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MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

SPEAKING IN OPPOSITION TO L.D. 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

PRESENTED BY REP. LIBBY

BEFORE THE JOINT STANDING COMMITTEE ON JUDICIARY

DATE OF HEARING:
FEBRUARY 5, 2025

Senator Carney, Representative Kuhn, and members of the Committee, I am Kevin Martin, Policy Director for the Maine Department of Environmental Protection. In my time at DEP, I have coordinated the response to over 1000 Freedom of Access Act Requests. I also serve as the representative of State Government interests, appointed by the Governor, on the Right to Know Advisory Committee. I am here today speaking in opposition to L.D. 152.

The Freedom of Access Act provides the appropriate balance between the rights of the public to have access to public records and the time necessary for public entities to adequately respond to a request. FOAA requests are not one size fits all and the requests that implicate the "reasonable time" standard currently in the law are not simple requests. These are not requests for single documents or easily obtained records. In my experience, these are broad requests, implicating large volumes of records. Many requests require sorting through thousands of communications,

detailed legal review of confidentiality and privilege claims, proprietary information such as trade secrets, or investigative records. This process takes time. Often, 30 days pass due to the iterative process of estimating how many hours will be required to identify responsive records and working with a requester to clarify the scope of their search. Given the ever-expanding volume (number of requests annually to DEP has tripled in the last decade) and complexity of requests and the limited staff and resources to respond to them, 30 days is simply not an achievable timeframe for responding to most FOAA requests.

In addition to the whether the bill, as proposed, could be complied with generally, LD 152 also conflicts with other provisions of FOAA and public records considerations administered by DEP in Title 38. First, the proposed language focuses on when a request is "made", which differs considerably from the triggering event for requests currently. Currently, acknowledgment and time estimate obligations begin when a request is "received" which means "the date a sufficient description of the public record is received". The current language provides meaningful opportunity to work with a requester to clarify and tailor their search which may be lost using the language proposed in this bill. Second, § 408-A (10) allows an agency or official to require payment in advance under certain conditions prior to even searching for records. Delay pending prepayment could not possibly be utilized with an overriding 30-day response deadline.

Finally, the DEP must comply with a detailed procedural process codified in 38 M.R.S. §1310-B. This statute defines what obligations we have to the submitter of certain information before we disclose records to the public. In short, when an entity provides us with proprietary information or trade secrets that are the subject of a request, we are required to notify them of the request and provide them 15 days to respond with support for their claim. We then have 15 days to issue a determination. Assuming a best-case scenario - a request where all records are immediately identified, the request only requires a single determination and there is no additional back and forth with the submitter - this process takes the entirety of the proposed 30-day window to respond. Were we to determine that disclosure to the public is appropriate, that determination may be appealed, and we are prohibited from disclosure, by law, while this appeal window is pending and the case plays out. This would be in direct conflict with the bill as proposed. Unfortunately, there are rarely best-case scenarios. As an example, recently passed PFAS in products reporting requirements resulted in dozens of submissions with claims of trade secrets or other confidentiality claims, all implicated by the same requests. DEP staff spent months dealing with dozens of entities, many of which were in other states and countries and had varying degrees of sophistication, to ensure that records requiring protection under the law were properly protected.

Lastly, I'll note that response timeframes are a common topic at the Right to Know Advisory Committee. The Committee, which includes a diverse representation of stakeholders, has consistently reached consensus that rigid timeframes won't work. When our 19th annual report

gets presented to this committee, you'll see that in many ways the recommendations head in the opposite direction of this bill. We as a committee formed a subcommittee, which I chaired focused on protecting agencies from burdensome requests. That effort will continue next fall; however, one such recommendation includes extending the time in which an agency may file an action for protection against an unduly burdensome or oppressive request from 30 days to 60 days. Were this committee to agree with that recommendation, it would conflict with this bill.

I have a tremendous amount of respect for FOAA, its goals, and the integral part it plays in ensuring government transparency and accountability. I hope that some insight into the difficulties associated with reviewing thousands of records for a single request helps you to better understand the time required to achieve an appropriate balance of those interests. Thank you for the opportunity to speak today. I am happy to answer any questions, provide additional examples, and can be available at a work session if so desired.