

MAINE STATE LEGISLATURE

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121st MAINE LEGISLATURE

SECOND SPECIAL SESSION-2004

Legislative Document

No. 1957

H.P. 1456

House of Representatives, April 5, 2004

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

Reported by Representative NORBERT of Portland for the Joint Standing Committee on
Judiciary pursuant to Resolve 2003, chapter 83, section 9 and Resolve 2003, chapter 101,
section 3.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

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

2
4 **Sec. 1. 1 MRSA §405, sub-§4.** as enacted by PL 1975, c. 758, is amended to read:

6 **4. Motion contents.** A motion to go into executive session shall must indicate the precise nature of the business of the executive session and include a citation of one or more sources of statutory or other authority that permits an executive session for that business. Failure to state all authorities justifying the executive session does not constitute a violation of this subchapter if one or more of the authorities are accurately cited in the motion. An inaccurate citation of authority for an executive session does not violate this subchapter if valid authority that permits the executive session exists and the failure to cite the valid authority was inadvertent.

18 **Sec. 2. 1 MRSA §408,** as enacted by PL 1975, c. 758, is repealed and the following enacted in its place:

20 **§408. Public records available for public inspection and copying**

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

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

36 **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.

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

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

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

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

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

12 5. Payment in advance. The agency or official may require
14 a requester to pay all or a portion of the estimated costs of
translating, searching for and retrieving and providing copies of
16 the public record prior to the translation, search and retrieval
and copying of the public record if:

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

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

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

26 A. The requester is indigent; or

28 B. Release of the public record requested is in the public
30 interest because it is likely to contribute significantly to
32 public understanding of the operations or activities of
34 government and is not primarily in the commercial interest
 of the requester.

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

38 SUBCHAPTER 1-A

40 EXCEPTIONS TO PUBLIC RECORDS

42 §431. Definitions

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

48 1. Public records exception. "Public records exception" or
"exception" means a provision in a statute or a proposed statute
that declares a record or a category of records to be

2 confidential or otherwise not a public record for purposes of
3 chapter 13, subchapter 1.

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

8 **§432. Exceptions to public records; review**

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

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

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

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

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

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

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

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

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

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

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

8 3. Assistance from committees of jurisdiction. The review
9 committee shall seek assistance in evaluating public records
10 exceptions from the joint standing committees of the Legislature
11 having jurisdiction over the subject matter related to the
12 exceptions being reviewed. The review committee may hold joint
13 public hearings with the appropriate committees of jurisdiction.
14 The review committee shall notify the appropriate committees of
15 jurisdiction concerning work sessions and shall allow members of
16 the appropriate committees of jurisdiction to participate in work
17 sessions.

18 §433. Schedule for review of exceptions to public records

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

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

- 24 (1) Title 1;
25 (2) Title 2;
26 (3) Title 3;
27 (4) Title 4; and
28 (5) Title 5.

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

- 31 (1) Title 6;
32 (2) Title 7;
33 (3) Title 8;
34 (4) Title 9;
35 (5) Title 9-A;

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- (6) Title 9-B;
- (7) Title 10;
- (8) Title 11;
- (9) Title 12;
- (10) Title 13;
- (11) Title 13-B;
- (12) Title 13-C;
- (13) Title 14; and
- (14) Title 15.

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

- (1) Title 16;
- (2) Title 17;
- (3) Title 17-A;
- (4) Title 18-A;
- (5) Title 19-A;
- (6) Title 20;
- (7) Title 20-A;
- (8) Title 21-A; and
- (9) Title 22.

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

- (1) Title 23;
- (2) Title 24;
- (3) Title 24-A;
- (4) Title 25;

- 2 (5) Title 26;
- 4 (6) Title 27;
- 6 (7) Title 28-A; and
- 8 (8) Title 29-A.

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

- 12 (1) Title 30;
- 14 (2) Title 30-A;
- 16 (3) Title 31;
- 18 (4) Title 32;
- 20 (5) Title 33;
- 22 (6) Title 34-A;
- 24 (7) Title 34-B;
- 26 (8) Title 35-A;
- 28 (9) Title 36;
- 30 (10) Title 37;
- 32 (11) Title 37-A;
- 34 (12) Title 38; and
- 36 (13) Title 39-A.

38 **§434. Review of proposed exceptions to public records**

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

2 unless review and evaluation pursuant to subsection 2 have been
3 completed.

4 **2. Review and evaluation.** Upon referral of a proposed
5 public records exception from the joint standing committee of the
6 Legislature having jurisdiction over the proposal, the review
7 committee shall conduct a review and evaluation of the proposal
8 and shall report in a timely manner to the committee to which the
9 proposal was referred. The review committee shall use the
10 following criteria to determine whether the proposed exception
11 should be enacted:

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

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

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

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

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

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

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

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

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

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

6
7 **Sec. 4. 29-A MRSA §2251, sub-§7,** as amended by PL 2003, c.
8 434, §27 and affected by §37, is further amended to read:

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

14
15 A report or statement contained in the accident report, or a
16 48-hour report as required by former subsection 5, a statement
17 made or testimony taken at a hearing before the Secretary of
18 State held under section 2483, or a decision made as a result of
19 that report, statement or testimony may not be admitted in
20 evidence in any trial, civil or criminal, arising out of the
21 accident.

22
23 A report may be admissible in evidence solely to prove compliance
24 with this section.

25
26 The Chief of the State Police may disclose the date, time and
27 location of the accident and the names and addresses of
28 operators, owners, injured persons, witnesses and the
29 investigating officer. On written request, the chief may furnish
30 a photocopy of the investigating officer's report at the expense
31 of the person making the request. The cost of furnishing a copy
32 of the report is not subject to the limitations of Title 1,
33 section 408, subsection 3.

34
35 **Sec. 5. Resolve 2003, c. 83, §4** is amended to read:

36
37 **Sec. 4. Committee duties. Resolved:** That the committee shall
38 meet a total of not more than 4- 8 times to study state and local
39 governmental compliance with Maine's freedom of access laws and
40 other issues relating to citizens' access to public records and
41 public proceedings. In examining these issues, the committee
42 shall:

43
44 1. Review and analyze the Report on Public Records Audit,
45 prepared by the Maine Freedom of Information Coalition in
46 November 2002, and the recommendations made in the report;

47
48 2. Study what measures, if any, state and local
governmental entities in Maine and in other states have taken to

2 ensure their employees are knowledgeable about and comply with
Maine's freedom of access laws or other comparable state laws;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 **Sec. 9-A. Final report. Resolved:** That, not later than November
42 3, 2004, the committee shall submit a final report that includes
43 its findings and recommendations, including suggested
44 legislation, for presentation to the First Regular Session of the

2 122nd Legislature. The committee is authorized to submit
3 legislation related to its report for introduction to the First
4 Regular Session of the 122nd Legislature at the time of
5 submission of its report; and be it further

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

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

18 SUMMARY

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20
21 This bill is the report of the Joint Standing Committee on
22 Judiciary pursuant to Resolve 2003, chapter 83, which established
23 the Committee to Study Compliance with Maine's Freedom of Access
24 Laws. The study committee submitted its report and presented
25 recommended legislation.

26
27 1. This bill amends the executive session law to require
28 that the motion to enter executive session must include a
29 citation of one or more sources of statutory or other authority
30 permitting the executive session for the nature of the business
31 stated in the motion.

32
33 A motion that includes the citation of statutory or other
34 authority for entering executive session but does not state all
35 possible authorities for the executive session does not
36 constitute a violation of the statute if the authority stated was
37 accurate and covered the precise nature of the business of the
38 executive session.

39
40 Similarly, if the authority cited in the motion is not
41 accurate, it is not a violation of the statute if there is valid
42 authority supporting the executive session for that business and
43 the failure to state the accurate authority was inadvertent.

44
45 2. The current law on the public's right to inspect and
46 copy public records at the location of the records or the record
47 custodian is repealed and replaced to clarify certain provisions
48 and to ensure reasonable costs for copies of public records.

2 New language is added to clarify that the agency or official
3 must provide the public record requested within a reasonable
4 period of time after the request. Many factors may affect the
5 amount of time necessary to produce the record for inspection or
6 a copy of the record, including the complexity of the request,
7 the type of record sought and the resources of the agency to
8 store and retrieve public records. In all cases, however, a copy
9 of the public record must be provided or the public record itself
10 must be provided for inspection within a reasonable period of
11 time after the request, taking all appropriate factors into
12 account.

13 As provided in current law, inspection, copying and
14 translation into usable form may be scheduled to occur when the
15 regular activities of the agency or official will not be delayed
16 or inconvenienced.

17 Current law concerning translating records into a form
18 usable by the requester is retained and clarified. The agency or
19 official may require payment in advance of the costs of
20 translation under certain circumstances.

21 This bill addresses the fees that may be charged for
22 fulfilling a request for public records, including copying costs
23 as well as fees for searching for and retrieving records. These
24 provisions apply unless another law or court order applies to the
25 fees that may be charged for that request. The law is clarified
26 to provide that only a reasonable fee may be charged for copies
27 of public records. The issue of whether to cap copying fees is
28 added to the duties of the Committee to Study Compliance with
29 Maine's Freedom of Access Laws, which this bill extends for an
30 additional year.
31

32 New to the law are provisions governing the recoupment of
33 costs of searching for, retrieving and compiling records to
34 satisfy a request. After the first hour of staff time to search
35 for, retrieve and compile records, the agency or official may
36 charge up to \$10 per hour for such staff services for each
37 request. Compiling a public record includes reviewing the record
38 and redacting confidential information.
39

40 An agency providing copies is not required to charge copying
41 costs. An agency that does charge for copies may waive all or
42 part of the regular charge if the requester is indigent or if
43 release of the record is not primarily in the commercial interest
44 of the requester and the release is in the public interest
45 because it is likely to contribute significantly to public
46 understanding of the operations or activities of government.
47 This waiver standard is modeled on the waiver standard that is
48 part of the federal Freedom of Information Act.
49
50

2 3. There are many statutes that except from the definition
4 of "public records" specific records created, received or
6 maintained by governmental entities. This bill requires the
8 Office of Policy and Legal Analysis and the Office of the Revisor
10 of Statutes to produce a bill that lists in the freedom of access
12 laws all the public records exceptions that exist in the Maine
14 Revised Statutes.

16 This bill requires that provisions excepting records from
18 the definition of "public records" be reviewed to determine if
20 the exceptions should be continued, modified or repealed. A
22 cyclical review process is established for a legislative review
committee, the joint standing committee of the Legislature having
jurisdiction over judiciary matters, to review and evaluate all
the identified exceptions at least once every 10 years. Criteria
are established for the review and evaluation. The legislative
committees of jurisdiction will have an opportunity to
participate in the review and evaluation process. The review
committee is authorized to report out legislation that carries
out the review committee's recommendations to continue, modify or
repeal each exception reviewed and evaluated.

24 4. Resolve 2003, chapter 83 is amended to extend the
26 reporting date of the Committee to Study Compliance with Maine's
28 Freedom of Access Laws to November 3, 2004. Four additional
30 meetings are authorized. The unexpended balance of the money
32 originally appropriated for the study committee will be used to
34 fund the completion of the study. The duties of the study
committee are expanded to include several issues identified by
the study committee. The issue of whether public employees' home
contact information should be kept confidential, as proposed by
Legislative Document 1727, is added as an issue for the study
committee to review.

36 **FISCAL NOTE REQUIRED**
(See attached)



**121st Maine Legislature
Office of Fiscal and Program Review**

LD xxxx - New Draft

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

LR 2823(01)

Fiscal Note for New Draft

Committee: Judiciary

Fiscal Note Required: Yes

Fiscal Note

Minor cost increase - All funds
Minor revenue increase - All funds

Fiscal Detail and Notes

Additional costs resulting from the proposed requirements of this legislation for the timely inspection, translation and copying of public records can be absorbed by the impacted departments and agencies utilizing existing budgeted resources. The Legislature can review proposed exceptions to public records within available resources. Implementation of specific fees for the provision of records may increase revenues collected. The amount can not be determined but is expected to be minor because many agencies already charge such fees.

The Committee to Study Compliance with Maine's Freedom of Access Laws had an unexpended balance of \$2,809.24 as of 3/1/04. It is anticipated that the committee has sufficient funds to meet four additional times as authorized by this legislation.