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DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
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SERVING THE PUBLIC AND DELIVERING ESSENTIAL SERVICES TO STATE GOVERNMENT

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Re: LD 152, An Act to Amend the Freedom of Access Act to Require a Specific Time Frame for Agencies to Comply with Requests for Public Records

Senator Carney, Representative Kuhn, and Members of the Joint Standing Committee on the Judiciary:

The Department of Administrative and Financial Services (DAFS) is providing the following written testimony in opposition to LD 152 because while the department can appreciate the intent of this legislation and we are committed to the transparency of State government, the bill ignores the growing scale and complexity of FOAA as well as the lack of dedicated resources devoted to FOAA. Establishing a 30-day turnaround would be setting the State and municipalities up for failure, given how we are currently struggling to keep up with the hundreds of FOAA requests that each department does fulfill each year.

While our testimony will primarily focus on the practical challenges presented by the bill, we would be remiss as the custodians of the State budget if we did not note the tremendous fiscal impact this bill will have not only on the State, but also local governments subject to FOAA. As the FOAA laws currently exist, they demand significant staff time to fulfill the volume of requests received within a reasonable time and place an additional strain on departments' staffing levels. Responding to FOAA requests is a function that departments are currently intended to accomplish within existing staffing levels and as staff are able to integrate these tasks in amongst their primary job responsibilities and alongside all other responsibilities delegated to each department. The proposed legislation requirement that FOAA request be completely fulfilled within 30 days of the date submitted is infeasible without the addition of multiple headcount within each department who could be solely dedicated to responding to the volume and complexity of the FOAA requests received by departments.

Not all FOAA requests are created equal. Some can be easily responded to, and DAFS aims to get those responses out the door as quickly as possible. But many FOAA requests entail complicated determinations and extensive review of numerous and lengthy documents.

Since Maine first established its FOAA laws in 1976, more than 22 different categories of “record” have been excluded from the definition of “public record” in FOAA and hundreds more exist throughout the Maine Revised Statutes. Among those exceptions are records designated confidential by statute, records that would be within the scope of privilege against discovery if such records were sought through the discovery process in court, legislative working papers throughout the course of the legislative session, security plans, procedures or risk assessments prepared for the purpose of preventing or preparing for acts of terrorism, along with a number of other very specific and very general exceptions to what is considered a “public record”.¹ This often makes the work of simply determining whether a FOAA request can be responded to or must be denied a sophisticated legal question on which Departments and Agencies must engage their Office of the Attorney General legal counsel.

In 2024, DAFS received 261 FOAA requests—an average of more than one FOAA per business day.² Of those requests, we noted the following response times:

0-5 Days	6-30 days	31-60 days	61 days – 6 months	6 months – 1 year	More than 1 year
28	89	44	66	29	5

When a FOAA request is initially received by DAFS, the requestor receives an acknowledgement from DAFS indicating that: the request was received, an estimate of the time and cost to produce requested records will be forthcoming, and that DAFS may deny the request if the information requested is exempt from FOAA or protected by confidentiality. From there, the FOAA request is forwarded to the bureau, division or office responsible for maintaining the requested records.

The first substantive issue upon initial review of each “FOAA request” is whether the request is, in fact, a request for “records” as defined under 1 MRS § 402. Often requests received by DAFS are actually general inquiries from the public or researchers rather than “formal” FOAA requests. When this happens, DAFS staff review the request to assess whether the request is for “records” maintained by the department and subject to FOAA or a request for information that can be addressed by redirecting the requestor to existing information made available on DAFS websites as part of the Administration’s overall commitment to transparency.

If a request is determined to be for records under FOAA, the next issue becomes whether the department can determine what records are being requested and what records, if any, the department may have that are responsive to the request. And if those records are responsive, do the records contain information or data that require staff time to redact confidential information. This step can be particularly burdensome when a request is for “*Any/all records related to...*” a particular topic or a certain kind of record, to which there would be hundreds or thousands of responsive documents (e.g. license applications, test results, purchase orders, email correspondence, etc.).

¹ See 1 MRS § 402(3) and (3-A).

² This figure includes requests received by DAFS that were identified as “FOAA requests” by the requestor as well as requests determined to be FOAA requests upon review.

In these circumstances, DAFS will contact the requestor in an attempt to narrow the scope of their request and provide DAFS with the information necessary to develop a good faith estimate of the time and costs associated with responding to the request. It often takes 30-days of back and forth with a requestor to simply clarify and narrow a FOAA request to the point that the body of potentially responsive documents can be identified and compiled. Because the requestor often does not know what documents are potentially responsive to their request, the onus is often on the State to recommend how the requestor might better structure their request to accomplish their objectives—this can be a particularly challenging situation when the FOAA request is adversarial in nature.

Some FOAA requests entail searches of archived records or e-mail communications and require assistance from Maine IT to ensure that all potentially responsive records are collected and reviewed before responding to requests. Based upon the search criteria laid out by the requestor, these searches can yield hundreds or thousands of potentially responsive communications. Even with the assistance of technology, those potentially responsive communications may then require that DAFS staff manually review those hundreds or thousands of pages to further determine whether the records are responsive to the request or not.

Additionally, unclear or overly broad FOAA requests, as well as those that require the production of responsive records that include confidential or privileged information, often require DAFS to seek counsel from the Office of the Attorney General to determine how to respond and with what records.

Forty percent (40%) of the FOAA requests DAFS received in 2024 were related to Procurement. These requests can often be partially fulfilled almost immediately by referring the requestor to the publicly available RFP/RFI/RFA and bid scoring packet published on Procurement's website. However, these requests usually also ask for all bid submissions, which can number several dozen for a single solicitation and are each typically hundreds, if not thousands, of pages in length. Bid submissions are not made publicly available online because portions of them have often been marked confidential by the bidder. Before producing the responsive documents, each bid proposal must be reviewed for confidentiality markings by Procurement staff, and assertions of confidentiality by the bidder must be reviewed and deemed valid by the Office of the Attorney General. The bidder must then be informed if Procurement intends to disclose any information previously marked confidentially and provided the opportunity for the bidder to prevent the disclosure of the records.

Each of these additional steps takes time and DAFS is continuously looking for ways to improve our FOAA response process to minimize these necessary delays. These improvements have included identifying and making publicly available as much information as possible via open data dashboards, databases and downloadable compilations of records maintained on DAFS websites. Not only do these efforts reduce the overall volume of requests for these records, they also reduce response times when DAFS staff can direct a requestor to these publicly available resources. In addition, when a request is for records related to an appeal of an agency decision (most often related to

the state procurement process), DAFS prioritizes its response to those FOAA requests to ensure an appealing party has the information necessary for their appeal.

Furthermore, many records requests received by DAFS and other departments are for records that will be used for commercial marketing purposes. These requests tend to be quite broad, generally are submitted without regard to the public information already available through DAFS' public data dashboards, and some requests increasingly appear to be AI generated. Similarly, from time-to-time, DAFS receives FOAA requests from attorneys seeking to circumvent the civil discovery process outside the bounds of oversight by the Judicial Branch. By circumventing the discovery process, the requesting party puts DAFS in the position of making extrajudicial determinations about whether information included in records may be "...within the scope of a privilege against discovery or used as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding". Both of these kinds of FOAA requests result in DAFS expending a fair amount of public resources to satisfy commercial or private purposes and frustrate the public policy aims of Maine's robust public records law.

Proposing a 30-day timeframe for Executive Branch agencies to respond to all records request is unachievable within the existing framework of FOAA. Departments do not have dedicated staff whose sole job responsibilities consist of responding to FOAA requests. Agency Public Access Officers all wear multiple hats in addition to serving in this capacity, and in reality, responding to FOAA requires a large team effort across many employees. Without meaningful statutory reform to clearly define what is an "unduly burdensome" or "oppressive" FOAA request, to limit requests under FOAA for commercial or other private purposes, and standardize the kind, scope and format of records to be produced under FOAA, it is entirely unreasonable to impose this 30 day time limit on departments like DAFS that are making a good faith effort every day to provide the public with timely responses to their requests.

DAFS respectfully urges the Committee to vote LD 152 Ought Not to Pass.