RIGHT TO KNOW ADVISORY COMMITTEE
BULK RECORDS SUBCOMMITTEE
LEGISLATIVE SUBCOMMITTEE

DRAFT AGENDA
November 17, 2011
11:30 a.m.
Room 438, State House, Augusta

Convene

1. Welcome and Introductions

2. LD 1465 remaining issues

3. Other responsibilities assigned to Legislative Subcommittee
   - Status of Maine Public Broadcasting Network records under the Freedom of Access laws (Mike Brown)
   - Use of technology for the purpose of remote participation by members of public bodies
   - Drafting templates
   - Storage, management and retrieval of public officials' communications, especially email

4. Other?

5. Scheduling future subcommittee meetings?

Scheduled meetings:
Thursday, November 17, 2011, 1:00 p.m., Right to Know Advisory Committee
Thursday, December 8, 2011, 1:00 p.m., Right to Know Advisory Committee

Adjourn

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Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
§408. Public records available for public inspection and copying	**44-04-18. Access to public records - Electronically stored information.**	**§408. Public records available for public inspection and copying**	**Repeal §408; Enact new §408-A, Public records available for inspection and copying**
1. Right to inspect and copy. Except as otherwise provided by statute, every person has the right to inspect and copy any public record during the regular business hours of the agency or official having custody of the public record within a reasonable period of time after making a request to inspect or copy the public record. An agency or official may request clarification concerning which public record or public records are being requested, but in any case the agency or official shall acknowledge receipt of the request within a reasonable period of time.	1. Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours. As used in this subsection, "reasonable office hours" includes all regular office hours of a public entity. If a public entity does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the public entity's records must be posted on the door of the office of the public entity, if any. Otherwise, the information regarding the contact person must be filed with the secretary of state for state-level entities, for public entities defined in subdivision c of subsection 12 of section 44-04-17.1, the city	**1. Right to inspect and copy.** Except as otherwise provided by statute, every person has the right to inspect and copy any public record during the regular business hours of the agency or official having custody of the public record within ~~a reasonable period of time after making a request to inspect or copy the public record~~ the time limits established in section 408-A. An agency or official may request clarification concerning which public record or public records are being requested, but in any case the agency or official shall acknowledge receipt of the request within a reasonable period of time. A person may request by telephone that a copy of the public record be mailed or e-mailed to that person.	**1. Right to inspect and copy.** Except as otherwise provided by statute, every person has the right to inspect and copy any public record within a reasonable time of making the request to inspect or copy. **2. Clarification.** An agency or official may request clarification concerning which public record or public records are being requested. **3. Acknowledgment; time estimate.** The agency or official shall acknowledge receipt of the request within a reasonable period of time, and shall provide a good faith, nonbinding estimate of the time within which the agency or official will comply with the request. The agency or official shall make a good faith effort to fully respond to the

Revised 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

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	auditor or designee of the city for city-level entities, or the county auditor or designee of the county for other entities.		request within the estimated time.
	7. A denial of a request for records made under this section must describe the legal authority for the denial and must be in writing if requested.		**4. Refusals; denials.** If any ~~body or~~ agency or official who has custody or control of any public record refuses permission to inspect or copy or abstract a public record, ~~this denial must be made by~~ the ~~body or~~ agency or official shall provide the denial in writing, stating the reason for the denial, within 5 working days of the request for inspection or copying by any person. *[Currently part of §409, sub-§1]*
	8. This section is violated when a person's right to review or receive a copy of a record that is not exempt or confidential is denied or unreasonably delayed or when a fee is charged in excess of the amount authorized in subsections 2 and 3.		A. An agency or official violates this subchapter if the agency or official denies or unreasonably delays a person's right to inspect or receive a copy of a record that is not confidential or if the agency or official charges a fee in excess of the amount

revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
			authorized in this section, if applicable.
	9. It is not an unreasonable delay or a denial of access under this section to withhold from the public a record that is prepared at the express direction of, and for presentation to, a governing body until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first. It also is not an unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first.		B. An agency or official does not unreasonably delay or deny access under this subchapter if the agency or official withholds from the public a record that is prepared at the express direction of, and for presentation to, a governing body until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first. An agency or official does not unreasonably delay or deny access if the agency or official withholds from the public a working paper or preliminary draft until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an

revised 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

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CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
			open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first.
	10. For public entities headed by a single individual, it is not an unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, or work is discontinued on the draft but no final version has been prepared, whichever occurs first. A working paper or preliminary draft shall be deemed completed if it can reasonably be concluded, upon a good-faith review, that all substantive work on it has been completed.		C. For agencies headed by a single individual, an agency or official does not unreasonably delay or deny access if the agency or official withholds from the public a working paper or preliminary draft until a final draft is completed, or work is discontinued on the draft but no final version has been prepared, whichever occurs first. A working paper or preliminary draft is considered completed if it can reasonably be concluded, upon a good faith review, that all substantive work on it has been ~~completed~~ *finished*.

revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

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CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
			5. Schedule. Inspection, ~~translation~~ conversion 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. As used in this section, "reasonable office hours" includes all regular office hours of an agency or official. If a the agency or official does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the agency's or official's records must be posted in a conspicuous public place and at ~~on the door of~~ the office of the agency or official, if an office exists.
			6. Inspect. A person may inspect any public record during reasonable office hours. An agency or official may not charge for inspection.

revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
			7. Copy. A person may copy a public record during reasonable office hours or may request that the agency or official having custody of the record provide a copy. A. A request need not be made in person or in writing. B. The agency or official shall mail the copy upon request.
2. Inspection, translation and copying scheduled. 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.		**2. Inspection, translation and copying scheduled.** 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, as long as the inspection, translation and copying occur within the time limits established in section 408-A. The agency or official may use a 3rd party to make a copy of an original public record, but a requester may not remove the original of a public record	

revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

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CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
		from the agency or official.	
	4. Except as provided in this subsection, nothing in this section requires a public entity to create or compile a record that does not exist. Access to an electronically stored record under this section, or a copy thereof, must be provided at the requester's option in either a printed document or through any other available medium. A computer file is not an available medium if no means exist to separate or prevent the disclosure of any closed or confidential information contained in that file. Except as reasonably necessary to reveal the organization of data contained in an electronically stored record, a public entity is not required to provide an electronically stored record in a different structure, format, or	**2-A. Form.** If a public record exists in electronic or magnetic form, the requester may request a copy of the public record in a paper, electronic, magnetic or other medium, specify the storage medium and request that the copy be provided by an electronic transfer by the Internet or other means. A. An agency or official shall provide a copy of the public record in the requested medium if: (1) The agency or official has the technological ability to produce the public record in that	**8. Compile or create.** An agency or official is not required to create or compile a record that does not exist. **9. Available medium.** Access to an electronically stored record under this section, or a copy of such a record, must be provided at the requester's option in either a printed document or ~~through any other available~~ in the medium in which it is stored. ~~A computer file is not an available medium if no exist to separate or prevent the disclosure of any closed or confidential information contained in that file.~~ A. ~~Except as reasonably necessary to reveal the organization of data contained in an electronically stored record, a public entity~~ An agency or official is not

REVISION 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

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CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
(Current §408, sub-§3, ¶C) C. If translation is necessary, the agency or official may charge a fee to cover the actual cost of translation.	organization. This section does not require a public entity to provide a requester with access to a computer terminal.	medium or can obtain the assistance necessary to produce the public record at a reasonable cost; and (2) The requester agrees to pay the agency's or official's costs to purchase and install any additional necessary computer software or hardware to accommodate the request and to copy the public record in a requested medium. B. If an agency or official cannot provide a copy of a public record in a requested medium, the agency or official shall identify every medium in which the public record can be provided for inspection and copying, which must include a paper copy, and the requester must identify the medium that is acceptable to the requester.	required to provide an electronically stored record in a different medium, structure, format or organization, but may do so at the agency's or official's discretion. B. If ~~translation is necessary~~ the agency or official converts the record into a form susceptible of visual or aural comprehension, the agency or official may charge a fee to cover the actual cost of ~~translation~~ conversion. C. This section does not require ~~a public entity~~ an agency or official to provide a requester with access to a computer terminal.

revision 11/15/11

Bulk Records Subcommittee and Legislative Subcommittee

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CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
3. Payment of costs. Except as otherwise specifically provided by law or court order, an agency or official having custody of a public record may charge fees as follows.	2. Upon request for a copy of specific public records, any entity subject to subsection 1 shall furnish the requester one copy of the public records requested. A request need not be made in person or in writing, and the copy must be mailed upon request.	**3. Payment of costs.** Except as otherwise specifically provided by law or court order, an agency or official having custody of a public record may charge fees as follows.	**10. Payment of costs.** Except as otherwise specifically provided by law or court order, an agency or official having custody of a public record may charge fees for copies of public records as follows.
A. The agency or official may charge a reasonable fee to cover the cost of copying.	A public entity may charge up to twenty-five cents per impression of a paper copy. As used in this section, "paper copy" means a one-sided or two-sided duplicated copy of a size not more than eight and one-half by fourteen inches [19.05 by 35.56 centimeters]. For any copy of a record that is not a paper copy as defined in this section, the public entity may charge a reasonable fee for making the copy. As used in this section, "reasonable fee" means the actual cost to the public entity	A. The agency or official may charge a reasonable fee to cover the cost of copying.	A. The agency or official may charge a reasonable fee to cover the cost of copying. ~~As used in this section, "reasonable fee" means the actual cost to the agency or official of making the copy, including:~~ ~~(1) Labor;~~ ~~(2) Materials; and~~ ~~(3) Equipment.~~

Revised 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
	of making the copy, including labor, materials, and equipment. The entity may charge for the actual cost of postage to mail a copy of a record. An entity may require payment before locating, redacting, making, or mailing the copy.		
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.	An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records, including electronic records, if locating the records requires more than one hour. An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for excising confidential or closed material under section 44-04-18.10 from the records, including electronic records. If the entity is not authorized to use the fees to cover the cost of	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.	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~~ $15 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.

revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
	providing or mailing the copy, or both, or if a copy machine is not readily available, the entity may make arrangements for the copy to be provided or mailed, or both, by another entity, public or private, and the requester shall pay the fee to that other entity.		
C. If translation is necessary, the agency or official may charge a fee to cover the actual cost of translation.		C. If translation is necessary, the agency or official may charge a fee to cover the actual cost of translation.	~~E. If translation is necessary, the agency or official may charge a fee to cover the actual cost of translation.~~ *(moved up to sub-§9, ¶B)*
D. An agency or official may not charge for inspection.		D. An agency or official may not charge for inspection.	F. An agency or official may not charge for inspection. *(included in subsection 4 – need both?)*
	The entity may charge for the actual cost of postage to mail a copy of a record. An entity may require payment before locating, redacting, making, or mailing the copy.	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.	G. The agency or official may charge for the actual cost of postage to mail a copy of a record.

revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

revision 11-15-11

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
	This subsection does not apply to copies of public records for which a different fee is specifically provided by law.		~~G. This subsection does not apply to copies of public records for which a different fee is specifically provided by law. *(need this?)*~~
4. Estimate. The agency or official shall provide to the requester an estimate of the time necessary to complete the request and of the total cost. If the estimate of the total cost is greater than $20, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than $100, subsection 5 applies.		**4. Estimate.** The agency or official shall provide to the requester an estimate of the time necessary to complete the request and of the total cost. If the estimate of the total cost is greater than $20, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than $100, subsection 5 applies and the estimate must be provided within 3 business days of the request.	**11. Estimate.** The agency or official shall provide to the requester an estimate of the time necessary to complete the request and of the total cost. If the estimate of the total cost is greater than $20, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than $100, subsection 12 applies.
5. Payment in advance. The agency or official may require a requester to pay all or a portion of the estimated costs to complete the request prior to the translation, search, retrieval, compiling and copying of the public record if:	(subsection 1) *An entity may require payment before locating, redacting, making, or mailing the copy.*	**5. Payment in advance.** The agency or official may require a requester to pay all or a portion of the estimated costs to complete the request prior to the translation, search, retrieval, compiling and copying of the public record if:	**12. Payment in advance.** The agency or official may require a requester to pay all or a portion of the estimated costs to complete the request prior to the ~~translation~~ conversion, search, retrieval, compiling and copying of the public

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
			record if:
A. The estimated total cost exceeds $100; or		A. The estimated total cost exceeds $100; or	A. The estimated total cost exceeds $100; or
B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.		B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.	B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.
6. Waivers. The agency or official may waive part or all of the total fee if:		**6. Waivers.** The agency or official may waive part or all of the total fee if:	**13. Waivers.** The agency or official may waive part or all of the total fee if:
A. The requester is indigent; or		A. The requester is indigent; or	A. The requester is indigent; or
B. Release of the public record requested is in the public interest because doing so is likely to contribute significantly to public understanding of the operations or activities of		B. Release of the public record requested is in the public interest because doing so is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily	B. Release of the public record requested is in the public interest because doing so is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily

revision 11/15/11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
government and is not primarily in the commercial interest of the requester.		in the commercial interest of the requester.	in the commercial interest of the requester.
	3. Automation of public records must not erode the right of access to those records. As each public entity increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law. A public entity may not enter into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of the agency, including public records online or stored in an electronic recordkeeping system used by the agency. An electronic copy of a record must be provided upon request at no cost, other than		**New §401-A. Public records; information technology policy** **1. Policy.** The use of information technology to collect, maintain, store and retrieve public records must not erode the right of access to public records. **2. New information technology; considerations.** Each agency or official shall consider the following in the purchase of computer software and other information technology resources: A. Maximizing public access to public records; and B. Maximizing the exportability of public data while protecting confidential information that may be part of otherwise public records.

revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

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CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
	costs allowed in subsection 2, except if the nature or volume of the public records requested to be accessed or provided requires extensive use of information technology resources, the agency may charge no more than the actual cost incurred for the extensive use of information technology resources incurred by the public entity. "Extensive" is defined as a request for copies of electronic records which take more than one hour of information technology resources to produce.		~~§408-B. Automation of public records.~~ ~~1. Right of access; protection of confidential records.~~ ~~Automation of public records may not erode the right of access to those records. As each agency or official increases the use of and dependence on electronic recordkeeping, each agency shall provide reasonable public access to records electronically maintained and shall ensure that confidential records are not disclosed except as otherwise permitted by law.~~ ~~2. Contracts.~~ ~~A public entity may not enter into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of the agency, including public records online or stored in an electronic recordkeeping system used by the agency.~~

revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
			~~**3. Cost of electronic copy.** An electronic copy of a record must be provided upon request at no cost, other than costs allowed in section 408-A, subsection 10, except if the nature or volume of the public records requested to be accessed or provided requires extensive use of information technology resources, the agency may charge no more than the actual cost incurred for the extensive use of information technology resources incurred by the public entity. "Extensive" is defined as a request for copies of electronic records which take more than one hour of information technology resources to produce.~~
	5. A state-level public entity as defined in subdivision a of subsection 12 of section 44-04-17.1 or a political subdivision as defined in subsection 10 of section 44-04-17.1 may establish procedures for providing access from an outside location to any computer		

revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
	database or electronically filed or stored information maintained by that entity. The procedures must address the measures that are necessary to maintain the confidentiality of information protected by federal or state law. Except for access provided to another state-level public entity or political subdivision, the state or political subdivision may charge a reasonable fee for providing that outside access. If the original information is keyed, entered, provided, compiled, or submitted by any political subdivision, the fees must be shared by the state and the political subdivision based on their proportional costs to make the data available.		
	6. Any request under this section for records in the possession of a public entity by a party to a criminal or civil action, adjudicative proceeding as defined in subsection 1 of section 28-32-01, or arbitration in which		

revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
	the public entity is a party, or by an agent of the party, must comply with applicable discovery rules or orders and be made to the attorney representing that entity in the criminal or civil action, adjudicative proceeding, or arbitration. The public entity may deny a request from a party or an agent of a party under this subsection if the request seeks records that are privileged under applicable discovery rules.		
C. Legislative papers and reports until signed and publicly distributed in accordance with legislative rules, and records, working papers, drafts and interoffice and intraoffice memoranda used or maintained by any Legislator, legislative agency or legislative employee to prepare	10. For public entities headed by a single individual, it is not an unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, or work is discontinued on the draft but no final version has been prepared, whichever occurs first. A working paper or preliminary draft shall be deemed completed if it can reasonably be concluded, upon a good-faith review, that all		~~**§402, sub §3, ¶C-2** is enacted to read:~~ ~~C-2. Proposed legislation and reports until publicly distributed in accordance with legislative rules, and records, working papers, drafts and interoffice and intraoffice memoranda used or maintained by the Governor or any employee of the Governor to prepare~~

11-15-11 revision

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
proposed Senate or House papers or reports for consideration by the Legislature or any of its committees during the legislative session or sessions in which the papers or reports are prepared or considered or to which the paper or report is carried over;	substantive work on it has been completed.		~~proposed legislation or reports for consideration by the Legislature or any of its committees during the legislative session or sessions in which the proposed legislation or reports are prepared or considered or to which the proposed legislation or report is carried over;~~ *(See instead sub-§4, ¶C)*
§409. Appeals			**§409. Appeals**
1. Records. If any body or agency or official who has custody or control of any public record refuses permission to inspect or copy or abstract a public record, this denial must be made by the body or agency or official in writing, stating the reason for the denial, within 5 working days of the request for inspection by any			**1. Records.** ~~If any body or agency or official who has custody or control of any public record refuses permission to inspect or copy or abstract a public record, this denial must be made by the body or agency or official in writing, stating the reason for the denial, within 5 working days of the request for inspection by any~~

Revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
person. Any person aggrieved by denial may appeal, within 5 working days of the receipt of the written notice of denial, to any Superior Court within the State. If a court, after a trial de novo, determines such denial was not for just and proper cause, it shall enter an order for disclosure. Appeals are privileged in respect to their assignment for trial over all other actions except writs of habeas corpus and actions brought by the State against individuals.			~~person.~~ Any person aggrieved by a refusal or denial to inspect or copy a record under section 408-A may appeal, within 5 working days of the receipt of the written notice of denial, to any Superior Court within the State. If a court, after a trial de novo, determines such denial was not for just and proper cause, it shall enter an order for disclosure. Appeals are privileged in respect to their assignment for trial over all other actions except writs of habeas corpus and actions brought by the State against individuals. *(Note that the timing of the appeal is within the jurisdiction of the Commission to Study Priorities and Timing of Judicial proceedings in State Courts)*
2. Actions. If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action is illegal and the officials			

revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

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responsible are subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for the action to be null and void. Appeals are privileged in respect to their assignment for trial over all other actions except writs of habeas corpus or actions brought by the State against individuals.			
3. Proceedings not exclusive. The proceedings authorized by this section are not exclusive of any other civil remedy provided by law.			
4. Attorney's fees. In an appeal under subsection 1 or 2, the court may award reasonable attorney's fees and litigation			

Revision 11-15-11

Bulk Records Subcommittee and Legislative Subcommittee

Timeline and Costs: Comparison of Current Maine law, North Dakota laws, LD 1465, Possible draft updated 11/15/2011 11:18 AM

CURRENT MAINE LAW	NORTH DAKOTA LAW	LD 1465	Possible draft?
expenses to the substantially prevailing plaintiff who appealed the refusal under subsection 1 or the illegal action under subsection 2 if the court determines that the refusal or illegal action was committed in bad faith. Attorney's fees and litigation costs may not be awarded to or against a federally recognized Indian tribe. This subsection applies to appeals under subsection 1 or 2 filed on or after January 1, 2010.			
PROPOSED CLEAN UP			Enact new §400
			§400. Short title This subchapter may be known and cited as the "Freedom of Access Act." *(Subchapter is currently §401 through §412)*

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FOR SUBCOMMITTEES REVIEW 11/17/11
DRAFTED BY MICHAEL CIANCHETTE

5. Working Papers. For purposes of this subsection, "working papers" means documents, records, correspondence, reports, articles, and other materials which are prepared for review, information, or consideration by a governing body or a duly-authorized official related to specific policy proposals, including, but not limited to, financial expenditures, legislation, ordinances, rules, and executive orders.

A. In the case of working papers created by direction of a governing body, an agency or official does not unreasonably delay or deny access under this subchapter if the agency or official withholds working papers from the public until such time as a quorum of the governing body receives the working papers for review.

B. In all other cases , an agency or official does not unreasonably delay or deny access under this subchapter if the agency or official withholds working papers from the public until such time as a duly-authorized official:

1. Makes a final decision to put forward a policy proposal in accordance with State law reasonably related to the content of the working papers; or
2. Makes a final decision to abandon a policy proposal reasonably related to the content of the working papers.

C. An agency or official claiming the protection of documents under this subsection shall specifically cite this subsection in the written response provided in subsection 4 (***refusal/denial***). The person requesting such documents may make a standing request to receive the working papers once they become available for public review.

D. Notwithstanding paragraphs A and B, working papers are available for public review:

(1) If the working papers are provided to persons not in the service of the agency or official; or
(2) In the case of a governmental unit headed by a single elected official, upon the removal or expiration of the tenure of office of the elected official.