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MEMORANDUM

TO: Members, Right to Know Advisory Committee, Burdensome FOAA Requests Subcommittee

FROM: Subcommittee Staff

DATE: November 18, 2024

RE: Subcommittee Recommendations

At prior meetings, the Burdensome FOAA Requests Subcommittee raised a number of potential recommendations to report back to the full Right to Know Advisory Committee at its final meeting. Below is a list of those potential recommendations, along with outstanding questions the Subcommittee may wish to consider and some additional information that the Subcommittee requested.

1) Recommendations & Additional Considerations

Recommendation 1: Strengthen/make more accessible the action for protection established in Title 1, section 408-A, subsection 4-A

a) Increase the timeframe for filing in court – currently, an agency must file for an action of protection within 30 days of receiving the request and notify the requester ten days prior to filing. Questions for consideration include:
   i) *Current timeframe may pose problems because the agency only has 30 days to make the determination that the request is indeed burdensome and decide to seek action in court*
   ii) *How much longer of a timeframe would be beneficial?*
   iii) *Would this make an agency more likely to pursue an action for protection, or are there other structural concerns that discourage use of actions for protection?*

b) Amend section 408-A to allow an agency to seek protection against repeated requests; currently, the statute allows for protection against "a request…that is unduly burdensome or oppressive." Questions for consideration include:
   i) *How to effectively capture harassing nature or "bad faith" repeated requests in language?*
   ii) *Can this be modeled after a so-called "Spickler order?" *(see section 2 on page 3 for more information)*
   iii) *Should an amendment specify a number of requests that meet the threshold for "unduly burdensome or oppressive?*

Recommendation 2: Prevent Use of FOAA for Discovery

a) How have other states addressed the use of freedom of access laws for the purpose of discovery?

i) Washington, D.C.: D.C Code §2-534 contains an exemption for "[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained." This exemption has been interpreted as precluding use of the FOIA as a "private discovery tool." *See Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 522 (D.C. 1989)

ii) Vermont: 1 V.S.A. §317(c) details public records that are exempt from public inspection and copying under the Public Records Act, including "[r]ecords that are relevant to litigation to which the public agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation."

Recommendation 3: Allow the court to award court costs to either side after FOAA litigation

a) In cases involving private requestors, courts may be reluctant to award court costs to an agency, and court cost orders can be challenging to enforce

Recommendation 4: Require and/or formalize a FOAA dispute mediation process

a) Threshold question: *Is the existing structure sufficient to provide opportunity for resolution of FOAA concerns/complaints?*

i) YES → No recommendations

ii) NO → See *b*

b) How should the capacity to resolve FOAA concerns pre-litigation be enhanced?

i) Option 1: Increased support for the Ombudsman's office, and

(1) Retain current authority; OR

(2) Expand authority of office to include all or some of the following

(a) Subpoena powers;

(b) Binding decision-making authority;

(c) Mediation process based in the AG's Office (see AG's Consumer Mediation Process for model) → See *c*

ii) Option 2: Establish mediation process within the court system, (see current mediation services offered by the courts, including foreclosure mediation, family matters mediation, small claims mediation, forcible entry and detainer (evictions) mediation and land use mediation) → See *c*

c) Additional questions to consider in developing a mediation program

i) Where to house the program (see above);

ii) Funding sources;

iii) How to staff and supervise the program (trained volunteers; paid staff);

iv) Parameters for acceptance of cases;

v) Timeframe for mediation;
vi) Whether mediation should be tied to an existing court action if housed within the judicial system;
vii) How to manage potentially concurrent jurisdiction with ombudsman program (if mediation housed separately) and with the courts;
viii) Whether decisions of the mediator are binding on the parties; and
ix) Appeal rights.

2) *Spickler* Case History

***Spickler v. Dube*, 463 A.2d 739 (Me.1983) (Spickler 1)**

Robert Spickler appealed a Superior Court judgment entered in favor of Roger Dube in a case involving a complex dispute over a parcel of land. Spickler moved for a new trial, which the Superior Court denied. Spickler appealed to the Supreme Judicial Court, which ruled against Spickler, finding that he had failed to establish abuse of discretion by the lower court.

***Spickler v. Dube*, No. 84–0059P (D.Me.1984) (Spickler II)**

In a case related to Spickler 1, Robert Spickler alleged that the defendant had manufactured evidence in that case. However, Spickler failed to show at trial and his claim was dismissed. The court granted the defendant's claim for injunctive relief and prohibited Spickler from bringing further suit regarding the matter against defendants in federal court.

***Spickler v. Dube*, Nos. 87–1833, 87–1962, 87–1963 (1st Cir. June 22, 1988).**

This case was an appeal of Spickler II; the First Circuit affirmed in an unpublished opinion.

***Spickler v. Key Bank of S. Maine*, 618 A.2d 204 (Me.1992)**

Following the 1988 First Circuit ruling, the Spicklers pursued further claims in state court against Key Bank of Maine. The Superior Court ruled partially in favor of defendants and partially in favor of plaintiffs. The court also issued a permanent injunction preventing the Spicklers from bringing frivolous lawsuits related to the land transaction. The Spicklers appealed, arguing, in part, that the court had abused its discretion in granting the permanent injunction because it restricted their access to the courts. The Supreme Judicial Court rejected this argument, noting that it was settled law that a court could enjoin a party from filing frivolous and vexatious lawsuits. It reiterated the standard that the party seeking the injunction must make a detailed showing of a pattern of abusive and frivolous litigation, but that the court must be careful not to issue a broader injunction than necessary. The Court reviewed the litigants' history and determined that the record supported the injunction.

***Spickler v. Dube*, 644 A.2d 465 (Me.1994)**

Robert Spickler and his wife appealed a Superior Court judgment entered in favor of Roger Dube and Alan Levenson. The case was a continuation of the land transaction at issue in Spickler 1, and the Spicklers had filed a shareholders' derivative suit against defendants. Following the 1988

First Circuit ruling, the Spicklers filed multiple cases in Maine Courts, two of which were consolidated into a single case in Superior Court (Spickler III). The Superior Court found that the complaint was bared on the basis of res judicata, and also issued an injunction, barring the Spicklers against future litigation of the matter unless they could establish a prime facie case to a judge. The Supreme Judicial Court affirmed, citing the standard established in *Spickler v. Key Bank of S,* Maine, finding the injunction was properly tailored to protect the parties' rights.