RIGHT TO KNOW ADVISORY COMMITTEE
Public Records Process Subcommittee
Monday, October 23, 2023
11:00 a.m. – 12:00 p.m.

Location: State House, Room 438 (Hybrid Meeting)
Public access also available through the Maine Legislature's livestream:
https://legislature.maine.gov/Audio/#438

AGENDA

1. Introductions

2. Discussion of Initial Subcommittee Topics

    - Require body to cite reason for going into executive session
    - Standard form for FOAA requests
    - Allow prioritization of requests based on type of requestor
    - Provide notice to individual who is the subject of inquiry

3. Preliminary Discussion of Remaining Topics
    - Repeat requestors and incomplete/delayed responses
    - Define "burdensome" request
    - Give Ombudsman authority to waive agency response requirement under certain circumstances

4. Next Steps and Future Meetings
    - Monday, November 6, 2023 (AFA Committee Room)
    - Monday, December 4, 2023 (AFA Committee Room)

5. Adjourn

§405. Executive sessions

Those bodies or agencies falling within this subchapter may hold executive sessions subject to the following conditions. [PL 1975, c. 758 (NEW).]

1. Not to defeat purposes of subchapter. An executive session may not be used to defeat the purposes of this subchapter as stated in section 401.
[PL 2009, c. 240, §2 (AMD).]

2. Final approval of certain items prohibited. An ordinance, order, rule, resolution, regulation, contract, appointment or other official action may not be finally approved at an executive session.
[PL 2009, c. 240, §2 (AMD).]

3. Procedure for calling of executive session. An executive session may be called only by a public, recorded vote of 3/5 of the members, present and voting, of such bodies or agencies.
[PL 2009, c. 240, §2 (AMD).]

4. Motion contents. A motion to go into executive session must indicate the precise nature of the business of the executive session and include a citation of one or more sources of statutory or other authority that permits an executive session for that business. Failure to state all authorities justifying the executive session does not constitute a violation of this subchapter if one or more of the authorities are accurately cited in the motion. An inaccurate citation of authority for an executive session does not violate this subchapter if valid authority that permits the executive session exists and the failure to cite the valid authority was inadvertent.
[PL 2003, c. 709, §1 (AMD).]

5. Matters not contained in motion prohibited. Matters other than those identified in the motion to go into executive session may not be considered in that particular executive session.
[PL 2009, c. 240, §2 (AMD).]

6. Permitted deliberation. Deliberations on only the following matters may be conducted during an executive session:

A. Discussion or consideration of the employment, appointment, assignment, duties, promotion, demotion, compensation, evaluation, disciplining, resignation or dismissal of an individual or group of public officials, appointees or employees of the body or agency or the investigation or hearing of charges or complaints against a person or persons subject to the following conditions:

(1) An executive session may be held only if public discussion could be reasonably expected to cause damage to the individual's reputation or the individual's right to privacy would be violated;

(2) Any person charged or investigated must be permitted to be present at an executive session if that person so desires;

(3) Any person charged or investigated may request in writing that the investigation or hearing of charges or complaints against that person be conducted in open session. A request, if made to the agency, must be honored; and

(4) Any person bringing charges, complaints or allegations of misconduct against the individual under discussion must be permitted to be present.

This paragraph does not apply to discussion of a budget or budget proposal; [PL 2009, c. 240, §2 (AMD).]

B. Discussion or consideration by a school board of suspension or expulsion of a public school student or a student at a private school, the cost of whose education is paid from public funds, as long as:

(1) The student and legal counsel and, if the student is a minor, the student's parents or legal guardians are permitted to be present at an executive session if the student, parents or guardians so desire; [PL 2009, c. 240, §2 (AMD).]

C. Discussion or consideration of the condition, acquisition or the use of real or personal property permanently attached to real property or interests therein or disposition of publicly held property or economic development only if premature disclosures of the information would prejudice the competitive or bargaining position of the body or agency; [PL 1987, c. 477, §3 (AMD).]

D. Discussion of labor contracts and proposals and meetings between a public agency and its negotiators. The parties must be named before the body or agency may go into executive session. Negotiations between the representatives of a public employer and public employees may be open to the public if both parties agree to conduct negotiations in open sessions; [PL 1999, c. 144, §1 (RPR).]

E. Consultations between a body or agency and its attorney concerning the legal rights and duties of the body or agency, pending or contemplated litigation, settlement offers and matters where the duties of the public body's or agency's counsel to the attorney's client pursuant to the code of professional responsibility clearly conflict with this subchapter or where premature general public knowledge would clearly place the State, municipality or other public agency or person at a substantial disadvantage; [PL 2009, c. 240, §2 (AMD).]

F. Discussions of information contained in records made, maintained or received by a body or agency when access by the general public to those records is prohibited by statute; [PL 1999, c. 180, §1 (AMD).]

G. Discussion or approval of the content of examinations administered by a body or agency for licensing, permitting or employment purposes; consultation between a body or agency and any entity that provides examination services to that body or agency regarding the content of an examination; and review of examinations with the person examined; and [PL 1999, c. 180, §2 (AMD).]

H. Consultations between municipal officers and a code enforcement officer representing the municipality pursuant to Title 30-A, section 4452, subsection 1, paragraph C in the prosecution of an enforcement matter pending in District Court when the consultation relates to that pending enforcement matter. [PL 1999, c. 180, §3 (NEW).]

[PL 2009, c. 240, §2 (AMD).]

SECTION HISTORY

PL 1975, c. 758 (RPR). PL 1979, c. 541, §A3 (AMD). PL 1987, c. 477, §§2,3 (AMD). PL 1987, c. 769, §A1 (AMD). PL 1999, c. 40, §§1,2 (AMD). PL 1999, c. 144, §1 (AMD). PL 1999, c. 180, §§1-3 (AMD). PL 2003, c. 709, §1 (AMD). PL 2009, c. 240, §2 (AMD).

131st MAINE LEGISLATURE

FIRST SPECIAL SESSION-2023

Legislative Document **No. 1649**

H.P. 1061 House of Representatives, April 13, 2023

An Act to Support Local Governments in Responding to Freedom of Access Act Requests

Reference to the Committee on Judiciary suggested and ordered printed.

ROBERT B. HUNT
Clerk

Presented by Representative TERRY of Gorham.
Cosponsored by Senator VITELLI of Sagadahoc and
Representatives: BOYLE of Gorham, BRENNAN of Portland, CLUCHEY of Bowdoinham, CRAFTS of Newcastle, MILLETT of Cape Elizabeth, MURPHY of Scarborough, O'CONNELL of Brewer, SALISBURY of Westbrook.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 1 MRSA §408-A, sub-§8, ¶B, as amended by PL 2021, c. 375, §1, is further amended to read:

B. The agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record in accordance with this paragraph. Compiling the public record includes reviewing and redacting confidential information.

(1) The agency or official may not charge a fee for the first 2 hours of staff time per request, except when the person making the public records request of that agency or official has previously made a request during the same calendar year.

(2) After the first 2 hours of staff time, the agency or official may charge a fee of not more than ~~$25~~ $40 per hour.

Sec. 2. 1 MRSA §408-A, sub-§13 is enacted to read:

13. Public records requests regarding school employees. If a school employee is the subject of a public records request, the employee must be notified of the request as soon as practicable. The employee must be provided an opportunity to inspect the records to be submitted to the requestor before the requestor receives any documents or materials involving the employee. The school district may require the use of the form under Title 5, section 200-I, subsection 2, paragraph H for any request.

If the school district believes the public records request is frivolous or designed to intimidate or harass, the school district may seek the opinion of the Public Access Ombudsman regarding the request. If the Public Access Ombudsman determines that the request is part of a series of contemporaneous requests, or a pattern of requests, that are frivolous or designed to intimidate or harass and that the requests are not intended for the broad dissemination of information to the public about actual or alleged government activity, the Public Access Ombudsman may relieve the agency or official of the obligation to provide the public records sought pursuant to Title 5, section 200-I, subsection 2, paragraph G. If the requestor disagrees with the denial of a request by the Public Access Ombudsman based on these standards, the requestor may appeal the denial pursuant to section 409.

Sec. 3. 5 MRSA §200-I, sub-§2, ¶E, as amended by PL 2013, c. 229, §1, is further amended to read:

E. Make recommendations concerning ways to improve public access to public records and proceedings; ~~and~~

Sec. 4. 5 MRSA §200-I, sub-§2, ¶F, as enacted by PL 2013, c. 229, §2, is amended to read:

F. Coordinate with the state agency public access officers the compilation of data through the development of a uniform log to facilitate record keeping and annual reporting of the number of requests for information, the average response time and the costs of processing requests~~.~~;

Sec. 5. 5 MRSA §200-I, sub-§2, ¶G is enacted to read:

G. Relieve an agency or official of the obligation to provide public records pursuant to Title 1, section 408-A, subsection 13; and

Sec. 6. 5 MRSA §200-I, sub-§2, ¶H is enacted to read:

H. Create a form for the submission of public records requests. The form must be simple, short and designed to provide only the basic information required to fulfill the request.

SUMMARY

This bill amends the State's freedom of access laws to increase the fee for a public records request from $25 per hour spent retrieving the public record to $40 per hour. It provides that an agency or official may charge a fee for the first 2 hours of staff time per request when the person making the public records request of that agency or official has previously made a request during the same calendar year.

It requires that school personnel who are the subject of public records requests be notified and allows them opportunity to inspect the records before they are released. If a school district believes a request is frivolous or designed to intimidate or harass, the school district is authorized to seek the opinion of the Public Access Ombudsman within the Department of the Attorney General regarding the request.

It provides that, if the Public Access Ombudsman determines that the request is part of a series of contemporaneous requests, or a pattern of requests, that are frivolous or designed to intimidate or harass and that the requests are not intended for the broad dissemination of information to the public about actual or alleged government activity, the Public Access Ombudsman is authorized to relieve the agency or official of the obligation to provide the records sought. If the requestor disagrees with the denial of a request based on these standards, the requestor may appeal to the Superior Court.

It also directs the Public Access Ombudsman to create a simple, short form for public records requests. A school district may require the use of this form for any public records request.

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April 26, 2023

Testimony of Rep. Maureen Terry presenting
LD 1649, An Act to Support Local Governments in Responding to Freedom of Access Act Requests
Before the Joint Standing Committee on Judiciary

Senator Carney, Representative Moonan and esteemed members of the Judiciary Committee, I am Maureen Terry, representing part of Gorham in House District 108 I am happy to be here to present **LD 1649, An Act to Support Local Governments in Responding to Freedom of Access Act Requests.**

The public's right to information about government activities is at the heart of a democratic government In recognition of that, the state has granted the people of Maine with broad right of access to public records through the Freedom of Access Act (FOAA) This is to help ensure accountability and transparency throughout all of the layers of government But I've recently been made aware of increasing occurrences of abuses of the FOAA request process that have highlighted some areas where we could better align the FOAA request process with the core intent of the law

The need for this bill came to my attention after several conversations with folks from the Gorham School Board Committee, school administrators and some of my friends who are teachers in Gorham Schools I know though that Gorham is not the only school district in Maine facing this issue This abusive practice is being seen in schools all over the country, targeting public schools and public school teachers In Virginia, one school district needed to add a half a million dollars to their school budget to process public records requests In Arkansas, within 90 days, one school district put 400 hours of staff time into processing requests In one Minnesota school district, one group requested so many single requests that they estimate that they've spent nearly 2,200 hours of time to fulfill the questions that one activist group requested Similarly, one parent in Gorham has filed 55 requests since the beginning of last school year

School departments have had to seek out greater legal advice regarding what qualifies as a public record, elevating the district's taxpayer-funded legal expense immensely My school department had to spend roughly $80,000 last year alone Those dollars are coming directly from our taxpayers and because of the nature of the requests and current law, these few requestors are

paying little to nothing to cover the costs There is a link in my electronic testimony that shows the actual nature of the requests

These are not proprietary for my school district They are targeted requests and are being seen by school districts all over Maine and the country Schools in every state say that resources are being diverted away from students' academic needs at the same time schools are facing dropping test scores, a teen mental health crisis and a teacher shortage

I am completely supportive of genuine requests for information in the interest of accountability and transparency, but nothing about what we're seeing happen in our school district and across the state is genuine This is harassment

LD 1649 would address this issue The bill would increase the fee for a public records request from $25 per hour spent retrieving the public record to $40 per hour One tactic used by the individuals exploiting the current law is to make requests that take no more than two hours to process This enables them to avoid having to pay for the requests because under current law, an agency or official cannot charge a fee to cover staff time for the first two hours of time spent on an inquiry For instance, one person (not a parent of any student in Gorham) made requests to see one of our teachers' school and personal emails at least four times, for four different weeks in four different requests Each request took approximately two hours to fulfill, therefore taking a sum total of eight hours of work for which none were compensated LD 1649 would eliminate that fee-free period if the person making that request has made a request of that same government agency or official within the year

The bill would also require school personnel who are subjects of the records request to be notified and gives them an opportunity to inspect the records before they are released One of our teachers found out that his personal emails were being requested when one of his colleagues notified him that he was all over social media Not being a social media user himself, he had no way of knowing what was being said about him

Additionally, if the school district believes a request is frivolous or intended as harassment, the school may seek the opinion of the Public Access Ombudsperson who may relieve that office or individual of having to respond to the request if the Ombudsperson finds that the request is part of a pattern of frivolous requests or harassing behavior This decision may be appealed by the requestor in the Superior Court

These measures are intended to uphold the spirit of the Freedom of Access Act while offering some specific and narrowly tailored changes to address a problem facing schools and other institutions across the state with alarming frequency

Thank you for the opportunity to present this bill I'm happy to take any questions you may have

msba MAINE SCHOOL BOARDS ASSOCIATION
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MSSA
Maine School Superintendents Association

TESTIMONY IN SUPPORT OF

L D 1649

AN ACT TO SUPPORT LOCAL GOVERNMENTS IN RESPONDING TO FREEDOM OF ACCESS ACT REQUESTS

Senator Carney, Representative Moonen and members of the Judiciary Committee I am Steven Bailey, executive director of Maine School Management Association, testifying on behalf of the legislative committees of the Maine School Boards Association and Maine School Superintendents Association, in support of L D 1649

Our associations support this bill because it puts some reasonable parameters around Freedom of Access requests It is important of course to follow through with these requests, yet what we are seeing is some have become more burdensome on school districts and are tying up valuable staff time

We believe there are requests being made that do just as the bill suggests Some are frivolous but the more concerning ones are designed to intimidate or harass An article in the *Portland Press Herald* earlier this year reported on such requests made to the Gorham School District referencing close to 63 FOA requests looking for material related to gender identity, sexual orientation, race and privilege Farther north, Hermon received 25 on the same topic

The fee structure proposed in the bill gives the public two free hours for a search, unless and importantly the requestor has made the same request in the calendar year It then provides for an hourly charge of not more than $40

The bill also allows school districts to ask the opinion of the Public Access Ombudsman to weigh in on the apparent intent of the request to determine if the requests are attempting to intimidate or harass

Public bodies, including the school boards we represent, have found themselves in uncharted waters when it comes to the Freedom of Access searches now being requested Our first responsibility in responding to these requests is to support and protect our students' confidentiality, prevent outside intimidation and assure students and staff feel safe at school

This legislation supports that responsibility

Steven W Bailey
MSBA Executive Director

Eileen E King
MSSA Executive Director

MAINE PRINCIPALS' ASSOCIATION

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Holly D. Blair
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Michael G. Bisson
Assistant Director

MPA is an Equal Opportunity Organization

TO: **Committee on Judiciary**

FROM: **Maine Principals' Association Legislative Committee**

RE: **In Support of LD 1649: An Act to Support Local Governments in Responding to Freedom of Access Act Requests**

DATE: **April 26, 2023**

Senator Carney, Representative Moonen, and distinguished members of the Committee on Judiciary. My name is Dr. Holly Blair, and I am the Executive Director of the Maine Principals' Association – Professional Division. The MPA represents more than 800 PreK-12 principals, assistant principals, CTE Directors and assistant directors of public and private schools in Maine.

The MPA Legislative Committee supports the passing of LD 1649. The MPA has worked closely with the Maine Educators Association (MEA), Maine School Boards' Association (MSBA), and the Maine School Superintendents' Association (MSMA) and other individual educators to work with Representative Terry to create a bill that best meets the needs of schools and districts, while meeting the needs of those who genuinely need to access public records in schools.

The MPA urges the Committee to vote Ought to Pass LD 1649.

Mark Chasse
Auburn
LD 1649

LD 1649 ought- NOT - to pass as defining the following paragraph is subjective and restrains the inquirer from seeking transparency. This is ounative legislation and would likely not pass a constitutional review.

Thank you.

Maine County Commissioners Association

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LD 1649, An Act to Support Local Governments in Responding to Freedom of Access Act Requests

April 26, 2023

Chair Carney, Chair Moonen, and Members of the Joint Standing Committee on Judiciary, my name is Stephen Gorden and in addition to serving as a member of the board of commissioners for Cumberland County, I am writing today in my role as chair of the legislative policy committee of the Maine County Commissioners Association. We appreciate the opportunity to provide testimony to the Committee in ***support*** of LD 1649. This bill provides a reasonable approach to ensuring that state and local agencies of government are not unreasonably burdened by certain Freedom of Access Act information requests, burdens that ultimately fall to Maine taxpayers.

About MCCA. Briefly, the Maine County Commissioners Association was established in 1890 to assist Maine's county government in providing vital services to Maine citizens in a responsive, efficient, and credible manner. The Association is based in Augusta, represents all 16 of Maine's counties, and is governed by a board with representation from each participating county.

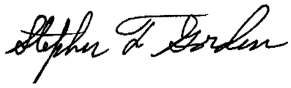
Background. By way of background, the Maine Freedom of Access Act ("FOAA") grants the people of Maine a right of access to public records, while also protecting legitimate governmental interests and the privacy rights of individual citizens. In addition, the FOAA is intended to ensure the accountability of the government to the citizens of the State by requiring public access to the meetings of public bodies, including meetings of county commissioners. Individuals may submit requests to the pertinent public body or agency, such as county commissions, to produce certain public records, and the public body or agency responds to such request. Under current law, public bodies and agencies may not charge a fee for the first two hours of staff time spent on each FOAA request.

What does LD 1649 do? Among other things, Section 1 of LD 1649 amends the State's FOAA to increase the fee for staff time spent on a public records request from the current $25 per hour fee to $40 per hour. Additionally, this bill provides that an agency or official may charge a fee for the first two hours of staff time spent on each request when the person making the public records request of that agency or official has previously made a FOAA request during the same calendar year.

Discussion. County government, like other public bodies and agencies, receive numerous FOAA requests each year. Many FOAA requests received by counties are straightforward and do not require staff to expend significant amounts of time to produce the requested public records. However, some requests made under the FOAA require county staff to expend significant time and resources to produce the requested public records, and are complicated in nature. Further, some individuals make numerous FOAA requests upon us within the same calendar year. To the extent that LD 1649 works to ensure that public bodies and agencies such as counties are appropriately compensated for staff time spent on requests made under the FOAA, and to ensure that public bodies are able to efficiently respond to as many FOAA requests as possible, we write in support.

Conclusion. We appreciate the opportunity to provide testimony on this bill, and if you have questions or need additional information, please do not hesitate to let us know.

Respectfully submitted,



Stephen Gorden
Chair, Legislative Policy Committee

cc: Commissioner Richard Dutremble, President, MCCA
James I. Cohen, Verrill Dana, LLP, MCCA Legislative Counsel

Maine Education Association
Grace Leavitt President | Jesse Hargrove Vice President | Beth French Treasurer
Rebecca Cole NEA Director | Rachelle Bristol Executive Director

Testimony

In Support

LD 1649 An Act to Support Local Governments in Responding to Freedom of Access Act Requests

In Opposition

LD 1699 An Act to Amend the Freedom of Access Act and Related Provisions

Ben Grant – General Council, Maine Education Association

Before the Judiciary Committee

April 26, 2023

My name is Ben Grant (he/him) and I am proud to serve as General Counsel for the Maine Education Association (MEA) The MEA represents 24,000 educators in the state of Maine, including teachers and other professionals in nearly every public school in the state, and faculty and other professional staff in the University of Maine and Community College Systems

I write to express the MEA's support for LD 1649 and, conversely, the MEA's opposition to LD 1699 Our view is that this Committee is charged with finding the correct balance between the competing rights at stake here On the one hand, there is an extreme position – largely now consigned to history - that believes the workings of the Government should be kept from the people It is that notion that even the Founding Fathers recognized as problematic, leading them to ensure publication of the Congressional Record It is also this notion that led to the passage of FOIA and FOAA in the 20th Century, as, rightly so, the Government lost the full trust of the people

What we are seeing now is louder and louder advocacy by extremists on the other side of the issue – those who wish the law to grant them a forensic examination of every thought considered by anyone who works in public employment Their goal is not to shine light on the workings of government, but rather to use social media to weaponize scraps of information in order to threaten, embarrass, and intimidate public employees The purpose of FOAA is to allow the public access to the information it needs to participate meaningfully in the legitimate political process If you don't like a policy, try to get it changed through the electoral and legislative process

However, that is decidedly not what is confronting public employees at present Rather, the law is being exploited by those who have failed at the political process, and instead are engaged in a rear-guard action to make public employment so unpleasant as to become untenable from the standpoint of mental health and public reputation FOAA exists to ensure accountability – not to provide a vocal and unscrupulous minority the tools to harass good people out of public life

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Maine Education Association
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At a time when hiring people to work in schools is so difficult, and when morale among educators is teetering on the brink, it is time for you – the policy makers – to bring some balance back to the law LD1649 is an excellent first step in correcting the overreach in how FOAA is used today First, it raises the fee chargeable to a requestor to align with federal law This may seem like a small change, but public employers are literally devoting dozens of hours responding to completely unregulated requests Second, it requires that public employees who are the subject of FOAA requests are notified of the request This is vital for many public employees, so that they can be prepared for the onslaught of public criticism (or worse) that is likely to ensue Third, this bill establishes an important filter for FOAA requests, in the form of Ombudsperson review In this way, public employers can focus on fulfilling legitimate requests, while avoiding those deemed by a neutral party to be frivolous, overly broad, or designed to intimidate Finally, the bill directs the Ombudsperson to create a common form for use by requestors This is important in order to ensure that the public agency has clear direction as to the documents being sought These are all good changes that will help bring balance back to the system

Conversely, LD 1699 will only make a bad situation worse, and encourage an escalation of the same actions that are so distasteful now First, it sweeps in thousands of additional organizations and employees who are subject to the law, even though these entities are in no other way "public" agencies Second, this bill imposes a harsh and impractical deadline for responding to FOAA requests Public agencies must be allowed to continue conducting their public business – and not have to shut down or slow down operations in order to respond to requests Finally, this bill imposes a cap on fees that fails to recognize the actual cost to public agencies in staff time, especially schools, required to respond to increasingly broad requests

For all of these reasons, the MEA urges the Committee to support LD 1649 and to oppose LD 1699 Thank you, and I am happy to try to answer any questions you may have

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Testimony of the Maine Municipal Association

Neither For Nor Against

LD 1649 - *An Act to Support Local Governments in Responding to Freedom of Access Act Requests*
April 26, 2023

Sen. Carney, Rep. Moonen and members of the Judiciary Committee, my name is Rebecca Lambert, and I am providing testimony neither for nor against LD 1649 on behalf of the Maine Municipal Association's (MMA) elected 70-member Legislative Policy Committee (LPC). For reference, the LPC provides direction to the advocacy team at MMA and establishes the position on bills of municipal interest.

Municipal officials appreciate that this bill intends to assist communities with over the top and borderline harassing Freedom of Access requests, by including the Public Access Ombudsman to weigh in when there are a series or pattern of requests that seem to have a goal of intimidation or harassment rather than broadly distributing information.

The LPC was a bit confused about the addition of the requirement that a school employee be allowed to review the records pertaining to them before they are released to the records requestor. Local leaders feel that all public employees should be subject to the same requirements and would kindly request the committee to consider amending the bill so that all public employees have the ability to review records pertaining to them before release or remove it altogether.

For these reasons the LPC is neither for nor against LD 1949. Thank you for your time and for considering the municipal perspective on this issue.

MAINE PRESS ASSOCIATION
On the record since 1864

Sen. Carney, Rep. Moonen, members of the Joint Standing Committee on Judiciary, my name is Judith Meyer. I am the editor of the Sun Journal in Lewiston, the Kennebec Journal and the Morning Sentinel.

I write on behalf of the Maine Press Association in opposition to LD 1649, An Act to Support Local Governments in Responding to Freedom of Access Act Requests.

* * *

During the last legislative session, at the recommendation of the Right to Know Advisory Committee, the Legislature raised the rate that an agency or official may charge to cover the cost of searching for, retrieving and compiling a public record from $15 to $25 per hour.

It was done to more accurately reflect the cost of public records searches and came following a months-long survey conducted by the Maine Municipal Association of its members seeking guidance on the issue of the hourly rate, with clerks and town managers agreeing the $25 per hour cost was sufficient. That higher hourly figure was supported by representatives of the Maine School Management Association and police agencies that are represented on the Right to Know Advisory Committee and has been in effect for a little more than a year.

The proposed increase to $40 per hour runs contrary to the MMA survey and guidance provided to RTK by other public bodies, and is excessive -- particularly for members of the general public who may struggle to pay such a high fee for records searches.

For these reasons, MPA opposes the fee increase.

MPA also opposes the language addressing public records requests that may be frivolous or designed to intimidate or harass school districts. There is already protection under Maine's Freedom of Access Act, under §408-A, in that "a body, an agency or an official may seek protection from a request for inspection or copying that is unduly burdensome or oppressive by filing an action for an order of protection in the Superior Court for the county where the request for records was made within 30 days of receipt of the request. "

This provision was drafted into law several years ago, after much consideration by stakeholders, to address frivolous or so-called "nuisance" requests in order to provide relief to governmental bodies. It is important to note that it was drafted as it was, for governmental bodies to go to Superior Court rather

than through the Public Access Ombudsman's office, as the most direct, efficient and effective way to address nuisance requests.

* * *

The Maine Press Association (MPA), founded in 1864, is one of the oldest professional news organizations in the nation. Our goals, as spelled out in our charter and by-laws are to promote and foster high ethical standards and the best interests of the newspapers, journalists, and media organizations of the state of Maine that constitute its membership; to encourage improved business and editorial practices and better media environment in the state; and to improve the conditions of journalism and journalists by promoting and protecting the principles of freedom of speech and of the press and the public's right to know.

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April 26, 2023

Written Testimony in SUPPORT of LD 1649

To: Sen Carney, Representative Moonen and Honorable Members of the Judiciary Committee
From: Heather J Perry, Ph D Superintendent of Schools
Re: Testimony on LD 1649

Dear Honorable Senators and Representatives,

I am writing this testimony **IN FAVOR** of An Act to Support Local Governments in Responding to Freedom of Access Act Requests

I have been a proud public school educator in Maine for 27 years I began as an Educational Technician, then teacher, and then building principal in the Machias area of Maine I have since spent the past 16 years as a Superintendent of Schools in Maine, first serving School Union 60 and MSAD 12 (Greenville and Jackman area), then RSU 3 (Unity/Thorndike Area) and most recently, serving the past 8 years as Superintendent of Schools in Gorham, ME

I have also served in many other leadership roles across the state, from president of the Maine Small Schools Coalition to chair of MSSA's Funding Committee to current member of MSSA's executive committee as well as AASA's (National Superintendent's Association) executive committee I have also volunteered my time as the chair of the board for Good Will Hinckley, as a member of USM's School of Education and Human Development Advisory Committee and have served on the JMG Board of Directors for 9 years

I do not share these experiences to brag I share them to demonstrate my record of service to the children and families of Maine I love Maine's people I love Maine's public school educators Most of all, I love Maine's incredible school children They deserve our very best It is because I believe our children deserve our very best that I am sharing my testimony with you here today I need to share with you a recent and troubling trend that I believe is causing harm to public schools across the state of Maine

Before I share this concern, I believe it is important for me to be up front and clear that I fully support and have consistently worked to uphold Maine's FOAA laws throughout my career I believe FOAA is a foundational aspect of accountability for our government institutions (including public schools) FOAA, when used appropriately, lies at the heart of a democratic government Transparency and open decision-making are essential to ensuring continued trust and confidence in our government and its public institutions As is stated on Maine's FOAA webpage "Open government is good government " and I couldn't agree more

Unfortunately, I believe that in some limited circumstances FOAA is being misused, not as a means of gathering information, but as a means of promoting a political agenda and/or as a means of diverting valuable human and monetary resources away from our public schools, away from children I believe that LD 1649 goes a long way in helping to ensure that FOAA laws remain the strong bastions of our democracy that they should be and I urge your support

A Quick Story...

Prior to the spring of 2022, the Gorham Schools had received at most 2-3 FOAA requests per year In the spring of 2022 the Gorham Schools received 25 requests Thus far during the 2022-23 School Year we have received 57 additional requests for a total of approximately 82 requests in just one calendar year

Rhonda Warren is a 38-year veteran public school servant She has worked as the assistant to the Superintendent in Gorham for all 38 of those years (plus 7 more in MSAD 6 before that) She has seen it all in public schools and is a valued member of the Gorham Schools staff For 37 of those years she has been able to do her job extremely well She answers phones, she manages calendars, she issues work agreements and contracts She inputs staff data into NEO, she tracks all required certifications for 500+ staff, she tracks staff years of experience, she prepares and assists in contract negotiations, she completes student attendance reports and a myriad of other state required reports, and she is our homeless liason She clearly works hard and is not afraid of hard work

Last year she became so inundated with FOAA requests that she couldn't perform these duties to the levels of service she had been used to For the first time in 37 years she fell behind in reports, she had to rush to get data input into systems and she didn't have time to track down employee certifications For the first time in 37 years Rhonda felt inadequate She felt like she couldn't do her job anymore She felt like what she was doing was no longer meaningful

What changed? FOAA requests If you were to look at the 87 total requests made during that year – they involved a total of 121 5 hours of time Rhonda's time This time is just the time listed – it doesn't include the time Rhonda had to spend organizing requests and making sure each one was responded to in the appropriate manner, and within the appropriate time frame It doesn't include the time she had to spend with legal council making sure that she was following the law It didn't count the time she had to spend tracking down information being requested and making sure principals, teachers and others were responding to the data collection requests that were being made

It got so bad that in December of this year, we had to hire a part time person to assist with FOAA requests just so that we didn't burn Rhonda out of the job she loved and cared about so dearly

The Data At A Glance...

- 87 FOAA requests in one calendar year
- 121 5 total hours of "billable" time Untold hours of other time
- Over $25,000 00 in legal fees expended on FOAA alone Currently we are $80,000 00 plus over our legal fees lines
- 15 different requesters total, 55 of which came from 1 person

Legitimate Questions/Seeking Information or Malicious Intent???...

A quote from one FOAA request to the Gorham Schools dated 9/26/22

"This should be a very easy ask for your IT person to search for, well within the two free hours of the Maine FOAA laws If you decide to try and respond with some asinine charge for public information, I'll simply revise my response and we can do this dance back and forth for a number of weeks, or months "

This one was eventually withdrawn by the requester, but later on, that same requester made another FOAA request regarding another matter dated 11/1/22 and when they were notified it would be 8 hours (6 hours of charged time) they broke the original request into four separate ones all dated 11/10/22

A quote from Social Media (Maine First Project, Tweet dated 5/18/22)

"Start to FOAA your school district and expose what's happening for local elections to make change and November elections to flip this state red "

A quote from Social Media (Shawn McBreairty, Tweet dated 3/9/23)

"As we expose the ignorant, like Hermon, ME Superintendent Micah Grant and have filed a civil lawsuit against him for calling 911 on me for taking a photo, I ask you to start using FOAA/FOIA as your greatest weapon to expose these public schools "

A quote from Social Media (www DavesPaper com tweet dated 3/7/24)

"Schools know FOAA/FOIA will crack open what's happening inside the brick walls Use your most powerful tool and hold them accountable "

Why You Should SUPPORT LD 1649 ...

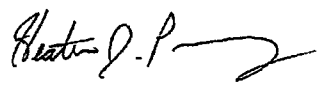
1. It places reasonable safeguards on the use (or rather misuse) of this important law
2. It charges a more reasonable fee for service $25/hr with employee related costs barely covers a min wage position conducting this work let alone professional educators taking their time to complete this important work Even Rhonda gets $31 00 per hour to perform the tasks of an assistant to the superintendent An experienced teacher's hourly rate is closer $55/hr Time spent by administrators would be more like $65/hr
3. It allows multiple requests to be treated as cumulative in nature, accounting for actual costs associated with fulfillment of the requests
4. It allows for an independent third party to determine whether requests are "frivolous" or not
5. It allows for the creation of a common template for FOAA requests so that individuals charged with processing requests can more readily see and understand what is being requested and respond more immediately without having to wade through what can be 2-3 pages of text to determine what the actual request for information is

Overall, I believe these safeguards are very reasonable They allow us to maintain the integrity of this very important law while balancing the need to ensure it is not eroded through continual misuse and abuse that ultimately cost our taxpayers more money, and take away time and resources from public schools that could otherwise be spent focusing on children

I would encourage individuals to go to our website (www gorhamschools org) and to click on the "Community Tab" and then click on the "FOAA" link to view the full history of FOAA requests made over the past calendar year to assist you in gaining the full scope of understanding for my request to you to support LD 1649 in its entirety

I thank you for your time and commitment to this important public law aimed at protecting our incredible democracy I am happy to provide any additional clarifying information to members of the Judiciary Committee at any time Thank you for all you do in your thankless roles as public servants and thank you for listening

Sincerely,



Heather J Perry, Ph D
Superintendent of Schools

Testimony in Opposition to LD 1649: "An Act to Support Local Governments in Responding to Freedom of Access Act Requests"

Senator Carney, Representative Moonen, and the distinguished members of the Committee on Judiciary, my name is Nick Murray and I serve as director of policy for Maine Policy Institute. We are a free market think tank, a nonpartisan, non-profit organization that advocates for individual liberty and economic freedom in Maine. Thank you for the opportunity to testify on LD 1649.

If passed, public transparency under LD 1649 would be sorely diminished. Sadly, it would increase the speed at which Mainers are losing access to their government, as we have been moving in the wrong direction of press freedom and transparency.

Unfortunately, Maine Policy Institute's experience with FOAA over the last several years with the Mills administration has been markedly different from our interactions with that of former governors John Baldacci and Paul LePage.

Some of our requests have seemingly been ignored by the current administration. Two filed in October 2021 remain unfilled today. They concern a so-called "advocacy journalist" policy used to restrict select journalists from CDC briefings in October 2021.[1]

LD 1649 would add a new provision at §408-A, sub-§13 requiring that a school employee be notified if they have been subject to a FOAA request. Why should public school employees be afforded this special privilege in Maine law? The only other instances requiring notification in Title 1 refer to the state's duty to report to the public.

The bill also stipulates that requesters lose the courtesy of not being charged the first two hours of staff time to fulfill their request, starting at just their second request in that calendar year. This needless provision would effectively punish Mainers who choose to be active in their government.

Because the state serves the people, or at least it should, this committee should quickly dispense with this bill. It would put the public farther away from local public servants and the truth.

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1 https://pressfreedomtracker.us/all-incidents/reporters-excluded-from-maine-cdc-media-briefings-after-being-labeled-advocacy-journalists/

Please deem LD 1649 “Ought Not To Pass,” and instead strengthen the public’s right to hold public servants accountable. Thank you for your time and consideration.

131st MAINE LEGISLATURE

FIRST REGULAR SESSION-2023

Legislative Document **No. 1203**

H.P. 763 House of Representatives, March 14, 2023

An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

Reference to the Committee on Judiciary suggested and ordered printed.

ROBERT B. HUNT
Clerk

Presented by Representative BOYER of Poland.
Cosponsored by Senator BRAKEY of Androscoggin and
Representatives: ANDREWS of Paris, HENDERSON of Rumford, LEE of Auburn, LIBBY of Auburn, POIRIER of Skowhegan, RECKITT of South Portland, SUPICA of Bangor.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 1 MRSA §408-A, sub-§3, as amended by PL 2015, c. 317, §1, is further amended to read:

3. Acknowledgment; clarification; time estimate; cost estimate. The agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within 5 working days of receiving the request and may request clarification concerning which public record or public records are being requested. Within a reasonable time of receiving the request, but no later than 30 days following receipt of the request, the agency or official shall provide a good faith, nonbinding estimate of the time within which the agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The agency or official shall make a good faith effort to fully respond to the request within the estimated time. For purposes of this subsection, the date a request is received is the date a sufficient description of the public record is received by the agency or official at the office responsible for maintaining the public record. An agency or official that receives a request for a public record that is maintained by that agency but is not maintained by the office that received the request shall forward the request to the office of the agency or official that maintains the record, without willful delay, and shall notify the requester that the request has been forwarded and that the office to which the request has been forwarded will acknowledge receipt within 5 working days of receiving the request.

Sec. 2. 1 MRSA §413, sub-§5 is enacted to read:

5. Prioritization of requests. A public access officer may give priority to a request for public records from a resident of this State or from a journalist acting in the journalistic capacity of gathering, receiving, transcribing or processing news or information for potential dissemination to the public.

Sec. 3. 16 MRSA §804, sub-§3, as enacted by PL 2013, c. 267, Pt. A, §3, is amended to read:

3. Constitute an invasion of privacy. Constitute an unwarranted invasion of personal privacy, except when the disclosure of the record is consented to by the individual who is the subject of the record or, if that individual is deceased, incapacitated or a minor, by a person who is a family or household member of the individual. As used in this subsection, "family or household member" has the same meaning as in Title 19-A, section 4102, subsection 6;

SUMMARY

This bill amends the Freedom of Access Act to specify that the reasonable time within which an agency or official having custody or control of a document has to provide a good faith, nonbinding estimate of the time that it will take the agency or official to comply with the request may not be longer than 30 days following receipt of the request. This bill allows the public access officer for an entity subject to the Freedom of Access Act to give priority to requests for public records from residents of Maine and journalists. This bill also amends the Intelligence and Investigative Record Information Act to allow the disclosure of a record that may constitute an unwarranted invasion of privacy if that disclosure is

consented to by the individual who is the subject of the record or, if the individual is deceased, incapacitated or a minor, by a family or household member of that individual.

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April 3, 2023

Testimony of Representative David Boyer

Presenting L.D. 1203 An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

Before the Joint Standing Committee on Judiciary

Senator Carney, Representative Moonen and distinguished members of the Joint Standing Committee on Judiciary, my name is Representative David Boyer and I am proud to present L.D. 1203 An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act. The goal of this legislation is to strengthen Maine's Right to Know law and does so in three ways.

As you know, under current law, agencies or officials must, within a reasonable time, provide a good faith, nonbinding estimate of the time it will take to fulfil the public records request. The issue many journalists, activists, and concerned citizens run into is the definition of "reasonable time." I have personally had requests that seem to hang in the abyss. My bill would set a deadline of 30 days for an estimate to be given. This is just for the estimate, not actually fulfilling the request.

The next change would be to allow Maine's Public Access Ombudsman to have the discretion to prioritize requests from Mainers or journalists over commercial and other out-of-state interests. This came about after having a conversation with the Ombudsman who said their office is bogged down with requests from commercial data mining companies. These types of requests should only be worked on when there isn't requests from Mainers or journalists.

Finally, this bill amends the Intelligence and Investigative Record Information Act to allow the disclosure of a record that may constitute an unwarranted invasion of privacy if that disclosure is consented to by the individual who is the subject of the record, or if the individual is deceased, incapacitated or a minor, by a family or household member of that individual.

I have spoken with Maine journalists who have ran into this part of law that has been used to prevent newsworthy information from becoming public.

One example of this law being used was the 2017 death of Chance Baker. Mr. Baker was shot and killed by a Portland Police officer. At the time, the Bangor Daily News made a public records request for the dashboard camera video from the scene of the shooting. The Portland Police Department denied the request stating that it was an open investigation. Additionally, the departments lawyer, BethAnne Poliquin also stated that personnel records are exempt from freedom of access requests, and this was interpreted to include the dash camera footage. Ms. Poliquin also cited the Intelligence and investigative information carveout that my bill addresses. What is the point of bodycams and dashcams if their footage can never be made public. I have included the Bangor Daily News article detailing this event with my testimony.

In 2020, the Portland Press Herald was denied a public records request by the Cumberland County Sheriff's Office. The request was for the footage of an alleged assault on an incarcerated man by a jail guard. Cumberland County Sheriff Kevin Joyce requested a criminal investigation after seeing video footage of the July 2020 altercation. His office cited the exemption for intelligence and investigative information when refusing to release the footage.

Furthermore, in 2014 the Maine Supreme Court reversed a lower court decision and ruled that 911 emergency call transcripts should be considered public records and are able to be released. This came after police would often refuse to release these transcripts because of the exception in the Intelligence and Investigative Record Information Act.

It's clear that Maine's Right to Know law needs updating and strengthening and I hope the committee considers these common-sense changes.

Thank you for your time and consideration today.

STATE OF MAINE

KATHRYN SLATTERY
DISTRICT I

JACQUELINE SARTORIS
DISTRICT II

NEIL MCLEAN
DISTRICT III

MAEGHAN MALONEY
DISTRICT IV

R. CHRISTOPHER ALMY
DISTRICT V

NATASHA IRVING
DISTRICT VI

ROBERT GRANGER
DISTRICT VII

TODD R. COLLINS
DISTRICT VIII

MAINE PROSECUTORS ASSOCIATION
SHIRA BURNS, EXECUTIVE DIRECTOR

"An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act"
Before the Joint Standing Committee on Judiciary

Public Hearing Date: April 3, 2023
Testimony in Opposition of LD 1203

Senator Carney, Representative Moonen and members of the Joint Standing Committee on Judiciary. My name is Shira Burns and I represent the Maine Prosecutors Association. I am here to testify in opposition of LD 1203.

Intelligence and investigative record information contains information about many subjects, a potential suspect, victims and witnesses. The current statute allows consideration to be taken regarding everyone's unwarranted invasion of personal privacy, not just one person contained in a record. This change narrows the focus to the "subject" of the record, but doesn't define who the subject of the record would be.

Furthermore, family or household members could have differing opinions regarding consenting to the dissemination of the intelligence and investigative record information. The bill does not give guidance if the record should be released when at least one family member objects to the dissemination. Family members might also not be in the best position to make this decision if they are involved in the substance of the record. Also, it would be a very big time burden if all "family or household members" needed to be contacted to obtain their consent for release of the records pursuant to this subsection.

For these reasons, the Maine Prosecutors Association is in opposition of LD 1203.

STATE OF MAINE
Department of Public Safety
Maine State Police
State House Station 42
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Augusta, Maine
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JANET T. MILLS
GOVERNOR

MICHAEL SAUSCHUCK
COMMISSIONER

COL. WILLIAM ROSS
CHIEF

LT. COL. BRIAN P. SCOTT
DEPUTY CHIEF

Testimony of Paul Cavanaugh, DPS FOAA records officer, Legislative Liaison, and MSP Staff Attorney

IN REGARD TO LD 1203

An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

Senator Carney, Rep. Moonen and distinguished Members of the Joint Standing Committee on Judiciary. My name is Paul Cavanaugh, and I am the FOAA officer and legislative liaison for the Department of Public Safety and the Staff Attorney for the Maine State Police. I am here today to testify on behalf of the Department of Public Safety and the Maine State Police regarding LD 1203: we are neither for nor against sections 1 and 2 as they would amend FOAA but are opposed to section 3 and the amendments to the intelligence and investigative record information act.

Section 1 and section 2 of LD 1203 propose amendments that we feel will have no impact on our response to requests or will have a very minor impact on our responses, so we are neither for nor against those changes.

Section 3 proposes a drastic change to the intelligence and investigative record information act that would at its best create confusion and more likely would create conflicting duties on this agency and result in much

more litigation over implementation. We have a number of specific concerns that I will address in no particular order.

First the proposed change to §804 could be seen to create a conflict with §808 of the Act. Under section 808 a person who is the subject of a record has no right to inspect or review that record for accuracy or completeness, but the proposed amendment to 804 could be read to allow that person to consent to disclosure of those records to a third party.

The proposed amendment allows "the individual who is the subject of the record or if that individual is deceased, incapacitated, or a minor" to consent to the release of records. Intelligence and investigative record information is rarely limited to a specific individual but contains all records about an investigation – suspect, victim, witness, and the like. The proposed amendment does not define who is the "individual who is the subject of the record" such that an argument could be make that each person named in the record is the subject of the record and a suspect could therefore consent to the release of the unwarranted invasion of personal privacy otherwise protected for the victim or anyone else named in the record.

The proposed amendment imports the vocabulary of protection orders in title 19-A into the Act by incorporating "family and household member" language. This creates confusion with section 806 which uses specific familial relation language to allow the release of records (an immediate family member, foster parent, or guardian" for example). Likewise, the extension of people who can consent to the release of personal, private information would include former lovers, former roommates, parents of natural children when the record might not involve that child and divorced or separated people when the record is about that very conflict. For example, if a child were killed – who should be able to consent to the release of those records to the public before anyone is charged criminally – the parent suspected in the death, the other parent, the suspect parent's former lovers or spouse, the non-suspect parent's former lovers or spouses or roommates?

The proposed amendment would allow a third party to consent to the release of information otherwise confidential as an unwarranted invasion of personal privacy if the person who is the subject of the record is deceased, incapacitated, or a minor. Currently, section 806 allows the

release of records to a victim if due to "death, age or physical or mental disease, disorder or defect, the victim cannot realistically act" on their own behalf. Those different standards could result in the release of records in inconsistent manners. Victims are not likely to want suspects to get such information.

For these reasons, we are neither for nor against sections 1 & 2 of LD 1203 but are opposed to section 3.

On behalf of the Department of Public Safety and the Maine State Police, I thank you for your time and would be happy to try and answer any questions that you might have.

Maine Town & City Clerks' Association

Local Government Center • 60 Community Drive
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Date: March 21, 2023

To: Senator Ann Carney, Senate Chair
Representative Matt Mooney, House Chair
And members of the Judiciary Committee

From: Patti Dubois, Chairperson, Legislative Policy Committee
Maine Town and City Clerks' Association

Re: LD 1203 – An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

Position: Neither For Nor Against

The Maine Town & City Clerks' Association is in strong support of LD 1203 and we thank you for the opportunity to outline our points for your Committee.

Members were in support of the language to specify that the reasonable time for an agency to provide a good faith estimate of the time and cost be established to be no longer than 30 days following the receipt of the request. Although there were some concerns stated that there are instances where it may be difficult to meet this requirement for certain complex requests, members still felt it was reasonable.

Since the section regarding the prioritization of requests is not mandatory, members were not overly concerned by this language addition but most felt that it was not necessary since requests are generally processed on a first-come, first-served basis. Focusing on a complex request simply because it is from a journalist may delay responses to other requests.

Many questions were raised regarding the consented release of a record which would constitute an unwarranted invasion of privacy and how these disclosure consents would be administered, if passed.

The Maine Town & City Clerks' Association appreciates the opportunity to share its testimony with the Committee. Should any questions arise, please feel free to contact me at 207)680-4210 or by email: pdubois@waterville-me.gov .

AARON M. FREY
ATTORNEY GENERAL

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April 3, 2023

Senator Anne Carney, Chair
Representative Matt Moonen, Chair
Committee on Judiciary
100 State House Station
Augusta, Maine 04333

Re: *LD 1203, An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act*

Greetings, Senator Carney and Representative Moonen,

I am writing to provide comments neither for nor against LD 1203, *An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act.*

Under current law, and with some exceptions, records containing intelligence and investigative information may not be disclosed if there is a reasonable probability that release would constitute an unwarranted invasion of personal privacy. LD 1203 would allow for disclosure when the "subject" of the record has consented, or, if the "subject" is deceased, incapacitated or a minor, by a person who is a family or household member.

The Office of the Attorney General ("OAG") receives a high volume of FOAA requests. A matter of concern for our office's workload is that investigations rarely involve just one person. The bill references "the subject" of the record but does not provide any definition as to who that would include. While "subject" could mean the person being investigated, there are almost always other individuals identified in investigation files (for example, co-actors, witnesses, contacts, and interviewees and victims) whose privacy would be invaded were the records to be released. Requiring a release from every individual identified in an investigation file before we can respond to a FOAA request would add significant time and work to what can already be a lengthy and labor-intensive process. Our office does not routinely track contacts from resolved investigations over time, and individuals move, change phone numbers, surnames, or pass away. It is unclear how much effort would be required to demonstrate due diligence in the seeking of releases, and it would raise transparency concerns should we be unable to obtain releases from each of these

concerns should we be unable to obtain releases from each of these involved parties. Importantly, the OAG does not have dedicated staff for intake, processing and responding to requests.

We appreciate the privacy concerns behind this bill and always do our best to balance privacy with the public's right to transparency. Our office can be available to answer questions if that would helpful to your process.

Sincerely,

Aaron M. Frey
Attorney General

ACLU
AMERICAN CIVIL LIBERTIES UNION
Maine

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TESTIMONY OF MICHAEL KEBEDE, ESQ.

LD 1203 – Ought To Pass

An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

Joint Standing Committee on Judiciary

April 3, 2023

Senator Carney, Representative Moonen, and distinguished members of the Joint Standing Committee on Judiciary, greetings. My name is Michael Kebede, and I am the policy counsel at the ACLU of Maine, a statewide organization committed to advancing and preserving civil rights and civil liberties guaranteed by the Maine and U.S. Constitutions. On behalf of our members, we urge you to support section 1 of LD 1203 because it would provide clarity to the public when they seek public records.

Currently, when a person submits a request to a public agency or official, the agency or official must acknowledge receipt of the request within five working days. However, there is no specified time limit for when the agency or official must give an estimate of how long it will take to fulfill the request for information. If this bill passed, it would require the agency or official to give a "good faith, nonbinding estimate of the time within which the agency or official will comply with the request, as well as a cost estimate" of the request, no later than 30 days following receipt of the request.

The purpose of Maine's FOAA law is to promote transparency in government by, among other things, ensuring that "public proceedings exist to aid in the conduct of the people's business," and that the records of actions from such proceedings are "open to public inspection." 1 M.R.S. §401. The purposes of FOAA are frustrated when citizens must wait for an indeterminate amount of time to get a mere estimate of when their document request may be fulfilled. Section 1 of this legislation strikes a balance between the public's right to receive information from its government, and government officials' needs to perform their jobs outside of responding to FOAA requests. It gives clarity to both parties about what is expected, and when. It does not change FOAA requirements in terms of what work government entities prioritize, but sets clear expectations for both the government and the public. For that reason, we support Section 1 of this bill.

We take no position on Sections 2 or 3 of the bill, but note that Section 2 may encounter legal challenge under the privileges and immunities clause.

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Testimony of the Maine Municipal Association

In Opposition to

LD 1203 - *An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act*

April 3, 2023

Sen. Carney, Rep. Moonen and members of the Judiciary Committee, my name is Rebecca Lambert, and I am providing testimony in opposition to LD 1203 on behalf of the Maine Municipal Association's (MMA) elected 70-member Legislative Policy Committee (LPC). For reference, the LPC provides direction to the advocacy team at MMA and establishes the position on bills of municipal interest.

Following current laws as it exists is extremely important to local leaders across Maine, including providing citizens with access to public records and doing so in a timely manner. The part of this proposed bill that specifies a time frame of no later than 30 days in which an agency is to respond to the requestor with a good-faith, nonbinding estimate of the time frame and costs associated with complying with the request does not cause officials as much concern as section two and three, since requests/estimates are typically responded to within the specified time frame.

Section two of the proposed bill allows the entity to prioritize the requests giving preference to Maine residents, or journalists acting in their professional capacity with the intention of providing information to the public. This portion of the bill causes concern among municipal officials where requests are fulfilled in the order they are received and do not typically have issues fulfilling requests in an appropriate time frame.

Municipal officials are also concerned with section three of the proposal as it may constitute an unwarranted invasion of privacy. While individual consent does not cause heartburn among officials, allowing family members to allow the invasion of privacy for incapacitated or deceased individuals and minors, could have unintended consequences when taking into consideration the variety of family styles, dynamics and choices available.

For these reasons the LPC is opposed to LD 1203. Thank you for your time and for considering the municipal perspective on this issue.

Sen. Carney, Rep. Moonen, members of the Joint Standing Committee on Judiciary, my name is Judith Meyer. I am the editor of the Sun Journal in Lewiston, the Kennebec Journal and the Morning Sentinel.

I am here today on behalf of the Maine Press Association to urge this committee not to pass LD 1203, An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act.

* * *

The Maine Press Association enjoys a seat on the Right to Know Advisory Committee, a committee established by the Legislature more than a dozen years ago specifically to serve as a resource for ensuring compliance with Maine's Freedom of Access Act and upholding the integrity of the purposes of the Act as it applies to all public entities in the conduct of the public's business.

Every year, every single year since its inception, RTK Committee members have discussed, debated and deliberated on the question of what is a "reasonable" response time for FOAA estimates and requests and each and every time have landed on what is known as the "reasonable" standard for response, a specific legal standard that applies when one entity owes a duty to another. That means government may take only so long to respond as is reasonable, and no longer.

So, if a person were to request access to Planning Board records approving a recent development project, for instance, a reasonable response time for both estimate and records might be the same or next day. The more complicated the request, the longer it takes for an entity to respond. Which is reasonable.

According to the 2022 annual report of Maine's Public Access Ombudsman, which tracks response time of FOAA requests at various state agencies, there were a total of 2,625 FOAA requests made to these agencies in 2022, of which 1,423 of the requests were fully responded to within five days. Another 639 requests were responded to within 30 days; the remaining requests – 573 – took 30 days or longer for response.

That's a lot of numbers, but the gist is that of all requests received, 2,062 were responded to in full within 30 days, or 78.5 percent. Estimates for these requests flowed much faster than 30 days.

Under the proposal before you, government entities would continue to provide a receipt acknowledging a request within five days, but would have 30 days to provide an estimate of cost rather than the current “reasonable” standard of time.

Thirty days is too long to receive an estimate, and in most cases would be unreasonable. Waiting 30 days to get an estimate on what could be an urgent request and/or a simple request – which includes most media requests – especially if the record access is needed within that 30-day timeframe, is unreasonable and significantly hinders access.

Everyone at the Maine Press Association loves a hard deadline, but the fact is if a person has a 30-day deadline to respond to any request for anything, more than likely they will take nearly all – or all – of that time to respond. It’s how we’re all wired.

Establishing a 30-day deadline to provide a cost estimate will significantly slow access for a vast majority of requestors and does not serve the public good. We know this because we have years of hard data collected by the Ombudsman showing FOAA estimates and responses are currently made much more quickly.

This bill also proposes giving priority FOAA access to journalists and Maine people, which we do not support for two reasons.

Journalists should have no greater access to public records than the public itself. Separating the two would create a tiered system of access – something RTK has also frequently discussed and rejected – because it could create tension to offer privileged access to journalists and not to other "people."

When "people" other than journalists make FOAA requests, it's often for urgent personal needs that --- I would argue --- are equally important if not more important than what we ask for as professionals. As a matter of practicality, journalists may already get quicker access because we know what we're looking for, how to ask for it, and that we may have to pester people to get it. The general public doesn't necessarily have that skillset.

As for giving priority to Maine people, we have seen other states adopt such practices and the instant response is the creation of a network of residents who serve as paid and unpaid proxies for out-of-state requestors. A plea went out on a national FOIA listserve just two weeks seeking in-state proxies in Arkansas and Kentucky “who can help facilitate public records requests” for out-of-state researchers and others. It’s become a cottage industry in some states to work around this obstacle and make in-state standards ineffective.

Testimony in Support of LD 1203: "An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act"

Senator Carney, Representative Moonen, and the distinguished members of the Committee on Judiciary, my name is Nick Murray and I serve as director of policy for Maine Policy Institute. We are a free market think tank, a nonpartisan, non-profit organization that advocates for individual liberty and economic freedom in Maine. Thank you for the opportunity to testify on LD 1203.

The last review of state freedom of access laws by the National Freedom of Information Coalition (NFOIC) in 2017 gave Maine just 6.5 points out of 16 total possible points: an "F" grade.[1] Maine's law has changed very little since then. [2]

We are pleased to see that commonsense Freedom of Access Act (FOAA) reform has bipartisan support in this legislature. The problems in Maine's law are apparent to journalists and observers across the political spectrum, and in our experience, have only gotten worse in the last four years.

In Maine Policy Institute's 20-plus years of experience submitting FOAA requests, state compliance has never been as poor as it is today. Rarely did we struggle to get information from the government under the Baldacci or LePage administrations. It almost seems as if government offices have been instructed by Gov. Mills to slow-walk the process and price certain requestors out of the information they seek.

In the last few years, the FOAA process has been unnavigable. Routine requests that should take a matter of weeks instead take several months or more. The cost estimates have spiraled out of control. The law has no teeth.

Our FOAA law, as it stands today, makes it far too easy for bureaucrats to obfuscate their communications and activities. It empowers the government to sit on state secrets – not citizens to uncover them – and is in desperate need of immediate reform.[3]

The 30-day limitation proposed in this bill is only for the delivery of a time and cost estimate of each request – it is still nonbinding. Of all the issues with FOAA, LD

[1] https://www.nfoic.org/states-failing-foi-responsiveness/
[2] https://northernnewenglandmunicipallaw.blogspot.com/2021/11/foaa-changes-now-in-effect.html
[3] https://www.pressherald.com/2023/03/12/commentary-maines-sunshine-law-has-lost-its-shine/

1203 offers a small change, but one that is basic to ensure some level of public access. This committee will likely face far more ambitious proposals this session; these should also be given serious consideration.

Please deem LD 1203 “Ought To Pass” and provide just a little more government accountability to the people and their right to know. Thank you for your time and consideration.

MAINE CHIEFS OF POLICE ASSOCIATION

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Statement of Opposition to L.D. 1203,
An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act
April 3, 2023

Senator Carney, Representative Moonen, and distinguished Committee on Judiciary. My name is Charles Rumsey, and I am the Chief of the Cumberland Police Department. I am submitting testimony on behalf of the Maine Chiefs of Police Association in opposition to section three of LD 1203.

The Mission of the Maine Chiefs of Police is to secure a closer official and personal relationship among Maine Police Officials; to secure a unity of action in law enforcement matters; to enhance the standards of police personnel, police training and police professionalism generally; to devise ways and means for equality of law enforcement throughout the state of Maine; to advance the prevention and detection of crime; to prescribe to the Law Enforcement Code of Ethics; and to promote the profession of law enforcement as an integral and dedicated force in today's society sworn to the protection of life and property.

According to the bill summary,

> This bill amends the Freedom of Access Act to specify that the reasonable time within which an agency or official having custody or control of a document has to provide a good faith, nonbinding estimate of the time that it will take the agency or official to comply with the request may not be longer than 30 days following receipt of the request. This bill allows the public access officer for an entity subject to the Freedom of Access Act to give priority to requests for public records from residents of Maine and journalists. This bill also amends the Intelligence and Investigative Record Information Act to allow the disclosure of a record that may constitute an unwarranted invasion of privacy if that disclosure is consented to by the individual who is the subject of the record or, if the individual is deceased, incapacitated or a minor, by a family or household member of that individual.

We are in opposition to section three of the bill because it has the potential to add a tremendous amount of work to the process of fulfilling a record request. This provision adds a complicating factor to records which, if released, would constitute an unwarranted invasion of privacy and would require us to determine whether someone consents to the release.

Many of the records in law enforcement possession reference multiple subjects, and in the case of a subject who is deceased, incapacitated or a minor, this statute change would allow for release of the record if there is consent by "a," or one person who is a family or household member of the individual. In practice, this is unworkable – generally, individuals who are deceased, incapacitated or a minor have multiple family or household members and frequently, those individuals are not in agreement with the decision to release a record. This law would require us to identify and then contact each family or household member, to determine if they ALL consent to the release.

We are not taking a position on the other pieces of this bill.

And so, for these reasons, we ask that you strike section three of LD 1203 in the work session. And, on behalf of the Maine Chiefs of Police Association, we want to thank the committee members for your work on this Committee.

MSSA

Maine School Superintendents Association

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TESTIMONY IN OPPOSITION TO

L.D. 1203

AN ACT TO CLARIFY DEADLINES IN THE FREEDOM OF ACCESS ACT AND DISCLOSURE PROVISIONS IN THE INTELLIGENCE AND INVESTIGATIVE RECORD INFORMATION ACT

Senator Carney, Representative Moonen and members of the Committee on Judiciary. I am Victoria Wallack, communications and government relations director for the Maine School Management Association testifying on behalf of the legislative committee of the Maine School Superintendents Association in opposition to L.D. 1203.

This bill says that a good faith estimate of time on how long it will take an entity to comply with a freedom of access request can take no longer than 30 days.

Superintendents are opposed to this bill because of the relatively recent history of receiving requests that are so expansive in some districts extra staff or staff hours have been added to comply.

As an example, the Gorham School District was hit with 34 freedom of information requests that focused on the school's support for its students who identified as gay or bisexual and a demand that books be removed from the school library and posters be taken down that encouraged acceptance. A similar freedom of access request was made to the Hermon School District that resulted in a lawsuit against the district.

CLAC MEMORANDUM/TESTIMONY
LD 1203 (Opposed to Section 3)

TO: Senator Anne Carney
Representative Matt Moonen
Joint Standing Committee on Judiciary

FR: Criminal Law Advisory Commission (CLAC)
c/o laura.yustak@maine.gov

RE: LD 1203, an Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

DA: April 3, 2023

The Criminal Law Advisory Commission (CLAC)* respectfully submits the following testimony in opposition to Section 3 of LD 1203.

CLAC members see the proposal as unworkable. The "subject" of a record may be any number of persons, including a defendant who is charged with a crime, an uncharged suspect who is not aware of an investigation, a witness, a victim, or a person named or described by persons interviewed as part of an investigation. One "subject" of a record cannot waive privacy rights of others identified in the record.

Unintended negative consequences may flow from a statutory requirement to disclose if a family or household member consents to release on behalf of an incapacitated, deceased, or minor subject. Members of the same family or household may not agree as to whether records should be released. Family or household members may be involved in crimes against the subject of a record or not be the next of kin or personal representative of a deceased subject. Record custodians may not know which persons to contact or whether there are conflicts between people named in or acting on behalf of persons named in records.

CLAC has no position with respect to Sections 1 and 2 of the bill, which address provisions of the FOAA outside the statutory role of the Commission.

*CLAC is an advisory body established by the Legislature. 17-A M.R.S. §§ 1351-1357. It consists of 9 members appointed by the Attorney General. Our current members include current defense attorneys, prosecutors, Maine Bar Counsel, and a retired practitioner with experience as defense counsel, prosecutor and in court administration. In addition, three sitting judges and one retired practitioner, appointed by the Chief Justice of the Supreme Judicial Court, and, by statute, the Co-Chairs of the Legislature's Committee on Criminal Justice and Public Safety, serve as consultants. The Supreme Judicial Court's Criminal Process Manager serves as liaison from the Court to CLAC. CLAC advises the Legislature on matters relating to crimes in the Criminal Code and in other Titles, the Bail and Juvenile Codes, and with respect to other statutes related to criminal justice processes.

§408-A. Public records available for inspection and copying

Except as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a reasonable time of making the request to inspect or copy the public record. [PL 2011, c. 662, §5 (NEW).]

1. Inspect. A person may inspect any public record during reasonable office hours. An agency or official may not charge a fee for inspection unless the public record cannot be inspected without being converted or compiled, in which case the agency or official may charge a fee as provided in subsection 8.
[PL 2011, c. 662, §5 (NEW).]

2. Copy. A person may copy a public record in the office of the agency or official having custody of the public record during reasonable office hours or may request that the agency or official having custody of the record provide a copy. The agency or official may charge a fee for copies as provided in subsection 8.

A. A request need not be made in person or in writing. [PL 2011, c. 662, §5 (NEW).]

B. The agency or official shall mail the copy upon request. [PL 2011, c. 662, §5 (NEW).]
[PL 2011, c. 662, §5 (NEW).]

3. Acknowledgment; clarification; time estimate; cost estimate. The agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within 5 working days of receiving the request and may request clarification concerning which public record or public records are being requested. Within a reasonable time of receiving the request, the agency or official shall provide a good faith, nonbinding estimate of the time within which the agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The agency or official shall make a good faith effort to fully respond to the request within the estimated time. For purposes of this subsection, the date a request is received is the date a sufficient description of the public record is received by the agency or official at the office responsible for maintaining the public record. An agency or official that receives a request for a public record that is maintained by that agency but is not maintained by the office that received the request shall forward the request to the office of the agency or official that maintains the record, without willful delay, and shall notify the requester that the request has been forwarded and that the office to which the request has been forwarded will acknowledge receipt within 5 working days of receiving the request.
[PL 2015, c. 317, §1 (AMD).]

4. Refusals; denials. If a body or an agency or official having custody or control of any public record refuses permission to inspect or copy or abstract a public record, the body or agency or official shall provide, within 5 working days of the receipt of the request for inspection or copying, written notice of the denial, stating the reason for the denial or the expectation that the request will be denied in full or in part following a review. A request for inspection or copying may be denied, in whole or in part, on the basis that the request is unduly burdensome or oppressive if the procedures established in subsection 4-A are followed. Failure to comply with this subsection is considered failure to allow inspection or copying and is subject to appeal as provided in section 409.
[PL 2015, c. 494, Pt. A, §1 (RPR).]

4-A. Action for protection. A body, an agency or an official may seek protection from a request for inspection or copying that is unduly burdensome or oppressive by filing an action for an order of protection in the Superior Court for the county where the request for records was made within 30 days of receipt of the request.

A. The following information must be included in the complaint if available or provided to the parties and filed with the court no more than 14 days from the filing of the complaint or such other period as the court may order:

(1) The terms of the request and any modifications agreed to by the requesting party;

(2) A statement of the facts that demonstrate the burdensome or oppressive nature of the request, with a good faith estimate of the time required to search for, retrieve, redact if necessary and compile the records responsive to the request and the resulting costs calculated in accordance with subsection 8;

(3) A description of the efforts made by the body, agency or official to inform the requesting party of the good faith estimate of costs and to discuss possible modifications of the request that would reduce the burden of production; and

(4) Proof that the body, agency or official has submitted a notice of intent to file an action under this subsection to the party requesting the records, dated at least 10 days prior to filing the complaint for an order of protection under this subsection. [PL 2015, c. 248, §2 (NEW).]

B. Any appeal that may be filed by the requesting party under section 409 may be consolidated with an action under this subsection. [PL 2015, c. 248, §2 (NEW).]

C. An action for protection may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require upon the request of any party. [PL 2015, c. 248, §2 (NEW).]

D. If the court finds that the body, agency or official has demonstrated good cause to limit or deny the request, the court shall enter an order making such findings and establishing the terms upon which production, if any, must be made. If the court finds that the body, agency or official has not demonstrated good cause to limit or deny the request, the court shall establish a date by which the records must be provided to the requesting party. [PL 2015, c. 248, §2 (NEW).]

[PL 2017, c. 288, Pt. A, §1 (AMD).]

5. Schedule. Inspection, conversion pursuant to subsection 7 and copying of a public record subject to a request under this section may be scheduled to occur at a time that will not delay or inconvenience the regular activities of the agency or official having custody or control of the public record requested. If 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 the office of the agency or official, if an office exists.
[PL 2011, c. 662, §5 (NEW).]

6. No requirement to create new record. An agency or official is not required to create a record that does not exist.
[PL 2011, c. 662, §5 (NEW).]

7. Electronically stored public records. An agency or official having custody or control of a public record subject to a request under this section shall provide access to an electronically stored public record either as a printed document of the public record or in the medium in which the record is stored, at the requester's option, except that the agency or official is not required to provide access to an electronically stored public record as a computer file if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in or associated with that file.

A. If in order to provide access to an electronically stored public record the agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format for inspection or copying, the agency or official may charge a fee to cover the cost of conversion as provided in subsection 8. [PL 2011, c. 662, §5 (NEW).]

B. This subsection does not require an agency or official to provide a requester with access to a computer terminal. [PL 2011, c. 662, §5 (NEW).]

[PL 2011, c. 662, §5 (NEW).]

8. 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 public records as follows.

A. The agency or official may charge a reasonable fee to cover the cost of copying. A reasonable fee to cover the cost of copying is no more than 10¢ per page for a standard 8 1/2 inches by 11 inches black and white copy of a record. A per-page copy fee may not be charged for records provided electronically. [PL 2021, c. 313, §1 (AMD).]

B. The agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record in accordance with this paragraph. Compiling the public record includes reviewing and redacting confidential information.

(1) The agency or official may not charge a fee for the first 2 hours of staff time per request.

(2) After the first 2 hours of staff time, the agency or official may charge a fee of not more than $25 per hour. [PL 2021, c. 375, §1 (AMD).]

C. The agency or official may charge for the actual cost to convert a public record into a form susceptible of visual or aural comprehension or into a usable format. [PL 2011, c. 662, §5 (NEW).]

D. An agency or official may not charge for inspection unless the public record cannot be inspected without being compiled or converted, in which case paragraph B or C applies. [PL 2011, c. 662, §5 (NEW).]

E. The agency or official may charge for the actual mailing costs to mail a copy of a record. [PL 2011, c. 662, §5 (NEW).]

F. An agency or official may require payment of all costs before the public record is provided to the requester. [PL 2017, c. 158, §1 (NEW).]

[PL 2021, c. 313, §1 (AMD); PL 2021, c. 375, §1 (AMD).]

9. Estimate. The agency or official having custody or control of a public record subject to a request under this section shall provide to the requester an estimate of the time necessary to complete the request and of the total cost as provided by subsection 8. If the estimate of the total cost is greater than $30, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than $100, subsection 10 applies.

[PL 2011, c. 662, §5 (NEW).]

10. Payment in advance. The agency or official having custody or control of a public record subject to a request under this section may require a requester to pay all or a portion of the estimated costs to complete the request prior to the search, retrieval, compiling, conversion and copying of the public record if:

A. The estimated total cost exceeds $100; or [PL 2011, c. 662, §5 (NEW).]

B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner. [PL 2011, c. 662, §5 (NEW).]

[PL 2011, c. 662, §5 (NEW).]

11. Waivers. The agency or official having custody or control of a public record subject to a request under this section may waive part or all of the total fee charged pursuant to subsection 8 if:

A. The requester is indigent; or [PL 2011, c. 662, §5 (NEW).]

B. The agency or official considers release of the public record requested to be 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 in the commercial interest of the requester. [PL 2011, c. 662, §5 (NEW).]

[PL 2011, c. 662, §5 (NEW).]

12. Retention of fees or costs. An agency may retain any fees or costs charged under this section. [PL 2021, c. 375, §2 (NEW).]

SECTION HISTORY

PL 2011, c. 662, §5 (NEW). PL 2013, c. 350, §§1, 2 (AMD). PL 2015, c. 248, §§1, 2 (AMD). PL 2015, c. 249, §1 (AMD). PL 2015, c. 317, §1 (AMD). PL 2015, c. 494, Pt. A, §1 (AMD). PL 2017, c. 158, §1 (AMD). PL 2017, c. 288, Pt. A, §1 (AMD). PL 2021, c. 313, §1 (AMD). PL 2021, c. 375, §§1, 2 (AMD).