

11-2004

Final Report of the Committee to Study Compliance with Maine's Freedom of Access Laws

Maine State Legislature

Maine Office of Policy and Legal Analysis

Margaret J. Reinsch

Maine State Legislature, Margaret.Reinsch@legislature.maine.gov

Marion Hylan Barr

Maine State Legislature, Marion.Hylanbarr@legislature.maine.gov

Follow this and additional works at: https://digitalmaine.com/opla_docs

Recommended Citation

Maine State Legislature; Maine Office of Policy and Legal Analysis; Reinsch, Margaret J.; and Hylan Barr, Marion, "Final Report of the Committee to Study Compliance with Maine's Freedom of Access Laws" (2004). *Office of Policy and Legal Analysis*. 137.
https://digitalmaine.com/opla_docs/137

This Text is brought to you for free and open access by the Legislature at Digital Maine. It has been accepted for inclusion in Office of Policy and Legal Analysis by an authorized administrator of Digital Maine. For more information, please contact statedocs@maine.gov.

**STATE OF MAINE
121st LEGISLATURE
SECOND REGULAR SESSION**

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

November 2004

Members:

**Senator Margaret Rotundo, Chair
Representative Theodore Koffman, Chair
Fred Bever
Todd Brackett
Esther Clenott
Richard Flewelling
Jeff Ham
Jess Knox
Mal Leary
Judy Meyer
Steve McCausland
Linda Pistner
Elizabeth Prata
Harry Pringle
Robert Schwartz
Chris Spruce**

Staff:

**Margaret J. Reinsch, Senior Analyst
Marion Hylan Barr, Legislative Analyst
Office of Policy & Legal Analysis
Maine Legislature
(207) 287-1670
<http://www.state.me.us/legis/opla/>**

Table of Contents

	Page
Executive Summary	i
I. Introduction	1
II. Process	1
III. Recommendations	14

Appendices

- A. Authorizing Legislation
- B. Membership List, Committee to Study Compliance with Maine’s Freedom of Access Laws
- C. Recommended Legislation
- D. Inconsistencies: Cases and Statutes

Executive Summary

The Committee to Study Compliance with Maine's Freedom of Access Laws was originally created by Resolve 2003, chapter 83, and was continued, with additional responsibilities, by Public Law 2003, chapter 709. The study committee filed its first report in January 2004; this report is the final report of the study committee. It includes recommended legislation that will be submitted to the 122nd Legislature.

The Committee to Study Compliance with Maine's Freedom of Access Laws divided the responsibilities added by Public Law 2003, chapter 709, into separate subject areas and established three working groups to cover the subject matter. The Compliance and Enforcement Working Group and the Freedom of Access Policy Working Group each met once, while the Public Records and Technology Working Group met twice during September and October. Each working group reported its preliminary recommendations to the full study committee. The full study committee met on September 28th and again on October 19th to finalize recommendations.

The Committee to Study Compliance with Maine's Freedom of Access Laws makes the following unanimous recommendations:

1. Do not change the statute on copying fees;
2. Do not change the law to establish separate charges for remote electronic access;
3. Do not change current enforcement procedures, but formalize the Attorney General's Pilot Project by establishing the Public Access Ombudsman in the Attorney General's Office to assist members of the public as well as public entities with freedom of access inquiries and complaints (legislation proposed);
4. Provide nonpartisan permanent staffing assistance for the exceptions review process (legislation proposed);
5. Do not change the current law concerning the public record status of e-mail and voice-mail but encourage education and training in record identification and maintenance;
6. Do not change the law concerning conducting public meetings through the use of technology; and
7. Establish the permanent Freedom of Access Advisory Committee to provide oversight and ensure the integrity of Maine's Freedom of Access laws (legislation proposed).

The following study committee recommendations are not unanimous:

8. Make personal contact information for public employees, except elected officials, confidential (nine members in favor, one opposed, one abstained) (legislation proposed); and
9. Authorize the court in Freedom of Access litigation to award reasonable attorneys' fees to the wholly prevailing party if the court determines that the failure to comply with the law was committed in bad faith or that the requested access or the enforcement action was frivolous, vexatious or without merit (eight members in favor, five opposed) (legislation proposed).

I INTRODUCTION

The Committee to Study Compliance with Maine's Freedom of Access Laws was established by Resolve 2003, chapter 83. The study committee included several recommendations in its report to the 121st Legislature.¹ The Joint Standing Committee on Judiciary received the recommendations and, pursuant to section 8 of the Resolve, reported out LD 1957, An Act to Implement the Recommendations of the Committee to Study Compliance with Maine's Freedom of Access Laws, which was enacted as Public Law 2003, chapter 709. In addition to amending the Freedom of Access laws concerning executive sessions, copying charges for public records and review of public records exceptions, Public Law 2003, chapter 709 extended the life of the study committee and assigned additional duties.²

The new reporting date for the Committee to Study Compliance with Maine's Freedom of Access Laws was set for November 2004. The study committee was directed to review and make recommendations regarding the following issues: the confidentiality of home contact information of public employees; charges for copies of public records; charges for remote access of electronic records; court authority to award attorneys' fees in freedom of access litigation; options for providing staffing assistance for the public records exception review process; voice-mail and electronic mail as public records; conducting public proceedings through electronic means; standardization and clarification of Maine's public access laws; and the Attorney General's Pilot Project for resolving inquiries and complaints.

This is the final report of the Committee to Study Compliance with Maine's Freedom of Access Laws.

II PROCESS

The study committee benefited greatly from having worked so well together during the first year of the study. Because the law extending the study did not take effect until July 30, 2004, it provided the chairs of the study committee the opportunity to effectively plan and organize the work of the study committee to accomplish its new assignments in a timely manner. The duties were divided into three subject areas and a different study committee member was asked to facilitate each working group. The summaries of discussions and working group recommendations follow.

A. Public Records and Technology Working Group

Jeffrey Ham coordinated the Public Records and Technology Working Group. The other working group members were: Todd Brackett, Esther Clenott, Mal Leary, Harry Pringle and

¹ Final Report of the Committee to Study Compliance with Maine's Freedom of Access Laws, January 2004, State of Maine, 121st Legislature, First Regular Session. Online: <http://www.state.me.us/legis/opla/foalwrpt.PDF>, and appendices <http://www.state.me.us/legis/opla/foarptapp.pdf>.

² See Public Law 2003, chapter 709, included as Appendix A.

Bob Schwartz.³ The working group met on September 9, 2004 and on September 21, 2004, and reported its preliminary recommendations to the entire study committee on September 28th. The group's duties, discussions and recommendations are as follows.

1. Recommend whether the personal home contact information of public employees should be confidential and not subject to disclosure.

LD 1727, An Act to Amend the "Freedom of Access Laws" To Exclude Public Employees' Home Addresses, proposed to amend the Freedom of Access laws to include an exception for the "home address" of employees of the State and its political subdivisions from the definition of "public records." The study committee sent a letter of support to the Judiciary Committee and suggested an expansion of the protected information to include personal e-mail addresses, telephone numbers and fax numbers. The Judiciary Committee was concerned about the definition of "public employee" and did not reach a conclusion about whether home contact information of elected officials and some appointed officials should be treated as confidential. The Judiciary Committee asked the study committee to review the issue. At the same time, the Labor Committee asked the study committee to consider the treatment of home contact information of the trustees of the Maine State Retirement System, seeing the trustees in a different situation than the employees, members and benefit recipients of the retirement system. The Maine State Retirement System also wrote to the study committee, explaining why the home contact information for the trustees of the system should be kept confidential.

Current law provides limited confidentiality for some home contact information for certain public employees, addressing separately state employees, county employees, municipal employees and, now, Maine State Retirement System employees. Current law does not address home contact information for school unit employees, although certain other personal information is designated confidential.

The members discussed the appropriateness of keeping confidential the home contact information of public employees. "Home contact information" is accepted by the group as meaning a home telephone number, the address of the public employee's residence, the home mailing address of the public employee and any e-mail addresses used by the person in his or her non-public employee status. There was consensus that, because for the vast majority of public employees there is no greater public interest in their home contact information than there is for any private citizen, the home contact information for public employees should be confidential and should not be disclosed. That information in an otherwise public record should be redacted and a record consisting of such information should not be a public record.

There was not agreement, however, on whether this shield of confidentiality should apply to elected officials and appointed officials. There is a public interest in the availability of

³ Study committee member Elizabeth Prata volunteered to work with the Public Records and Technology Working Group but was unable to attend the two meetings. She served as a member of the Freedom of Access Policy Working Group.

home contact information in order to provide a tool of accountability concerning elected officials. Does that public interest outweigh the privacy interest of individual officials? Should an elected official be required to accept some compromise of his or her personal privacy as part of the responsibility of being elected to public office?

The working group agreed that the law should not place an affirmative duty on the elected or appointed official to make known to the public every possible way to contact the official at all times. Similarly, the public entity with which the official is associated should not be obligated to publicize such information. The issue arises when a member of the public seeks the home contact information or when the home contact information is contained in an otherwise public record.

Working Group Recommendation:

A. Consensus: Protect home contact information of public employees

B. Not decided:

- (1) Who does the definition of “public employee” include? The working group did not reach agreement on whether the home contact information of elected officials and appointed officials should be protected from public release. The working group examined several options, leaving the final recommendation to the entire study group.
- (2) The working group also explored the question of how much home contact information should be a public record if elected and/or appointed officials are treated differently than the vast majority of public employees.

2. Review the fees charged by agencies and officials for copies of public records and determine whether a cap on fees is appropriate and, if so, recommend the level of such a cap on copying fees.

One of the issues examined in the first year of the work of the Committee to Study Compliance with Maine’s Freedom of Access Laws was the widely divergent and reportedly excessive fees public entities were charging for copies of public records. After much discussion and review, the study committee recommended that the 121st Legislature amend the FOA laws to set a maximum on copying fees of 20 cents per page. That recommendation was not accepted by the Legislature, although the law was amended to set the copying charge limit at a “reasonable fee to cover the cost of copying.”

Working Group Recommendation:

Do not change current law. Although the working group still supports the principle that copying charges should be uniform across the state, the cap on fees proposed to the Legislature was not accepted. The members recognize that the maximum fee originally recommended by the study group is politically unpalatable. In addition, the new “reasonable fee” language went into effect July 30th, and there is little information at this

time to evaluate the consequences of the amendment. The members therefore recommend that no changes be made to the copying fee language at this time, and allow the public and the records custodians to have a chance to work with the existing statute. The issue should be revisited in the not too distant future to see if the overall principle of equal access to public records for everyone is being achieved.

3. Review the issues surrounding appropriate charges for remote electronic access to public records.

Remote electronic access via the Internet is an important tool for the public to use in accessing public records. Such access is of course dependent upon which records the public entity makes available electronically. The working group was charged with reviewing the issues surrounding appropriate charges for remote electronic access to public records.

The working group started the discussion with agreement that an electronic version of a public record should be the same as and treated no differently from a paper version of that public record. The members recognized that, in fact, depending on the type of information, the public entity may have created and may maintain the record in electronic form rather than on paper. In any case, the electronic and paper versions (and any other formats) of a public record must be identical.

To explore the question of appropriate charges for remote electronic access to public records, the working group looked at whether remote electronic access to a public record is the equivalent of inspecting a public record or copying a public record. Harry Pringle suggested that, because technology allows the eventual reduction onto paper of anything available on the Internet in electronic form, an electronic file is really more akin to copying a public record. Therefore, the statute governing copying charges applies to charges for remote electronic access of public records.

The working group agreed that its recommendations would not require public entities to make public records available electronically, therefore leaving up to each entity which records, if any, will be made available.

Working Group Recommendation:

No change is needed in the current law concerning charges for remote electronic access. The law governing copying charges applies to entities charging for remote electronic access to public records, requiring such fees to be “reasonable.” An entity is therefore free to recoup the costs of making public records available electronically, limited by the reasonableness of such fees.

The law may need to be amended to make clear that for the posting of electronic versions of public records created or maintained on paper, the paper and electronic versions must

contain the identical information, unless the differences are explicitly identified and the reasons for the divergence are explained.

4. Review the issues surrounding the extent to which voice mail and electronic mail are public records and determine if statutory changes are necessary to ensure public access to public records.

The working group was charged with reviewing the issues surrounding the extent to which voice mail and e-mail are public records and determine if statutory changes are necessary to ensure public access to public records. The members believe that this question is fairly well resolved, in that the definition in the current law of “public record” is written broadly enough to cover the e-mail format just as it covers a paper document. If the content of a particular e-mail qualifies as the subject matter of a public record, then the e-mail is a public record and the public is entitled to inspect and copy it.

Although not strictly within the charge of the working group, the harder question is how to maintain e-mail so that the public may access it. The Maine State Archives has developed an e-mail policy for State agencies, [Electronic and Voice Mail 2.0, A Management Guide of Maine State Government](#).

Jim Henderson, the State Archivist, met with the working group on September 21st. He provided a very informative briefing about electronic mail and voice mail as public records. He reiterated that the format of the record is irrelevant – paper, electronic, voice – if the content meets the definition of “public record.” In addressing some of the practical concerns about maintaining e-mail and voice-mail, he described the retention schedules adopted by the State Archives pursuant to statute. Organizing the records based on their content and providing clear dates will not only make retrieving the records easier, but, once the retention period has expired, allows the easy disposal of such records.⁴

There was general, if somewhat disquieting, recognition that as we become more efficient in communicating and recording our thoughts and actions electronically, we are losing track of our history because of the impermanence of the media being used.

Working Group Recommendation:

Do not change current law. However, there should be more training and education about the fact that e-mail and voice-mail may be public records because of their content, and therefore ways to maintain those public records must be employed in order to retain them for the required period.

⁴ Some records – only about 5% of the universe of public records in Maine – require permanent retention; therefore 95% are subject to destruction once they have been retained for the required period. Title 5, section 95 gives the State Archivist the authority to establish a records management system. See <http://www.maine.gov/sos/arc/> for the retention schedules for public records for state agencies and local government.

5. Review the issues surrounding the conduct of public proceedings through electronic means and the methods of ensuring public access to such proceedings.

At the first meeting, the working group briefly touched on the issue of using technology to conduct public meetings, with the intent to discuss it fully at the next working group meeting. The consensus was that the Freedom of Access laws do not specifically endorse or prohibit conducting public meetings through different forms of technology, but that the touchstone is the required public access to all public meetings. Use of a technology that does not provide that access - communication through e-mail, for example - would be in violation of the current law.

The issue was discussed again at the September 25th working group meeting. Harry Pringle had discussions with members of the Maine School Management Association members and others about electronic meetings. There was general dissatisfaction with using conference calls for decision-making. Concerns identified were: (1) participants do not know who is with another person who is part of the conference call; (2) participants do not know who may be counseling another person who is part of the conference call; (3) participants cannot see each other and interact; (4) there is a tradition in Maine of having to show up to vote; and (5) there would be pressure to not show up once a quorum is ensured. These drawbacks focus on teleconferencing because very few entities would have the resources to handle video-conferencing, and not many people have experience with using that technology, especially to make decisions. In short, there was no interest in changing Maine law to specifically endorse or make it easier to use technology for public proceedings.

Esther Clenott mentioned her dissatisfaction with conference calls for meetings, and how difficult it can be to ensure adequate public participation.

Jeff Ham also supported keeping the law as is, agreeing that logistics and effectiveness of using conference calls for meetings were stumbling blocks. He also noted the potential for disagreements over what constitutes a “meeting,” including what qualifies as a quorum, and who is actually part of meeting.

Staff provided a brief summary of the Virginia video conferencing law that was adopted as a pilot project.⁵ One of the purposes was to encourage broader participation of people across the state who do not have the time or opportunity to travel great distances to take part in meetings of state-level boards and commissions. Information from the Virginia Freedom of Information Council⁶ indicates that the law is not used much, except perhaps by the Virginia community college system for some of their meetings.

⁵ §2.2-3708 of the Code of Virginia.

⁶ The Virginia Freedom of Information Council is established by statute and is charged with providing opinions about the application and interpretation of Virginia's Freedom of Information Act (FOIA), conducting FOIA training seminars and publishing educational materials. See <http://dls.state.va.us/foiacouncil.htm>.

Working Group Recommendation:

Do not change current law. The working group noted that current law neither prohibits nor authorizes the use of technology to conduct public proceedings, but instead focuses on ensuring notice and public access to all public proceedings.

B. Compliance and Enforcement Working Group

Steven McCausland coordinated the Compliance and Enforcement Working Group. The other members were Richard Flewelling, Judy Meyer, Linda Pistner and Harry Pringle. The working group met on September 22, 2004, and reported its recommendations to the entire study committee on September 28th. The group's duties, discussions and recommendations are as follows.

1. Recommend whether the court should have discretion to award attorney's fees to a party denied access to records or proceedings and, if so, under what circumstances.

The working group was charged with the duty to recommend whether the court should have discretion to award attorneys' fees to a party denied access to records or proceedings and, if so, under what circumstances. The entire study committee considered this issue last year, with no consensus achieved.

Harry Pringle expressed arguments against authorizing attorneys' fees in Freedom of Access litigation:

(1) There is no evidence that there is a problem for which the availability of attorneys' fees would serve as at least a partial solution. The Maine Freedom of Information Coalition's records audit, the results of which are cited as evidence supporting the need for attorneys' fees, included only two instances in which the person in the school district office had the document requested and refused to provide a copy. Not being able to locate the document, or needing time to determine if the document requested was in fact a public record were more common problems. The new changes to the law will help determine whether a violation occurs because the public entity must respond within a reasonable time that the record is public and will be produced or that the record is not public and access will not be provided.

(2) The training and voluntary compliance recommended by the study committee earlier this year may be effective in ensuring public access. Many people have engaged in a large amount of work to educate public entities in their responsibilities under the law.

(3) Rather than making additional changes, the Legislature should give the Attorney General's Pilot Project an opportunity to work.

(4) Using attorneys' fees as a club to force compliance is not helpful.

Judy Meyer responded with arguments in favor of giving courts discretion to award attorneys' fees to the prevailing party when the withholding of access was willful and the public entity knew the record or proceeding was public or when the request for records or access to proceedings was frivolous or for vexatious purposes.

(1) Although there are no recent documented cases that can be placed on the table for discussion, she has been contacted by people who are frustrated and cannot access documents or attend public meetings. People have legitimate problems, and they cannot resolve them on their own.

- Durham property tax information request. Originally denied, but the information was released once a State legislator intervened.
- Greenwood excise tax information request. Originally denied by public employee, because the employee did not want the requestor to have the information for personal reasons.

(2) A 1996 Maine Supreme Judicial Court opinion cited violations of the law guaranteeing access to public records that entitled the requestor to damages even though disclosure was eventually provided. Cook v. Lisbon School Committee, 682 A.2d 672 (Me. 1996).

(3) Ms. Meyer checked with The Media Law Resource Center, which has not reported an increase in litigation in states in which attorneys' fees provisions were adopted.

Richard Flewelling agreed with Mr. Pringle that there is no evidence to support this change. The Maine Municipal Association is contacted by small communities for assistance in understanding requests and responding appropriately. Larger communities often have their own counsel to turn to, although some consultation with MMA's legal department often occurs. Mr. Flewelling also expressed a concern that the availability of attorneys' fees could serve as an incentive for litigation as an initial step rather than trying more nonadversarial and cheaper methods of resolution first. If the decision of the study committee is to provide for attorneys' fees for plaintiffs, there should be reciprocal attorneys' fees for the public entities that have had to defend frivolous or vexatious suits.

Ms. Meyer agreed that balancing the incentives by providing the availability of attorneys' fees for either party in willful, frivolous or purely vexatious cases was reasonable. She also noted, however, that the resources aren't balanced; municipalities and school districts have the help of their attorneys, the Maine Municipal Association and the Maine School Management Association, while public requestors have no such support, which is why they often turn to the media to take up the cause.

Linda Pistner explained that she sees this issue tied to the question of penalties. It is rare that the Attorney General's Office would file an enforcement suit to seek a maximum \$500 penalty. Attorneys' fees are not often available under Maine laws, and Ms. Pistner sees the availability of such fees as an incentive for claims and litigation. For example, plaintiffs sometimes claim, in addition to a central complaint, a civil rights violation under federal law,⁷ which authorizes attorneys' fees. What is really needed is a mechanism that provides a resolution to the conflict without going to court. Ms. Pistner opposed adding in the availability of attorneys' fees. She recommended that if the will of the study committee was to recommend court discretion in awarding attorneys' fees, that it be for violations that are, at a minimum, "willful."

The Attorney General's Office currently has a case pending before the Maine Supreme Judicial Court concerning public records. It concerns redacting information contained in the files about alleged abuse by priests, some of whom are now deceased. The Law Court's opinion may be instructive on the redaction question at the very least, and possibly in other areas.

Working Group Recommendation:

- ▶ Four members supported no change in current law, although there was willingness to revisit the issue once there is more experience after the education and training initiatives and the Attorney General's Pilot Project, referred to in section 3, below, have been in place.
- ▶ One member supported giving the court discretion to award attorneys fees to:
 - (1) The requestor if the documents were willfully withheld when the public entity knew they were public records; and
 - (2) The public entity when the requestor has filed a frivolous suit or a suit for vexatious purposes.

2. Recommend whether the enforcement procedures of Maine's freedom of access laws, including the imposition of monetary penalties, should be modified.

The working group was charged with recommending whether the enforcement procedures of Maine's Freedom of Access laws, including the imposition of monetary penalties, should be modified. The members believe that there may be some merit in exploring this issue, but the fiscal situation of the State does not allow realistic expectations about expanding prosecution efforts. District Attorneys are currently foregoing prosecutions of some crimes, such as breaking and entering, because of the lack of resources.

⁷ Title 42 US Code §1983.

Ms. Meyer observed that it is sad that the group's answer is to not enhance enforcement because of the lack of money. She noted that in Florida, denial of access violations decreased when jail time became a possible sanction for violations.

The working group agreed that a better use of funds may be to fund a position, possibly an assistant attorney general, to act as a public advocate on complaints. The advocate would be able to handle concerns and work with public entities to resolve the conflicts. The results would be much more beneficial to all parties. Other resources with the Attorney General's Office would not need to be diverted to Freedom of Access issues.

Working Group Recommendation:

Do not change current law. Funding an assistant attorney general position to act as an advocate for the public in requests and complaints would be a cost-effective response to the need for enforcement. The working group recognizes the dire condition of the State's fiscal health and realizes that funding for such a position, even though cost effective and the right thing to do, is not realistically available.

3. Review the efforts of the Department of the Attorney General to provide public access assistance to the public and entities covered by Maine's freedom of access laws.

The Committee to Study Compliance with Maine's Freedom of Access Laws recommended in its first report that the Attorney General's Office be directed to provide information and mediation and training assistance on freedom of access laws to the general public and local public entities. The office already provides legal advice to State agencies. The recommendation encouraged the Attorney General's Office to work with statewide professional organizations, such as the Maine School Management Association and the Maine Municipal Association, to help address concerns of constituents. The Judiciary Committee asked the Attorney General to set up a pilot program to provide assistance and training on freedom of access issues generally and when the public raises specific questions. Linda Pistner updated the working group on efforts to date.

The Attorney General's Office has been able to resolve inquiries from members of the public as well as questions from the press. Assistance has been requested for different reasons with regard to records requested from State agencies. In some cases, agencies were not clear whether certain documents were public and could therefore be released. In other situations, there was uncertainty about redacting confidential information from an otherwise public record. If a document is protected by federal restrictions that are stricter than Maine's confidentiality protections, the cite to that federal law must be provided to the requestor to explain why the record is not being released. The majority of the problems have arisen because agencies do not fully understand their responsibilities with regard to the Freedom of Access laws.

In at least one situation at the municipal level, there was misunderstanding about what information was being requested; resolution came quickly once the confusion was eliminated.

Judy Meyer commented that she had received at least two calls complimenting the Attorney General's Office on the prompt handling of complaints.

Ms. Pistner indicated that there is a need for a tracking system to be used in the office to inventory requests and their resolutions and she is working on creating such a system. She is also collaborating with the Governor's Chief Counsel to develop and provide training, including FOA training, for the Governor's Cabinet and senior management personnel in state government. In addition, she would like to provide at least basic information and support on the Attorney General's Office webpage.

Ms. Pistner pointed out that there is a tension in the Attorney General's Office providing assistance to the public when the entity the requestor is complaining about is a state agency. If the problem is not resolved, it is the Attorney General that represents the agency in any resulting litigation. Therefore, it is inappropriate to negotiate with a requestor; mediating the dispute is a much more appropriate role for the office to play.

Working Group Recommendation:

Do not change current law. Request that the Attorney General continue to support the Pilot Project.

C. Freedom of Access Policy Working Group

Chris Spruce coordinated the Freedom of Access Policy Working Group on which Elizabeth Prata also served. The working group met on October 8, 2004 and reported its recommendations to the entire study committee on October 19th. The group's duties, discussions and recommendations are as follows.

1. Explore options for providing staffing assistance for the legislative review of exceptions to the definition of "public records."

New law requires the Legislature, through the Judiciary Committee and individual committees of jurisdiction, to review over a period of years all existing exceptions to the public records law. The study committee was charged with exploring the options for providing staffing assistance for the review process. It was clear to the working group that it is essential to employ a staff person whose priority and focus is to provide staffing assistance for the legislative review of exceptions to the definition of "public records." That person must ensure that the schedule for reviews set by the Legislature is met, that the criteria for the evaluation of the laws is applied correctly and that the evaluation process is done accurately and objectively. Also, that person must serve as an effective

liaison who links the appropriate legislative committees of jurisdiction with the Judiciary Committee throughout the review process.

Although the need for staff and the primary duties of staff appear clear, it is not as clear who should fill the position. The working group discussed two potential staff options – first, an additional employee of the nonpartisan Office of Policy and Legal Analysis (OPLA) and second, a contractual part-time person. Because the work will be analysis-focused, Mr. Spruce suggested that OPLA should be involved at some level, whether the staff person is an OPLA employee or just works directly with the OPLA analysts. Noting that the job will be very time-consuming and labor intensive and will require comprehensive analysis of statutory language, the working group concluded that a contractual situation -- the Legislature contracting with a person on at least a half-time basis for the purpose only of providing staffing assistance for the legislative review of exceptions to the definition of "public records" -- was the best fit. Knowing how busy legislative committees and analysts become during the legislative session, it seems likely that the reviews would fall to the bottom of the priority list. Analysts and committees would not have the time and ability to sit down and go through the extensive paperwork, interview the necessary parties and then analyze the information using the required criteria. In addition to workload concerns, realistically the budget would not allow for a new full-time person in OPLA at this time. Believing in the importance of the review process, it would make sense to begin the job with the staff necessary to provide the effective, efficient and successful completion of the job.

Ms. Prata also suggested that a contractual employee might be attractive to the Legislature, because a contract would not require the Legislature to provide benefits. Mr. Spruce agreed but noted that in order to attract qualified candidates, the Legislature would have to pay a fair hourly rate -- anywhere from \$30 to \$50 per hour.

The working group noted the many exceptions to public records that exist in the statutes. Ms. Prata asked that staff contact Mal Leary to see if he had any thoughts about other states' experiences with exceptions. Specifically, has the integrity of other states' freedom of access laws been chipped away by exceptions? Are there more lawsuits or other difficulties because of the exceptions? Although there appears to be no empirical evidence on the question, study committee member Mr. Leary noted that "logic would dictate that too many exceptions relegate a law to irrelevancy...the strength of the new law is that it requires a review of existing exceptions and has a process established to review new requests."

Working Group Recommendation:

Amend the law to direct the Legislature to specifically provide staff assigned to the public records exception review duties. The working group recommends that the Legislature hire an independent person to work on a contractual basis to ensure that the legislative review of exceptions to the definition of "public records" is carried out in a timely, thorough and objective manner. Because of the necessary working relationships with joint standing committees, it makes sense to house the position in the Office of Policy and Legal Analysis.

2. Review the options for standardization and clarification of Maine law contained in the report to the Legislature, Confidentiality of Public Records (1992), prepared by the Office of Policy and Legal Analysis.

The working group recognizes that this charge is large and complex and can be best accomplished when reviewing the various exceptions throughout the statutes. Mr. Spruce and Ms. Prata agreed that there are important areas crucial to focus upon in this effort, which will support the essential provision of education (which is now difficult due to the inconsistencies in the statutes). Those areas include: streamlining the number of exceptions, making consistent all exceptions/exemptions language throughout the statutes, redefining terms such as "confidential" and sorting out "record" versus "information." To provide proper education and a consistent application and understanding of the FOA laws, it is necessary to identify, in a unvarying manner, what is "public," what it means to "release" a record, what kind of record can be released and to whom, once released is a record releasable to all, and, if a record is confidential, is it confidential forever. Crafting a policy to deal with the many questions surrounding the release of records would be very helpful. There are inconsistencies in how confidential information is designated, and whether such designation prohibits release or access without further instructions. See Appendix D for a collection of cases and statutes illustrating inconsistencies in statutory language concerning confidential information and records.

Mr. Spruce made an additional suggestion, which Ms. Prata supported, to create a permanent statutory advisory committee of 5 to 7 people whose role would be to provide support and policy advice regarding the FOA laws to the Legislature. This committee could further support the efforts of the staff and the Judiciary Committee in reviewing the statutes for public records exceptions and provide continuity and guidance in ensuring the integrity of the FOA laws over time. Mr. Spruce suggested that the group could meet quarterly and that its membership might include some of the same members of the current FOA Committee. It was contemplated that there would be no compensation for members.

Finally, another issue that Ms. Prata raised and wanted the committee to explore is the potential sunset of all public records exceptions in the statutes.

Working Group Recommendations:

Establish the Freedom of Access Advisory Committee to serve as a permanent oversight resource for the exception review process and to ensure the ongoing integrity of the Freedom of Access laws. The Advisory Committee would be able to field policy questions and make recommendations for changes in law and practice to state and local governmental entities.

Review terminology used to describe exceptions to public records and make consistent with regard to: what it means for information or a record to be “confidential;” whether specific information or the entire record is confidential; whether there are limitations on the discretion of a public entity to redact confidential information from a record and release the remainder of the record; the circumstances under which the confidential information or record may be shared, released, disseminated or otherwise not kept confidential.

D. Full meetings of the Committee to Study Compliance with Maine’s Freedom of Access Laws

The full study committee met twice, on September 28, 2004 and October 19, 2004. The members received the reports of the Public Records and Technology Working Group and the Compliance and Enforcement Working Group, and discussed the preliminary recommendations. The Freedom of Access Policy Working Group reported its recommendations at the October 19, 2004 meeting. The members discussed each proposed recommendation and adopted final recommendations, described in Part III of this report. In addition, the members requested that the chairs write a letter to the Judicial Branch’s Task Force on Electronic Court Records Access to express the study committee’s commitment to the principle of ensuring that electronic versions of public records have the same content as paper versions of the public record.

III RECOMMENDATIONS

The Committee to Study Compliance with Maine’s Freedom of Access Laws makes the following recommendations.

A. Review the fees charged by agencies and officials for copies of public records and determine whether a cap on fees is appropriate and, if so, recommend the level of such a cap on copying fees.

The study committee unanimously recommends no statutory change with regard to copying fees at this time. Although the study committee still supports the principle that copying charges should be uniform across the state, the members recognize that the maximum fee originally recommended by the study group is politically unpalatable. Therefore, the members recommend that the public and the records custodians have a chance to work with

the existing statute. The issue should be revisited in the not too distant future to determine if the overall principle of equal access to public records for everyone is being achieved.

B. Review the issues surrounding appropriate charges for remote electronic access to public records.

The study committee unanimously recommends no statutory changes with regard to charges for remote electronic access. The law governing copying charges applies to entities charging for remote electronic access to public records, requiring such fees to be “reasonable.” An entity is therefore free to recoup the costs of making public records available electronically, limited by the reasonableness of such fees.

The law may need to be amended to clarify that for the posting of electronic versions of public records created or maintained on paper, the paper and electronic versions must contain the identical information, unless the differences are explicitly identified and the reasons for the divergence are explained. The study committee has expressed this concern to the Judicial Department’s Task Force on Electronic Court Records Access (TECRA) and encouraged the task force to adopt the same principle.

C. Recommend whether the enforcement procedures of Maine’s freedom of access laws, including the imposition of monetary penalties, should be modified.

The study committee unanimously recommends no statutory changes in enforcement procedures at this time. The study committee believes that working to resolve questions and disputes early will not only result in better compliance but will also encourage better relationships among the parties. Enforcement proceedings can be costly and time-consuming, and the potential fine recovery, even if increased above the current \$500 level, would not make the process cost effective.

Instead, the study committee unanimously recommends the creation of a **Public Access Ombudsman** within the Department of the Attorney General. The Ombudsman represents an extension and formalization of the pilot project⁸ initiated by the Attorney General in response to the study committee’s January 2004 recommendations. The proposal is for one position, and that person will be responsible for responding to inquiries and complaints from both members of the public and public entities. The Ombudsman will work to resolve disputes, and report annually on the work and accomplishments of the program. The study recognizes that the state of the budget greatly decreases the chances of the proposal being adopted; however, the study committee strongly supports the concept of the State

⁸ The “pilot project” refers to an informal directive to the Attorney Generals’ Office to provide information and mediation and training assistance on freedom of access laws to the general public and local public entities. The project also involved the Attorney General working with statewide professional organizations to help address constituent concerns.

Government providing resources to help citizens access the records and proceedings of the government.

(See Appendix C for proposed legislation.)

D. Explore options for providing staffing assistance for the legislative review of exceptions to the definition of "public records."

The study committee unanimously recommends that the Legislature hire an independent person to work on a contractual basis to ensure that the legislative review of exceptions to the definition of "public records" is carried out in a timely, thorough and objective manner. Because of the necessary working relationships with joint standing legislative committees, it makes sense to house the position in the Office of Policy and Legal Analysis. By creating a contractual position focused solely on the review process, the task will retain its importance and stature among the other functions of the committees and the Legislature as a whole.

The study committee recognizes that there is, of course, a question about the availability of the financial resources necessary to carry out this recommendation. Making the position contractual reduces costs. Devoting the position to the review process ensures the continuity of the process without other needs of the Legislature drawing on the time of the contractual employee.

(See Appendix C for proposed legislation.)

E. Review the issues surrounding the extent to which voice mail and electronic mail are public records and determine if statutory changes are necessary to ensure public access to public records.

The study committee unanimously recommends no statutory changes at this time with regard to voice-mail and electronic mail. However, there should be more training and education about the fact that e-mail and voice-mail may be public records because of their content, and therefore ways to maintain those public records must be employed in order to retain them for the required period. The State Archivist is developing new materials that provide information about different types of records, whether they are public and how long they must be maintained.

F. Review the issues surrounding the conduct of public proceedings through electronic means and the methods of ensuring public access to such proceedings.

The study committee unanimously recommends no statutory changes at this time with regard to electronic meetings. The working group noted that because current law is silent with regard to electronic meetings, it does not explicitly prohibit the use of technology to conduct public proceedings, and neither does it explicitly authorize electronic meetings.

Requirements for the presence of a quorum, notice and public access do apply. The study committee believes that electronic meetings raise serious access issues. Satisfying those requirements as well as the practical logistics involved makes conducting electronic meetings extremely difficult.

G. Review the options for standardization and clarification of Maine law contained in the report to the Legislature, Confidentiality of Public Records (1992), prepared by the Office of Policy and Legal Analysis.

The study committee recognizes that this charge is large and complex and can be best accomplished when reviewing the various exceptions throughout the statutes. There are important areas crucial to focus upon in this effort, which will support the essential provision of education (which is now difficult due to the inconsistencies in the statutes). Those areas include: streamlining the number of exceptions, making consistent all exceptions/exemptions language throughout the statutes, redefining terms such as “confidential” and sorting out “record” versus “information.” To provide proper education and a consistent application and understanding of the FOA laws, it is necessary to identify, in a unvarying manner, what is “public,” what it means to “release” a record, what kind of record can be released and to whom, once released is a record releasable to all, and, if a record is confidential, whether it is confidential forever. Crafting a policy to deal with the many questions surrounding the release of records would be very helpful. There are inconsistencies in how confidential information is designated and whether such designation prohibits release or access without further instructions.

The study committee unanimously recommends the creation of a permanent **Freedom Of Access Advisory Committee** whose role will be to provide support and policy advice regarding the Freedom of Access laws to the Legislature. This committee will further support the efforts of the staff and the Judiciary Committee in reviewing the statutes for public records exceptions and provide continuity and guidance in ensuring the integrity of the FOA laws over time. It was suggested that the group meet quarterly without compensation and that its membership include some of the same members of the current FOA Committee.

The study committee specifically recommends that the Freedom of Access Advisory Committee include members representing: municipalities, counties or regional entities, schools/education, law enforcement, state government, the Legislature, the Judicial Branch, the Maine Freedom of Information Coalition, the press, broadcast media, the Attorney General and the public. The Executive and the Legislature would be responsible for appointing the members, and the Chief Justice would be invited to appoint a member from the Judicial Branch. The advisory committee’s duties would include reviewing the Public Access Ombudsman’s report on complaints about lack of access as well as frivolous requests. The study committee recommends that the advisory committee have the authority to submit legislation. The advisory committee would be responsible for overseeing the exception review process and serve as a resource on policy questions for the Judiciary Committee, as well. It would also be able to recommend drafting standards for the

modification of existing and the creation of new confidentiality provisions. Using the Criminal Law Advisory Commission as a model, the study committee proposed that the Legislature use the expertise of the advisory committee as a resource to comment on all bills that add or change confidentiality provisions. To help ensure the continuity of the advisory committee, the study committee suggested that the advisory committee be able to seek, accept and use outside funding.

Sunset exceptions. One of the recommendations made by the Freedom of Access Policy working group was to sunset all exceptions to the public record definition. Florida's statutes include an automatic 5-year sunset.⁹ There are two legislative committees that review the provisions, and recommend the continuation, change or repeal of exceptions. If the Legislature does nothing, the exceptions are repealed by their own terms.

The study committee discussed the fact that the study committee supported the review cycle, which is now law, in lieu of imposing the sunsets. Committee members expressed concern that there may be legitimate reasons for the exceptions, and a person protected by that exception should not be harmed by its unnoticed expiration. The study committee does not support imposing sunsets on exceptions.

H. Recommend whether the personal home contact information of public employees should be confidential and not subject to disclosure.

The study committee unanimously recommends providing protection to private home contact information for most, if not all, public employees. The study committee was unable to reach consensus on whether the cloak of confidentiality should cover the home contact information for elected officials and high-level non-elected employees. The study committee reviewed draft legislation amending the Freedom of Access laws by excepting from the definition of public record certain personal contact information of public employees. There was much discussion, including the basic question as to whether there is actually a problem, and whether the exception should be limited to a smaller group of public employees (such as school employees). The study committee revised the draft proposal, and a majority (14-1, 1 abstention) agreed to cover personal contact information for public employees, except elected officials. The following members support the recommendation: Sen. Rotundo, Rep. Koffman, Fred Bever, Todd Brackett, Esther Clenott, Richard Flewelling, Jess Knox, Mal Leary, Judy Meyer, Steve McCausland, Linda Pistner, Elizabeth Prata, Robert Schwartz and Chris Spruce. Jeff Ham opposed the proposal in part because the proposal was developed fairly quickly without enough time to work out the unintended consequences that could easily result. Harry Pringle abstained.

I. Recommend whether the court should have discretion to award attorney's fees to a party denied access to records or proceedings and, if so, under what circumstances.

⁹ Open Government Sunset Review Act of 1995, Fla. Stat. §119.15.

The study committee unanimously recommends the creation of a collection and reporting system for Freedom of Access violations, inquiries and resolutions to determine if there is a need for an attorneys' fee provision. The study committee's proposal directs the Attorney General to work collaboratively with other organizations that would be likely to know about or receive complaints about violations or frivolous requests and create an inventory of the information. The study committee recommends that this be accomplished in an informal manner rather than enacting statutes to direct the program.

The study committee divided, however, on whether to include language authorizing attorneys' fees. A majority recommends that the court be given the discretion to award attorneys' fees to a party who wholly prevails in the action, if the court determines that the failure to comply with the law was committed in bad faith or that the requested access or the enforcement action was frivolous, vexatious or without merit. Members supporting the proposal are: Sen. Rotundo, Fred Bever, Esther Clenott, Jeff Ham, Jess Knox, Mal Leary, Steve McCausland, Judy Meyer, Elizabeth Prata and Bob Schwartz. Those voting in opposition to the proposal are: Rep. Koffman, Todd Brackett, Richard Flewelling, Linda Pistner, Harry Pringle and Chris Spruce.

(See Appendix C for proposed legislation.)

APPENDIX A

Authorizing Legislation

**RESOLVE 2003
CHAPTER 83**

H.P. 797 - L.D. 1079

**Resolve, To Establish the Committee To Study Compliance
with Maine's Freedom of Access Laws**

Sec. 1. Committee established. Resolved: That the Committee to Study Compliance with Maine's Freedom of Access Laws, referred to in this resolve as "the committee," is established; and be it further

Sec. 2. Committee membership. Resolved: That the committee consists of 16 members appointed as follows:

1. One member of the Senate, appointed by the President of the Senate;
2. One member of the House of Representatives, appointed by the Speaker of the House;
3. One member representing the Maine Press Association, appointed by the President of the Senate;
4. One member representing the Maine Daily Newspapers Publishers Association, appointed by the Speaker of the House;
5. One member representing the Maine Municipal Association, appointed by the Governor;
6. One member representing the Maine Chiefs of Police Association, appointed by the Governor;
7. One member representing the Maine School Management Association, appointed by the Governor;
8. The Attorney General, or the Attorney General's designee;
9. One member representing the Maine Association of Broadcasters, appointed by the President of the Senate;
10. One member representing the Maine Freedom of Information Coalition, appointed by the Speaker of the House;
11. The Commissioner of Public Safety, or the commissioner's designee;

12. One member representing county commissioners, appointed by the President of the Senate;

13. One member representing the Maine Sheriffs' Association, appointed by the President of the Senate;

14. One member representing persons whose privacy interests are protected by the freedom of access laws, appointed by the President of the Senate;

15. One member of the public, appointed by the President of the Senate; and

16. One member of the public, appointed by the Speaker of the House; and be it further

Sec. 3. Appointments; cochairs. Resolved: That all appointments must be made no later than 30 days following the effective date of this resolve. The appointing authorities shall notify the Executive Director of the Legislative Council upon making their appointments. The legislative members named to the committee shall serve as cochairs. When the appointment of all members is completed, the cochairs of the committee shall call and convene the first meeting of the committee no later than 15 days after the last member is appointed; and be it further

Sec. 4. Committee duties. Resolved: That the committee shall meet not more than 4 times to study state and local governmental compliance with Maine's freedom of access laws and other issues relating to citizens' access to public records and public proceedings. In examining these issues, the committee shall:

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

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

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

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

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

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

Sec. 5. Staff assistance. Resolved: That upon approval of the Legislative Council, the Office of Policy and Legal Analysis shall provide necessary staffing services to the committee; and be it further

Sec. 6. Reimbursement. Resolved: That legislative members of the committee are entitled to receive legislative per diem, as defined in the Maine Revised Statutes, Title 3, section 2, and reimbursement for travel and other necessary expenses for their attendance at authorized meetings of the committee. Public members not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses and, upon a demonstration of financial hardship, a per diem equal to the legislative per diem for their attendance at authorized meetings of the committee; and be it further

Sec. 7. Funding. Resolved: That the committee may seek outside funds to advance its work. Prompt notice of solicitation of funds must be sent to the Legislative Council. Contributions to support the work of the committee may not be accepted from any party having a pecuniary or other vested interest in the outcome of the matters being studied. Any person, other than a state agency, desiring to make a financial or in-kind contribution must certify to the Legislative Council that it has no pecuniary or other vested interest in the outcome of the study. Such certification must be made in the manner prescribed by the Legislative Council. All contributions are subject to approval by the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council along with an accounting record that includes the amount of funds, the date the funds were received, from whom the funds were received and the purpose and any limitation on the use of the funds. The Executive Director of the Legislative Council administers any funds received; and be it further

Sec. 8. Committee budget. Resolved: That the cochairs of the committee, with assistance from the committee staff, shall administer the committee's budget. Within 10 days after its first meeting, the committee shall present a work plan and proposed budget to the Legislative Council for its approval. The committee may not incur expenses that would result in the committee's exceeding its approved budget; and be it further

Sec. 9. Report. Resolved: That the committee shall submit a report that includes its findings and recommendations including suggested legislation for presentation to the Joint Standing Committee on Judiciary and the Legislative Council by December 3, 2003. Following receipt and review of the report, the Joint Standing Committee on Judiciary may report out a bill to the Second Regular Session of the 121st Legislature to implement the committee's recommendations. If the committee requires a limited extension of time to conclude its study and to make its report, it may apply to the Legislative Council, which may grant the extension; and be it further

Sec. 10. Appropriations and allocations. Resolved: That the following appropriations and allocations are made.

LEGISLATURE

**Committee to Study Compliance with
Maine's Freedom of Access Laws**

Initiative: Provides a base allocation of Other Special Revenue funds to authorize expenditures from this dedicated account.

Other Special Revenue Funds	2003-04	2004-05
All Other	\$500	\$0
Other Special Revenue Funds Total	<hr/> \$500	<hr/> \$0

PUBLIC LAW 2003
CHAPTER 709

H.P. 1456 - L.D. 1957

An Act To Implement the Recommendations of the Committee To
Study Compliance with Maine's Freedom of Access Laws

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

Sec. 1. 1 MRSA §405, sub-§4, as enacted by PL 1975, c. 758, is amended to read:

4. Motion contents. A motion to go into executive session ~~shall~~ 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.

Sec. 2. 1 MRSA §408, as enacted by PL 1975, c. 758, is repealed and the following enacted in its place:

§408. Public records available for public inspection and copying

1. Right to inspect and copy. Except as otherwise provided by statute, every person has the right to inspect and copy any public record during the regular business hours of the agency or official having custody of the public record within a reasonable period of time after making a request to inspect or copy the public record.

2. Inspection, translation and copying scheduled. Inspection, translation and copying may be scheduled to occur at such time as will not delay or inconvenience the regular activities of the agency or official having custody of the public record sought.

3. Payment of costs. Except as otherwise specifically provided by law or court order, an agency or official having custody of a public record may charge fees as follows.

A. The agency or official may charge a reasonable fee to cover the cost of copying.

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

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

D. An agency or official may not charge for inspection.

4. Estimate. The agency or official shall provide to the requester an estimate of the time necessary to complete the request and of the total cost. If the estimate of the total cost is greater than \$20, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than \$100, subsection 5 applies.

5. Payment in advance. The agency or official may require a requester to pay all or a portion of the estimated costs to complete the request prior to the translation, search, retrieval, compiling and copying of the public record if:

A. The estimated total cost exceeds \$100; or

B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.

6. Waivers. The agency or official may waive part or all of the total fee if:

A. The requester is indigent; or

B. Release of the public record requested is in the public interest because it 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.

Sec. 3. 1 MRSA c. 13, sub-c. 1-A is enacted to read:

SUBCHAPTER 1-A

EXCEPTIONS TO PUBLIC RECORDS

§431. Definitions

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Public records exception. "Public records exception" or "exception" means a provision in a statute or a proposed statute that declares a record or a category of records to be confidential or otherwise not a public record for purposes of subchapter 1.

2. Review committee. "Review committee" means the joint standing committee of the Legislature having jurisdiction over judiciary matters.

§432. Exceptions to public records; review

1. Recommendations. During the second regular session of each Legislature, the review committee shall report out legislation containing its recommendations concerning the repeal, modification and continuation of public records exceptions and any recommendations concerning the exception review process.

2. Process of evaluation. According to the schedule in section 434, the review committee shall evaluate each public records exception that is scheduled for review that biennium. The review committee shall use the following criteria to determine whether each exception scheduled for review should be repealed, modified or remain unchanged:

A. Whether a record protected by the exception still needs to be collected and maintained;

B. The value to the agency or official or to the public in maintaining a record protected by the exception;

C. Whether federal law requires a record to be confidential;

D. Whether the exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records;

E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records;

F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records;

G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records;

H. Whether the exception is as narrowly tailored as possible; and

I. Any other criteria that assist the review committee in determining the value of the exception as compared to the public's interest in the record protected by the exception.

3. Assistance from committees of jurisdiction. The review committee shall seek assistance in evaluating public records exceptions from the joint standing committees of the Legislature having jurisdiction over the subject matter related to the exceptions being reviewed. The review committee may hold joint public hearings with the appropriate committees of jurisdiction. The review committee shall notify the appropriate committees of jurisdiction

concerning work sessions and shall allow members of the appropriate committees of jurisdiction to participate in work sessions.

§433. Schedule for review of exceptions to public records

1. Scheduling guidelines. The joint standing committee of the Legislature having jurisdiction over judiciary matters shall review public records exceptions as follows.

A. In 2006 and every 10 years thereafter, the committee shall review exceptions codified in:

- (1) Title 1;
- (2) Title 2;
- (3) Title 3;
- (4) Title 4; and
- (5) Title 5.

B. In 2008 and every 10 years thereafter, the committee shall review exceptions codified in:

- (1) Title 6;
- (2) Title 7;
- (3) Title 8;
- (4) Title 9;
- (5) Title 9-A;
- (6) Title 9-B;
- (7) Title 10;
- (8) Title 11;
- (9) Title 12;
- (10) Title 13;
- (11) Title 13-B;

(12) Title 13-C;

(13) Title 14; and

(14) Title 15.

C. In 2010 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 16;

(2) Title 17;

(3) Title 17-A;

(4) Title 18-A;

(5) Title 19-A;

(6) Title 20;

(7) Title 20-A;

(8) Title 21-A; and

(9) Title 22.

D. In 2012 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 23;

(2) Title 24;

(3) Title 24-A;

(4) Title 25;

(5) Title 26;

(6) Title 27;

(7) Title 28-A; and

(8) Title 29-A.

E. In 2014 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 30;

(2) Title 30-A;

(3) Title 31;

(4) Title 32;

(5) Title 33;

(6) Title 34-A;

(7) Title 34-B;

(8) Title 35-A;

(9) Title 36;

(10) Title 37;

(11) Title 37-A;

(12) Title 38; and

(13) Title 39-A.

§434. Review of proposed exceptions to public records

1. Procedures before legislative committees. Whenever a legislative measure containing a new public records exception is proposed, the joint standing committee of the Legislature having jurisdiction over the proposal shall hold a public hearing and determine the level of support for the proposal among the members of the committee. If there is support for the proposal among a majority of the members of the committee, the committee shall request the review committee to review and evaluate the proposal pursuant to subsection 2 and to report back to the committee of jurisdiction. A proposed exception may not be enacted into law unless review and evaluation pursuant to subsection 2 have been completed.

2. Review and evaluation. Upon referral of a proposed public records exception from the joint standing committee of the Legislature having jurisdiction over the proposal, the review committee shall conduct a review and evaluation of the proposal and shall report in a timely

manner to the committee to which the proposal was referred. The review committee shall use the following criteria to determine whether the proposed exception should be enacted:

A. Whether a record protected by the proposed exception needs to be collected and maintained;

B. The value to the agency or official or to the public in maintaining a record protected by the proposed exception;

C. Whether federal law requires a record covered by the proposed exception to be confidential;

D. Whether the proposed exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records;

E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records;

F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records;

G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records;

H. Whether the proposed exception is as narrowly tailored as possible; and

I. Any other criteria that assist the review committee in determining the value of the proposed exception as compared to the public's interest in the record protected by the proposed exception.

3. Report. The review committee shall report its findings and recommendations on whether the proposed exception should be enacted to the joint standing committee of the Legislature having jurisdiction over the proposal.

Sec. 4. 29-A MRSA §2251, sub-§7, as amended by PL 2003, c. 434, §27 and affected by §37, is further amended to read:

7. Report information. An accident report made by an investigating officer or a 48-hour report made by an operator as required by former subsection 5 is for the purposes of statistical analysis and accident prevention.

A report or statement contained in the accident report, or a 48-hour report as required by former subsection 5, a statement made or testimony taken at a hearing before the Secretary of State held under section 2483, or a decision made as a result of that report, statement or testimony may not be admitted in evidence in any trial, civil or criminal, arising out of the accident.

A report may be admissible in evidence solely to prove compliance with this section.

The Chief of the State Police may disclose the date, time and location of the accident and the names and addresses of operators, owners, injured persons, witnesses and the investigating officer. On written request, the chief may furnish a photocopy of the investigating officer's report at the expense of the person making the request. The cost of furnishing a copy of the report is not subject to the limitations of Title 1, section 408, subsection 3.

Sec. 5. Resolve 2003, c. 83, §4 is amended to read:

Sec. 4. Committee duties. Resolved: That the committee shall meet a total of not more than ~~4~~ 8 times to study state and local governmental compliance with Maine's freedom of access laws and other issues relating to citizens' access to public records and public proceedings. In examining these issues, the committee shall:

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

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

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

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

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

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

7. Recommend whether the personal home contact information of public employees should be confidential and not subject to disclosure;

8. Review the fees charged by agencies and officials for copies of public records and determine whether a cap on fees is appropriate and, if so, recommend the level of such a cap on copying fees;

9. Review the issues surrounding appropriate charges for remote electronic access to public records;

10. Recommend whether the court should have discretion to award attorney's fees to a party denied access to records or proceedings and, if so, under what circumstances;

11. Recommend whether the enforcement procedures of Maine's freedom of access laws, including the imposition of monetary penalties, should be modified;

12. Explore options for providing staffing assistance for the legislative review of exceptions to the definition of "public records";

13. Review the issues surrounding the extent to which voice mail and electronic mail are public records and determine if statutory changes are necessary to ensure public access to public records;

14. Review the issues surrounding the conduct of public proceedings through electronic means and the methods of ensuring public access to such proceedings;

15. Review the options for standardization and clarification of Maine law contained in the report to the Legislature, Confidentiality of Public Records (1992), prepared by the Office of Policy and Legal Analysis;

16. Review the efforts of the Department of the Attorney General to provide public access assistance to the public and entities covered by Maine's freedom of access laws; and

17. Review any other public access issues that may improve compliance with Maine's freedom of access laws and enhance public access to public proceedings; and be it further

Sec. 6. Resolve 2003, c. 83, §7-A is enacted to read:

Sec. 7-A. Funding for 2nd year of study. Resolved: That any unexpended balance of funds originally budgeted to support the work of the committee that remain within the Legislature's Miscellaneous Studies account must be used for the same purposes; and be it further

Sec. 7. Resolve 2003, c. 83, §9 is amended to read:

Sec. 9. Initial report. Resolved: That the committee shall submit ~~a~~ an initial report that includes its findings and recommendations including suggested legislation for presentation to the Joint Standing Committee on Judiciary and the Legislative Council by December 3, 2003. Following receipt and review of the report, the Joint Standing Committee on Judiciary may report out a bill to the Second Regular Session of the 121st Legislature to implement the committee's recommendations. If the committee requires a limited extension of time to conclude its study and to make its report, it may apply to the Legislative Council, which may grant the extension; and be it further

Sec. 8. Resolve 2003, c. 83, §9-A is enacted to read:

Sec. 9-A. Final report. Resolved: That, not later than November 3, 2004, the committee shall submit a final report that includes its findings and recommendations, including suggested legislation, for presentation to the First Regular Session of the 122nd Legislature. The committee is authorized to submit legislation related to its report for introduction to the First Regular Session of the 122nd Legislature at the time of submission of its report; and be it further

Sec. 9. Codification of public records exceptions. The Office of Policy and Legal Analysis and the Office of the Revisor of Statutes shall produce a bill for introduction in the First Regular Session of the 122nd Legislature that lists in the Maine Revised Statutes, Title 1, chapter 13, subchapter 1-A all the public records exceptions that exist elsewhere in the statutes, including cross-references to those exceptions.

Sec. 10. Retroactivity. Those sections of this Act that amend Resolve 2003, chapter 83, section 9 and enact Resolve 2003, chapter 83, section 9-A apply retroactively to December 3, 2003.

APPENDIX B

Membership list, Commission to Study Compliance with Maine's Freedom of Access Laws

**COMMITTEE TO STUDY COMPLIANCE WITH MAINE'S FREEDOM OF
ACCESS LAWS**

Resolve 2003, Ch. 83

Appointments by the Governor

Richard P. Flewelling
60 Community Drive
Portland, ME 04101

Representing Maine Municipal Association

Harry R. Pringle
245 Commercial Street
Portland, ME 04101

Representing Maine School Management Association

Robert Schwartz
Executive Director
Maine Chiefs of Police Association
P.O. Box 2431
South Portland, ME 04116-24341

Representing Maine Chiefs of Police Association

Appointments by the President

Sen. Margaret Rotundo
446 College Street
Lewiston, ME 04240

Chair

Fred Bever
P.O. Box 1628
Portland, ME 04104

Representing the Maine Association of Broadcasters

Todd Brackett
P.O. Box 611
42 Bath Road
Wiscasset, ME 04578

Representing the Maine Sheriff's Association

Esther Clenott
107 Macworth Street
Portland, ME 04103

Representing County Commissioners

Jeff Ham
26 Elmwood Road
Cape Elizabeth, ME 04107

Representing the Maine Press Association

Jess Knox
57 Gleckler Road
Portland, ME 04103

Representing Those Whose Privacy Interest Are Protected by
FOA Laws

Elizabeth Prata
4 Brown Street
Gray, ME 04039

Representing the Public

Appointments by the Speaker

Rep. Theodore Koffman
168 Mill Brook Road
Bar Harbor, ME 04609

Mal Leary
Capitol News Service
17 Pike Street
Augusta, ME 04330

Judy Meyer
Lewiston Sun Journal
P.O. Box 4400
Lewiston, ME 04243-4400

Christopher Spruce
1011 Happytown Road
Ellsworth, ME 04605

Attorney General

Linda Pistner
Chief Deputy Attorney General
6 State House Station
Augusta, ME 04333

Commissioner, Department of Public Safety

Steve McCausland
Public Information Officer
Department of Public Safety
104 State House Station
Augusta, ME 04333

Staff: Peggy Reinsch, OPLA, 287-1673
Marion Hylan Barr, OPLA, 287-1683

Chair

Representing the Maine Freedom of Information Coalition

Representing the Maine Daily Newspapers Publishers
Association

Representing the Public

Representing the Attorney General

Representing the Department of Public Safety

APPENDIX C

Recommended Legislation

Title: An Act to Implement the Recommendations of the Committee to Study Compliance with Maine's Freedom of Access Laws

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

Sec. 1. 1 MRSA §411 is enacted to read:

§411. Freedom of Access Advisory Committee

1. Advisory committee established. The Freedom of Access Advisory Committee is established to serve as a resource for ensuring compliance with this chapter and upholding the integrity of the purposes underlying this chapter as it applies to all public entities in the conduct of the public's business.

2. Membership. The committee consists of the following 13 members:

A. One member representing the Maine Senate, appointed by the President of the Senate;

B. One member representing the Maine House of Representatives, appointed by the Speaker of the House of Representatives;

C. One member representing municipal interests, appointed by the Governor;

D. One member representing county or regional interests, appointed by the President of the Senate;

E. One member representing school interests, appointed by the Governor;

F. One member representing law enforcement interests, appointed by the President of the Senate;

G. One member representing State government interests, appointed by the Governor;

H. One member representing a statewide coalition of freedom of access advocates, appointed by the Speaker of the House of Representatives;

I. One member representing newspaper and other press interests, appointed by the President of the Senate;

J. One member representing broadcast interests, appointed by the Speaker of the House of Representatives;

K. One member representing the public, appointed by the Speaker of the House of Representatives;

L. The Attorney General, or the Attorney General's designee; and

M. The committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the Judicial Branch to serve as a member of the committee.

3. Terms of appointment. The terms of appointment are as follows.

A. Terms of appointment for gubernatorial appointments and appointments by the President of the Senate and the Speaker of the House, other than legislative appointments, are for terms of 3 years.

B. Terms of appointment for Legislators are for the legislative term of office of the person appointed.

C. Members may serve beyond their designated terms until their successors are appointed.

4. First meeting; chair. The Executive Director of the Legislative Council shall call the first meeting of the committee as soon as funding permits. At the first meeting, the committee shall select a chair from among its members and may select a new chair annually.

5. Meetings. The committee may meet as often as necessary but, if funding permits, must meet at least quarterly. A meeting may be called by the chair or by any 4 members.

6. Duties and powers. The committee:

A. Shall oversee the public records exception review process under subchapter 1-A, ensuring that the schedule for review is maintained, that proposed exceptions are subject to the review process and that the criteria for review are appropriately applied;

B. Shall review the public's ability to access public proceedings and records;

C. Shall review information provided by the Public Access Ombudsman concerning complaints about lack of access and frivolous requests for access;

D. Shall make recommendations to the Governor, the Legislature, the Chief Justice and local and regional governmental entities for changes in law and practice that are appropriate to maintain the integrity of Maine's Freedom of Access laws and the underlying principles;

E. Shall serve as a resource to the Legislature when legislation affecting public access is considered;

F. May conduct public hearings, conferences, workshops and other such meetings to obtain information about, discuss and publicize the needs of and solutions to, problems concerning access to public proceedings and records;

G. May submit legislation to the Legislature at the start of each session; and

I. May undertake other activities consistent with its responsibilities.

7. Funding. The committee is authorized to seek, accept and expend outside sources of funding to carry out the committee's activities.

8. Reimbursement for expenses. Members are entitled to reimbursement for actual and necessary expenses related to the travel to and from committee meetings when the expenses are approved by the chair and submitted to the Executive Director of the Legislative Council.

9. No compensation. The members of the committee receive no compensation for their services.

10. Staffing. Upon approval of the Legislative Council, the Office of Policy and Legal Analysis shall provide necessary staffing services to the committee. In addition, the committee may contract for administrative, professional and clerical services if funding permits.

11. Report. By January 15, 2006 and at least annually thereafter, the advisory committee shall report to the Governor, the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Chief Justice about the state of Maine's Freedom of Access laws and the public's access to public proceedings and records.

Sec. 2. 3 MRSA §163-A, sub-§7 is amended to read:

7. Committee assistance. To provide research, analysis, ~~and bill drafting~~ and public records exceptions review assistance for joint standing or select committees, including, but not limited to, the Joint Standing Committee on Appropriations and Financial Affairs, ~~the Joint Standing Committee on Audit and Program Review~~ and other legislative agencies;

Sec. 3. 5 MRSA §200-I is enacted to read:

§200-I. Public Access Ombudsman

1. Public Access Ombudsman. The Attorney General shall appoint a Public Access Ombudsman, hereinafter referred to in this section as the "ombudsman," within the Department of the Attorney General to assist in compliance with Maine's Freedom of Access laws, Title 1, chapter 13.

2. Duties. The ombudsman shall:

A. Prepare interpretive and educational materials and programs concerning Maine's Freedom of Access laws in cooperation with the Freedom of Access Advisory Committee;

B. Make available to elected or appointed public officials the Freedom of Access laws and educational materials concerning the Freedom of Access laws;

C. Respond to inquiries made by the public and public agencies and officials concerning the Freedom of Access laws;

D. Respond to and work to resolve complaints made by the public and public agencies and officials concerning the Freedom of Access laws;

E. Furnish, upon request, guidelines and other appropriate information regarding the Freedom of Access laws to any person or public agency or official in an expeditious manner; and

F. Make recommendations to the Legislature and the Freedom of Access Advisory Committee concerning ways to improve public access to public records and proceedings.

3. Assistance. The ombudsman may request from any public agency or official such assistance, services and information as will enable the ombudsman to effectively carry out the responsibilities of this section. Every public agency and official shall cooperate with, and provide such assistance to, the ombudsman as the ombudsman may request.

4. Report. Beginning in 2006 and annually thereafter, the ombudsman shall submit a report not later than March 15 of each year to the Legislature and to the Freedom of Access Advisory Committee concerning the activities of the ombudsman for the previous year. The report must include the following information:

A. The total number of inquiries and complaints received;

B. The number of inquiries and complaints received each from the public, the media and public agencies or officials;

C. The number of complaints received concerning each of the following:

(1) Public records; and

(2) Public meetings;

E. The number of inquiries and complaints that were resolved, and the types of resolutions; and

E. The number of complaints received about each of the following:

- (1) State agencies;
- (2) County agencies;
- (3) Regional agencies;
- (4) Municipal agencies;
- (5) School administrative units; and
- (6) Other public entities.

Sec. 4. 5 MRSA §12004-J, sub-§14 is enacted to read:

14.	Freedom of Access	Freedom of Access Advisory Committee	Expenses only	1 MRSA §411
------------	------------------------------	--	------------------	----------------

SUMMARY

Freedom of Access Advisory Committee

This is a unanimous recommendation of the Committee to Study Compliance with Maine’s Freedom of Access Laws. It establishes the Freedom of Access Advisory Committee to maintain the integrity of Maine Freedom of Access laws. The committee’s duties include providing oversight of the public records exception review process, ensuring that the schedule for review is maintained, that proposed exceptions are subject to the review process and that the criteria for review are appropriately applied. The committee shall also review the public’s ability to access public proceedings and records, receive information from the Public Access Ombudsman concerning complaints about lack of access and frivolous requests for access, make recommendations for changes in law and practice that are appropriate to maintain the integrity of Maine’s Freedom of Access laws and the underlying principles and serve as a resource to the Legislature when legislation affecting public access is considered.

The committee may conduct public hearings, conferences, workshops and other such meetings to obtain information about, discuss and publicize the needs of and solutions to, problems concerning access to public proceedings and records and may also submit legislation to the Legislature at the start of each session. The Office of Policy and Legal Analysis shall provide staff support to the committee, and annually by January 15th, the advisory committee shall report to the Governor, the Legislative Council and the Chief Justice about the state of Maine’s Freedom of Access laws and the public’s access to public proceedings and records.

Public Access Ombudsman

This is a unanimous recommendation of the Committee to Study Compliance with Maine’s Freedom of Access Laws. It establishes the Public Access Ombudsman within the Department of the Attorney General. The ombudsman will provide information and educational materials to

the public and public agencies and officials. The ombudsman will respond to inquiries, resolve freedom of access complaints when possible and issue guidelines concerning Maine's Freedom of Access laws. The ombudsman will work with the Freedom of Access Advisory Committee to provide interpretive and educational materials and programs. The ombudsman will make recommendations to the Legislature and the Freedom of Access Advisory Committee concerning ways to improve public access to public records and public proceedings.

The ombudsman may request the assistance of any public agency or official in carrying out these responsibilities. Public agencies and officials must cooperate with and provide assistance to the ombudsman.

Beginning in March 2006, the ombudsman will report annually to the Legislature and the Freedom of Access Advisory Committee regarding the ombudsman's activities and the inquiries and complaints received.

Staffing assistance for exception review process

This is a unanimous recommendation of the Committee to Study Compliance with Maine's Freedom of Access Laws. It establishes the legislative staff services responsibility for supporting the legislative committees that are required to conduct the review of exceptions to public records laws pursuant to Title 1, chapter 13, subchapter 1-A.

Title: An Act to Implement the Recommendations of the Committee to Study Compliance with Maine’s Freedom of Access Laws Concerning Personal Contact Information

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

Sec. 1. 1 MRSA §402, subsection 3, ¶N is enacted to read:

N. Personal contact information concerning public employees, except when that information is public pursuant to other law. For the purposes of this paragraph:

(1) “Personal contact information” means home address, home telephone number, home facsimile number, home e-mail address and personal mobile telephone number and personal pager number; and

(2) “Public employee” means an employee of a governmental entity as defined in Title 14, section 8102, subsection 2, except that “public employee” does not include elected officials.

SUMMARY

This bill is the recommendation of the majority of the Committee to Study Compliance with Maine’s Freedom of Access Laws.

This bill provides an exception to the definition of “public record” in Maine’s Freedom of Access laws for the personal contact information of public employees. This change means that a public entity will not be required to release the personal contact information of public employees.

“Personal contact information” means the public employee’s home address, telephone numbers, fax numbers, mobile phone numbers and pager numbers.

“Public employee” means an employee of a governmental entity as that term is defined in the Maine Tort Claims Act. This includes all state, county and local governmental bodies, as well as other public entities. Because “elected officials” are excepted from the definition of “public employee” for the purposes of this statute, their personal contact information is not confidential.

Title: An Act to Implement the Recommendations of the Committee to Study Compliance with Maine's Freedom of Access Laws Concerning Attorneys' Fees

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

Sec. 2. 1 MRSA §411 is enacted to read:

§411. Attorneys' fees and litigation expenses

In an action to enforce this subchapter, the court may award reasonable attorneys' fees and litigation expenses reasonably incurred to the wholly prevailing party if the court determines that the failure to comply with the law was committed in bad faith or that the request for access or the enforcement action was frivolous, vexatious or without merit.

This section applies to actions for enforcement of this subchapter filed on or after September 1, 2007.

SUMMARY

This bill is the recommendation of the majority of the Committee to Study Compliance with Maine's Freedom of Access Laws.

This bill applies to actions filed in court to enforce access to public proceedings and records under the Maine Freedom of Access laws. It gives the court discretion to award attorneys' fees and litigation expenses to either party when certain circumstances exist. First, the party must wholly prevail, meaning a negotiated settlement of providing partial access or copies of some of the records requested will not make either the plaintiff or the defendant eligible for the award of attorneys' fees and litigation expenses. Second, failure to comply with the law and therefore denying access must have been committed in bad faith. Being unsure whether a requested record is a public record is not sufficient to rise to the level of "bad faith," nor would a legitimate, but mistaken, belief that the record requested is confidential. Similarly, for a defendant to be awarded attorneys' fees and litigation expenses, the request for access to proceedings or records, or proceeding to court in order to compel access, must have been frivolous, vexatious or without merit. A legitimate belief in the right to attend a meeting or inspect or copy a record would not give rise to an award. Using the Freedom of Access laws and the enforcement procedures to harass and inconvenience an agency or public officials could give rise to such an award. Attorneys' fees and litigation expenses must be reasonable.

This section applies to actions filed in court on or after September 1, 2007. This is consistent with the recommendations of the Committee to Study Compliance with Maine's Freedom of Access Laws in assessing the volume and severity of violations of Maine's Freedom of Access laws and the need to provide the opportunity for attorneys' fees to encourage compliance.

APPENDIX D

Inconsistencies: Cases and Statutes

Appendix D

Inconsistencies: Cases and statutes

The study committee was directed to review the options for standardization and clarification of Maine law contained in the report to the Legislature, Confidentiality of Public Records (1992), prepared by the Office of Policy and Legal Analysis. In reviewing the laws affecting public records and proceedings it became clear that the inconsistencies in language sometimes make interpretation difficult. The study committee anticipates that the Freedom of Access Advisory Committee will have a better capability to develop standard language for consistent interpretation as the exception review process continues. The legislative staff person dedicated to the review process will be able to incorporate the recommendations into the process. This Appendix provides a sample of statutes to illustrate that there are inconsistencies in how confidential information is designated and whether such designation prohibits release or access without further instructions. This is meant to serve illustrative purposes and is not meant to be an exhaustive list of confidentiality statutes. Appendix F of the January 2004 report provides a much larger compilation of statutes designating information and records as confidential.

- A statute that stated that certain records were “confidential and not subject to public inspection” was interpreted as not permitting the partial opening of such records. Lewiston Daily Sun v. City of Lewiston, 596 A.2d 619 (Me. 1991).
- At least one court interpreted a statute that declared all of a certain type of records “confidential” as prohibiting the public entity from releasing the record. Dunn & Theobald, Inc. v. Cohen, 402 A.2d 603 (Me. 1979).
- The statute designating as confidential state public employee personnel records containing “[m]edical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders...” requires that a sentence that contains such medical information in a settlement agreement is protected from disclosure. The remainder of the settlement agreement between the University and a former employee is a public record and must be made available to the requestor. Guy Gannett Publishing Co. v. University of Maine, 555 A.2d 470 (Me. 1989)
- The statute providing for confidentiality, as exception to Freedom of Access Act, of records and documents relating to negotiations for and appraisals of property by right-of-way division of Department of Transportation was not limited to negotiations and appraisals, but rather, could be extended to purchase and sale documents, deeds, cancelled checks, and transfer tax forms. Davric Maine Corp. v. Maine Dept. of Transp., 606 A.2d 201 (Me. 1992).
- If a tax return possessed by a public official contains information relating to the transaction of public business the return is a public record unless it falls within one of the statutory exceptions. Wiggins v. McDevitt, 473 A.2d 420 (Me. 1984)

The statutes contain a range of provisions governing release of and access to confidential information and records.

5 MRSA §244-C, sub-§2, ¶C:

C. Documentary or other information obtained by the Auditor during the course of an audit or investigation *is privileged or confidential to the same extent under law that that information would be privileged or confidential in the possession of the department, commission or agency providing the information.* Any privilege or statutory provision, including penalties, concerning the confidentiality or obligation not to disclose information in the possession of any department, commission or agency or their officers or employees applies equally to the Auditor. Privileged or confidential information obtained by the Auditor during the course of an audit or investigation *may be disclosed only as provided by law and with the agreement of the department, commission or agency subject to the audit or investigation that provided the information.*

16 MRSA §614, sub-§1-A:

1-A. Limitation on release of identifying information; cruelty to animals. The names of and other identifying information on persons providing information pertaining to criminal or civil cruelty to animals to the Department of Agriculture, Food and Rural Resources *is confidential information and may not be disseminated.*

20-A MRSA §5001-A, sub-§3, ¶A, sub-¶(4), division (c):

(c) Dissemination of any information filed under this subparagraph is governed by the provisions of section 6001; the federal Family Educational Rights and Privacy Act of 1974, 20 United States Code, Section 1232g (2002); and the federal Education for All Handicapped Children Act of 1975, 20 United States Code, Sections 1401 to 1487 (2002), except that "directory information," as defined by the federal Family Educational Rights and Privacy Act of 1974, *is confidential and is not subject to public disclosure unless the parent or guardian specifically permits disclosure in writing or a judge orders otherwise.* Copies of the information filed under this subparagraph must be maintained by the student's parent or guardian until the home instruction program concludes. *The records must be made available to the commissioner upon request.*

22 MRSA §1828, sub-§4:

4. Further disclosure. Information released pursuant to subsections 2 and 3 *shall be used solely for the purpose for which it was provided and shall not be further disseminated.*

22 MRSA §1494:

The names and related information which may identify individuals having an occupational disease *shall be confidential and may be released only to other public health officials, agents or agencies, or by court order or by written authorization of the individual being reported on.* All other information submitted pursuant to this chapter may be made available to the public.

38 MRSA §100-A:

§100-A. Confidentiality of complaints and investigative records

1. During investigation. All complaints and investigative records of the commission *are confidential during the pendency of an investigation. Those records become public records upon the conclusion of an investigation unless confidentiality is required by some other provision of law.* For purposes of this section, an investigation is concluded when:

- A. A notice of an adjudicatory hearing under Title 5, chapter 375, subchapter IV has been issued;
- B. The complaint has been listed on a meeting agenda of the commission;
- C. A consent agreement has been executed; or
- D. A letter of dismissal has been issued or the investigation has otherwise been closed.

2. Exceptions. *Notwithstanding subsection 1, during the pendency of an investigation, a complaint or investigative record may be disclosed:*

- A. To department employees designated by the commissioner;
- B. To designated complaint officers of the commission;
- C. By a department employee or complaint officer designated by the commissioner when and to the extent considered necessary to facilitate the investigation;
- D. To other state or federal agencies when the files contain evidence of possible violations of laws enforced by those agencies;
- E. When and to the extent considered necessary by the commissioner to avoid imminent and serious harm. The authority of the commissioner to make such a disclosure may not be delegated;
- F. Pursuant to rules adopted by the department, when it is determined that confidentiality is no longer warranted due to general public knowledge of the circumstances surrounding the complaint or investigation and when the investigation would not be prejudiced by the disclosure; and
- G. To the person investigated on that person's request. The commissioner may refuse to disclose part or all of any investigative information, including the fact of an investigation, when the commissioner determines that disclosure would prejudice the investigation. The authority of the commissioner to make such a determination may not be delegated.

3. Violation. A person who knowingly or intentionally makes a disclosure in violation of this section commits a civil violation for which a forfeiture not to exceed \$1,000 may be adjudged.

7 MRSA §306-A, sub-§3, ¶C:

C. Information relative to market research or development activities provided to the commissioner prior to formal application, included in grant applications or provided to the commissioner to fulfill reporting requirements is confidential information and *may not be publicly disclosed by the commissioner as long as:*

- (1) The person to whom the information belongs or pertains has requested that certain information be designated as confidential; and
- (2) The commissioner has determined that the information gives the person making the request opportunity to obtain business or competitive advantage over another person who does not have access to the information or will result in loss

of business or other significant detriment to the person making the request if access is provided to others; and

1 MRSA §538, sub-§3:

3. Subscriber records. Records that contain information relating to the identity of a subscriber relative to the subscriber's use of InforME services *are confidential*. *Those records may only be released with the express written permission of the subscriber involved or pursuant to a court order.*

22 MRSA §4018, sub-§4:

4. Confidentiality. All personally identifiable information provided by the person delivering the child to a safe haven provider *is confidential and may not be disclosed by the safe haven provider to anyone except to the extent necessary to provide temporary custody of the child until the child is transferred to the department and except as otherwise provided by court order.* All health care or other information obtained by a safe haven provider in providing temporary custody of the child may also be provided to the department upon request.

21-A MRSA §22, sub-§2:

2. Ballots. Ballots *are not public records* and may be inspected only in accordance with this Title.

22 MRSA §832, sub-§3, ¶¶B and C:

B. The hearing *is confidential* and must be electronically or stenographically recorded.

C. The report of the hearing proceedings must be sealed. A report of the hearing proceedings *may not be released to the public*, except by permission of the person whose blood or body fluid is the source of the exposure or that person's counsel and with the approval of the court.

7 MRSA §1052, sub-§2:

2. Record keeping. The manufacturer or seed dealer shall identify and maintain, for at least 2 years after the date of sale, a list of the names and addresses of all growers of its genetically engineered plants, plant parts or seeds in this State. *The list is not a public record as defined in Title 1, section 402, subsection 3.* A manufacturer or seed dealer shall permit the commissioner to inspect the list when requested to facilitate an investigation into a claim of cross-contamination. A manufacturer or seed dealer is not required to keep records on seeds sold at the retail level in packets weighing less than one pound.

A manufacturer of genetically engineered seeds is not required to keep records under this subsection when the required records are being kept by a seed dealer.

4 MRSA §1701, sub-§7:

7. Meeting; quorum; concurrence. The Executive Director of the Legislative Council shall call the first meeting of the commission no later than 5 days after the appointments are made. For all subsequent meetings, the commission shall meet, either in person or by teleconference, on the call of the chair or on the request of at least 2 members. The presence of at least 2 members is required to conduct a meeting. The concurrence of at least 2 members is required for any formal action taken by the commission. *The working papers, draft reports and other papers of the commission in the possession of a legislative employee are excepted from the definition of public records in accordance with Title 1, section 402, subsection 3, paragraph C.*

G:\STUDIES\Study Reports - 121st 2nd\Freedom of Access Laws Final Report-2004.doc