

**RIGHT TO KNOW ADVISORY COMMITTEE
LEGISLATIVE SUBCOMMITTEE
AND
PUBLIC POLICY SUBCOMMITTEE**

DRAFT AGENDA
November 12, 2013
10:00 a.m.
Room 438, State House, Augusta

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Convene

1. Welcome and Introductions
Judy Meyer and Chris Parr, Subcommittees Chairs
2. *Discussion of LR 2490, which proposes to make confidential certain aquaculture and seafood processing information (Sponsor and constituent invited, not confirmed)*
3. Remote participation by members in public proceedings, LD 258
 - Other states' approaches
4. Proposed adjustments to new law (LD 1216, PL 2013, c. 350)
 - Deadlines to respond, failure to comply
 - Court case response deadlines
5. Solutions for curbing "abuse" of the Freedom of Access Act (FOAA);
 - Letter from Maine Water Utilities Association
 - Draft proposal
6. Draft legislation: redacting Social Security numbers from filings in the Registries of Deeds
7. Update on State e-mail management protocol
8. Can FOA requests be made anonymously? Does it matter if the request is in writing?
9. Should FOAA requests for commercial purposes be subject to the fee restrictions of 1 MRSA §408-A, sub-§8? What is a commercial purpose?
10. Review of standard fees and fee schedules adopted by agencies
11. Review of allocation of responsibilities between the Advisory Committee and the Ombudsman
12. State-level "privacy acts" - Should government records containing personal information about private citizens be generally protected from public disclosure (or protect just the personal information in public records)? How do other states address?
13. Additional issues, questions?
14. Schedule additional meetings

Adjourn



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October 25, 2013

Right to Know Advisory Committee
c/o 13 State House Station
Augusta, Maine 04333-0013

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Re: Freedom of Access Act, Meetings of Public Bodies (LD 420), Other Public Information Issues

Dear Committee Members;

We are aware that Right to Know Advisory subcommittees have been meeting on specific issues over the past several weeks; I actually attended one and one of our members attended another. For our members - and even for me - this is a very busy time of the year. It is not always possible to attend all of the subcommittee meetings; hence I am taking this opportunity to provide input on some of the specific issues that are being discussed.

Serial Filers:

During this past session, our association offered testimony on LD 1216 An Act to Amend the Freedom of Access Act. Among our FOAA concerns, and one that was not addressed by the Maine Legislature, is the fact that there have been, and still are, situations whereby a very, very limited number of serial FOAA request filers are using the FOAA law to systematically disrupt the operation of public agencies.

There is no need to go into detail, as we are all aware that this is happening.

Our members are supportive of providing appropriate information to the public when requested, as transparency in government is a cornerstone of our society. More than that, our members are truly in the public service sector. Exemplary customer service is a goal that our members strive for. The provision of information in a timely fashion is a standard of customer service we want to be known for.

It must be acknowledged that the true cost of providing this requested information is not recovered in the fees that are allowed to be charged under FOAA. For the occasional request, this is not a big concern. However, when several requests a month come in from the same individual or associated group, the remainder of the customers end up paying for the majority of the time and other resources necessary to respond to the request.

The fees charged by the agencies should reflect the true cost of the response. Those fees should be based on the hourly wage rate of the staff person(s) responding to the request and an appropriate overhead multiplier should be applied to that wage rate. When these public agencies secure the services of professionals it is not unusual for them to pay a multiplier of 2.0 or higher and that is what we would propose.

Meetings of Public Bodies

Some of our member's district trustees have served for decades. They possess a depth of institutional knowledge and insight that makes them valued assets to the operation of the district. Some of these boards have only three trustees. Some of these district trustees participate in board meetings remotely, either via conference call, Skype or some other means of remote participation.

It is our understanding that there is no statutory prohibition against this practice.

One of the provisions of LD 258 An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Meetings of Public Bodies is that only those officials who are physically present at the meeting location can be counted as part of the quorum.

That is problematic, particularly for those districts that have only three board members. It seems to us that there is little or no benefit to be derived by being so prescriptive and that there is much to be gained by allowing remote attendance at these meetings. We remind you that it was not that long ago that there was much contingency planning associated with a potential pandemic threat. That, in and of itself, is enough reason to accommodate remote attendance.

LD 258 proposed that the board would be required to establish a policy that authorizes a member of the body who is not physically present to participate in a public proceeding through telephonic, video, electronic or other similar means of communication.

If that policy requirement is adopted, let the board address the remote attendance particulars in their policy. It is not always easy, particularly in a small community, to find qualified board members who can commit the time necessary to effectively contribute. What we don't need is another reason not to run for these offices.

The Provision of Customer Information

Under the rules of the Public Utilities Commission a utility generally shall not disclose, sell or transfer individual customer information. One of the exceptions is that the utility shall disclose that information "as otherwise authorized by law".

It is our understanding that FOAA requests would be one of those exceptions. We suggest that there may be instances where it is not appropriate to disclose customer information. The FOAA requirements, which are quite broad, may result in undesirable unintended consequences.

We appreciate the opportunity to provide comments. We will try to have representation at some of the future subcommittee meetings.

Sincerely,



Jeffrey L. McNelly
Executive Director

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Legislative Subcommittee and Public Policy Subcommittee

Summary: Participation in Public Proceedings

1. Permitted use. Most states allow public bodies, at least at the state level, to meet through the use of telecommunications or other technology to connect one or more members of the public body to the rest the members, although some states limit the purposes. (Ohio expressly prohibits; Louisiana statute is silent but Attorney General says can't; Maine does not specifically address and no caselaw or published AG opinions).

Four main approaches:

- A. A few states' open meetings laws are silent on the issue, but Attorney General Opinions or court decisions allow.
- B. Several states include policy-type statements that a public body can't use teleconferencing to circumvent the open meetings law, but no other guidance.
- C. Several states define "meeting" to include the use of telephone or video conferencing, but don't contain statutory guidance other than that all the other requirements of the open meetings law apply.
- D. Several states specifically authorize and include requirements, such as notice, roll call votes, location of quorum, access by the public to sites, annual meeting requirements, reasons for not meeting face-to-face.

2. Types of entities. States do not generally draw distinctions in the type of public body that can use telecommunications technology – if subject to the open meeting laws, then it can. A couple of states allow only state-level and not local-level entities to teleconference.

3. Quorum. Many states require a quorum to be physically present at the location stated in the notice, but some states specifically authorize members who are participating remotely to be counted toward a quorum. These states require at least one member to be present in the location in the notice, although one state allows the meeting to occur without a member present as long as the public can see and hear what is going on from that location (Oregon).

4. Voting. Uniformly, the states that address the issue of voting require votes to be taken and recorded by roll call.

5. Materials. Most statutes do not address what materials must be made available to members not physically present. One state (Tennessee) requires that any member not physically present at a meeting must be provided, before the meeting, with any documents that will be discussed at the meeting, with substantially the same content as those documents actually presented at the meeting location.

6. Notice. Most statutes require the notice of the meeting to include details of the videoconferencing.

7. Type of technology. Most statutes don't limit to a specific type of communications technology, but give examples.

Legislative Subcommittee and Public Policy Subcommittee

Summary: Participation in Public Proceedings

8. Public access. All statutes require public access to the location of the meeting and the ability to at least hear, if not see and hear, all the members. Some statutes require that the remote locations from which the absent members are participating be open to the public as well.

So far, the RTKAC discussion has not included a requirement that the public have access to the remote site, probably because what has been contemplated is an individual member or two not being able to make it to the meeting, yet can participate from afar. (Think Selectman with the broken leg.) A couple of states have slightly different provisions for a meeting being conducted via communications technology and a meeting in which a member participates remotely because attendance is impossible. (Virginia)

9. Physical attendance required, annual meeting. A few states limit how many times an individual member may participate by videoconference, at least without a doctor's statement. A few states require that at least one meeting of the public body occur during which all members participating are physically present.

10. Reason not physically present. Several states limit the reasons why a member of the public body is not physically present: health or medical condition, absence from the jurisdiction, disability that prohibits attendance, when attendance is not reasonable practical, when attendance is otherwise difficult or impossible, on active duty in the armed services, emergency or personal matter and public body approves, member's personal residence in more than 60 miles from the meeting location, member unable to travel.

11. Compensation and reimbursement. One state statute provides that a member of a state board or commission who attends a meeting through telephone or other electronic means is not entitled to compensation or reimbursement for expenses for attending the meeting. (Oregon)

12. Meeting record. Most states expressly require the meeting minutes to include the information about who is participating from other locations. Many require a statement of the reason why the persons who are not physically present cannot attend at the meeting location.

Legislative Subcommittee and Public Policy Subcommittee
 Summary: Participation in Public Proceedings

| Topic | LD 258 | Comments |
|---|--|--|
| | §403-A. Public proceedings through other means of communication | |
| Application <ul style="list-style-type: none"> • All public proceedings • Includes executive sessions | This section governs public proceedings, including executive sessions, during which public or governmental business is discussed or transacted through telephonic, video, electronic or other means of communication. | Does transaction of governmental business include “discussion”? |
| Requirements to conduct a public proceeding | 1. Requirements. A body subject to this subchapter may conduct a public proceeding during which a member one or more members of the body participates <u>participate</u> in the discussion or transaction of public or governmental business through telephonic, video, electronic or other means of communication only if the following requirements are met. | Make clear that more than one member can participate via telecommunications? Do you want to allow the meeting to be conducted by electronic communication with public access to remote sites? |
| Policy required. Can include criteria that must be met for a member to participate remotely. | A. The body has adopted a policy that authorizes a member of the body who is not physically present to participate in a public proceeding through telephonic, video, electronic or other means of communication in accordance with this section. The policy may establish circumstances under <u>criteria</u> which <u>must be met before</u> a member may participate when not physically present. | Could include participation but not voting |
| Usual meeting notice required | B. Notice of the public proceeding has been given in accordance with section 406. | Should the notice include the fact that a member is participating electronically? |

Legislative Subcommittee and Public Policy Subcommittee
 Summary: Participation in Public Proceedings

| Topic | LD 258 | Comments |
|---|--|-----------------|
| Quorum must be physically present (unless a real emergency) | C. Except as provided in subsection 3, a quorum of the body is assembled physically at the location identified in the notice required by section 406. | |
| All members hear all members | D. Each member of the body participating in the public proceeding is able to hear all the other members and speak to all the other members during the public proceeding, and members of the public attending the public proceeding in the location identified in the notice required by section 406 are able to hear all members participating from other locations. | See and hear? |
| Identify who is in the remote location(s) | E. Each member who is not physically present and who is participating through telephonic, video, electronic or other means of communication identifies the persons present in the location from which the member is participating. | |
| Roll call vote. | F. All votes taken during the public proceeding are taken by roll call vote. | |
| | | |

Legislative Subcommittee and Public Policy Subcommittee
 Summary: Participation in Public Proceedings

| Topic | LD 258 | Comments |
|--|---|--|
| Documents provided in time, substantially same content | <p>G. Each member who is not physically present and who is participating through telephonic, video, electronic or other means of communication has received prior to the public proceeding any documents or other materials that will be discussed at the public proceeding, with substantially the same content as those documents actually presented. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate the action of a body in a public proceeding.</p> | |
| Voting – quasi-judicial | <p>2. Voting, quasi-judicial or judicial proceeding. A member of a body who is not physically present and who is participating in the public proceeding through telephonic, video, electronic or other means of communication may not vote on any issue concerning testimony or other evidence provided during the public proceeding if it is a judicial or quasi-judicial proceeding.</p> | <p>Most other states do not make this distinction, although some states waive the application of the open meetings act to quasi-judicial proceedings altogether.</p> <p>This provision was included in LD 258 to make sure that a member of a public body who is voting has the benefit (constitutionally required?) of seeing witnesses in person. Note that the FOAA does not prohibit proceedings, including adjudicatory proceedings, in which the <u>witnesses</u> are not physically present and participate remotely.</p> |

Legislative Subcommittee and Public Policy Subcommittee
 Summary: Participation in Public Proceedings

| Topic | LD 258 | Comments |
|--------------------------------|--|---|
| Emergency exception to quorum | <p>3. Exception to quorum requirement. A body may convene a public proceeding by telephonic, video, electronic or other means of communication without a quorum under subsection 1, paragraph C if:</p> | <p>Several other states are not as strict – requiring the public body to find on its own that an emergency exists or that the meeting is a necessity.</p> |
| | <p>A. An emergency has been declared in accordance with Title 22, section 802, subsection 2-A or Title 37-B, section 742;</p> | |
| | <p>B. The public proceeding is necessary to take action to address the emergency; and</p> | |
| | <p>C. The body otherwise complies with the provisions of this section to the extent practicable based on the circumstances of the emergency.</p> | |
| One meeting without technology | <p>4. Annual meeting. If a body conducts one or more public proceedings pursuant to this section, it shall also hold at least one public proceeding annually during which members of the body in attendance are physically assembled at one location and where no members of the body participate by telephonic, video, electronic or other means of communication from a different location.</p> | |

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Revision

§ 408-A. Public records available for inspection and copying

Except as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a reasonable time of making the request to inspect or copy the public record.

1. Inspect. A person may inspect any public record during reasonable office hours. An agency or official may not charge a fee for inspection unless the public record cannot be inspected without being converted or compiled, in which case the agency or official may charge a fee as provided in subsection 8.

2. Copy. A person may copy a public record in the office of the agency or official having custody of the public record during reasonable office hours or may request that the agency or official having custody of the record provide a copy. The agency or official may charge a fee for copies as provided in subsection 8.

- A. A request need not be made in person or in writing.
- B. The agency or official shall mail the copy upon request.

3. Acknowledgment; clarification; time estimate; cost estimate. The agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within ~~a reasonable period of time~~, 5 working days of receiving the request. ~~and The agency or official may request clarification concerning which public record or public records are being requested. The~~ Within a reasonable time of receiving the request, the agency or official shall provide a good faith, nonbinding estimate of the time within which the agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The agency or official shall make a good faith effort to fully respond to the request within the estimated time. For purposes of this section, the date a request is received is the date a sufficient description of the public record is received by the agency or official at the office responsible for maintaining the public record. (This comes from Alaska 2AAC 96.315(b))

4. Refusals; denials. If a body or an agency or official having custody or control of any public record refuses permission to inspect or copy or abstract a public record, the body or agency or official shall provide written notice of the denial, stating the reason for the denial, within 5 working days of the receipt of the request for inspection or copying. ***If a body or agency or official expects that the request will be denied in full or in part following a review, the body or agency or official may provide written notice of that expectation within 5 working days of the receipt of the request for inspection or copying.*** Failure to ~~comply with~~ provide the notice required by this subsection within 10 working days of the receipt of the request is considered **failure a denial** to allow inspection or copying and is subject to appeal as provided in section 409.

5. Schedule. Inspection, conversion pursuant to subsection 7 and copying of a public record subject to a request under this section may be scheduled to occur at a time that will not delay or inconvenience the regular activities of the agency or official having custody or control of the public record requested. If the agency or official does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the agency's or official's records must be posted in a conspicuous public place and at the office of the agency or official, if

an office exists.

6. No requirement to create new record. An agency or official is not required to create a record that does not exist.

7. Electronically stored public records. An agency or official having custody or control of a public record subject to a request under this section shall provide access to an electronically stored public record either as a printed document of the public record or in the medium in which the record is stored, at the requester's option, except that the agency or official is not required to provide access to an electronically stored public record as a computer file if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in or associated with that file.

A. If in order to provide access to an electronically stored public record the agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format for inspection or copying, the agency or official may charge a fee to cover the cost of conversion as provided in subsection 8.

B. This subsection does not require an agency or official to provide a requester with access to a computer terminal.

8. 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 for public records 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 \$15 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.

C. The agency or official may charge for the actual cost to convert a public record into a form susceptible of visual or aural comprehension or into a usable format.

D. An agency or official may not charge for inspection unless the public record cannot be inspected without being compiled or converted, in which case paragraph B or C applies.

E. The agency or official may charge for the actual mailing costs to mail a copy of a record.

9. Estimate. The agency or official having custody or control of a public record subject to a request under this section shall provide to the requester an estimate of the time necessary to complete the request and of the total cost as provided by subsection 8. If the estimate of the total cost is greater than \$30, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than \$100, subsection 10 applies.

10. Payment in advance. The agency or official having custody or control of a public record subject to a request under this section may require a requester to pay all or a portion of the estimated costs to complete the request prior to the search, retrieval, compiling, conversion 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.

11. Waivers. The agency or official having custody or control of a public record subject to a request under this section may waive part or all of the total fee charged pursuant to subsection 8 if:

- A. The requester is indigent; or
- B. The agency or official considers release of the public record requested to be in the public interest because doing so 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.

§409. Appeals

~~**1. Records.** Any person aggrieved by a refusal or denial to inspect or copy a record under section 408-A may appeal, within 5 working days of the receipt of the written notice of denial, to any Superior Court within the State. If a court, after a trial de novo, determines such denial was not for just and proper cause, it shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.~~

1. Records. Any person aggrieved by a denial *of a request to inspect or copy* a record under section 408-A may appeal the denial within 30 calendar days of the receipt of the written notice of denial or **40 days from the date of the request if no written notice is provided under section 408-A, subsection 4** to ~~any~~ the Superior Court ~~within the State as a trial de novo for the county in which the person resides or in which the agency maintains the office to which the person made the request.~~ The agency or official shall file ~~an answer~~ *a statement of position* within 14 calendar days *of service of the appeal*. If a court, after ~~a trial de novo review and taking testimony and other evidence it determines necessary,~~ determines such refusal, denial or failure was not for just and proper cause, the court shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

2. Actions. If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action is illegal and the officials responsible are subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for the action to be null and void. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

3. Proceedings not exclusive. The proceedings authorized by this section are not exclusive of any other civil remedy provided by law.

Draft of proposed changes to §408-A and §409. *Revised 11/12/2013 9:43 AM*

4. Attorney's fees. In an appeal under subsection 1 or 2, the court may award reasonable attorney's fees and litigation expenses to the substantially prevailing plaintiff who appealed the refusal under subsection 1 or the illegal action under subsection 2 if the court determines that the refusal or illegal action was committed in bad faith. Attorney's fees and litigation costs may not be awarded to or against a federally recognized Indian tribe.

This subsection applies to appeals under subsection 1 or 2 filed on or after January 1, 2010.

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**Right to Know Advisory Committee
Bulk Records (Public Policy) Subcommittee and Legislative Subcommittee**

Draft Legislation
Government Relief from Abusive FOAA Requests

Version A:

1 MRSA § 410-A is enacted to read:

§410-A. Abuses

Any body or agency or official who has custody or control of any public record may petition any Superior Court within the State for a determination whether, after a trial de novo, a request by a person to inspect or copy the public record may be denied with just and proper cause. A court shall enter an order appropriately limiting or denying the request.

For the purposes of this section, in determining whether a request to inspect or copy a public record may be denied with “just and proper cause” a court shall include consideration of the identity of the requesting person and the historical frequency, scope and manner of the requesting person’s requests for inspection or copying of records under section 408-A, and whether the probative value of the information to the public outweighs any substantial burden on the government body, agency or official.

Version B:

1 MRSA §409, sub-§ 1 is amended to read:

§409. Appeals

1. Records. Any person aggrieved by a refusal or denial to inspect or copy a record or the failure to allow the inspection or copying of a record under section 408-A may appeal the refusal, denial or failure within 30 calendar days of the receipt of the written notice of refusal, denial or failure to any Superior Court within the State as a trial de novo. The agency or official shall file an answer within 14 calendar days. If a court, after a trial de novo, determines such refusal, denial or failure was not for just and proper cause, the court shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

For the purposes of this section, in determining whether a refusal, denial or failure under this section is for “just and proper cause” a court shall include consideration of the identity of the aggrieved person and the historical frequency, scope and manner of the aggrieved person’s requests for inspection or copying of records under section 408-A, and whether the probative value of the information to the public outweighs any substantial burden on the government body, agency or official.

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Legislative and Public Policy Subcommittees

Draft: Redaction of social security numbers by Registers of Deeds

Sec. 1. 33 MRSA § 651-B is amended to read:

33 §651-B. Privacy protection

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Personal information" means an individual's first name or first initial and last name in combination with any one or more of the data elements described in this paragraph:

- (1) Social security number;
- (2) Driver's license number or state identification card number;
- (3) Account number, credit card number or debit card number if circumstances exist such that the number could be used without additional identifying information, access codes or passwords;
- (4) Account passwords or personal identification numbers or other access codes; or
- (5) Any of the data elements contained in subparagraphs (1) to (4) when not in connection with the individual's first name, or first initial, and last name if the information included would be sufficient to permit a person to fraudulently assume or attempt to assume the identity of the person whose information was included.

2. Personal information on registry's website. If a document that includes an individual's personal information is recorded with a register of deeds and is available on the registry's publicly accessible website, the individual may request that the register of deeds redact that personal information from the record available on the website. The register shall establish a procedure by which individuals make such requests at no fee to the requesting individual. The register shall comply with an individual's request to redact personal information.

3. Redaction of social security numbers. At the register of deed's discretion and without a request from an individual that the individual's personal information be redacted pursuant to subsection 2, a register of deeds may redact an individual's social security number from a document filed with the register of deeds for recording.

Summary

This amendment authorizes a register of deeds to redact social security numbers from recorded documents.



STATE OF MAINE

POLICY ON PRESERVATION OF STATE GOVERNMENT RECORDS

Effective: October 11, 2013

TO: All State Employees

Applicability: This policy applies to all employees of Maine state government, including all Executive Branch agencies, employees of the Judicial Branch, Legislative Branch, the Constitutional Offices, and semi-independent agencies.

Statutory Authority: Maine State Revised Statutes, Title 5, Chapter 6, Section 95, §7 (www.mainelegislature.org/legis/statutes/5/title5sec95.html).

Policy: Records management statutes, rules and policies provide the public with the evidentiary assurance and proper documentation that state and local government operations are operating in accordance with their public mandate and that their work is carried out with transparency. Public records are the property of the public and must be made available to citizens unless specifically proscribed in law. Agencies may destroy records only in accordance with statutorily-approved retention schedules. If agencies wish to destroy records earlier than those retention times, they must get approval from the State Archivist.

Purpose: This policy establishes uniform records management practices throughout Maine state government. State government employees create and receive documents and e-mails as part of their official duties, therefore, most documents and e-mails are official state records. State Archives records retention schedules dictate how long to retain any document or email created or received in connection with official government business; or evidence of the agency's functions, policies, and procedures; or because of its informational or historical value. These records schedules apply to both paper and electronic records. General Records Schedules apply to records common to most agencies. Most agencies also have agency-specific records schedules to supplement the General Records Schedules for paper and electronic records.

For questions about records retention schedules specific to your agency, contact your agency records officer. See list at: <http://www.maine.gov/sos/arc/records/state/statero.html>.

Guidelines for Correspondence and E-mail: E-mail is considered general correspondence. In the General Records Schedules, most general correspondence, and therefore most e-mail, has a retention period of 3 years. The only exceptions are:

- Commissioner or Agency head correspondence and e-mail is considered of historical value and to be kept permanently.
- Correspondence and e-mail related to the official state budget is to be kept for 4 years (two biennia) and then destroyed.

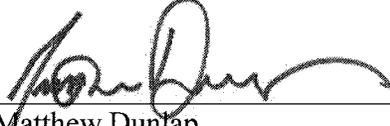
- Correspondence and e-mail related to equipment and property is to be kept for 5 years, and then destroyed.
- Junk mail such as advertisements and any personal e-mails an employee may have in their state e-mail accounts do not need to be preserved, since these are not official state government records.

In summary, most state agency correspondence and e-mail has a retention schedule of 3 to 5 years (unless for a commissioner or agency head, which is archival / permanent). In most cases, agency users should be managing their e-mail to retain for 3 to 5 years.

Guidelines for Other Record Types: Non-correspondence records have various retention periods, some even permanent. For example, contracts must be kept 7 years, official budget records 10 years, personnel records 60 years, and some record types that have historical value must be kept permanently (transferred to the State Archives). For details on each record type, see links to the records schedules below.

Actions by Employees: Every State employee shall comply with this policy by taking the following actions:

1. Properly manage all of their State government records, including correspondence, e-mail and electronic documents.
 - a. Employees are to save (archive) their correspondence, email and other documents so that it is preserved for the amount of time required by the records schedules. It is the responsibility of Agency managers and supervisors to secure and archive records of former employees. For steps on how to archive e-mail, see the instructions on the State internal website at: <http://inet.state.me.us/foaa/archiving.aspx>.
 - b. Executive Branch: If assistance is needed, employees can call the OIT Help Desk at 624-7700.
 - c. Judicial Branch, Legislative Branch, Constitutional Offices and semi-independent agencies: If assistance is needed, employees should call their individual HelpDesk.
2. Review the following Schedules and Guides:
 - General Records Schedules: www.maine.gov/sos/arc/records/state/gensched2.html.
 - State Agency Schedules (pertaining to their agency): <http://www.maine.gov/sos/arc/records/state/stsched.html>.
 - Email Retention Guide: <http://www.maine.gov/sos/arc/records/state/emailguide.pdf>.
 - Basics of Records Management Guide: <http://www.maine.gov/sos/arc/records/state/trainaug13.pdf>.
3. Annually sign the web-based acknowledgement form (within 60 days of receiving notice): <http://www.maine.gov/sos/arc/records/state/policyform.html>.



Matthew Dunlap
Secretary of State

Fees and fee schedules for responding to document requests

Email responses from query to State FOA Contacts

| AGENCY | CHARGE FOR COPIES? | PER PAGE | TIME | COMMENTS |
|--|--------------------|------------------|--------------------------------|----------|
| Bureau of Capitol Police, Department of Public Safety | Yes | See DPS schedule | \$15 per hour after first hour | |
| Bureau of Consolidated Emergency Communications, Department of Public Safety | Yes | See DPS schedule | No | |
| Bureau of Highway Safety, Department of Public Safety | No | No | No | |
| Emergency Medical Services, Department of Public Safety | Yes | See DPS schedule | No | |
| Gambling Control Board, Department of Public Safety | No | See DPS schedule | No | |
| Maine Criminal Justice Academy, Department of Public Safety | Yes | See DPS schedule | No | |
| Maine Drug Enforcement Agency, Department of Public Safety | No | No | No | |
| Maine State Police, Department of Public Safety | Yes | See DPS schedule | Yes | |

| AGENCY | CHARGE FOR COPIES? | PER PAGE | TIME | COMMENTS |
|--|--------------------|---|--------------------------------|---|
| State Fire Marshal's Office, Department of Public Safety | Yes | See DPS schedule | Yes | |
| Maine Human Rights Commission | Yes | \$0.12 per page | \$15 per hour after first hour | Written policy |
| Department of Transportation | Yes | (not specified) | \$15 per hour after first hour | |
| State Treasurer | | No fee schedule | | Consider charging only if time to produce documents excessive; look to AG's Office for guidance |
| Workers' Compensation Board | Yes | \$0.10 per page | \$15 per hour after first hour | Research charge generally applied only if request is large and, as a result, time-consuming for staff |
| Maine Turnpike Authority | Generally no | \$0.25 | As allowed by statute | Most requests not that big |
| Public Advocate | No | No | No | |
| Public Utilities Commission | Yes | \$0.25 if PUC makes copies \$0.10 if requester makes copies at PUC | \$15 per hour after first hour | Written policy |
| State Auditor | Generally no | | | Don't receive many requests; most responses can be emailed |
| Maine State Board of Nursing | Yes | \$0.25 | \$15 per hour after first hour | Charge for time only if requires substantial time |

| AGENCY | CHARGE FOR COPIES? | PER PAGE | TIME | COMMENTS |
|---|--------------------------------|---|--------------------------------|--|
| Finance Authority of Maine | Yes | \$0.05 | \$15 per hour after first hour | Also charge actual postage fees |
| Department of Corrections | Yes – if not electronic record | \$0.25 | | |
| Department of Environmental Protection | Yes | \$0.25 Larger format = \$0.50 Color copies = \$0.60 | \$15 per hour after first hour | Actual shipping costs |
| Maine Ethics Commission | If a lot of documents | \$0.20 if Commission makes copies \$0.10 if requester does copying | \$15 per hour after first hour | Rarely charge for time – only when a huge effort on part of staff Most request are small Very few records not in electronic format |
| Maine Emergency Management, Department of Defense, Veterans and Emergency Management | No | No | No | |
| Office of Profession and Financial Regulation, Department of Professional and Financial Regulations | After first 7 pages | \$0.25 | \$10 per hour after first hour | Requests rarely result in requestors being invoiced |
| Office of Securities, Department of Professional and Financial Regulations | Yes | \$0.20 | Not typically | |

| AGENCY | CHARGE FOR COPIES? | PER PAGE | TIME | COMMENTS |
|---|---|----------|--------------------------------|---|
| Bureau of Insurance, Department of Professional and Financial Regulation | Yes – if not transmitted electronically | \$0.50 | No | |
| Bureau of Financial Institutions, Department of Professional and Financial Regulations | Yes | \$0.25 | No | |
| Bureau of Consumer Credit Protection, Department of Professional and Financial Regulation | No | - | No specific set price | Provides firm estimate on cost in advance based on time and materials it will require, then agree with the requesting party ahead of time on the charge |
| Maine Historic Preservation Commission | No | No | No | |
| Department of Education | Yes | \$0.10 | \$15 per hour after first hour | |

See attached schedules and policies:

- Department of Public Safety, Maine State Police
- Maine Human Rights Commission
- Public Utilities Commission

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State of Maine

DEPARTMENT OF PUBLIC SAFETY MAINE STATE POLICE

UNIFORM FREEDOM OF ACCESS ACT FEE SCHEDULE

| ITEM | FEE |
|--|---|
| Paper documents (for example, paper copies of incident reports, notes, memoranda, e-mails, etc.) | Incremental fee of five dollars (\$5.00) per every twenty-five (25) pages: <ul style="list-style-type: none">▪ 1 to 25 pages: \$5.00▪ 26 to 50 pages: \$10.00▪ 51 to 75 pages: \$15.00... etc. |
| Photographs <ul style="list-style-type: none">▪ 4" x 6" prints▪ Digital photos on CD ROM | <ul style="list-style-type: none">▪ \$2.00 each▪ \$5.00 each <p>No fee is to be charged if digital photos are being provided to a defense attorney or prosecuting authority for purposes of discovery in the context of a pending criminal case.</p> |
| Forensic maps <ul style="list-style-type: none">▪ 8½" x 11" black and white / color map▪ Color/e-mailed▪ 33" x 44" plotter size map | <ul style="list-style-type: none">▪ \$10.00 each / \$10.00 each▪ \$15.00 each▪ \$35.00 each |
| CDs DVDs | <ul style="list-style-type: none">▪ \$5.00 each▪ \$5.00 each |
| Staff time dedicated to searching for, retrieving, and compiling any type of requested records | "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 \$15 per hour after the first [free] hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information." (1 MRSA § 408-A(8)(B)) |
| NOTES | |
| <ul style="list-style-type: none">▪ The fees provided in this schedule supersede any and all fees provided in current Maine State Police policies.▪ Fees for types of records that are not considered in this schedule are to be reasonable and determined on a case-by-case basis.▪ The Maine State Police may make reasonable deviations from this fee schedule at any time.▪ Payment of fees may be made with a check or money order made payable to, "Treasurer, State of Maine." | |

▪ Updated 9/8/2011

**MAINE HUMAN RIGHTS COMMISSION POLICY
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 record¹ during the regular business hours of the agency within a reasonable period of time after making a request to inspect or copy the public record. The Commission may request clarification concerning which public record or public records are being requested and shall acknowledge receipt of the request within a reasonable period of time.

Any information relating to a complaint prior to the conclusion of the investigation, settlement or conciliation information, and information identifying persons who are not parties to a complaint are confidential and will not be disclosed. *See* 5 M.R.S.A. § 4612(1)(A, B), (3), (5).

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 Commission 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 Commission charges .12² per page to cover the cost of copying.
 - B. The Commission charges a fee to cover the actual cost of searching for, retrieving and compiling the requested public record of \$15 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.
 - C. The Commission charges for the actual cost to convert a public record into a form susceptible of visual or aural comprehension or into a usable format.
 - D. The Commission does not charge for on-site inspection of the file by parties to a complaint.
 - E. The Commission charges for actual mailing costs incurred with a request.
4. Estimate. Commission provides the requester with 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 \$30, 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 Commission 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 Commission 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 doing so 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.

¹ Public records. 1 M.R.S.A. § 402(3).

² Fees. 5 M.R.S.A. §2051

PUC Policy on Costs Associated with FOAA Requests

In addition to the requirements in 1 M.R.S.A. § 408-A, the Commission's policy concerning FOAA requests is as follow:

1. Documents may be viewed at the Commission for free.
2. If paper copies are requested, the charge is .25¢ per page if the Commission makes the copies or .10¢ per page if the requester makes his/her own copies at the Commission. Requests consisting of less than ten pages will be at no charge.
3. The first hour for Commission staff searching, retrieving and compiling a response is free. Time over one hour shall be charged at \$15.00 per hour.
4. If electronic copies are requested, the searching, retrieving and compiling charges described in #3 shall apply.
5. When documents are available through the Commission's electronic filing system, the requester will first be directed to the electronic case files where the documents exist to determine if this satisfies the request.
6. If an individual claims he/she is indigent and cannot afford any charges, the Commission shall apply the rules applied by the courts in determining indigency as set forth in the Maine Rules of Civil Procedures, Rule 91. This requires the requester to file an affidavit stating:
 - a. the person's monthly income and necessary monthly expenses;
 - b. that the person possesses no other source to pay the charges;
 - c. if the person is receiving poverty-based public assistance income identifying the government program and nature and duration of the assistance and;
 - d. that the request is made in good faith.

There will be an assumption that the requester is without sufficient funds if the person's income is derived from poverty-based public assistance programs. The information in the affidavit shall be treated as confidential. Based on the information filed, the Commission's Administrative Director will determine whether the charges should be waived and notify the requester.

MacImage of Maine LLC, et al. v Androscoggin County, et al.

MacImage of Maine LLC, et al. v Androscoggin County, et al., 2012 ME 44, 40 A.3d 975. The Supreme Judicial Court held that county registries of deeds must establish reasonable fees for responding to bulk requests for real estate records that are available to the public by law. The Law Court found that the fees charged by the counties for the transfer of bulk records were reasonable and the counties were not required to provide bulk transfers of the records at the price requested by a private entity. In making its ruling, the Law Court relied heavily on recently enacted legislation (Public Law 2011, chapter 378) that established fees and applied retroactively.

In 2010, this case was initiated in Superior Court by MacImage of Maine, LLC and its general manager, John Simpson, who brought suit against six counties seeking access to the computer database of records maintained by each county's registry of deeds. MacImage's plan to build a single website on which the land records of all counties are available for review and copying was dependent on MacImage's ability to obtain the records of the registries of deeds both initially and on a regular basis for updates. MacImage requested the electronic bulk transfer of the records from each county, which the counties were not willing or able to do at the price MacImage was willing to pay.

The Superior Court determined that the Legislature's 2010 amendment to Title 33, sections 651 and 751 made clear that the Title 33 statute, and not the fees provisions of the Freedom of Access Act, applies to the establishment of copying fees for the records of the registry of deeds in each county. The Court found that section 751 did not, however, authorize the counties to charge fees based on the overall cost of maintaining their data in electronic form. The Court then reviewed each county's fees for the bulk transfer of records to MacImage, and found that each county's fees were not reasonable and constituted constructive denial of MacImage's public records requests. The Court ordered each county to provide a download of the requested records using county-specific cost formulas.

After the counties had commenced their appeals, the Legislature enacted Public Law 2011, chapter 378, which repealed section 751, subsection 14, replaced that subsection with new statutory language, and provided a retroactive explanation of what qualified as a reasonable fee between September 1, 2009, and June 16, 2011, the effective date of the Act.

In vacating the Superior Court's ruling, the Law Court held that the real estate records held by the county registries of deeds, along with the indexes to those records, are available to the public pursuant to Title 33, section 651 and not through the more general provisions under the Freedom of Access Act (Title 1, section 402, subsection 3 and section 408 [now section 408-A]). It also noted that the Legislature through Public Law 2011, chapter 378, established reasonable fees for responding to record requests for records and indexes, including the transfer of electronic data. The Law Court held that the legislation is applicable to the disputed fees and that those fees fall within the parameters for "reasonable fees" established by that legislation.

Evolution of Advisory Committee and Ombudsman responsibilities

11

| RESPONSIBILITY | 2005 LD 301 | 2005 COM AMD | CURRENT LANGUAGE |
|---|------------------------|-----------------------------|---|
| Statutes/Legislation | | | |
| 1. adviser to Legislature when legislation concerning public access is considered | AC | AC | 1 MRSA §411, sub-§6 H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered; |
| 2. submit legislation | AC | AC | (No authority) |
| 3. examine inconsistencies in statutory language | | | 1 MRSA §411, sub-§6 F. Shall examine inconsistencies in statutory language and may recommend standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released; |
| 4. review existing public records exceptions | AC | AC | 1 MRSA §411, sub-§6 E. Shall serve as a resource for the review committee under subchapter 1-A in examining public records exceptions in both existing laws and in proposed legislation; |
| 5. make statutory recommendations | AC PAO | AC | 1 MRSA §411, sub-§6 G. May make recommendations for changes in the statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and regional governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws and their underlying principles. The joint standing committee of the Legislature having jurisdiction over judiciary matters may report out legislation based on the advisory committee's recommendations; 5 MRSA §200-I, sub-§ E. Make recommendations concerning ways to improve public access to public records and proceedings; and |
| | | | |

Evolution of Advisory Committee and Ombudsman responsibilities

| RESPONSIBILITY | 2005 LD 301 | 2005 COM AMD | CURRENT LANGUAGE |
|--|------------------------|-----------------------------|---|
| Complaints | | | |
| 6. compliance issues | | | 1 MRSA §411, sub-§6 A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws; |
| 7. review info from PAO about lack of access and frivolous requests | AC | | |
| 8. respond to and work to resolve complaints | PAO | | 5 MRSA §200-I, sub-§2 C. Respond to and work to resolve complaints made by the public and public agencies and officials concerning the State's freedom of access laws; |
| 9. advisory opinions | | | 5 MRSA §200-I, sub-§2 D. Furnish, upon request, advisory opinions regarding the interpretation of and compliance with the State's freedom of access laws to any person or public agency or official in an expeditious manner. The ombudsman may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under Title 1, chapter 13. Advisory opinions must be publicly available after distribution to the requestor and the parties involved; |
| | | | |
| Guidance/Education | | | |
| 10. recommendations to state and local government – law and practices (same as #5 above) | | | 1 MRSA §411, sub-§6 G. May make recommendations for changes in the statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and regional governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws and their underlying principles. The joint standing |

Evolution of Advisory Committee and Ombudsman responsibilities

| RESPONSIBILITY | 2005 LD 301 | 2005 COM AMD | CURRENT LANGUAGE |
|---|----------------|--------------------|---|
| | | | committee of the Legislature having jurisdiction over judiciary matters may report out legislation based on the advisory committee's recommendations; |
| 11. prepare interpretative and educational materials and programs | PAO | AC | 5 MRSA §200-I, sub-§2 A. Prepare and make available interpretive and educational materials and programs concerning the State's freedom of access laws in cooperation with the Right To Know Advisory Committee established in Title 1, section 411; |
| 12. make available to elected or appointed public officials educational materials | PAO | | |
| 13. resource to support training and education - core resources, best practices | | | 1 MRSA §411, sub-§6 D. Shall serve as a resource to support training and education about the freedom of access laws. Although each agency is responsible for training for the specific records and meetings pertaining to that agency's mission, the advisory committee shall provide core resources for the training, share best practices experiences and support the establishment and maintenance of online training as well as written question-and-answer summaries about specific topics. The advisory committee shall recommend a process for collecting the training completion records required under section 412, subsection 3 and for making that information publicly available; |
| | | | |
| Guidance/Information | | | |
| 14. requests for interpretation and clarification | | | 1 MRSA §411, sub-§6 A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws; |
| 15. central source and coordinator | | | 1 MRSA §411, sub-§6 |

Evolution of Advisory Committee and Ombudsman responsibilities

| RESPONSIBILITY | 2005 LD 301 | 2005 COM AMD | CURRENT LANGUAGE |
|---|------------------------|-----------------------------|--|
| of information | | | B. Shall serve as the central source and coordinator of information about the freedom of access laws and the people's right to know. The advisory committee shall provide the basic information about the requirements of the law and the best practices for agencies and public officials. The advisory committee shall also provide general information about the freedom of access laws for a wider and deeper understanding of citizens' rights and their role in open government. The advisory committee shall coordinate the education efforts by providing information about the freedom of access laws and whom to contact for specific inquiries; |
| 16. respond to inquiries from public and officials | PAO | AC | 5 MRSA §200-I, sub-§2 B. Respond to informal inquiries made by the public and public agencies and officials concerning the State's freedom of access laws; |
| 17. furnish upon request guidelines and other appropriate information | PAO | | |
| | | | |
| Website | | | |
| 18. central publicly accessible website: statutes, guidance on using the law, contact information, complaints, statutory exceptions | | | 1 MRSA §411, sub-§6 C. Shall serve as a resource to support the establishment and maintenance of a central publicly accessible website that provides the text of the freedom of access laws and provides specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. The website must include the contact information for agencies, as well as whom to contact with complaints and concerns. The website must also include, or contain a link to, a list of statutory exceptions to the public records laws; |
| | | | |

Evolution of Advisory Committee and Ombudsman responsibilities

| RESPONSIBILITY | 2005 LD 301 | 2005 COM AMD | CURRENT LANGUAGE |
|--|----------------|--------------------|--|
| Monitor, data gathering, tracking | | | |
| 19. review public access to public proceedings and public records | AC | AC | |
| 20. conduct public hearings, conferences, workshops other meetings to obtain information, discuss, publicize needs of and consider solutions | AC | AC | 1 MRSA §411, sub-§6 I. May conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records; |
| 21. review collection, maintenance and use of records by agencies | | | 1 MRSA §411, sub-§6 J. Shall review the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public; and |
| 22. coordinate with state agency PAOs to compile data about requests, time, costs | | | 5 MRSA §200-I, sub-§2 F. Coordinate with the state agency public access officers the compilation of data through the development of a uniform log to facilitate record keeping and annual reporting of the number of requests for information, the average response time and the costs of processing requests. |
| 23. report | | | 5 MRSA §200-I 5. Report. The ombudsman shall submit a report not later than March 15th of each year to the Legislature and the Right To Know Advisory Committee established in Title 1, section 411 concerning the activities of the ombudsman for the previous year. The report must include: <ul style="list-style-type: none"> A. The total number of inquiries and complaints received; B. The number of inquiries and complaints received respectively from the public, the media and public agencies or officials; C. The number of complaints |

Evolution of Advisory Committee and Ombudsman responsibilities

| RESPONSIBILITY | 2005 LD 301 | 2005 COM AMD | CURRENT LANGUAGE |
|-----------------------|------------------------|-----------------------------|--|
| | | | <p>received concerning respectively public records and public meetings;</p> <p>D. The number of complaints received concerning respectively:</p> <ul style="list-style-type: none"> (1) State agencies; (2) County agencies; (3) Regional agencies; (4) Municipal agencies; (5) School administrative units; <p>and</p> <ul style="list-style-type: none"> (6) Other public entities; [<p>E. The number of inquiries and complaints that were resolved;</p> <p>F. The total number of written advisory opinions issued and pending; and</p> <p>G. Recommendations concerning ways to improve public access to public records and proceedings.</p> |
| | | | |
| Catchall | AC | AC | <p>1 MRSA §411, sub-§6</p> <p>K. May undertake other activities consistent with its listed responsibilities.</p> |

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A

To: Legislative Subcommittee & Public Policy Subcommittee
From: Stephen Wagner
Date: November 12, 2013
Re: Sampling of State Privacy Statutes Modeled After the 1974 Federal Privacy Act

I. Objective and Introduction

This Memo responds to a request raised in the last joint meeting of the Legislative and Public Policy Subcommittees for information on any states that have privacy statutes modeled after the federal Privacy Act of 1974. The discussion centered on what duty a state government should owe when it collects a citizen's private information. Currently in Maine, "every time a new aspect of public records is deemed confidential, it requires additional review and redaction of documents by public agencies, which increases the costs to that agency to comply with FOIA requests."¹ Staff further explained "there are several places in Maine statutes where private information is collected that the agency is not precluded from disclosing." This memo attempts to summarize some of the different states models that are to varying degrees based on the single-statute approach taken in the federal Privacy Act.

In order to narrow the scope of the state privacy laws analyzed, Part II of this memo quickly summarizes the federal Privacy Act's purposes, the substantive and procedural rights created by the act, and selected relevant provisions; the state's analyzed reflect a similar structure. Part III briefly explores the privacy statutes of several states that are to some degree modeled on the federal Privacy Act. If the Committees desire any further information on a specific state's approach, I am happy to provide further detail from my research. Finally, the objective of this memo is not to reach any conclusion; however, if the Committees wishes to pursue further research, I recommend exploring commentary on proposed approaches for modern privacy regulation that seek to improve on the federal Privacy Act and numerous state approaches.²

II. The Federal Privacy Act of 1974

In the aftermath of the Watergate scandal, in 1974 the US Congress enacted the Privacy Act.³ This was largely in response to concerns about the emergence of computerized databases, which contain individual's personal and private information.⁴ Aside from limited exceptions,⁵ the Act applies only to federal agencies within the executive department, including the White House.⁶

The act focuses on four basic policy objectives: 1) to restrict disclosure of personally identifiable records maintained by agencies; 2) to grant individuals increased rights of access to agency records maintained on themselves; 3) to grant individuals the right to seek amendment of inaccurate agency records; 4) to establish a code of "fair information practices" which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records.⁷

In this pursuit, the act creates four substantive and procedural rights: 1) it requires government agencies to show an individual any records kept on him or her; 2) it requires agencies to follow certain principles, called "fair information practices," when gathering

and handling personal data; 3) it places restrictions on how agencies can share an individual's data with other people and agencies; and 4) it lets individuals sue the government for violating its provisions.⁸ Despite granting concrete substantive and procedural rights, the 1974 federal Privacy Act is often viewed as a flawed and limited protection of privacy rights.⁹

For the purposes of this memo, the provisions that restrict disclosure of personally identifiable records maintained by agencies, and the relevant definitions, are partially excerpted below. I used these provisions as my baseline when researching other states to determine whether their privacy laws contained a statute that was perhaps modeled on the federal Privacy Act. Such provisions excerpted from 5 U.S.C. §§ 522, 522a include:

5 U.S.C. 522

(f)(1) “agency” . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

5 U.S.C. 522a

(a)(1) “record” means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(b) Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless . . .

[These 12 exemptions include disclosure: to officers in performance of their duties, as required under FOIA, for “routine use,” for the census, for certain statistical research, to the National Archives for evaluation, to another agency for an authorized activity by written permission, to an individual under a showing of “compelling circumstances affecting health or safety,” either House of Congress within its jurisdiction, to the Comptroller general in its performance of its duties, by order of a court of competent jurisdiction, or to an authorized consumer reporting agency.]

III. Sampling of States With a Single Privacy Act That Regulates Disclosure and Handling of Government-Collected Private Personal Information

Following the enactment of the federal Privacy Act, one observer found that approximately nine states followed suit with their own privacy acts.¹⁰ While some of these acts today remain largely similar to the federal act, others differ in various ways. Included below are six states: California, New York, Hawai`I, Utah, Idaho, and Minnesota. These states demonstrate approximately four different approaches to creating a state counterpart to the federal privacy act.¹¹ The approaches and the corresponding states are: 1) California and New York are examples of states that employ an approach very similar to the federal privacy act; 2) Hawaii and Idaho are examples of states employ an ad hoc balancing approach to each piece or category of public data; 3) Idaho is an example of a state that specifically lists the information that is subject to disclosure; and finally, 4) Minnesota bases its level and procedure for disclosure by categorizing each type of information. This sampling is not meant to be exhaustive of all approaches that states do employ for protecting private information collected by the government or exhaustive of those states that employ a single privacy act for this purpose. Rather, the intent is to give brief examples of the range of approaches that Maine could potentially employ, should it chose to proceed in grating a single privacy act statute. Each section contains a brief summary and excerpts of the relevant statutory language that supports the summary.

California (Similar to the Federal Privacy Act)

California is often viewed as the “vanguard of the privacy field” because of its extensive (over 30) privacy laws, as well as an expansive definition of privacy in their state constitution.¹² California’s Information Privacy Act of 1977 is closely modeled on the federal Privacy Act of 1974.¹³ The California act broadly prohibits disclosure of personal information by state agencies, subject to specified exemptions. Nearly immediately the act was criticized for striking the balance too far on the side of privacy, and has subsequently been amended.¹⁴

Excerpted From CAL. CIV. CODE §§ 1798-1798.78:

§ 1798.3

(a) **“personal information”** means any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual.

(b) **“agency”** means every state office, officer, department, division, bureau, board, commission, or other state agency, except that the term agency shall not include:

- (1) The California Legislature.
- (2) Any agency established under Article VI of the California Constitution.

- (3) The State Compensation Insurance Fund, except . . . personal information about the employees . . .
- (4) A local agency . . .

§ 1798.24

“No agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains unless the information is disclosed, as follows:”

[lists 22 exemptions that provide disclosure to: the individual to whom the information pertains; by prior written consent; to the guardian, conservator, representative; if relevant and necessary in the ordinary course of duties of employee of agency; as necessary for transferee to perform constitutional duties; governmental entity as required by law; pursuant to Public Records Act; certain statistical research; “compelling circumstances affecting health or safety”; to state archives for evaluation; per compulsory legal process so long as agency reasonably attempted to give notice to the individual; by search warrant; pursuant to Vehicle Code; for verifying and paying government health care serve claims; law enforcement investigations unless prohibited; agency investigation; to an adopted person; to a child or grandchild of an adopted person; certain research; certain insurance purposes; certain provision under the Financial Code.]

**New York
(Similar to the Federal Privacy Act)**

Similar to California, New York’s Personal Privacy Protection Law of 1984 was modeled after the federal Privacy Act of 1974.¹⁵ Similarly, this law also generally prohibits disclosure, subject to specified exemptions. Unlike California, however, the Personal Privacy Protection Act also specifically states those records that will, even under the exemptions, not be subject to disclosure.

Excerpted From N.Y. PUB. OFF. 6-A §§ 91-99:

§ 92. Definitions

(1) Agency. The term "agency" means any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys.

(9) Record. The term "record" means any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject irrespective of the physical form or technology used to maintain such personal information. The term "record" shall not include personal information which is not used to make any determination about the data subject if it is:

- (a) a telephone book or directory which is used exclusively for telephone and directory information;
- ~~(b) any card catalog, book or other resource material in any library;~~
- (c) any compilation of information containing names and addresses only which is used exclusively for the purpose of mailing agency information;
- (d) personal information required by law to be maintained, and required by law to be used, only for statistical research or reporting purposes;
- (e) information requested by the agency which is necessary for the agency to answer unsolicited requests by the data subject for information; or
- (f) correspondence files.

§ 96. Disclosure of records.

(1) No agency may disclose any record or personal information unless such disclosure is:

[lists 14 exemptions for disclosure: by written consent of the data subject; officer in performance of duties; state public access law; for use by agency; specifically authorized by federal or state statute or regulation; census; certain statistical research; state archives for evaluation; legal compulsion; for criminal law enforcement; search warrants; certain agency purposes]

(2) Nothing in this section shall require disclosure of:

- (a) personal information which is otherwise prohibited by law from being disclosed;
- (b) patient records concerning mental disability or medical records where such disclosure is not otherwise required by law;
- (c) personal information pertaining to the incarceration of an inmate at a state correctional facility which is evaluative in nature or which, if disclosed, could endanger the life or safety of any person, unless such disclosure is otherwise permitted by law;
- (d) attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivisions (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena issued in the course of a criminal action or proceeding, court ordered or grand jury subpoena, search warrant or other court ordered disclosure.

Hawaii
(Ad Hoc Balancing Approach)

Hawaii does not have a privacy statute the closely models the federal Privacy Act of 1974. Instead, Hawaii’s Office of Information Practices (located with the Attorney General’s Office), which “promotes open and transparent government in Hawaii,” administers two open government laws: 1) the Uniform Information Practices Act, which requires open access to government records, and 2) the Sunshine Law, which requires open public meetings.¹⁶ The Office’s website states “both laws are intended to open up governmental processes to public scrutiny and participation by requiring government business to be conducted as transparently as possible, while balancing personal privacy rights guaranteed under the Hawaii State Constitution.”¹⁷ So rather than a privacy statute that prohibits disclosure subject to specific exemptions, Hawaii’s state agencies apply an ad hoc balancing approach.

Excerpted from HAW. REV. STAT. §§ 92F-1-42

§ 92F-3

“Agency” means any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.

“Personal record” means any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

§ 92F-14

(a) Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual.

(b) [Provision lists specific examples seemingly meant to illustrate when an individual would have a “significant privacy interest” that would outweigh the public interest in disclosure using the balancing approach above]

Utah
(Ad Hoc Balancing Approach)

Utah is included because it is one of the most recent states to pass something that could be characterized as a general privacy act, and so may arguably reflect the trend of thinking in this area.¹⁸ The Government Records Access and Management Act provides for disclosure under a balancing test similar to Hawaii, with some categorization similar to Minnesota.¹⁹ However, the act does not provide any “guidance with respect to the identification of the relevant interests [or] how they are to be weighed.”²⁰

Utah Code Ann. § 63G-2-201(5)

“A governmental entity may disclose a record that is private under Subsection 63G-2-302(2) or protected under [the three classifications of private information in this act] to persons [that individual or her representative] if the head of a governmental entity, or a designee, determines that . . . there is no interest in restricting access to the record [or] the interests favoring access are greater than or equal to the interest favoring restriction of access.”

Idaho
(Specific Items Subject to Disclosure)

Idaho does not have a statute that closely models the federal Privacy Act. Rather, Idaho specifically exempts “records of a personal nature” defined only by an extensive, but likely not exhaustive, list of records exempt for disclosure. Further, unlike the federal Privacy Act or California, Idaho’s exemptions from public disclosure apply to the state and local level.

Excerpted From Idaho Code Ann. §§ 936-941

§ 9-337

(11) “Public agency” means any state or local agency as defined in this section.

(8) “Local agency” means a county, city, school district, municipal corporation, district, public health district, political subdivision, or any agency thereof, or any committee of a local agency, or any combination thereof.

(15) “State agency” means every state officer, department, division, bureau, commission and board or any committee of a state agency

including those in the legislative or judicial branch, except the state militia and the Idaho state historical society library and archives.

(13) “Public record” includes, but is not limited to, any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics.

§§ 9-340C-341 [list of exemptions and exceptions]

Minnesota (Disclosure Subject to Cataogrization)

Enacted in 1979, Minnesota’s Data Practices Act was one of the first privacy acts of its kind in the United States; today, it continues to be viewed as a unique approach administering the privacy of personal information collected by the government.²¹ Unlike statues on the federal level, containing the adjacent but distinct Privacy Act and Freedom of Information Act, the Minnesota Data Practices Act “fuses notions of freedom of information and fair information practices into a single statute.”²² Generally speaking, the act categorizes private information collected by government entities into six different categories.²³ Unlike Hawaii, for example, which balances the interests every time, the Minnesota Act presumes that data is publically available, unless it is explicitly categorized otherwise.²⁴ The level of disclosure and procedure for disclosing the information depends the category of private information. When over classification occurs, or an agency cannot categorize information, the Act provides for a series of administrative procedures to that balance the public and private interests. This has resulted in a complex statute, updates nearly every year, potentially creating a high administrative burden.²⁵

Minn. Stat. §§ 13.01-13.4

§ 13.02

(5)“Data on individuals” means all government data in which any individual is or can be identified as the subject of that data, unless the appearance of the name or other identifying data can be clearly demonstrated to be only incidental to the data and the data are not accessed by the name or other identifying data of any individual.

(7a) “Government entity” means a state agency, statewide system, or political subdivision.

(11) “Political subdivision” means any county, statutory or home rule charter city, school district, special district, any town exercising powers under chapter 368 and located in the metropolitan area, as defined

in section 473.121, subdivision 2, and any board, commission, district or authority created pursuant to law, local ordinance or charter provision. It includes any nonprofit corporation which is a community action agency organized pursuant to the Economic Opportunity Act of 1964 (Public Law 88-452) as amended, to qualify for public funds, or any nonprofit social service agency which performs services under contract to a government entity, to the extent that the nonprofit social service agency or nonprofit corporation collects, stores, disseminates, and uses data on individuals because of a contractual relationship with a government entity.

§ 13.03

(1) All government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified by statute, or temporary classification pursuant to section 13.06, or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential. The responsible authority in every government entity shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use. Photographic, photostatic, microphotographic, or microfilmed records shall be considered as accessible for convenient use regardless of the size of such records.

¹ Meeting Summary, Joint Legislative Subcommittee & Public Policy Subcommittee, Maine Right to Know Advisory Committee, 3 (Oct. 3, 2013).

² See e.g. Scot Ganow & Sam S Han, *Model Omnibus Privacy Statute*, 35 U. Dayton L. Rev. 345 (2010) (explores the feasibility of an omnibus privacy statute and suggests a model form); See also note 9 *infra*.

³ Privacy Act of 1974, 5 U.S.C. § 552a (West 2007) (enacted 1974).

⁴ Electronic Information Privacy Center, *The Privacy Act of 1974*, <http://epic.org/privacy/1974act/> (last visited Nov. 5, 2013).

⁵ Privacy Act of 1974, Pub. L. 93-579 § 7(a)(2)(B) (1974) (included in the original Privacy Act, but codified in 5 U.S.C.A 522a only as a note, the Privacy Act's provision on the disclosure of a social security account number applied to all levels of government).

⁶ 5 U.S.C. § 522a(a)(1); DEP'T OF JUSTICE, *Overview of the Privacy Act of 1974*, 4 (2009)

⁷ *Id.*

⁸ Electronic Information Privacy Center, *supra* note 4.

⁹ See generally Haeji Hong, *Dismantling the Private Enforcement of the Privacy Act of 1974: Doe v Chao*, 38 AKRON L. REV. 71 (2005) (arguing the Privacy Act is ineffective because agencies can get around it by collecting privacy data by employing private party contractors); Todd Robert Coles, Comment, *Does the Privacy Act of 1974 Protect Your Right to Privacy? An Examination of the Routine Use Exemption*, 40 Am. U. L. Rev. 957 (1991) (discussing the abuse and lack of oversight over the "routine use" exemption to the disclosure protections of the Privacy Act); Lior Jacob Strahilevitz, *Prosser's Privacy at 50: A Symposium on Privacy in the 21st Century*, 93 Cal. L. Rev. 2007 (2010)

(discussing how the Privacy Act should be reconciled with numerous other federal privacy acts enacted subsequently to fix the “increasingly fragmented and decreasingly coherent” privacy law in the United States).

¹⁰ Memorandum from the Tex. Office of the Att’y Gen., to the House Committee on State Affairs Subcommittee on Privacy Issues (July 20, 2000) (Subject: Privacy Acts of the Stats and the Federal Government; identified California, Hawaii, Idaho, Kentucky, Massachusetts, Minnesota, New York, Ohio, and Virginia); my own research confirmed the findings of these states, but also found an additional 3 state with a single-statute approach.

¹¹ I subjectively determined these approached based on the statutory scheme, with reference to the excerpted portions of the federal Privacy Act *supra*.

¹² CLIFFORD S. DAVIDSON, NAVID SOLEYMANI, SCOTT P. COOPER & TANYA L. FORSHEIT, PROSKAUR ON PRIVACY: A GUIDE TO PRIVACY AND DATA SECURITY LAW IN THE INFORMATION AGE 5-6 (2006)

¹³ Graeme Hancock, *California’s Privacy Act: Controlling Government’s Use of Information?*, 32 STAN. L. REV. 1001, 1004 (1980)

¹⁴ *Id.* at 1019.

¹⁵ Spargo v. New York State Com’n on Gov’t Integrity, 140 A.D.2d 26, 531 N.Y.S.2d 417 (3d Dep’t 1988).

¹⁶ STATE OF HAWAII OFFICE OF INFORMATION PRACTICES, <http://oip.hawaii.gov/> (last visited Oct. 21, 2012).

¹⁷ *Id.*

¹⁸ Governmental Internet Information Privacy Act, H.B. 25, 2005 Gen. Sess. (Ut 2004) (enacted to modify the Information Technology Act, expanding former disclosure laws to include all three branches of government).

¹⁹ ROBERT ELLIS SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS 1750 (Privacy Journal, Kindle Edition, 2013) (pagination reflects Kindle version only)

²⁰ Dale F. Rubin, *State Government Records and Individual Privacy: Theoretical and Comparative Approaches*, 26 URB. LAW. 589, 593 (1994)

²¹ Donald A. Gemberling, *Data Practices at the Cusp of the Millennium*, 22 WM. MITCHELL L. REV. 767, 770 (remarking that the act has been viewed as a “seemingly impenetrable idiom”).

²² *Id.*

²³ *Id.*

²⁴ Margaret Westin, *The Minnesota Government Data Practices Act: A Practitioner’s Guide and Observations on Access to Government Information*, 22 WM. MITCHELL L. REV. 839, 850 (1996).

²⁵ *Id.*

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The New York Times

October 30, 2013

No U.S. Action, So States Move on Privacy Law

By SOMINI SENGUPTA

State legislatures around the country, facing growing public concern about the collection and trade of personal data, have rushed to propose a series of privacy laws, from limiting how schools can collect student data to deciding whether the police need a warrant to track cellphone locations.

Over two dozen privacy laws have passed this year in more than 10 states, in places as different as Oklahoma and California. Many lawmakers say that news reports of widespread surveillance by the National Security Agency have led to more support for the bills among constituents. And in some cases, the state lawmakers say, they have felt compelled to act because of the stalemate in Washington on legislation to strengthen privacy laws.

“Congress is obviously not interested in updating those things or protecting privacy,” said Jonathan Stickland, a Republican state representative in Texas. “If they’re not going to do it, states have to do it.”

For Internet companies, the patchwork of rules across the country means keeping a close eye on evolving laws to avoid overstepping. Many companies have an internal team to deal with state legislation. And the flurry of legislation has led some companies, particularly technology companies, to exert their lobbying muscles — with some success — when proposed measures stand to harm their bottom lines.

“It can be counterproductive to have multiple states addressing the same issue, especially with online privacy, which can be national or an international issue,” said Michael D. Hintze, chief privacy counsel at Microsoft, who added that at times it can create “burdensome compliance.” For companies, it helps that state measures are limited in their scope by a federal law that prevents states from interfering with interstate commerce.

This year, Texas passed a bill introduced by Mr. Stickland that requires warrants for email searches, while Oklahoma enacted a law meant to protect the privacy of student data. At least three states proposed measures to regulate who inherits digital data, including Facebook passwords, when a user dies.

Some of the bills extend to surveillance beyond the web. Eight states, for example, have passed laws this year limiting the use of drones, according to the American Civil Liberties Union, which has advocated such privacy laws. In Florida, a lawmaker has drafted a bill that would prohibit schools from collecting biometric data to verify who gets free lunches and who gets off at which bus stop. Vermont has limited the use of data collected by license plate readers, which are used mostly by police to record images of license plates.

California, long a pioneer on digital privacy laws, has passed three online privacy bills this year. One gives children the right to erase social media posts, another makes it a misdemeanor to publish identifiable nude pictures online without the subject's permission, and a third requires companies to tell consumers whether they abide by "do not track" signals on web browsers.

But stiff lobbying efforts were able to stop a so-called right to know bill proposed in California this year that stood to hurt the online industry. The bill would have required any business that "retains a customer's personal information" to share a copy of that information at the customer's request, as well as disclose which third parties have received the information. The practice of sharing customer data is central to digital advertising and to the large Internet companies that rely on advertising revenue.

"'Right to know' is an example of something that's not workable," said Jim Halpert, a lawyer with the national firm DLA Piper, who leads an industry coalition that includes Amazon, Facebook and Verizon. "It covers such a broad range of disclosures. We advocated against it."

More than a year ago, the White House proposed a consumer privacy bill of rights, but Congress has not yet taken on the legislation. And a proposed update to the 27-year-old Electronic Communications Privacy Act has stalled. The proposal would require law enforcement agencies to obtain a warrant, based on probable cause, before they could read through emails.

Several legislators said they felt compelled to act because Congress had not. "They don't act in the best interest unless it's in their best interest," said Daniel Zolnikov, a first-time legislator in Montana. Mr. Zolnikov, a Republican, suggested that the lack of action was because of lobbying efforts from "special interests" on Capitol Hill.

So Mr. Zolnikov took up the privacy issue in his state house: Montana became the first state in the nation this year to pass a law that requires police to obtain a search warrant before it can track a suspect's whereabouts through cellphone records.

According to a survey conducted in July by the Pew Internet Center, most Americans said they believed that existing laws were inadequate to protect their privacy online, and a clear majority reported making great efforts to mask their identities online. Some of those surveyed said they cleared browsing histories, deleted social media posts or used virtual networks to conceal their Internet Protocol addresses — and a few even said they used encryption tools.

Many states have already responded to those opinions. In the last couple of years, about 10 states have passed laws restricting employers from demanding access to their employees' social media accounts.

California set the stage on digital privacy 10 years ago with a law that required organizations, whether public or private, to inform consumers if their personal data had been breached or stolen. Several states followed, and today, nearly every state has a data breach notification law.

This year, California amended that landmark law, adding an Internet user's login name and password to the menu of personal information that is covered. The California attorney general's office also has a full-time unit to enforce digital privacy laws.

But even in California, the steps taken on privacy legislation are not sweeping overhauls like those supported by the White House. And some bills in the state never become law at all. Last year, the Legislature passed a bill compelling police to seek a warrant before searching cellphone records to track a suspect's location. Gov. Jerry Brown vetoed it, saying it did not strike "the right balance" between the needs of citizens and the police.

John Pezold, a Republican representative in Georgia, said that issues like creating jobs were more pressing than privacy for many of his constituents. But he said the issue of digital privacy was beginning to bubble up, especially because of the recent reports on eavesdropping by the federal government.

"They're becoming increasingly wary that their lives are going to be no longer their own," said Mr. Pezold, who plans to introduce a broad consumer privacy bill in the next legislative session. "We have got to protect that."

4
revision
11/12/13

§ 408-A. Public records available for inspection and copying

Except as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a reasonable time of making the request to inspect or copy the public record.

1. Inspect. A person may inspect any public record during reasonable office hours. An agency or official may not charge a fee for inspection unless the public record cannot be inspected without being converted or compiled, in which case the agency or official may charge a fee as provided in subsection 8.

2. Copy. A person may copy a public record in the office of the agency or official having custody of the public record during reasonable office hours or may request that the agency or official having custody of the record provide a copy. The agency or official may charge a fee for copies as provided in subsection 8.

A. A request need not be made in person or in writing.

B. The agency or official shall mail the copy upon request.

3. Acknowledgment; clarification; time estimate; cost estimate. The agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within ~~a reasonable period of time~~, 5 working days of receiving the request. ~~and~~ The agency or official may request clarification concerning which public record or public records are being requested. The Within a reasonable time of receiving the request, the agency or official shall provide a good faith, nonbinding estimate of the time within which the agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The agency or official shall make a good faith effort to fully respond to the request within the estimated time. For purposes of this section, the date a request is received is the date a sufficient description of the public record is received by the agency or official at the office responsible for maintaining the public record. (This comes from Alaska 2AAC 96.315(b))

4. Refusals; denials. If a body or an agency or official having custody or control of any public record refuses permission to inspect or copy or abstract a public record, the body or agency or official shall provide written notice of the denial, stating the reason for the denial, within 5 working days of the receipt of the request for inspection or copying. If a body or agency or official expects that the request will be denied in full or in part following a review, the body or agency or official shall provide written notice of that expectation, stating the reason for the denial, within 5 working days of the receipt of the request for inspection or copying. Failure to ~~comply with~~ provide the notice required by this subsection within 10 working days of the receipt of the request is considered failure a denial to allow inspection or copying and is subject to appeal as provided in section 409.

5. Schedule. Inspection, conversion pursuant to subsection 7 and copying of a public record subject to a request under this section may be scheduled to occur at a time that will not delay or inconvenience the regular activities of the agency or official having custody or control of the public record requested. If the agency or official does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the agency's or official's records must be posted in a conspicuous public place and at the office of the agency or official, if

an office exists.

6. No requirement to create new record. An agency or official is not required to create a record that does not exist.

7. Electronically stored public records. An agency or official having custody or control of a public record subject to a request under this section shall provide access to an electronically stored public record either as a printed document of the public record or in the medium in which the record is stored, at the requester's option, except that the agency or official is not required to provide access to an electronically stored public record as a computer file if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in or associated with that file.

A. If in order to provide access to an electronically stored public record the agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format for inspection or copying, the agency or official may charge a fee to cover the cost of conversion as provided in subsection 8.

B. This subsection does not require an agency or official to provide a requester with access to a computer terminal.

8. 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 for public records 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 \$15 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.

C. The agency or official may charge for the actual cost to convert a public record into a form susceptible of visual or aural comprehension or into a usable format.

D. An agency or official may not charge for inspection unless the public record cannot be inspected without being compiled or converted, in which case paragraph B or C applies.

E. The agency or official may charge for the actual mailing costs to mail a copy of a record.

9. Estimate. The agency or official having custody or control of a public record subject to a request under this section shall provide to the requester an estimate of the time necessary to complete the request and of the total cost as provided by subsection 8. If the estimate of the total cost is greater than \$30, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than \$100, subsection 10 applies.

10. Payment in advance. The agency or official having custody or control of a public record subject to a request under this section may require a requester to pay all or a portion of the estimated costs to complete the request prior to the search, retrieval, compiling, conversion 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.

11. Waivers. The agency or official having custody or control of a public record subject to a request under this section may waive part or all of the total fee charged pursuant to subsection 8 if:

- A. The requester is indigent; or
- B. The agency or official considers release of the public record requested to be in the public interest because doing so 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.

§409. Appeals

~~**1. Records.** Any person aggrieved by a refusal or denial to inspect or copy a record under section 408-A may appeal, within 5 working days of the receipt of the written notice of denial, to any Superior Court within the State. If a court, after a trial de novo, determines such denial was not for just and proper cause, it shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.~~

1. Records. Any person aggrieved by a denial to inspect or copy a record under section 408-A may appeal the denial within 30 calendar days of the receipt of the written notice of denial or 40 days from the date of the request if no written notice is provided under section 408-A, subsection 4 to any the Superior Court within the State as a trial de novo for the county in which the person resides or in which the agency maintains the office to which the person made the request. The agency or official shall file an answer a statement of position within 14 calendar days of service of the appeal. If a court, after a trial de novo review and taking testimony and other evidence it determines necessary, determines such refusal, denial or failure was not for just and proper cause, the court shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

2. Actions. If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action is illegal and the officials responsible are subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for the action to be null and void. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

3. Proceedings not exclusive. The proceedings authorized by this section are not exclusive of any other civil remedy provided by law.

Draft of proposed changes to §408-A and §409. **Revised 11/12/13**

4. Attorney's fees. In an appeal under subsection 1 or 2, the court may award reasonable attorney's fees and litigation expenses to the substantially prevailing plaintiff who appealed the refusal under subsection 1 or the illegal action under subsection 2 if the court determines that the refusal or illegal action was committed in bad faith. Attorney's fees and litigation costs may not be awarded to or against a federally recognized Indian tribe.

This subsection applies to appeals under subsection 1 or 2 filed on or after January 1, 2010.

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