



## Maine Freedom of Information Coalition

PO Box 232, Augusta, Maine 04332

Joint Standing Committee on the Judiciary

May 1, 2019

LD 1575 -- An Act To Improve the Freedom of Access Laws of Maine

Senator Carpenter, Representative Bailey, and Members of the Joint Standing Committee on the Judiciary:

The Maine Freedom of Information Coalition appreciates the opportunity to offer comments on LD 1575 “An Act To Improve the Freedom of Access Laws of Maine.” While we appreciate the expressed intent of the proposed bill, we find that it does not, in fact, improve Maine’s FOAA but instead weakens it from the perspective of users of the law.

We find three major problems with the proposed bill as drafted, and suggest several changes which we feel would, in fact, “Improve the Freedom of Access Laws of Maine.”

### **1. Definition of a Public Record**

The proposed definition of “public or governmental business” is needlessly narrow, confusing, and subject various interpretations by those charged with executing FOAA’s provisions. Currently, “public records” are defined as records that relate to the “transaction of public or governmental business.” That definition is clear and sufficient as it stands. LD 1575’s definition introduces a potential narrowing of what should be considered a public record.

For example, if a government employee were to use a government email account for both a governmental and a personal purpose in the same communication - which, as we recognize should not be the case but could happen - how do we separate out what the “subject” of the communication is? Must the “Subject” line in the email communication specifically indicate that the communication involves “the administration of public policy and the exercise of governmental power through laws, rules, ordinances, regulations and the equivalent”?

Conversely, if a governmental employee includes comments or discussion of

governmental business in an email communication transmitted through a personal email account but the subject line says “Free for Lunch Thursday,” would that communication be considered private communication rather than a public record which it would be under current practice?

*Recommendation:* The proposed definition does not improve the law but potentially narrows its scope and is confusing and unnecessary. We suggest this section be stricken from the bill.

## **2. Date Required to Identify a Public Record**

LD 1575 requires that a person requesting a public record provide a “date or dates upon which the record was created.” This puts an additional burden on the requester who may have no way of knowing the date, or even “a broad range of dates within which the record may have been created.” Under FOAA currently, an agency may request additional clarification about a FOAA request, including dates or date ranges, if that is necessary to more accurately identify the requested record.

*Recommendation:* We suggest this section be stricken from the bill.

## **3. Time Allowed for Acknowledgement, Remedy for Violation**

We agree that FOAA would benefit from clarification of the time allowed for response to a FOAA record request. However, the proposed 30 day period for providing a progress report and/or cost estimate, and an additional 30 period to provide the requested record is excessive. In terms of working days, that is 10 weeks! Records are often requested for particular purposes, e.g., to be able to respond to a hearing or time-limited request for comments.

In addition, if an agency misses even this excessively extended deadline, there is no consequence other than filing a complaint with the Ombudsman. This is hardly an incentive not to miss a deadline, especially since the Ombudsman law as written provides no authority or staff to handle such complaints, as the current Ombudsman has stated on several occasions.

*Recommendation:* We would suggest amending this timeline to indicate that a FOAA request receive a response as soon “as reasonably practicable but no longer than 20 days” 20 working days is the response time indicated under the federal FOIA. As an incentive to respond in a timely fashion, we further recommend that agencies be able to collect no fees for responses that are not within the time allotted.

## **Additions to LD 1575**

In addition to the changes we have mentioned thus far, we suggest two additional areas in which the current FOAA could and should be improved: the Standardization of Fees, and Remedies for Violations.

#### **4. Standardization of Fees**

Per-page fees for copying records vary dramatically across state agencies. For example, the Department of Inland Fisheries charges 10 cents per page for copying in keeping with what most libraries and commercial copy centers charge. The Department of Labor charges 38 cents per page, almost four times as much. High copying costs can provide a barrier to public access.

Per-page fees are unnecessary when providing a copy of an electronic record in the medium in which the electronic record is stored.

*Recommendation:* We recommend that LD 1575 be amended to set a standard copying fee of ten cents per page for an 8.5 x 11 inch page in black and white format, and that there be no per-page charge for providing an electronic copy of an electronically stored record when it is available in the medium in which the requested record is stored.

#### **5. Violations**

We have testimony specific to LD 1414 which the Committee will be hearing when that bill is heard. In general, we suggest that the current fine of \$500 for violating FOAA is an amount that, in 2019, does not provide an incentive for agencies to avoid violating FOAA. Moreover, if this minimal fine is adjudged, the employee involved pays none of even this modest fine. Neither of these situations provides incentive to comply with FOAA since the current penalty is essentially meaningless.

*Recommendation:* we suggest that the Committee adopt penalties for violations of the FOAA that will be significant enough to discourage noncompliance but agencies and employees of agencies alike. We have outlined detailed suggestions in our testimony on LD 1414.

#### **6. Payment of Attorney's Fees**

We recommend that the court have the authority to award recovery of attorney's fees to the prevailing parties in appeal actions at the court's discretion. The current requirement to prove "bad faith" is extremely difficult to prove and is unnecessary for this purpose.

#### **Summary**

We thank the committee for the opportunity to submit testimony regarding LD 1575. We wholeheartedly share the bill's expressed intent to improve FOAA, and we believe that the recommendations we have made will, in fact, provide significant improvements to Maine's FOAA. However, as LD currently 1575 is written, we believe LD 1575 will, in practice, significantly hamper access to public records in Maine rather than improve it.

We have appended a rough draft of suggested language for the Committee's

consideration to be incorporated in FOAA for the recommendations we have suggested.

We are happy to take any questions you might have now or at the work session. Thank you.



## *Maine Freedom of Information Coalition*

PO Box 232, Augusta, Maine 04332

Joint Standing Committee on the Judiciary

May 1, 2019

LD 1414 -- An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Penalties for Violations of the Freedom of Access Act.

Senator Carpenter, Representative Bailey, and Members of the Joint Standing Committee on the Judiciary:

The Maine Freedom of Information Coalition appreciates the opportunity to offer comments on LD 1414 “An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Penalties for Violations of the Freedom of Access Act.” While we share the intent of LD 1414, we believe that the stated penalties will not be sufficient to incentivize full compliance with FOAA on the part of governmental bodies and their employees.

The FOAA statute has not been amended in more than 30 years, so the fine (presently, \$500) is much less in today’s dollars than it was when it was established long ago. With this in mind and sharing LD 1414’s intent to maximize compliance with FOAA requests, we recommend an increase in the maximum fine to no more than \$2,500 for willful violations and no more than \$5,000 for multiple willful violations within a 5 year period of time. We believe that multiple violations warrant a greater fine. The court would retain discretion in setting an appropriate fine.

The Act would also allow the court discretion to assess up to half the fine personally on the public officer or official responsible for a willful violation. This would enhance personal accountability for willful violations. This would also make violations more meaningful in so far as a fine paid by a state agency from the general fund may be deposited into the general fund, making the fine pointless for all practical purposes.

### **Summary**

We applaud the intent of LD 1414 but for it to be effective as an incentive to comply with both the spirit and letter of FOAA, and as a disincentive not to comply, we find that the proposed penalties in a real world setting are simply insufficient and we recommend

that LD 1414 include the more effective penalty structure we have outlined above, and that these recommendations be incorporated into FOAA.

We are happy to take any questions you might have now or at the work session. Thank you.