municipal Association

Date: May 11, 2011

Re: Follow-up on mandate elements of LD 1465, *An Act to Amend the Laws Governing Freedom of Access*

This memo is provided as a follow-up to MMA's testimony on LD 1465 which indicated the municipal belief that the bill represents a "state mandate" as that term is defined in Article IX, Section 21 of the state's Constitution.

It is our understanding that a bill is defined as a state mandate if the legislation: (1) requires a modification or expansion of a local government's activities; and (2) the modifications or expansion will result in increased expenditures. If the answer to both questions is 'yes', the legislation represents a state mandate.

Municipal officials believe at least four elements of LD 1465 have mandate impacts:

1. The requirement to immediately respond to all FOAA requests will require increased staffing requirements.
2. The requirement to provide documents in the format requested, including exploring making technological changes, and implementing those changes, to accommodate those requests, will require additional local expenditures. Allowing local governments to charge a fee to recover those costs does not make the mandate designation disappear (see 30-A MRSA, Section 5685 (3)(A)).
3. The requirement to appoint and ensure the certification of a newly required public access officer will lead to increased personnel costs.
4. Because current law does not require a municipality to actually provide public documents to requestors if the community is willing to allow inspection instead, and because the statutory limits on charges that can be applied to FOAA requests (i.e., no more than \$10/hour after the first free hour) are typically far less than the actual charges incurred, and because LD 1465 clearly requires a much more extensive level of actually providing public documents to requestors, municipalities will experience increased expenditures from property tax resources to comply with document provision requirements.

Thank you for the opportunity to clarify this issue.



Maine Community College System

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May 10, 2011

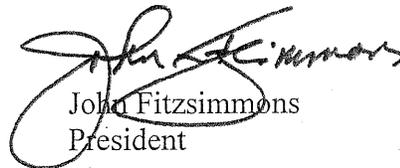
The Honorable David R. Hastings, Chair
The Honorable Joan M. Nass, Chair
The Joint Standing Committee on Judiciary
125th Maine Legislature
Augusta, ME 04333

Dear Senator Hastings, Representative Nass, and honorable members of the Joint Standing Committee on Judiciary:

This letter addresses L.D. 1465, "An Act To Amend the Laws Governing Freedom of Access" which is scheduled for public hearing on Wednesday, May 11, 2011. The bill would require the Maine Community College System, as well as others, to provide documents regardless of size, age or complexity within five (5) business days of the request date. From our operational perspective, a more manageable and appropriate standard would be fifteen (15) business days.

We appreciate the opportunity to comment on L.D. 1465, and thank you for your consideration. Should you require any additional information, please do not hesitate to contact my office.

Sincerely yours,


John Fitzsimmons
President

JF/ejc

A Letter Concerning LD 1465 "An Act to Amend the Laws Governing Freedom of Access"

Committee on Judiciary
c/o Legislative Information
100 State House Station
Augusta, ME 04333

Thursday, April 6, 2011

To the Honorable Chairmen and Members of the Joint Standing Committee on Judiciary,

We, the undersigned members of the Falmouth Town Council and School Board, urge you to vote Ought Not To Pass with regard to LD 1465, "An Act to Amend the Laws Governing Freedom of Access", or to defer it to the Right to Know Advisory Committee for review. Prior to outlining our concerns, we would like to go on the record as supporting the Freedom of Access Act and the concept of transparent governance. To that end, we strongly believe that transparent governance must incorporate functional governance.

The concerns outlined below are not theoretical. As public officials in the Town of Falmouth, we have been diverting tens of thousands of dollars complying with the FOAA requests submitted by a small number of individuals under the current statute. Passage of the proposed changes jeopardizes not only the delivery of services in all Maine communities but retention of qualified personnel.

What we do not support are initiatives that, while noble in intent, potentially cause greater harm and cost than good. As such, the following are specific concerns raised by LD 1465 that we would like to bring to your attention.

- The concept of requiring immediate access to public records presents great difficulties particularly in those situations in which vast and complex requests are made. This standard is unrealistic, and while there are provisions to lengthen the time allotted for record compiling, we do not believe these provisions appropriately protect the concept of functional government.
- The requirement of an agency or official to reproduce records in a medium as requested by a citizen, if the agency or official has the technological capability to do so, places a great deal of burden on the agency or official producing the record, such that data re-entry, data re-organization, and/or data translation into a program or format, different from the original, becomes the burden of the agency or official. For example, if a person asks for an Excel spreadsheet with the name, salary, number of classes assigned, and the number of students in each class, this information would have to be compiled from a number of sources and re-input into the spreadsheet in order to fulfill the request.
- Furthermore, the concept of technological capability is vague and concerning. If an official has database software on their computer, are they required to enter data that has been requested into the software, simply because they have it installed? Or, is the standard defined as their having the personal ability to do so? Is it reasonable to require an agency or official to produce documents in a format that is costly, when a more cost efficient methodology is available, solely because they have the capacity to produce the documents in the more costly format? If an electronic copy of the 1000-page school budget is made available, can a person insist that the school district make them a photocopy, thus burning up a school employees' time?
- In situations where a citizen requests a large number of documents as we have experienced on numerous occasions, and the district may only charge a fixed per-hour fee, is it reasonable and appropriate for a community of taxpayers to pay for the remaining costs associated with meeting a FOAA request, even when those costs may run into the tens of thousands of dollars when the questions are so high level that they must be answered by one of the highest paid individuals in the district?

- Opening up the means by which individuals can place an FOAA request (e.g. text messaging on nights and weekends) does not allow a proper protocol to be put into place to efficiently answer FOAA requests. There is no clear line drawn and so therefore, could a school official have to abide by a FOAA request, immediately, during a football game? Protocols are designed to ensure efficiency and equality in process.
- Many agencies, municipalities, and districts are operating with tighter and tighter administrative budgets. This bill, as written, creates the potential to create additional costs that may be unmanageable for that public organization. Examples of concern include not only the production of records in a requested medium, but also the requirement for potentially adding a public access officer to oversee requests. Inundated entities will require additional funding to support that position in order to meet the demands of LD 1465. At what point is it reasonable to sacrifice programming and services to meet the demands of FOAA requests?

To highlight the potential difficulties with this bill, consider the resources you would require as a state legislator if a citizen called you on the phone and requested a copy of all correspondence that you either sent or received since you took office. How would you account for that? How would you manage that? How would LD 1465 affect you? Now think about a small municipality or a school that receives a request for all documents produced by that public entity for the past twenty years, including all documents currently in that public entities' possession. Now consider that situation compounded by a request for those documents to be produced in a specific format as directed by the requestor.

These situations are not foreign or unrealistic; they occur on a regular basis. One must be able to recognize the very potential for abuse and the ramifications of that abuse. Therefore, we must find balance on this issue, so that we maintain a government accountable to the citizenry and protects their "right to know", all while ensuring that the purpose of government, to serve the general welfare of the people, is protected. As written, there is no protection for the services provided by public agencies, municipalities, or school departments in LD 1465.

We would strongly urge the members of this committee either to defeat LD 1465 in committee or to defer this piece of legislation to the Right to Know Advisory Committee for review. This piece of legislation has the potential to create intolerable operating conditions that will inhibit the ability for government to function. We pose this final question to you. Do we as citizens have a right to a transparent functional government that serves our best interest? If so, then how can we enact a system that violates the "functional" component of that right? We thank you for your consideration in these matters and, again, urge you to either defeat this bill or defer it to the Right to Know Advisory Committee for review.

Best Regards,

CC: The Honorable David R. Hastings III, Senator, Oxford
The Honorable Richard G. Woodbury, Senator, Cumberland
The Honorable Philip L. Bartlett II, Senator, Cumberland
The Honorable Joan M. Nass, Representative, Acton
The Honorable G. Paul Waterhouse, Representative, Bridgton
The Honorable Michael G. Beaulieu, Representative, Auburn
The Honorable Ralph W. Sarty, Jr., Representative, Denmark
The Honorable Bradley S. Moulton, Representative, York
The Honorable Karen D. Foster, Representative, Augusta
The Honorable Charles R. Priest, Representative, Brunswick
The Honorable Cynthia A. Dill, Representative, Cape Elizabeth
The Honorable Maeghan Maloney, Representative, Augusta

The Honorable Megan M. Rochelo, Representative, Biddeford
Susan Pinette, Committee Clerk, Joint Standing Committee on Judiciary

Beth Frankelm
Anastasia Larson
Karen Jarbes
C. H. [unclear]

Jessica Pierce
Dud Chau
Faded Varney

Tommy Payne

[Handwritten signature]

Richard Reed

[Handwritten signature]

[Handwritten signature]

The Honorable David R. Hastings, III,
Chair, Joint Standing Committee on Judiciary
955 Main Street
Fryeburg, ME 04037

Tuesday, April 26, 2011

Dear Senator Hastings,

I am writing to you and your colleagues on the Joints Standing Committee on Judiciary to comment on LD 1465 "An Act To Amend the Laws Governing Freedom of Access". This bill, as sponsored by Senator Rosen, takes a noble intent to promote the transparency of our government. I take no objection to that principle, and strongly support the intent. I believe that transparent government encourages individuals to become involved in the process of government, sparks creative problem solving, and promotes self-reflection.

As a member of the Falmouth School Board, I have watched, first hand, the impact of record access requests and the abuse that can be associated with those requests. This important civic tool has routinely been abused by members of our local community, in my opinion, in order to intimidate school officials, obstruct them from conducting their regular professional duties, and assert their civic "authority" over the school department. Without a check on this power, citizens have, and will continue to have the ability to abuse a power such that it detracts from the important efforts that public servants are putting towards the general public welfare.

The bill as presented does provide me with a great deal of concern that, if passed, would have significant adverse impacts on the individuals who must operate under this law. I have concerns over the timeframes and processes outlined in the bill. I feel that the additional steps and requirements placed on an agency or organization increase the liability of said agency or organization in the event that these additional steps and requirements are neither practical nor feasible in operational situations. I have concerns over requiring an agency or official to produce documents in a specific medium, as requested by a citizen, if that agency has the technological capability to do so. This causes great concern such that the burden of data reorganization and reentry could be placed on the agency or the official. While government should provide public access to government documents, and while government should promote the principle of transparent governance, it should not be unduly burdened by potentially irrational or immensely complex access requests.

I think that it is important that the committee bring to consideration the different resources available to the various agencies and officials for whom this legislation would directly affect. The resources of the Falmouth School Department, from an operational and administrative standpoint are limited. In instances in which abuse of the power to request access to records occurs, this has the potential to significantly affect the ability of the district to adequately function in the best interests of the children and taxpayers of Falmouth. I do not feel that this bill, as written, takes into account a very real and unfortunate scenario that I am sure is not foreign to other districts and agencies.

Christopher B. Murry Jr.
(207) 671-1509

In a time when we as a society are creating more "lean" organizations and agencies, we cannot appropriately expect the same quality of service from said organization or agency if we increase their workload. I fear that this bill will do just that. In the case of education, it is my belief that without accounting for the potential abuses of this legislation by individuals, a school department inundated with records access requests could not appropriately serve the needs of its students. We have to find balance such that government is transparent and accountable, but also that the citizenry cannot obstruct work, such as public education, which is truly in the best interest of the public.

I would strongly urge you and the members of your committee to defeat this bill in committee. In the absence of protecting the productivity and ability of public organizations, agencies, and officials to appropriately carry out their duties, this bill has the potential to compound a very real problem. Transparent government must walk hand-in-hand with functional and efficient government, to do so otherwise would be against the best interest of the public. I appreciate your time and applaud your efforts in tackling an issue in order to find reasonable balance. If you have any questions or if I can be of any service, please feel free to contact me at your convenience.

Best Regards,



Christopher B. Murry, Jr.

Member, Falmouth School Board

cbmurryjr@falmouthschools.org

(207) 671-1509

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Christopher B. Murry Jr.

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TESTIMONY OF
MICHAEL CIANCHETTE
ON BEHALF OF GOVERNOR PAUL R. LePAGE

**NEITHER FOR NOR AGAINST LD 1465: “An Act To Amend
the Laws Governing Freedom of Access”**

BEFORE THE JOINT STANDING COMMITTEE ON
JUDICIARY
27 April 2011

Senator Hastings, Representative Nass, and Members of the Committee, I am submitting written testimony on behalf of the Governor and the various Executive Branch agencies neither for nor against LD 1465.

As we have testified before, we support the objectives of Maine’s Freedom of Access law. Unfortunately, as written, LD 1465 presents some difficult issues.

1. Reasonable v. Immediate

The first issue that many agencies have brought to our attention concerns the language change. Currently, government is required to respond to FOA requests in a “reasonable” time period. This bill changes the requirement to an immediate response period unless it is either (1) not “available immediately,” or (2) a “large request.” There is no guidance in the bill on how to determine whether something is “available immediately” or if a request is “large.”

While we understand that the stakeholder community is not comfortable with the “reasonable” language currently in statute, members of this committee know that “reasonable” is a term of art for courts and attorneys and the interpretation of the term lies with judges and juries with the facts before them. Removing it in favor of an immediacy requirement subject to caveats we do not believe is an improvement to the current law and will only serve to further confuse the issue.

2. Freedom of Access Officers

This provision is likely to add substantial expense to municipalities and counties and may implicate the mandate provisions under the Maine Constitution. Executive Branch policy currently requires State agencies to maintain a FOAA contact and promulgate that person’s contact information on the State FOAA website. While we believe it is good policy to have someone within a department take the lead on FOAA responses, adding a mandate on the counties, cities and towns of Maine does not seem to add any particular value.

3. Production

The changes requiring documents to be made available electronically is understandable and something we support in concept but, again, have concerns with the bill as written.

E-mail is an electronic document but can contain sensitive, non-public material. Redacting emails is a difficult prospect. Further, there is a possibility of inadvertent destruction of records as we ask state employees to attempt to redact these documents electronically. The impetus behind this provision appears to be databases and spreadsheets where some in government have sought to frustrate the requests of interested parties by providing them information in a format that is highly difficult to use effectively. We would support the committee's efforts to focus the language to address this specific issue.

4. Timing

The changes to the response time period – from 5 days to 3 for a response with an estimate, respond completely to a FOAA request within 5 days rather than confirm receipt in that period – present real difficulties to the efficient operation of government. Responding to requests for records is an important service provided by government, but so are paving roads, paying teachers, and the myriad of other services done through the day-to-day operations of our State.

We support the objective of adding “teeth” to the FOAA laws and understand that some local governments may not respond within a reasonable time period. We believe that, working with this committee, we can strengthen our laws to address these real concerns while ensuring that the other roles of government are not negatively impacted.

In conclusion, we are neither for nor against LD 1465 as written. There are some good policies contained in the bill and we look forward to working with the committee to focus and clarify the language to achieve those objectives.

**Testimony of Harry R. Pringle in Opposition to LD 1465,
An Act to Amend the Law Governing Freedom of Access,
on behalf of the Legislative Committees of the Maine School Boards Association and the Maine
School Superintendents Association
April 27, 2011**

Senator Hastings, Representative Nass and distinguished members of the Joint Standing Committee on Judiciary, my name is Harry Pringle and I am an attorney at Drummond Woodsum in Portland. I am here today to speak in opposition to LD 1465, on behalf of the Legislative Committees of the Maine School Boards Association and the Maine School Superintendents Association.

In speaking today I would like to make it very clear at the outset that our two Associations fully support the Freedom of Access statute and the public's right to access public documents and attend public proceedings. The school systems we represent work diligently, often under very adverse conditions, to provide that access. But we also believe that the key to the current statute is balance – a delicate balance between the public's right of access, and the public's right to have school systems which can effectively educate our students. This LD totally destroys that balance, threatens to seriously hamper the ability of school districts to do their job, and will be unworkable in practice. That is why we oppose it.

First, a procedural point. I am a member of the Right to Know Advisory Committee, and have been privileged to serve on that Committee and its predecessors since 2004. I am proud of the work the Committee has done. Its members, virtually all of them volunteers, represent very diverse constituencies. The Committee's analysis of the issues has been rigorous, and it has a good record of tackling very tough issues, working through them, and coming up with recommendations that the group as a whole can live with.

And yet, LD 1465 represents the most radical rewriting of the Freedom of Access statute in over 50 years. If the Committee believes that LD 1465 deserves serious consideration, then we urge you to refer it to the Right to Know Advisory Committee. If changes of this magnitude are to bypass the Advisory Committee completely, it is frankly hard to understand why it should continue to exist.

Second, let me make a few comments about how the Freedom of Access statute works in the world of schools. Contrary to what some may think, many right to know requests made of school departments present very complicated issues. This is because there are very strict confidentiality statutes with respect to students, employees and collective bargaining – all of which must be analyzed whenever a request for

records is made. Very often, a school thus faces a difficult choice between violating employee or student confidentiality rights, on the one hand, or public access rights, on the other. Sometimes it takes a little time to get the answer right.

Additionally, it is important to remember that the Freedom of Access statute contains absolutely no limit on the number of requests that an individual or individuals can make, nor – unlike the discovery rules in court cases – any requirement that a request be relevant to anything or that it not be oppressive or unduly burdensome. Nor is there any geographical limitation on the requestor: a request can come from California or China just as easily as from Presque Isle and must be responded to in exactly the same fashion. And, it may surprise you to know that not infrequently requests come from commercial interests seeking information for marketing purposes or large law firms seeking discovery – free of the constraints of the discovery rules – prior to filing a lawsuit. So, the burdens that the current statute imposes on school districts with limited resources can be very substantial.

Against this background, let me comment on just a few aspects of LD 1465:

- Section 408(1) and (2) of the Freedom of Access statute *currently* provide that every person can inspect and copy a public record within a “reasonable” period of time, so as to not to “delay or inconvenience the regular activities” of the agency or official with custody of the records. LD 1465 totally destroys this crucial balance: it requires public records to be made available “immediately” under section 408-A, unless time is required to redact the record or to locate one that is not in use. And if the record is not available immediately, then it must be made available within 5 business days unless it is “large” or there are “multiple public records” – totally undefined terms.

These time limits are completely unrealistic. For example, assume (as recently happened) that a school district receives a request for the names of all teachers being considered for a reduction in force. Must it produce those names under the Freedom of Access statute, or is it prohibited from producing those names under the collective bargaining statute and the personnel records statute? That is a very difficult question to answer – I doubt anyone in this room has the answer - but under LD 1465, it would nevertheless have to be answered “immediately”. And if the

“immediate” answer was wrong, one statute or another would by definition have been violated. As a matter of public policy, does this make any sense at all?

- A second major provision of LD 1465, Section 408(2-A), would require a public entity to provide a public record not only immediately but in the “storage medium” required by the requestor if the record can be produced in that medium with or without assistance “at a reasonable cost”. Who knows what this language means, and I for one would need to hear from qualified IT specialists to even begin to get my arms around the issues it raises. But just for starters, would it require a superintendent in a small school district to create an Excel spreadsheet, or create a specific database in a program no one in the school system knew how to use, if that is what the requestor wanted? What if the superintendent in that small unit were out on sick leave – what then? Who is supposed to do this work? And remember, all of this under the terms of LD 1465 must be done “immediately”. As a matter of public policy, does this make any sense at all?
- Let’s talk about cost, and the burden on local school units with budgets that are in the worst shape in a generation. Under the current statute, agencies may charge no more than \$10.00 per hour after the first hour of staff time to search for, retrieve and compile a public record. This is nowhere near enough to compensate local school districts for the cost incurred as things stand right now. Yet the problem will be exponentially greater if spreadsheets, databases, PowerPoint presentations, and who knows what else must be created immediately on demand, as LD 1465 would require. How are those costs going to be covered?
- Section 408((4) requires an estimate of the costs to be made in 3 business days. I recently heard of a request for “all the records” in a school system’s office; how can a superintendent possibly estimate that cost accurately in 3 days without dropping everything else on his or her plate?
- Section 413(1) requires the appointment of public access officers who are required to oversee requests but Section 413(6) provides that if the public access officer is unavailable this cannot delay a response. Putting aside the complete logical inconsistency between these two requirements, in a small office with a skeleton staff who exactly is supposed to make the

“immediate” decision on a difficult records request if the public access officer is out on bereavement leave?

- Section 413(3) prohibits a public employee from asking the purpose of a request. Putting aside the issue of whether this provision is constitutional, the fact of the matter is that many requests from ordinary citizens are confusing. Often a couple of questions can help determine exactly what a member of the public wants. Do we – assuming we constitutionally could - really want to make that kind of an inquiry illegal, and subject to a \$500 fine?

I could go on and on, for LD 1465 goes on and on; there are many other problems that we could discuss. Suffice it to say that, in our judgment, LD 1465 will prove unworkable, inordinately expensive, and unfairly burdensome to the school districts – especially the small rural school districts – that our Associations represent. For these reasons, we would strongly urge the Committee to vote “ought not to pass” on LD 1465, or at the very least to refer it to the Right to Know Advisory Committee for a rigorous, thoughtful debate and analysis.

Re: LD 1465

Senator Hastings, Rep. Nass and members of the Committee:

My name is Larry Post, and I am the County Administrator of Somerset County. I am here to speak in opposition to LD 1465-An Act to Amend the Laws Governing Freedom of Access.

I have been in municipal and county government for the past 33 years, and have always been in favor of honest, open government, transparent and responsive to the public. The Freedom of Access law has always been understood as having the purpose of not being able to make decisions or keep documents in secret, away from public knowledge or scrutiny.

This bill, however, appears to go far beyond that and places greater burden of public bodies and agencies in several aspects. It has always been that the record(s) requested were provided in the manner and medium available. This bill places more burden on officials to go to great lengths to cater to individual whims or desires for purposes other than getting public information or documents. It even goes to the extreme requirement that the requester can provide computer software or hardware to accommodate their request. This is an unacceptable breach of system security and common sense.

It has been that the public body or agency had 5 days to determine if it could comply with the request being made. This time was sometimes needed to determine if the particular document was indeed a public document. Release of a document which is not a public document can lead to serious liability in some cases. By enacting a hurry-up process, the chance of releasing a protected document is increased.

This bill retains the language that 'inspection, translation and copying may be scheduled to occur at such time as will not delay or inconvenience the regular activities of the agency or official having custody of the public record' but then adds timelines of 'immediately upon request' etc. that makes such protection of the public's work meaningless, to the detriment of taxpayers expecting normal and usual public work to be conducted.

This bill will be very helpful to those who wish to use the Freedom of Access law to either harass officials or for their personal gain. Indeed, if I did not know better, I would think this bill was crafted to facilitate someone taking the documents of which taxpayers have a significant cost in maintaining, and using those documents for personal gain upon the backs of those taxpayers.

The requirement of a Public Access Officer and an Assistant Attorney General position further adds to the burdens of government way beyond requiring that public documents be available to the public. The presumption is that the Public Access Officer-by

appointing an existing employee-won't cost anything. That premise is very problematic, due to the increased burdens being required by this bill. The extra burdens being placed upon entities by the bill is far more than ensuring compliance with honest, open government where decisions and documents are open to the public.

I would therefore urge you to reject this bill. Thank you.

M.C.C.A.

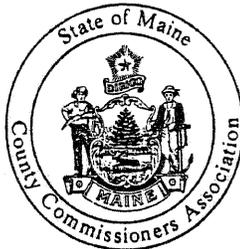
MAINE COUNTY COMMISSIONERS ASSOCIATION

Amy R. Fowler, President
Waldo County

Jonathan LaBonte, Vice President
Androscoggin County

Stephen E. Joy, Secretary-Treasurer
Hancock County

Robert S. Howe, MPA, Executive Director



11 Columbia Street
Augusta, ME 04330
Tel. 623-4697
Fax: 622.4437

April 27, 2011

Senator David R. Hastings III, Representative Joan M. Nass and distinguished members of the Joint Standing Committee on Judiciary.

My name is Robert Howe and I represent the Maine County Commissioners Association in opposition to LD 1465, "An Act To Amend the Laws Governing Freedom of Access." MCCA opposes the bill for the following reasons:

- It creates unreasonable expectations on state, county and municipal agencies for responding to Freedom of Access Act (FOAA) requests.
- It places the request of a citizen who invokes the Act ahead of the business of any other citizen waiting to be served.
- It would create a potential nightmare for county registries of deeds and probate.
- It appears to facilitate the commercial use of government databases with little or no recognition of the value of those databases created at taxpayer expense.
- It is an unfunded state mandate on local government of the highest magnitude.

Public Notice requirement

The three-day public notice requirement in section 406 may be reasonable in most circumstances, but it removes any flexibility in the law that allows for a meeting in an emergency situation and creates the distinct possibility that the action taken could be rendered null and void.

Immediate response to records requests

The requirement in section 408-A that the agency make a record "available immediately upon request" is unreasonable and unnecessary to protect the public's interest. By invoking FOAA, anyone coming into or telephoning a public agency is placed at the head of the line, before anyone else with any other business.

The "available immediately" language in 408-A seems to negate the language in 408 which says that, "Inspection, translation and copying may be scheduled to occur at such time as will not delay or inconvenience the regular activities of the agency or official having custody of the public record sought."

County registries of deeds and probate

The vast record holdings of the county registries of deeds and probate are records subject to FOAA, even though they are no records of public proceedings. These are records of private transaction maintained for a public purpose. They are made available for those who wish to search and copy them. There are individuals and businesses who specialize searching these records repositories. A search for a single purpose can involved dozens of documents filed over tens, even hundreds of years, taking hours and even days.

LD 1465 could have a devastating impact on the staffs of the registries who, under this bill, could be required to perform title searches and other document searches for the requestor. The new sentence at the end of section 408, subsection 1 could result in a requestor calling a registry over the phone and asking for all documents related to a title search be mailed or emailed to the requestor. I doubt the drafters of this bill have thought this through.

Commercial use of taxpayer- or user-funded databases

The language in section 408, subsection 2-A could impact current litigation before the Maine Supreme Judicial Court in the case of MacImage of Maine, LLC v. Androscoggin County and John P. Simpson v. Androscoggin County. That case involves a request for the entire body of records in the Androscoggin County Registry of Deeds (and the other counties' registries). Issues before the court include what fee the county is entitled to charge for that information and in what electronic format they must provide it.

The broader public policy issues which this state has yet to address include questions about who can access public databases for commercial purposes, at what cost and for what ultimate purposes. LD 1465 to a large extent pre-empts the discussions that this state needs to have about those questions.

Unfunded local mandate

There seems to be no question but what this is a mandate on local units of government. In our view, it is also an unwarranted one.

In summary, I hope you will give LD 1465 an Ought Not To Pass report.

Public Hearing Testimony Regarding LD 1465

“An Act To Amend the Laws Governing Freedom of Access”

DATE OF HEARING: April 27, 2011

To: Honorable Senator David R. Hastings III, Representative Joan M. Nass, and Distinguished Members of the Joint Standing Committee on Judiciary

From: Nathan Poore, Falmouth Town Manager

Date: April 27, 2011

In Opposition

Thank you for providing an opportunity to offer input regarding LD 1465. Transparent and open government is essential as is the efficient management of the business and services provided by government.

Historically, FOAA requests have been typically about acquiring copies of agendas, minutes, property record files and voter registration lists. Recently, there has been a higher demand for additional information such as employee salaries, supporting documents, draft reports, e-mails and other electronic communication. Many organizations have started to rely more on web sites to provide public information. There are some communities and agencies that receive more request than others. In some cases, there are individuals who have realized how powerful FOAA can be from the perspective of interrupting, perhaps on purpose or perhaps inadvertently, the efficient management of our towns and cities. We need to make sure that the current FOAA requirements and future amendments do not overburden governmental organizations and we need to consider some form of accountability for the requester. This is necessary so that the business of the general public is not jeopardized by a few individuals. This is a difficult task because access to government needs to be open without interference or obstacles. I don't have all the solutions but I am compelled to bring some observations to your attention.

There are many reasons why I have concerns about LD 1465. I offer my testimony in the form of specific questions and comments relevant to specific sections on the proposed amendment.

408.2-A.A This section could force communities to provide information to requesters in a format

that is not available with existing software, requiring time and resources to convert the information to a medium mandated by the requester. While there is a provision to reimburse the community, the total cost of providing the service cannot be recovered at \$10 per hour. If the intent is to provide electronic information rather than paper copy or electronic information in a format that can be manipulated, the language could be amended so as to relieve the community from excess burden and cost. Language could be developed to allow information to be provided in standard or typical software applications, such as MS Excel or MS Word. At a minimum, the community should not be forced to provide information in a format that is not customarily used by the community.

The current amendment language will add a great deal of cost to municipalities.

408.4 and 408-A.4 This section only allows 3 days to provide an estimate if the cost of providing the information exceeds \$100. Even well-staffed governmental organizations could have trouble meeting that timeframe for the sweeping document requests, but this standard is being applied to even the small communities who have very few employees. There will be times when employees are not available due to sickness, vacation, or urgent town business that will not permit them to provide the estimates within 3 days. There is the possibility that a requester could use this law to file frivolous requests with no intent to pay for or take delivery of the information but the request must be honored with an estimate. Requester accountability needs to be considered.

408-A.1 This section mandates an immediate response to all FOAA requests as a general rule, but permits an extension for limited reasons (such as the need for redaction or retrieval from storage), provided in writing. The term "immediate" would require communities to provide service without delay for a matter that, by law, defines the task as urgent or pressing that will need to be dealt with before anything else. Preparation of written certifications would require time, tracking and resources. Imagine a request for a property assessment card by a citizen who makes the request while the assessor is leaving the building for a field visit. Assume no one else is works in the assessing department. The assessor may not have the option to be late for the field visit and would have to write a letter to the requester certifying why they could not copy the document upon immediate request.

This section also states that a delay in response is appropriate to find a record that is not in active use or that may be in storage. The terms "active" and "storage" could be difficult to interpret. Could a building permit, issued in 1980, that is kept in archived files be considered "active"? It could be if the building inspector needs it to review a new building permit. Is an e-mail received one day prior to the FOAA request "active"? It may not be if the employee or official never intends to look at the document in the future. The term "storage" may have different meanings for hard paper copies

versus electronic archiving.

408-A.3 This section relates to “large” requests or “multiple” records requests. The term “large” is subjective and could be difficult to interpret. Does this mean a 24” x 36” map is larger than an 8.5” x 11” photocopy and could take longer to produce or does it imply many pieces of paper? The term “multiple” could also refer to multiple pieces of paper or many related records.

This section also has a provision that mandates partial submission of documents if the entire document can not be provided within 5 business days. Imagine a scenario where the public access officer finds two pages or two e-mails four days into the request period but is called away to an emergency or is out sick and fails to meet the requirement to submit the partial response within 5 business days. This would constitute a failure to comply with the Freedom of Access Act. Finally, there is the possibility that a requester could use this law to file frivolous requests with no intent to take delivery or inspect the documents but the request must be honored in accordance with the proposed amendment. Requester accountability needs to be considered

408-B.1, 2, and 3 These sections require the community to act as a personal assistant to the requester, having the responsibility to remind the requester up to 3 times, in writing, over a 40 day period that their request is available. The 40 day period includes the initial 10 day period, one 20 day extension and one 10 day extension. The community may also find it is warranted to send the written information via expensive certified mail to be sure the requester receives the written reminder notice. The proposed amendment does not provide for reimbursement of the time, resources and mailing costs. The management of this section will add an unnecessary burden that will also cost the community money that is not reimbursable.

413.5 This section stipulates that a community must provide “reasonable comfort”. I agree that the place of inspection should be an area that is as accommodating as possible and not a location that is selected to purposefully be uncomfortable but the term “reasonable comfort” is subjective. Subjectivity leaves too much room for interpretation and endless calls to the Attorney General’s office, combined with potential frivolous law suits.

In summary, I offer this testimony in opposition to the proposed amendment. I think there are concepts of the proposal that could enhance the existing FOAA requirements but we should rely on the Right to Know Advisory Committee to review the proposal and offer suggestions that will balance the necessity to provide information to the public and government transparency with the costly burden on agencies to follow unnecessary steps to produce the information.

LD 1465 An Act To Amend the Laws Governing Freedom of Access

Senate Chair, Senator David R. Hastings III

House Chair, Representative Joan M. Nass

To the Chairs and Members of the Joint Standing Committee on Judiciary.

My name is Fred W. Hardy. I live in New Sharon, in Franklin County. I am currently a Commissioner of Franklin County, representing District #2. I have held this position for over 18 years.

I stand before you today in opposition to LD 1465. I am also a firm believer in the Freedom Of Access Act (FOAA). I am also a firm believer in government transparency. To my knowledge all public records at Franklin County are accessible to the public at any time during regular business hours of the County.

I am opposed to tinkering on laws presently on the books. Especially when some of this is being done to line the pockets of an entrepreneur, who by his own admission, in a recent news article said "If he gets all the data, his company could earn up to \$ 1 million per year". I have no problem with entrepreneurs but this cool \$1 million would be, mainly, at County property tax payer expense.

We employ 3 full time people in our Registry of Deeds office at Franklin. The processing of these deeds, printing, filing, tending the public and etc. creates a cost to the County property tax payer.

If you insist on tinkering on this legislation, I would suggest the following;

1. Exempt land records, in Deeds Registry, and refer to MRSA Title 33.
2. Allow, in charging for the entire data base, an accounting of the cost of producing same.
3. Compensation should be allowed for resulting loss (to the Registry) of revenue.

I would bring to your attention, briefly, a few more concerns I have with LD1465.

1. B. under #2. Under Inspection: "----identify medium that is acceptable to the requester".
2. B. under #3. Payment of Costs: "— not more than \$10 per hour—" you gotta be kidding!

Then in the Summary—" to ensure that requesters can access public records in the format requested and to require the designation of public access officers for every agency and political subdivision. Generating even more cost to the property tax payer!

LD 1465 does nothing to enhance "public access" as far as the Registry of Deeds is concerned. Franklin County already has guaranteed access to its Deeds Registry. Please kill this Bill.

Fred W. Hardy
887 Weeks Mills Road
New Sharon, ME 04955
Phone (207) 778-4320
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The Portland Press Herald

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The Maine Deal!

Posted: April 19
Updated: Today at 12:57 AM



Gregory Rec/Staff Photographer

John Simpson wants the records so he can launch an online database where users can view digital images of deeds, and print them for a fee.

Maine online deed business gains court victory against counties

By J. Hemmerdinger
Staff Writer

SHARE   

CUMBERLAND FORESIDE - Following a favorable court ruling last week, a local entrepreneur is one step closer to launching an online clearinghouse of county deed records.

John Simpson of Cumberland has been in court for the last year and a half, battling six counties – Cumberland, Knox, Penobscot, Aroostook, York and Androscoggin – for electronic copies of property deeds and other documents.

Simpson hasn't yet received the records, but in February a Cumberland County judge ruled in his favor, ordering the counties to provide the documents at a reasonable fee.

And last Tuesday, the counties' request for a stay pending appeal was denied.

Simpson needs the records, millions of pages of scanned documents, including copies of mortgages, property liens and land plans, to launch a comprehensive online database where users can view digital images of deeds, and print them for a fee.

He already operates a database of Hancock County deeds called www.registryofdeeds.com, but is looking to expand.

Deeds prove property ownership and are often referenced by parties in real estate transactions.

The counties already provide most of the documents online, where they can be viewed for free. But they charge between \$1 and \$3 per page to print the documents, and offer monthly

subscriptions.

Cumberland County, for instance, charges \$2 per page, or \$1.50 per page for subscribers who pay \$50 per month.

Simpson said his website will be less expensive and more convenient than the existing systems.

"We will put it all on one website, and you can select the counties you are interested in," he said.

Simpson hasn't disclosed how much he will charge to print documents, but noted that the price to print on his Hancock County site is 25 cents a page.

He said prices for the additional six counties may be a bit higher, but they will be less than the counties charge.

If he gets all the data, Simpson said his company could earn up to \$1 million per year.

But he said start-up costs could be significant.

He has immediate plans to hire two staffers, and may eventually expand to half-a-dozen employees.

Simpson and his company, MacImage of Maine LLC, took the counties to court in October 2010. He had sent a public records request to the counties, but said they either didn't respond or charged what Simpson considered exorbitant fees.

Sigmund Schutz, a Preti Flaherty attorney who represents Simpson, said the counties, collectively, wanted close to \$1 million for the records, much more than the cost of transferring them to Simpson.

Bill Collins, Penobscot county administrator, thinks the services the counties were asked to provide justified the costs.

"All counties spend great deals of money to produce these records at taxpayers' expense, and we are being asked to produce the records in bulk for less than what it costs," Collins said.

Edward Gould, a Gross, Minsky & Mogul attorney who represents Penobscot County, said Simpson's request created major logistical challenges for his client.

"The county isn't set up to do that, from a hardware, software and personnel standpoint," he said.

Gould added that the case wasn't about access to information, it was about an individual forcing government to make expensive operational changes.

"It's not an access question. This case is really about the means and costs of access and whether a public records request can force an entity to (make) changes," he said. "This is not a case where a registry is hiding (documents) in the back room."

In February, a judge ruled that the actions violated Maine's Freedom of Access Act and ordered the counties to provide the records at a reasonable fee, which may allow Simpson to buy some of the records for just a few thousand dollars.

On April 12, the judge denied the counties' request for a stay. They may still appeal to the Maine Supreme Judicial Court.

Simpson, who spent close to \$150,000 of his own money on court and lawyer's fees, said the ruling was "exactly what we were hoping for."

And he doubts the supreme court will overrule the lower court.

"The counties will have to comply with the judge's order and give us the documents. In two months we can have our website up and going," he said.

Simpson said he is eager to improve his relationship with the counties.

"I really want to sit down and talk to the county commissions, end the acrimony and find a positive, win-win solution," he said.



**SOCIETY OF
PROFESSIONAL
JOURNALISTS®**
Maine Pro Chapter

Testimony of Jeff Inglis, president of the Maine Pro Chapter of the Society of Professional Journalists

Before the Joint Standing Committee on Judiciary, April 27, 2011

IN FAVOR OF LD 1465

Senator Hastings, Representative Nass, Members of the Judiciary Committee:

I am Jeff Inglis, president of the Maine Pro Chapter of the Society of Professional Journalists, the country's largest and most diverse journalism membership organization.

I apologize that personal business has kept me from being able to testify in person. I am writing to testify **in favor of LD 1465**, An Act to Amend the Laws Governing Freedom of Access.

As a working journalist, and as leader of a statewide organization representing the interests of journalists, I can assure you that **these amendments** to the existing language of the Freedom of Access Act **are substantive, useful, and in the public interest.**

These changes make government more open, more accountable, and — crucially — easier to access for members of the public.

While journalists are among the most visible and vocal users of open-government laws, studies repeatedly show that across the nation vastly **more freedom-of-information requests come from members of the public than from media organizations.**

Journalists, though, are usually more experienced at handling such requests, since they have access to colleagues and, through SPJ, fellow journalists at other outlets, who can provide guidance along the way. Though the public collectively asks for more information than the media, individual members of the public are often less experienced at navigating the system.

LD 1465 **makes the system easier to use, and more responsive to requesters.** I want to highlight a few specific instances of this in the proposal before you today:

1) First and foremost is the **creation of both public-access officers and a partial position in the Attorney General's Office** to deal with freedom-of-access issues. Very often state agencies are unclear on what the rules and guidelines are, and sometimes different employees offer different answers about what is or is not public. Having trained in-house experts on the matter, as well as an independent voice in the AG's office, will substantially improve everyone's understanding of how to handle public-records requests.

2) The **prohibition on asking about the purpose of a request.** This is an excellent move that removes a potential point of contention between requesters and officials of the agency they are seeking information about. An official's inquiry about the purpose of a request is often perceived by the requester as intimidating, and may decrease interest in pursuing a request. This is also an important philosophical point — public records are public records, no matter what they might be used for in the hands of a private citizen. The government has no right to determine what a

private citizen can or should do with public information, and need not be informed about what a requestor will or will not do after receiving the information.

3) The **ability to request — and receive — a public record in the format in which it is stored** by the government. This will save time, effort, and cost for everyone involved — including governmental agencies, who will now be able to simply attach a file to an e-mail message and satisfy the request.

4) The **ability to request records be mailed**. For records that cannot be e-mailed, this provision will substantially improve transparency in a state as large as Maine, where a requester might otherwise be required to travel from far-flung reaches of the state to Augusta simply to exercise her right to see what her government is doing.

5) The **provisions for timelines**. They will increase communication between requesters and state agencies, allowing everyone to understand the process more completely and therefore be more comfortable with the experience of asking government agencies to remain accountable to the citizens.

I urge you to vote “ought to pass” for LD 1465, and to support it once it comes to the floor of your respective house. Should you have any questions, I can be reached at jeff@jeffinglis.com or 207.749.4502. Thank you very much for your time.

Joint Standing Committee on Judiciary
State House, Room 438
April 27, 2011
LD 1465: "An Act to Amend the Laws Governing Freedom of Access"

Testimony by Gary Foster

Senator Hastings, Representative Nass, members of the Joint Standing Committee on Judiciary, my name is Gary Foster. I am from the Town of Gray and am here today to urge support for LD1465: "An Act To Amend the Laws Governing Freedom of Access."

Though less obvious now than it once was, government in this country, by design, is a means by which we the people govern ourselves. We choose from among our peers, people to represent us honestly and honorably who in turn select others to perform tasks on our behalf. On rare, or perhaps not so rare occasion, some form of incentive helps to inspire honesty and integrity among public officials, whether elected or appointed. Transparency provides just that incentive, and in my opinion LD 1465 will improve upon that.

As a former member and Chairman of the Gray Town Council, I received numerous informal requests for information, which I happily fulfilled. Where, like most public officials, I respected the trust and expectations my peers placed in me, and the powers and duties of the office, formal requests were unnecessary.

Nonetheless, I did receive formal requests for information, the apparent intent of which was to intimidate or harass rather than research or review information.

If an official honors his oath of office and has nothing to hide, fulfilling a request for information is merely part of the responsibilities and duties of a public official. The law currently addresses circumstances whereby a request may be intended to harass or prevent an official from performing his duties.

If there is something to hide, however, as has recently come to light, the importance of transparency, or rather the means to enforce it becomes ever more evident.

One of the more important aspects of LD 1465 is defining timelines for both requests and fulfillment of requests. Though sad but true, subjectivity is often a window to abuse or defy the intent and purpose of a law. Under the changes proposed by LD 1465, what no two people will likely agree is a reasonable amount of time, becomes a definite period of time.

Having served in a public capacity, and with an understanding of the role of government in our country and state, I urge this committee to recommend that LD 1465 "Ought to Pass."



MAINE CIVIL LIBERTIES UNION

TESTIMONY OF SHENNA BELLOWS

In Support Of

LD 1465: An Act To Amend the Laws Governing Freedom of Access

JOINT STANDING COMMITTEE ON JUDICIARY

April 27, 2011

Dear Senator Hastings, Representative Nass and Distinguished Members of the Joint Standing Committee on the Judiciary, my name is Shenna Bellows, and I am Executive Director of the Maine Civil Liberties Union, a non-profit dedicated to defense of the Bill of Rights and the Constitution through advocacy, education, and litigation. I also serve as a member of the Right to Know Advisory Committee. On behalf of our more than 3,300 members statewide, we urge you to support LD 1465.

We view the public's right to know as fundamental to our democracy. The citizenry can only make informed decisions about who represents us in government if we have full access to information about the government's work on our behalf. The achievement of government of and by the people requires that the people know what the government is doing. We are deeply concerned that government agencies have often arbitrarily suppressed news and information of public interest, thereby narrowing "the marketplace of opinion." Government secrecy inevitably leads to abuse of power.

The MCLU supports clear deadlines for prompt government response to information requests and advertisement of public meetings. Eliminating any ambiguity in the law empowers the people of Maine to more fully understand and demand compliance with their legal right to know about a public meeting that has been scheduled or to obtain a public document in a timely manner.

LD 1465 brings Maine's Right to Know laws up to date with current technology and creates new accommodations for Maine people who live far away from Augusta or agency offices by allowing request for information to happen via telephone or email and requiring that a record be mailed or emailed to the requester or otherwise provided in electronic form. This will increase access to public records for people for whom a trip to Augusta is a significant barrier. It's appropriate and important that records kept in electronic form be available in electronic form to ease the public's review of the records.

The MCLU supports the legal remedy contained in LD 1465 for failure to comply with a public records request. A right can only be meaningful if it can be enforced. This is also a reason that the MCLU supports creation of the position of public access ombudsman at the Attorney General's Office. The MCLU gets calls on a frequent basis from members of the public who have been denied records to which they are entitled under the law. With only two attorneys on staff, we simply do not have the resources to take these individuals as clients in legal cases. Moreover, most of these problems can be resolved, not with a lawsuit, but with a phone call from a person in authority to the offending official. The Attorney General's Office is the most logical authority to serve as a resource to the public and to elected officials who are confused about the laws itself. Please vote "ought to pass."



MPA Maine Press Association

1079 River Rd., Buxton, ME 04093-6021
1-800-799-6008

**Statement before the Judiciary Committee
In Support of LD 1465 "An Act to Amend the Laws Governing Freedom of Access"
Prepared by Anthony J. Ronzio
Editor & Publisher of the Kennebec Journal & Morning Sentinel
President, Maine Press Association**

April 28 2011

Sen. Hastings, Rep. Nass, distinguished members of the Judiciary Committee, it is a pleasure to appear before you this afternoon.

My name is Anthony Ronzio, and I'm the editor and publisher of the Kennebec Journal in Augusta and Morning Sentinel in Waterville. Today, I'm here in my capacity as President of the Maine Press Association to testify in support of LD 1465.

The MPA, representing the state's newspaper industry, consists of more than 40 weekly and daily papers across the state. We employ over 2,000 Mainers, pay over \$70 million in annual wages.

Maine's newspapers are consistent and vigilant in protecting and improving this state's landmark Freedom of Access Act. The members of the Maine Press Association believe strongly that Maine's governments best serve their citizens when they operate in the open and make their records accessible to the people they serve.

We believe LD 1465 contains several important and sensible revisions to Maine's FOAA law to improve its overall effectiveness not only for the public, but also Maine government. FOAA is a two-way street that should work well for all involved.

Every government office, agency or subdivision deals with FOAA requests, yet no two government offices, agencies or subdivisions handles them the same way. This can make utilizing FOAA, even for simple record requests, unpredictable and unwieldy.

LD 1465's prescription of instituting timelines for answering record requests, installing guidelines for how public records can and should be transmitted to requesters, and most important, installing an overdue public records ombudsman within the Office of the Attorney General will make FOAA procedures better.

The process needs predictability. Timelines for answering requests will allow requesters to know when their request should be fulfilled, and let agencies know how long they have

to fulfill it – regardless if they’re part of the state, county, town or village level.

Designating public record officers within government organizations is sensible; FOAA requests are important, but can also be time-consuming for government offices with limited resources. A record officer with expertise in FOAA can not only perform a valuable service to the public, but also to their office by managing requests.

And the ombudsman – a position long-supported by the MPA – will serve a critical position as arbiter for FOAA issues. The spirit of public access laws is collaboration and cooperation between the public and government, yet the only current recourse for FOAA disagreements are the courts.

An ombudsman should help rectify disputes before reaching litigation, a role that, again, should make FOAA a more pleasant experience for all sides.

LD 1465 deserves an ought-to-pass vote from this esteemed committee. FOAA is a crucial part of governing. Its presence is essential to the public trust. Making it better would serve only to improve public confidence in those entrusted to lead.

And LD 1465 makes FOAA better.

Thank you very much, and I’m happy to answer any questions.

Testimony in Support of LD 1465 by John Simpson of Cumberland Maine.

Good Afternoon Members of the Judiciary Committee.

My name is John Simpson. I live in Cumberland and am the owner of Maclmage of Maine LLC, a Maine business that provides computer software, websites and other services used by registries of deeds and the public.

Thank you for the opportunity to testify in support of LD 1465 today. I believe the provisions of LD 1465 will improve access to public records by clarifying the law relating to such access. Thus, I support the bill. However, the bill could be improved to clarify exactly what fees government may charge for copies of public records. I know from personal experience that government officials can and will exploit ambiguous provisions in the Freedom of Access Act to block access to public records.

If I may, I would like to tell you a little about my company's experience with county government and the Freedom of Access Act.

My business, Maclmage of Maine, wants to build a statewide land records website. Today, title researchers, bankers, lawyers, realtors and other people who need copies of deeds must deal with 18 different county websites, each of which works a little differently and requires a separate subscription. A statewide registry website would allow these people save time and money by providing more efficient access to the records they use every day. At least 10,000 people would use a statewide land records website each year, and construction of a the website could generate several dozen jobs in Maine.

As some of you may know, Maine Counties have refused to provide access to copies of the electronic land records Maclmage needs to build a statewide website. Maclmage offered to pay all costs associated its request for public records, but the counties demanded fees totaling millions of dollars. After the counties refused to offer access to their records for a reasonable fee, I asked for help from the courts. The Superior Court recently ordered six counties to provide copies to Maclmage at fees which conform to the limits specified in the Freedom of Access Act. However, the counties have appealed the court's order to the Maine Supreme Judicial Court.

The Counties are concerned that their copy revenue will decline if a statewide land records website operated by Maclmage competes with their individual registry websites. I understand county commissioners are struggling to balance their budgets and I want to work with them to address their revenue concerns. My company has offered specific proposals to counties which could actually increase their revenue. Unfortunately, most county commissioners have refused to talk with my company.

It has now been 20 months since I made my public records request. I have incurred more than \$100,000 in legal fees, and even though the court has several times ruled in my favor, it may be another year before I have access to copies of the records I requested.

April 27, 2011

I am here today to ask that you consider an amendment to LD 1465 that would clarify the Freedom of Access Act's fee provisions and prevent government officials from exploiting ambiguities in the law. It may be too late for this law to help my business, but the bill could help other people avoid the difficulties and expense I have incurred.

The text of the proposed amendment is attached to my written testimony.

The amendment does three things: first it clarifies that "the cost of copying" means only those costs actually incurred by an agency in response to a request for copies. Second, the amendment addresses a problem that occurs when other statutes could be interpreted to permit charging excessive fees for copying public records. A government agency would only be permitted to charge higher fees for copying records if the legislature approved specific copy fee amounts or created an exemption in the Freedom of Access Act. Lastly, the amendment clarifies that an agency may not charge for copies made by a requestor when the agency incurs no additional costs due to such copying. An example could be a person photographing public records with his or her own digital camera.

Thank you for your time and consideration. I would be pleased to answer questions.

John Simpson

PLEASE NOTE: Legislative Information **cannot** perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

Proposed Committee Amendment to LD 1465, An Act To Amend the Laws Governing Freedom of Access

This amendment strikes out all text included within 1 MRSA §408, sub-§3 and inserts the following text:

1 MRSA §408, sub-§3, as amended by PL 2009, c. 240, §4, is further amended to read:

3. Payment of Costs. Except as otherwise when specifically fee amounts are established provided by law or court order, an agency or official having custody of a public record may charge fees for copying only as follows:

A. The agency or official may charge a reasonable fee to ~~cover the cost of copying~~ recover costs incurred specifically to produce copies for a requestor.

B. The agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record of not more than \$10 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.

C. If translation is necessary, the agency or official may charge a fee to cover the actual cost of translation.

D. An agency or official may not charge for inspection and may not charge for copies made by the requestor when the agency incurs no additional costs due to such copying.

E. If the requester requests that the public record be mailed, the agency or official may charge a fee not greater than the actual cost of mailing the record.

SUMMARY

This amendment further amends the original bill to clarify that “the cost of copying” means only those costs actually incurred by an agency specifically to respond to a request for copies. The amendment eliminates ambiguity in statutes that might otherwise be interpreted to permit government agencies to charge fees for copying public records that exceed a reasonable amount as determined in the FOAA. A government agency would only be permitted to charge higher fees for copying records if the legislature approved specific copy fee amounts for a class of records or created an exemption for those records in the FOAA (1 MRSA §401 et al.). This amendment also clarifies that an agency may not charge for copies made by a requestor without any assistance from agency staff when the agency incurs no additional costs due to such copying. An example would be photographing records with a digital camera owned by the requestor.

FOAA TESTIMONY
APRIL 27, 2011
LD 1465

I am Michael Doyle of Falmouth. I don't work for a news organization. I am only a citizen and taxpayer. I support this bill and want to suggest additions or clarifications to what is being considered in these amendments.

1. This law should prohibit government units supplying locked data disks.

I asked the Falmouth School Dept for a list of professional staff showing total compensation. The School Director of Finance gave me a disk with an Excel spreadsheet listing the staff in alphabetical order (about 200 names) however; he locked the disk so I could not sort the data. He told me he locked it because I had altered data on a previous disk. This was not accurate, all I did was download his Excel spreadsheet onto my computer and sort the data. I never changed numbers or switched between staff.

2. This law should prohibit government units considering separate requests as one continuous request in order to deny the free hour.

Our Town Manager has treated EVERY SEPARATE request I make concerning the Town Council as ONE CONTINUOUS request so he can deny me the one free hour per request as required by this law.

3. This law should prohibit government units from refusing to comply with the current provision for offsite copying to be done at the requester's expense, for a town employee to be present, and for the first hour of such copying oversight to be free.

The Town Manager in violation of this provision recently denied me this offsite provision and charged me \$90 for 242 pages of copies. Something I could have done for \$12 at another location.

4. This law should keep the time limits proposed in the current changes.

It has been my experience that often there are questions regarding time limits, and these proposed time limits will add certainty to the process.

Respectfully submitted this 27th day of April 2011.

Michael Doyle
3 Shady Lane
Falmouth, ME 04105
207.766.6644

We the people of Maine...

THE MAINE HERITAGE POLICY CENTER

**Testimony in Support of LD 1465:
An Act To Amend the Laws Governing Freedom of Access**

Chris Cinquemani
Director of Communications
The Maine Heritage Policy Center

April 27, 2011

Good afternoon Senator Hastings, Representative Nass, and members of the Legislature's Joint Standing Committee on Judiciary. My name is Chris Cinquemani. I am a resident of Augusta, and I serve as Director of Communications for The Maine Heritage Policy Center.

Today I testify in support of LD 1465: An Act To Amend the Laws Governing Freedom of Access.

A representative government must be open and accountable to remain legitimate in the eyes of the people. Our laws should guarantee citizens the right to access public records in a timely fashion, and those laws should ensure that politics will never trump the people's Right to Know.

LD 1465 is a critical step to guarantee those rights and protections to the people and to make sure government transparency and accountability are always a priority.

The idea for these types of reforms began in 2007 when I worked for then-Senate Minority Leader Carol Weston during the 123rd Legislature. After she submitted a Freedom of Access request to Governor Baldacci's office related to the controversy and mismanagement of PIN Rx—a government-backed mail order pharmacy program—the weaknesses within our current Freedom of Access law became clear to us, which led to her proposal of LD 1881 to strengthen our Right to Know laws. Carol Weston is here today and will share the details of that experience, and the circumstances that led to the downfall of that bill.

During Sunshine Week in March 2010, the movement to strengthen our Right to Know law was revived. The Maine Heritage Policy Center partnered with the Maine Civil Liberties Union and the Maine Press Association to propose reforms that create a more open and accountable government. Since then, we have worked with other transparency advocates to develop a proposal that gives Maine people peace of mind that they could easily access records that are rightfully theirs. LD 1465 is the result of that more than year-long endeavor.

Today, this bill has wide-ranging support. In addition to the informal coalition involved in the drafting of this proposal, 30 legislators from both parties have cosponsored LD 1465.

The movement to expand the public's Right to Know is strong and growing.

One of the most important provisions of LD 1465 creates a five business day deadline to comply with requests for public records if those records are not immediately available. Today, the only deadline placed on government is to acknowledge within five days that a request has been received.

LD 1465 also includes provisions to extend that deadline. If a government agency needs additional time beyond five days to compile large requests or redact confidential information, this bill simply requires the agency to certify that fact in writing, and provide the requester an explanation for the delay. If after the additional time the entire request still cannot be fulfilled, the government agency would provide portions of the request as they become available, unless the requester chooses to wait until the entire request is available.

There is a very real need for a deadline process for government to comply with public records requests. Such a process would minimize the role politics play in guaranteeing the people's right to public information.

Included with my testimony are e-mail correspondences between Maine Heritage Policy Center staff and the staff attorney for the Maine Turnpike Authority. This e-mail chain clearly demonstrates the need for deadlines to comply with Freedom of Access requests, and shows how the weaknesses of our current law easily allow a government entity to shield potentially damaging information from the public.

These e-mails show the following timeline of events:

- **Aug. 4, 2010**
MHPC sends Freedom of Access Request for payroll and vendor payments data to the Maine Turnpike Authority
- **Aug. 9, 2010 - 5 days after request**
MTA complies with current law and acknowledges our request has been received
- **Sept. 7, 2010 - 34 days after request**
Having received no further correspondence from MTA, MHPC staff attorney e-mails MTA asking to advise on status of request
- **Sept. 10, 2010 - 37 days after request**
MTA replies, suggesting it will take 20 hours to complete the request
- **Jan. 31, 2011 - 180 days after request**
Having received no further correspondence from MTA, MHPC staff e-mails MTA asking again to advise on status of request
- **Feb. 4, 2011 - 184 days after request**
MTA finally complies with request

Despite our staff attorney's involvement, we still had to wait 184 days for the Maine Turnpike Authority to comply with our request for this public information. Would an average citizen without an attorney be forced to wait even longer? Would they still be waiting today?

We know from recent events that the Maine Turnpike Authority has been under fire for poor financial management. Was their stalling politically motivated to delay the public finding out the details of salary increases for top management and detailed MTA spending?

Regardless, our laws should ensure that members of the public do not become victims of loopholes and political obfuscation when trying to access public records. Had LD 1465 been law, MTA would have had to comply with our request in a timely fashion, and if it refused, we would have had the open records ombudsman position this bill funds as a resource to help resolve the problem.

This example is not meant to show how a governmental agency has evaded The Maine Heritage Policy Center's requests for public information. Rather, it shows how easy it is for a government agency to manipulate our current Freedom of Access statute, and how an agency can legally delay the release of public records until it is politically expedient.

Maine people deserve reforms to our Freedom of Access law to guarantee their rights will be respected, and to hold government to a higher standard of responsiveness and accountability.

LD 1465 also compels each government agency to designate from existing staff the responsibilities of public access officer. These individuals would oversee requests for public records, and would be required to undergo the same training on our Freedom of Access laws that elected officials receive. This ensures government will have staff well-versed in our Right to Know laws and will have the responsibility to uphold them.

This Legislature has, in the past, been vigilant in promoting greater accountability within government, and many of our statutes reflect that commitment.

For example, candidates for office are required to submit signatures for ballot placement within a predetermined period of time. And candidates who seek taxpayer funding to run their campaigns face a deadline for submitting their qualifying checks. Citizens seeking to create new laws through the citizen initiative process, or to overturn laws passed by the Legislature through the People's Veto, also face deadlines to submit petition signatures.

With this deadline precedent established and well-respected, it is common sense to apply the same set of standards to government when facing requests for public information.

LD 1465 is a Sunshine Law to protect and expand the public's Right to Know. This proposal represents the right reforms to create a more open, accountable and responsive government for Maine people.

The Maine Heritage Policy Center is proud to support LD 1465, and we are honored to be a part of a diverse movement to expand openness within Maine government. I urge members of the Committee to join this movement by unanimously supporting LD 1465 and the greater accountability and transparency it creates.

Thank you for allowing me to testify today. I will try to answer any questions you may have at this time.

Sam Adolphsen

From: Sam Adolphsen
Sent: Monday, January 31, 2011 1:44 PM
To: 'Arey, Jonathan A.'
Cc: 'David P. Crocker'
Subject: RE: Maine Heritage Policy Center - FOAA Update

Jonathan,

Any progress on this? It's been quite awhile.

Thanks,
Sam

-----Original Message-----

From: Sam Adolphsen
Sent: Friday, September 10, 2010 11:09 AM
To: 'Arey, Jonathan A.'
Cc: David P. Crocker
Subject: RE: Maine Heritage Policy Center - FOAA Update

Jonathan,

1) For payroll information:

We will just go with the 1998 - 2010 payroll data that can be done in the format we requested. Latest title is acceptable if that's what you can provide. Cost of benefit by percentage is acceptable if that's what you can provide. We understand and accept the charges of up to 20 hours or time.

* I would note that there were no overtime figures provided in previous data, that's why we asked for repeat years, to make sure we capture that information accurately.

2) For Vendor information:

Yearly totals for Vendors are acceptable if that's what you can provide. One major thing missing from the previous data - that would be particularly important to include is the "Category of Expense" field, which would add context to the data. Please provide that field if possible.

Please feel free to contact me with any further questions.

Thanks,

Sam Adolphsen
(207) 975-6617

-----Original Message-----

From: Arey, Jonathan A. [<mailto:JArey@maineturnpike.com>]
Sent: Friday, September 10, 2010 10:02 AM
To: David P. Crocker
Cc: Sam Adolphsen
Subject: RE: Maine Heritage Policy Center - FOAA Update

I met with the Director of our Finance/Accounting department on this yesterday to determine what we had that was responsive to your request. The personnel side of the request is similar to what you asked for before and we can provide something similar to what we provided before, at least from 1998 on. This does require writing some script / queries and we anticipate it could take up to 20 hours of staff time which we would bill according to the statute. Please see the attached table for more specific details.

On the vendor side the request, as written, is quite a bit more complicated than your previous request. If you wanted something similar to what we provided last time, which was yearly totals for vendors that can be provided for most of the years cited. It is not possible, however, to provide a good deal of what you are asking for, as written, because our records are not kept in the kind of format that would allow that. We should probably discuss this side of the request so I can understand what you want and try to get you whatever we have that is as close to that as possible.

Anyway, please take a look at the attached and let me know how you would like to proceed.

Jonathan Arey

(207) 482-8136

-----Original Message-----

From: David P. Crocker [<mailto:dpc@davidcrocker.com>]
Sent: Tuesday, September 07, 2010 3:20 PM
To: Arey, Jonathan A.
Cc: 'Sam Adolphsen'
Subject: Maine Heritage Policy Center - FOAA Update

Mr. Arey:

Could you please advise me on MTA's progress in fulfilling MHPC's FOAA request? The last communication I received from you was your letter of August 9, 2010.

Regards,

David P. Crocker
Center for Constitutional Government
The Maine Heritage Policy Center
P.O. Box 7829
Portland, ME 04112
www.mainepolicy.org



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GOVERNOR

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April 20, 2011

Senator David R. Hastings, III, Chair
Representative Joan M. Nass, Chair
Joint Standing Committee on Judiciary
100 State House Station
Augusta, ME 04333-0100

Re: LD 1465, An Act to Amend the Laws Governing Freedom of Access

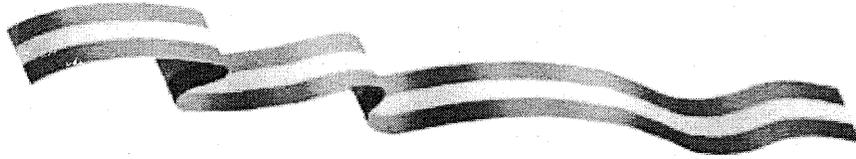
Dear Senator Hastings, Representative Nass, and Members of the Judiciary Committee:

The Maine Board of Dental Examiners would like to indicate its opposition to LD 1465. This proposed legislation would require undo burden on the Board's limited staff. In the Board's experience, we have not had any issues relating to a Freedom of Access request made to our Board and we feel that this legislation is unwarranted.

If the Committee has questions regarding LD 1465, or if the Board of Dental Examiners can ever be of assistance, do not hesitate to contact me.

Sincerely,

Philip W. Higgins, Jr., DMD
Board President



Maine Freedom of Information Coalition

Testimony of Mal Leary, President, MFOIC on LD 1082, LD 1154, LD 917 and LD 1465

April 27, 2011

Senator Hastings, Representative Nass and members of the Judiciary Committee:

My name is Mal Leary and I appear before you as President of the Maine Freedom of Information Coalition, a state wide group of individuals and organizations united to advocate for openness and transparency in their government. I also serve on the legislature's Right to Know Advisory Committee.

Today you are considering several proposals that would amend the state's public access and public records laws. Let me address them in order.

LD 1082 is the recommendations of a majority of the Right to Know Advisory Committee. We spent considerable time seeking to respond to the request of the Legislature, in the form of a resolve, asking that we craft legislation to protect certain information that may be in the custody of a lawmaker as a result of communications from a constituent. In essence, this measure says if another section of state law makes a particular piece of information, for example a medical record, confidential, than it would also be confidential in the custody of a lawmaker.

Accompanying this legislation is the strong suggestion that all legislative websites spell out that communications with lawmakers are public.

LD 1154 is the omnibus bill from the Right to Know Advisory Committee. Most of the bill deals with cleaning up language and removing unneeded references. But there are several significant provisions.

One section expands the ability of public bodies to make use of technology to allow participation of its members through technology from locations outside the meeting room. For example, allowing a member of a city council to participate in the council meeting by phone or a web connection, as long as the majority of the council agrees.

Another section deals with the concern of serial communications between members of a public body that are used to defeat the purposes of the freedom of access laws. This section strikes a balance between the free speech rights of members of a public body with the public's right to know how decisions are reached on issues of concern.

One section responds to the resolve from the legislature asking for recommendations on establishing minimum record keeping of public bodies that make decisions.

It also clarifies the ability of the Judiciary Committee to include in its review of proposed public records exceptions any factors that may affect public accessibility to records, including, but not limited to the cost of copying fees.

LD 917 seeks to declare that names, addresses, telephone numbers and email addresses provided to the Department of Inland Fisheries and Wildlife are confidential. It also directs the Right to Know Advisory Committee to look at similar records in other departments and whether they should be confidential. This is clearly a case of putting the cart before the horse. IF&W should not receive preferential treatment over all other state agencies. If the committee and the legislature believe the study is warranted, than IF&W should be part of that study.

LD 1465 seeks to overhaul the process for requesting public records by establishing timelines for responses to requests. While the establishment of timelines will improve the process, I and other members of the MFOIC board are not sure if the timelines in the bill are the best.

We would suggest that portion of the bill be sent to the Right to Know Advisory Committee for their recommendations. Other sections of the legislation improve the law such as requiring the designation of a public access officer and the funding of a public access ombudsman in the Attorney General's office will improve the ability of the public to access the proceedings of their government and are worth of your support.

I will try to answer any of your questions on these bills.

**Summary of Concerns with Respect to LD 1465,
An Act to Amend the Law Governing Freedom of Access,
Submitted on behalf of the Legislative Committees of the Maine School Boards Association and
the Maine School Superintendents Association
May 11, 2011**

The Associations are strongly opposed to LD 1465 for many reasons, but the following bullets summarize some of the more obvious ones:

- LD 1465 is the most radical revision of the Freedom of Access statute in over 50 years, but it was never referred to the Right to Know Advisory Committee. This should be done, so that it can receive an appropriately rigorous, thoughtful debate and analysis.
- The requirement in Section 408(2-A) that school systems provide public records in the requested “medium” is completely open ended. Would it require the creation of spreadsheets or the creation of databases that no one in the school system is trained to use, if that is what the requester wants?
- The requirement in Section 408(2-A)(A) that schools must install any computer software or hardware paid for by the requester raises extremely serious network security concerns. Additionally, who is to pay for the training on the software, its maintenance, and the integration of software and hardware with existing school computer systems? Is this not an unfunded mandate?
- The requirement in Section 408-A that public records must be made “immediately upon request” unless time is required to redact the record (in which case they must be provided in 5 business days) is completely unrealistic and will be extraordinarily burdensome for schools. If the custodian of the records is not available on the date the request is made, the school committee will immediately be in violation of the statute.
- The requirement in Section 408-A(4) that cost estimates greater than \$100 must be provided within 3 business days may be impossible to meet. If large or multiple records are requested, it may not be possible to even determine their size and location within that time.
- The provision in Section 413 that public access officers must oversee prompt responses to requests but that the unavailability of a public access officer may not delay a request are completely inconsistent; what if the public access officer is simply not available on the day the request is made?
- The extreme nature of LD 1465 can best be understood by specific scenarios; here is one:

Assume that a member of the public at a public hearing (a) asks a School Committee (or a Legislative Committee) for all emails, texts, or other documents received or sent by any committee member within the past 7 days; (b) requests that they be scanned and emailed in PDF format; and (c) demands under Section 408-A that they be produced “immediately”.

Under LD 1465:

- *Would unredacted documents have to be provided “immediately”?*

(Over)

- *If so, how could this be done, given that the School Committee is in the middle of an important hearing?*
- *If there were redaction questions posing difficult legal issues, would those documents nevertheless have to be emailed as PDF's within 5 business days?*
- *What would happen if a Committee member was not at the hearing because they were seriously ill or out of the country?*
- *How could you reasonably estimate the time and cost of responding to this request within three business days?*

**OFFICE OF POLICY AND LEGAL ANALYSIS
Public Hearing Summary**

To: Joint Standing Committee on Judiciary

From: Peggy Reinsch, Legislative Analyst

LD 1082 **An Act Concerning the Protection of Personal Information in Communications with Elected Officials**

LD 1154 **An Act to Implement the Recommendations of the Right to Know Advisory Committee**

LD 1465 **An Act to Amend the Laws Governing Freedom of Access**

Public Hearing Date: April 27, 2011

SUMMARY

LD 1082 consists of the recommendations of the majority of the members of the legislative subcommittee of the Right to Know Advisory Committee in response to Resolve 2009, chapter 184.

LD 1082 amends the definition of "public record" in the freedom of access laws to provide that certain information in communications between constituents and elected officials is not a public record. Specifically, information is not a public record if the information would be confidential if it were in the possession of another public agency or official or if the information is of a personal nature. Information of a personal nature consists of:

1. An individual's medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders;
2. Credit or financial information;
3. Information pertaining to the personal history, general character or conduct of the constituent or any member of the constituent's immediate family;
4. Complaints, charges of misconduct, replies to complaints or charges of misconduct or memoranda or other materials pertaining to disciplinary action; or
5. An individual's social security number.

LD 1154 implements the recommendations of the Right to Know Advisory Committee as included in the advisory committee's 5th annual report.

PART A

The recommendations resulting from the review of existing public records exceptions are contained in Part A. The Maine Revised Statutes, Title 1, section 433 directs the advisory committee to review existing public records exceptions found in Titles 22 to 25 in 2012.

Part A:

1. Repeals Title 22, section 1065 to eliminate reporting requirements regarding influenza immunization agents because the information is no longer collected;
2. Makes changes to achieve language consistency. These changes are not intended to change the effect of the law;
3. Repeals Title 24A, section 2315 to eliminate obsolete language referring to "stamping bureaus," which are no longer in existence; and
4. Makes a substantive change to provide that specific modified property and casualty policy form and rate filings are confidential until approved in accordance with applicable law. Current law refers to confidentiality until the filings are effective.

PART B

Part B is in response to Resolve 2009, chapter 171, which, among other charges, directed the advisory committee to examine the use of technologies to ensure that decisions are made in public proceedings that are open and accessible to the public. Part B amends the public policy section of the freedom of access laws to specifically allow communications outside of public proceedings between members of a public body if those communications are not used to defeat the purposes of the freedom of access laws.

PART C

Part C contains the advisory committee's recommendations pursuant to Resolve 2009, chapter 186. Part C requires that public bodies keep records of their meetings if they are required under the freedom of access laws to give notice of their meetings and the public body is not purely advisory in its authority.

The meeting records must include:

1. The date, time and place of the public proceeding;
2. The members of the body holding the public proceeding recorded as either present or absent; and
3. All motions and votes taken, by individual member, if there is a roll call.

An audio, video or other electronic recording of a public proceeding is an acceptable record. Record management requirements and retention schedules adopted under Title 5, chapter 6 apply to these meeting records. The validity of any action taken in a public proceeding is not affected by the failure to make or maintain a record as required.

PART D

Part D consists of the advisory committee's recommendations to broaden the review requirements for both existing public records exceptions and the Legislature's review of proposed public records exceptions. Part D provides that the review and evaluation process includes language that affects the public accessibility of a public record. Any factors that affect the accessibility may be considered, including but not limited to fees, request procedures and timeliness of responses.

PART E

Part E exempts social security numbers from the definition of "public records" under the freedom of access laws.

LD 1465 increases governmental transparency by enhancing the existing freedom of access laws to provide deadlines for responses to requests for public records, to ensure that requesters can access public records in the format requested and to require the designation of public access officers for every agency and political subdivision.

LD 1465 provides funding for an Assistant Attorney General position located in the Office of the Attorney General to act as the public access ombudsman, which is a part-time position.

TESTIMONY

- Rep. Nass, presenter, LD 1082 and LD 1154 for Right to Know Advisory Committee
- Sen. Rosen, sponsor, LD 1465 (written testimony)
- Sen. Hill, cosponsor, LD 1465 (written testimony)
- Linda Pistner, Deputy Attorney General, Member of Right to Know Advisory Committee, LD 1082 and LD 1154
- Chris Cinquemani, Maine Heritage Policy Center, LD 1465 (written testimony)
- Michael Doyle (written testimony)
- Mal Leary, Maine Freedom of Information Coalition, Member of Right to Know Advisory Committee (written testimony)
- Dwight Hines (E-mail)
- Michael Cianchette, Deputy Counsel for Governor LePage, LD 1082 and LD 1154 (written testimony)
- John Simpson, MacImage (written testimony, PROPOSED AMENDMENT)
- Suzanne Goucher, Maine Association of Broadcasters, Former Member of Right to Know Advisory Committee
- Harry Pringle, Maine School Boards Association, Maine Superintendents Association (Member of Right to Know Advisory Committee), LD 1082, LD 1154 (Parts B and C) (written testimony)
- Carol Weston, Americans for Prosperity
- Shenna Bellows, Maine Civil Liberties Union, LD 1154 and LD 1465 (written testimony)
- Jeff Inglis, Society of Professional Journalists, Maine Pro Chapter (written testimony)

Opponents

- Harry Pringle, Maine School Boards Association, Maine Superintendents Association (Member of Right to Know Advisory Committee), LD 1465 (written testimony)
- Peter Merrill, Maine Housing
- Larry Post, County Administrator for Somerset County (written testimony)
- Fred Hardy, Commissioner Franklin County (written testimony and article)
- Nathan Poore, Falmouth Town Manager (written testimony)
- Susan Boulay, Register of Deeds Penobscot County, LD 1465
- Dan Walker, Maine Press Association (written testimony)
- Gary Foster (written testimony)

- Greg Connors, Maine Municipal Association, LD 1082 and LD 1154 (written testimony)
- Christopher Murry, Jr., LD 1465 (written testimony only)
- Philip W. Higgins, Maine Board of Dental Examiners (written testimony only)
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Neither for nor against

- Michael Cianchette, Deputy Counsel for Governor LePage, LD 1465 (written testimony)
- Rep. Hayes
- Eric Stout, Assistant to Chief Information Officer, FOA Coordinator for Office of Information Technology
- Beverly Bustin-Hatheway, Register of Deeds, Kennebec County
- Shenna Bellows, Maine Civil Liberties Union, LD 1082 (written testimony)
- Greg Connors, Maine Municipal Association, LD 1465 (written testimony)
- Tim Leet, Maine County Commissioners Association (written testimony)

FISCAL IMPACT:

LD 1082: No fiscal impact

LD 1154: Not determined as of May 8, 2011

LD 1465: Not determined as of May 8, 2011

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