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**STATE OF MAINE
125TH LEGISLATURE**

**Sixth Annual Report
of the
RIGHT TO KNOW ADVISORY COMMITTEE**

January 2012

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EXECUTIVE SUMMARY

This is the sixth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The 16 members are appointed by the Governor, the Chief Justice, the Attorney General, the President of the Senate and the Speaker of the House of Representatives. More information is available on the Advisory Committee's website: <http://www.maine.gov/legis/opla/righttoknow.htm>. The Office of Policy and Legal Analysis provides staffing to the Advisory Committee while the Legislature is not in session.

By law, the Advisory Committee must meet at least four times per year. During 2011, the Advisory Committee met four times: July 15, September 29, November 17 and December 8. To assist in completion of its work, the Advisory Committee appointed three subcommittees: Legislative, Public Records Exceptions and Bulk Records. All three subcommittees held meetings and made recommendations to the Advisory Committee.

The Advisory Committee was very fortunate to have the services of a Legal Extern of the Maine School of Law. Diane DeJesus, currently a second year student at the Law School, worked with the Advisory Committee during the first semester of the 2011-2012 school year.

As in previous annual reports, this report includes a brief summary of the legislative actions taken in response to the Advisory Committee's January 2011 recommendations and a summary of relevant Maine court decisions from 2011 on the freedom of access laws.

For its sixth annual report, the Advisory Committee makes the following recommendations, although not all the recommendations are unanimous:

- Continue without modification, amend and repeal the existing public records exceptions in Titles 22 through 25;**
- Support the revision of the Criminal History Record Information Act proposed by the Criminal Law Advisory Commission;**
- Make no distinction under the freedom of access laws for a request for bulk records with regard to the fees for access or the purpose for which the request is made;**
- Enact legislation to require an agency or official to provide an estimate of the time within which the agency or official will comply with a public records request (alternative minority recommendation);**
- Enact legislation to increase the hourly fee that may be charged for the actual cost of searching for, retrieving and compiling the requested public record from \$10 per hour to \$15 per hour request;**
- Enact legislation to clarify that an agency or official shall provide access to an electronically stored record in the available medium of the requester's choice, which is defined as a printed document of the public record or the medium in which the record is stored except that an agency or official is not required to provide access to a**

computer file if the agency or official has no ability to separate or prevent disclosure of any confidential information contained in the file;

- Enact legislation to require each State agency, county, municipality, school unit, school board and regional or other political subdivision to designate an existing employee as public access officer and require public access officers to complete the same training in the freedom of access laws as elected officials;**
- Enact legislation to increase the maximum penalty to \$5,000 for willful violation of the freedom of access laws (minority recommendation);**
- Support funding for a full-time Ombudsman position within the Department of Attorney General; and**
- Enact legislation concerning the confidentiality of working papers of the Office of Governor to mirror the existing confidentiality exception available for working papers of the Legislature (majority recommendation).**

In 2012, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 22 through 25. The Advisory Committee is scheduled to begin the review and evaluation of existing public records exceptions contained in Titles 26 through 39-A in 2012. The Advisory Committee will continue its review and evaluation of Title 22, section 8754 relating to medical sentinel events and reporting. Also on the agenda are the issues concerning the application of the Freedom of Access laws to the Maine Public Broadcasting Network, the use of remote access for public members of boards and commissions to participate in public proceedings, templates for drafting specific confidentiality statutes and the storage, management and retrieval of public officials' communications, especially email.

The Advisory Committee looks forward to a full year of activities and working with the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in its sixth annual report.

I. INTRODUCTION

This is the sixth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. Title 1, section 411 is included as Appendix A. Previous annual reports of the Advisory Committee can be found on the Advisory Committee's webpage at www.maine.gov/legis/opla/righttoknowreports.htm.

The Right to Know Advisory Committee has 16 members. The chair of the Advisory Committee is elected annually by the members. The Advisory Committee members are:

Sen. David R. Hastings III Chair	<i>Senate member of Judiciary Committee, appointed by the President of the Senate</i>
Rep. Joan M. Nass	<i>House member of Judiciary Committee, appointed by the Speaker of the House</i>
Perry Antone Sr.	<i>Representing law enforcement interests, appointed by the President of the Senate</i>
Shenna Bellows	<i>Representing the public, appointed by the President of the Senate</i>
Percy Brown Jr.	<i>Representing county or regional interests, appointed by the President of the Senate</i>
Michael Cianchette	<i>Representing State Government interests, appointed by the Governor</i>
Richard Flewelling	<i>Representing municipal interests, appointed by the Governor</i>
James T. Glessner	<i>Member of the Judicial Branch</i>
A.J. Higgins	<i>Representing broadcasting interests, appointed by the President of the Senate</i>
Mal Leary	<i>Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House</i>
William Logan	<i>Representing the public, appointed by the Speaker of the House</i>

Judy Meyer	<i>Representing newspaper publishers, appointed by the Speaker of the House</i>
Kelly Morgan	<i>Representing newspapers and other press interests, appointed by the President of the Senate</i>
Linda Pistner	<i>Attorney General's designee</i>
Harry Pringle	<i>Representing school interests, appointed by the Governor</i>
Mike Violette	<i>Representing broadcasting interests, appointed by the Speaker of the House</i>

The complete membership list of the Advisory Committee, including contact information, is included as Appendix B.

By law, the Advisory Committee must meet at least four times per year. During 2011, the Advisory Committee met four times: July 15, September 29, November 17 and December 8. Subcommittee meetings were held on September 1, 12, and 29; October 6, 7, 14 and 21; and November 10 and 17; and December 8. All of the meetings were held in the Judiciary Committee Room of the State House in Augusta and open to the public. Each meeting was also accessible through the audio link on the Legislature's webpage. The Advisory Committee has also established a webpage which can be found at www.maine.gov/legis/opla/righttoknow.htm. Agendas, meeting materials and summaries of the meetings are included on the webpage.

II. RIGHT TO KNOW ADVISORY COMMITTEE DUTIES

The Right to Know Advisory Committee was created to serve as a resource and advisor about Maine's freedom of access laws. The Advisory Committee's specific duties include:

- Providing guidance in ensuring access to public records and public proceedings;
- Serving as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know;
- Supporting the provision of information about public access to records and proceedings via the Internet;
- Serving as a resource to support training and education about Maine's freedom of access laws;
- Reporting annually to the Governor, the Legislative Council, the Joint Standing Committee on Judiciary and the Chief Justice of the Supreme Judicial Court about the

state of Maine's freedom of access laws and the public's access to public proceedings and records;

- Participating in the review and evaluation of public records exceptions, both existing and those proposed in new legislation;
- Examining inconsistencies in statutory language and proposing clarifying standard language; and
- Reviewing 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.

In carrying out these duties, the Advisory Committee 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.

The Advisory Committee may make recommendations for changes in 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 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.

III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES

By law, the Advisory Committee serves as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know. In carrying out this duty, the Advisory Committee believes it is useful to include in its annual reports a digest of the developments in case law relating to Maine's freedom of access laws. During 2011, the Advisory Committee identified 2 court decisions summarized below.

2011 Maine Supreme Judicial Court Decision

- ◆ **Anastos v. Town of Brunswick**, 2001 ME 41. The Supreme Judicial Court upheld the application of a public records exception to a feasibility study submitted as part of a joint development project in which the developer was seeking town approval of a tax increment financing agreement. The Court ruled in favor of the Town of Brunswick that refused to release the study submitted by the developer, finding that the entire report was protected by the public records exception shielding proprietary information submitted in the course of economic development projects. The Law Court reviewed de novo the public records exception in Title 5, section 13119-A, stating that it was aware of the need to "balance transparency of government action with the protection of sensitive information." The Superior Court had conducted an *in camera* review of the feasibility study and found that the entire work product was protected from public disclosure because it contained not only specific information but also an analysis of the information that would be advantageous to

the developer's competitors and would disadvantage the developer if released. The Law Court agreed and stated that a document that contains a "commercially advantageous collection or analysis of information" may be found to be confidential as a whole; neither release nor redaction is appropriate in such situations.

The Law Court reviewed the legislative history of the public records exception protecting proprietary information submitted for economic development assistance and found that the statute constitutes a "legislative balancing of equities and a clear intent to stimulate economic development." The Court identified the feasibility study as the type of document contemplated by the Legislature in creating the public records exception. The protection from public disclosure was provided to encourage applicants to seek public economic development assistance; releasing this particular study even in redacted form would frustrate the clearly stated legislative intent.

2001 Maine Superior Court Decision

- **MacImage of Maine, LLC v. Androscoggin County, et al.**, (Me. Super. Ct., Cumb. Cty., Feb. 20, 2011) (Warren, J.). The Cumberland County Superior Court ruled in February 2011 in favor of MacImage of Maine, LLC and its general manager John Simpson, who had brought suit against six counties in 2010 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 is 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 had not been willing or able to do at the price MacImage was willing to pay. The case against the counties was pending at the close of 2010.

The Superior Court determined that the Legislature's amendment to Title 33, section 751 made clear that the Title 33 statute, and not the fees provisions of the Freedom of Access laws, applies to the establishment of copying fees for the records of the registry of deeds in each county. The Court found that §751 does 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.

The appropriate balance for future requests, determined based on the factors in the amended statute, is to allocate some portion of a county's overall database costs in setting a copying fee. The court said that cost of storage media, mailing costs and contractor and personnel costs actually incurred in the translation and copying process can be charged to the requester. "Amortized infrastructure costs" can be figured into counties' per image charge for electronic copies only to the extent that the infrastructure in question relates to the cost of producing and making copies.

All six counties appealed the decision to the Maine Supreme Judicial Court. Five entities filed amicus briefs. Oral arguments are scheduled before the Law Court on Tuesday, December 13, 2011.

IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEES

Given the broad scope of the Advisory Committee's ongoing duties and responsibilities and the nature of the requests received from the Legislature, the Advisory Committee reorganized its subcommittee structure in 2010. Three subcommittees were appointed: 1) Legislative; 2) Public Records Exceptions; and 3) Bulk Records. Senator Hastings and Representative Nass, the legislative members of the Advisory Committee, are ex officio members of each subcommittee.

Legislative Subcommittee. The Legislative Subcommittee's focus is to serve as an advisor to the Legislature when legislation affecting public access is proposed and to respond to requests from the Legislature or others to consider issues affecting public records and public access. Judy Meyer serves as chair of the subcommittee and the following serve as members: Shenna Bellows, Michael Cianchette, Richard Flewelling, Ted Glessner, Mal Leary, William Logan, Kelly Morgan, Linda Pistner and Harry Pringle.

During 2011, the Legislative Subcommittee had six meetings; three of the meetings were joint meetings with the Bulk Records Subcommittee. The subcommittee was charged with several specific tasks.

Review of the draft revision of the Criminal History Record Information Act proposed by the Criminal Law Advisory Commission

The subcommittee received two presentations of a proposed re-draft of the Criminal History Record Information Act from Special Assistant Attorney General Charlie Leadbetter, a representative of the Criminal Law Advisory Commission. The Criminal History Record Information Act implicates public and confidential records. The subcommittee reviewed the draft revision, concentrating on the specific confidentiality provisions. The draft is broken into two pieces, the first focuses on criminal history record information and the second creates a separate subchapter on intelligence and investigative information, a category of information that is not the same as criminal history. The subcommittee agreed that the new language is much clearer with regard to what information is public and what information is confidential. The subcommittee agreed to recommend that the full Advisory Committee approve the draft and that the Criminal Law Advisory Committee proceed with submitting the revision as proposed legislation.

Inquiry about whether a freedom of access request should specifically cite the law from Chris Parr, Staff Attorney for the Maine State Police, Department of Public Safety

The subcommittee discussed a request from Chris Parr, Staff Attorney in the Maine State Police, Department of Public Safety, asking the subcommittee to consider the question of what a FOA request is and whether a formal request that cites the FOA laws is necessary. The subcommittee

agreed that formality is not and should not be required for a request, particularly for the general member of the public making a request. The subcommittee did note that formality may become more necessary if changes to the law such as the timelines proposed in LD 1465 are adopted.

Review of LD 1465, An Act to Amend the Laws Governing Freedom of Access

The Judiciary Committee carried over to the Second Regular Session LD 1465, An Act to Amend the Laws Governing Freedom of Access, and asked the Advisory Committee to review the bill and provide recommendations to the Judiciary Committee in January. The subcommittee received an overview presentation from the Maine Heritage Policy Center on LD 1465. The Maine Heritage Policy Center worked with the sponsor Senator Rosen and other stakeholders in drafting the bill and was the leading proponent of the bill before the Legislature. The subcommittee discussed each provision included in LD 1465 and developed recommendations for the Advisory Committee.

Public notice. The subcommittee opposed the change included in LD 1465 that required public notice of public proceedings be given not less than three days prior to the public proceeding except in an emergency. The subcommittee agreed that the minimum of three days could easily become the standard maximum notice, thus resulting in less notice of proceedings than is available now.

Form of request. In conjunction with the Bulk Records Subcommittee, the subcommittee agreed that a copy of a record should always be available in the form the record is kept, even in electronic form. The Legislative and Bulk Records Subcommittees developed proposed statutory language (different than proposed in LD 1465) to require an agency or official to provide access to an electronically stored record in the available medium of the requester's choice, unless the agency or official does not have the ability to separate or prevent the disclosure of any confidential information contained in a computer file.

The members also agreed to support clarification that requests can be made by any means, including over the phone, and the copies can be provided by mailing, which could be more convenient for requestors and responders alike.

Fees and cost of access. Although LD 1465 does not propose any statutory changes related to fees, the subcommittee agreed by a vote of 5-4 to recommend an increase in the hourly fee for searching for, retrieving and compiling a public records request from \$10 per hour to \$15 per hour after the first hour of staff time per request.

Timelines. The subcommittee does not support the timelines included in LD 1465. Members expressed a concern that it would be hard to develop a fixed timeline that would apply to all bodies and that it would be difficult for public bodies and officials to meet the timelines proposed in LD 1465; the current law's reasonable time standard is recognition by the Legislature that a single fixed-date approach may not fit everyone. The members recognized that current law allows a balancing test to consider the scope of the request and the staff time needed to respond but also requires that agencies acknowledge the request within a reasonable time. Members stated that the "reasonable" standard in current law is a legal term of art that courts can

interpret on a case by case basis. While all members of the subcommittees noted that the proposed timelines in LD 1465 are not likely to pass as drafted, some members expressed support for a deadline because the “reasonable” standard in current law does not give requestors or agencies a structure in which to work. Other members believed that a deadline will become the date that responses will be made, even if they could have been provided earlier. All agreed that they do not want to eliminate the opportunity for a citizen to walk up to the counter and ask for a public record; formalizing the process is not necessary. Establishing deadlines may require the use of a form for requests in order to track compliance with the deadlines.

As an alternative to a fixed timeline, the subcommittee (and the Bulk Records Subcommittee) agreed to require that a responding agency or official provide an estimate of when a copy of a requested record would be available, rather than setting hard deadlines. The estimate would have to be made in good faith and would be nonbinding.

Subcommittee members also support an effective Ombudsman as a resource to ensure timely compliance.

Remedies for violations of FOA laws. The subcommittee opposed the change proposed in LD 1465 to authorize the Superior Court to issue an injunction to enforce violations of the law. The subcommittee agreed that the court’s inherent powers include the power to issue an injunction and that no statutory change is necessary.

Public Access Officer. The subcommittee supported a requirement that each State agency, county and municipality appoint an existing employee to serve as the contact person for public records request. The subcommittee also supports a requirement that public access officers complete the same training in the Freedom of Access laws as elected officials. The subcommittee did not believe the detailed listing of responsibilities included in LD 1465 was necessary for public access officers to be effective.

Ombudsman position funding. The subcommittee supported funding the Ombudsman within the Attorney General’s Office as a full-time Assistant Attorney General position. As drafted, LD 1465 proposed funding for a part-time position.

Expansion of “working papers exception” to Governor

The subcommittee discussed the concerns raised by the Governor in a letter to the Advisory Committee about the use of the Freedom of Access laws for political purposes and to increase the workload of the Governor’s office, particularly during the legislative session. At the request of the Governor’s deputy counsel and subcommittee member, Michael Cianchette, the subcommittee considered a draft proposal to create an exception from the definition of “public record,” modeled on the existing exception for the Legislature, for working papers and other documents used or maintained by the Governor or the Governor’s office to prepare proposed legislation or reports during the Legislative session in which the proposed legislation or reports are prepared. The rationale for the exception is to allow policies to be developed freely and to protect the mental processes of the Governor and his staff before decisions are made. All the records would become public, of course, upon distribution or the end of the legislative session.

Mr. Cianchette advocated for the exemption for two reasons. First, he said that the Governor's office, during the hearings on LD 1, received a number of broad-based requests for documents from people who were possibly using the Freedom of Access laws to create work for the office to undermine efforts at regulatory reform. Second, he asserted that the public's right to know is harmed over the medium- and long-term because the Governor's office conducts meetings in person or by telephone on sensitive matters. The Governor informed the Maine Civil Liberties Union, the Maine Heritage Policy Center and chairs of the Judiciary Committee that he has refrained from taking notes or asking for written materials because of the breadth of the Freedom of Access laws. A "working papers" exception would further the public's right to know by allowing major parts of the decision-making process to be documented and released once the papers lose their "working" protection.

The subcommittee recognized that the policy issue raised by the proposal brings focus to the inequity in the current law between the Legislative branch and the Executive branch of State government; the subcommittee's policy options are to broaden the exception to include the Governor and other public bodies or to repeal the Legislature's exception. Several members expressed support for the proposal based on the current inequity that protects the working papers and drafts prepared for and by the Legislature and Judiciary, but not the Executive. Other subcommittee members expressed concern about whether the existing exception for the Legislature was appropriate. The members expressed reservations about putting language like this into the law as it is useful for the public to know the government's thinking as policies and documents are developed.

The subcommittee voted 7-2 in favor of expanding the exception, pending review of draft language. Because the subcommittee is significantly divided on the issue, members proposed that such a proposal, if it goes forward, should not be made part of LD 1465, but should be a separate piece of legislation.

Additional issues not resolved

The subcommittee agreed to hold the following four items for review in 2012:

- Status of Maine Public Broadcasting Network records under the Freedom of Access laws;
- Use of technology for the purpose of remote participation by members of public bodies;
- Drafting templates; and
- Storage, management and retrieval of public officials' communications, especially email.

See discussion of Advisory Committee's recommendations in Section VI.

Public Records Exceptions Subcommittee. The Public Records Exception Subcommittee's focus is to participate in the review and evaluation of public records exceptions, both existing and those proposed in new legislation; to examine inconsistencies in statutory language and to propose clarifying standard language. Shenna Bellows is the chair of the subcommittee and the following serve as members: Perry Antone, Percy Brown, AJ Higgins and Linda Pistner.

During 2011, the Public Records Exception Subcommittee held four meetings. The subcommittee completed review of 31 existing public records exceptions; these are the remaining exceptions of the more than 120 exceptions in Titles 22 to 25 that the subcommittee began reviewing in 2010. In its review, the subcommittee sought input from the State agencies responsible for administering the public records exceptions and a number of interested parties affected by specific exceptions, including the Department of Health and Human Services, Bureau of Insurance, Maine Turnpike Authority, Maine Department of Transportation, Board of Licensure in Medicine, Office of the Attorney General, Maine Health Data Organization, Northern New England Passenger Rail Authority, the Maine Hospital Association, Maine Trial Lawyers' Association and Maine Medical Mutual Insurance Company.

The subcommittee recommended that some statutes be amended and also recommended communicating with the appropriate legislative policy committees about confidentiality provisions in programs that have never been implemented. Appendix C contains the proposed legislation and Appendix D contains the text of the proposed communications with the appropriate legislative committees.

See discussion of Advisory Committee's recommendations in Section VI.

Bulk Records Subcommittee. The Bulk Records Subcommittee's focus is to continue the Advisory Committee's consideration of how the freedom of access laws apply to bulk records requests. Michael Cianchette is the chair of the subcommittee and the following serve as members: Perry Antone, Percy Brown, Richard Flewelling, Mal Leary and Judy Meyer.

During 2011, the Bulk Records Subcommittee held 6 meetings; three of the meetings were joint meetings with the Legislative Subcommittee.

The subcommittee discussed the scope of its charge and agreed that issues related to bulk data go beyond records maintained by county registry of deeds and that bulk data requests impact a wide range of records and electronic databases maintained by government agencies. The subcommittee reviewed other states' laws that define bulk data and determined that other state laws do not provide any guidance for a clear statutory definition or approach to bulk data. The subcommittee decided to gather public input and suggestions for how to address bulk data issues.

The subcommittee held a public hearing on Friday, October 14th to get input from state and local government agencies and interested parties on four questions:

1. What is bulk data and how should it be defined?
2. What is the appropriate method of determining the cost that a requestor must pay for bulk data?
3. Should a requestor of bulk data be entitled to the records in the format and type of access requested? Should a distinction be made between a requestor seeking access to records and a requestor seeking ownership of records?

4. Should the law distinguish between bulk data requests of public records for commercial purposes versus requests for noncommercial purposes?

What is bulk data and how should it be defined?

The Subcommittee determined that there was no way to work through bulk records as an issue separate from and outside the Freedom of Access laws. The Subcommittee agreed that defining “bulk records” was problematic; they concluded that they did not need to define the term if bulk records requests could generally be treated like any other public records request. The Subcommittee reached consensus in finding that deeds are public records and would otherwise fall under the FOA laws generally.

What is the appropriate method of determining the cost that a requestor must pay for bulk data?

The subcommittee discussed whether there should be a separate way to establish fees for bulk records requests. The subcommittee’s discussion about fees was thorough; several options were considered, including specific authorization for agencies to conduct rulemaking before setting fees, setting fees in statute and maintaining the current freedom of access laws’ requirement that fees must be reasonable. The subcommittee tried to separate deeds from the rest of the issues, especially since there is a separate statute that addresses issues specifically related to fees of the Registries of Deeds. The subcommittee also noted that the Secretary of State’s Office has statutory authority to work with InforME to establish filing fees and other fees relating to electronic access to records held by the Secretary of State.

A majority of the subcommittee concluded that fees for bulk records should not be handled separately from other public records. One member, Joe Brown, didn’t agree with the rest of the Subcommittee and believed it would be appropriate to establish fees for bulk records requests differently based on whether the requestor will be using the information for commercial or noncommercial purposes. Mr. Brown noted that the State already draws distinctions between commercial and noncommercial purposes in other areas, such as registering motor vehicles and in shellfish licenses. Reflecting that same distinction in bulk records, especially with regard to deeds, would not be unreasonable.

Should a requestor of bulk data be entitled to the records in the format and type of access requested? Should a distinction be made between a requester seeking access to records and a requester seeking ownership of records?

In discussing how responses to record requests should be formatted (electronic, paper, etc.), the subcommittee found common ground with the Legislative Subcommittee and they approached this issue together. The subcommittees agreed that a copy of a record should always be available in the form the record is kept, even in electronic form. The subcommittees developed proposed statutory language to require an agency or official to provide access to an electronically stored record in the available medium of the requester’s choice, unless the agency or official does not have the ability to separate or prevent the disclosure of any confidential information contained in a computer file.

As for whether a distinction exists between accessing a record and owning a record, the subcommittee agreed that the records are owned by the public. The distinction may be important if access or costs are dependent on whether the requester is seeking the public records for a commercial purpose.

Should the law distinguish between bulk data requests of public records for commercial purposes versus requests for noncommercial purposes?

A majority of the subcommittee members determined that the freedom of access laws should make no distinction based on whether a requester is seeking a record for a commercial purpose, although there was some interest in exploring whether it would be appropriate to base fees for copies on whether the records were being requested for resale. Members expressed concern that making a distinction between commercial and noncommercial requests would require agencies and officials to investigate the motivation and purpose of requests. The members did not believe that a process like this could be applied uniformly across the state in both small towns and large State agencies. Again, Mr. Brown did not agree with the subcommittee; he reiterated his opinion that there is a difference between the use of public records or bulk data like deeds for commercial use versus personal use and that it is reasonable for the law to recognize that distinction.

The Bulk Records Subcommittee and the Legislative Subcommittee decided to wait on issues directly related to deeds because the Law Court has not acted on the pending case. If the Legislature chooses to address the issue, the members of the subcommittee were evenly split on the commercial/noncommercial distinction approach, but all agreed that allowing the counties to make “rules” concerning fees would be appropriate.

See discussion of Advisory Committee’s recommendations in Section VI.

V. ACTIONS RELATED TO RIGHT TO KNOW ADVISORY COMMITTEE RECOMMENDATIONS CONTAINED IN FIFTH ANNUAL REPORT

The Right to Know Advisory Committee made several recommendations in its fifth annual report. The actions taken in 2011 as a result of those recommendations are summarized below.

<p>Recommendation: Continue without modification, amend and repeal the specified existing public records exceptions in Titles 22 through 25</p>	<p>Action: The Judiciary Committee accepted the recommendations of the Advisory Committee with regard to specific public records exceptions as proposed in Part A of LD 1154, enacted as Public Law 2011, chapter 320.</p>
<p>Recommendation: Amend the freedom of access laws to clearly</p>	<p>Action: The Judiciary Committee accepted the recommended statutory language of the Advisory Committee as proposed in</p>

state that all forms of communications, including electronic mail, not be used to defeat the purposes of the freedom of access laws	Part B of LD 1154, enacted as Public Law 2011, chapter 320.
Recommendation: Retain the existing penalty provisions of the freedom of access laws	Action: No legislative changes have been made to the penalty provisions.
Recommendation: Take no action concerning the application of the freedom of access laws to partisan caucuses	Action: No changes have been made in law or the Legislature's rules relating to partisan caucuses.
Recommendation: Include a simple but noticeable statement on all State webpages that all aspects of communications with the State, including an individual's email address may be considered public records	Action: No legislative changes have been made, although the issue was discussed at the Freedom of Access training for legislators in December 2010.
Recommendation: Retain the Central Voter Registry System's confidentiality provisions as enacted by Public Law 2009, chapter 564	Action: No legislative changes have been made to the Central Voter Registry System's confidentiality provisions.
Recommendation: Amend the freedom of access laws to clarify that Social Security Numbers are not public records	Action: The Judiciary Committee accepted the recommended statutory language of the Advisory Committee as proposed in Part E of LD 1154, enacted as Public Law 2011, chapter 320.
Recommendation: Enact legislation to require records of public proceedings	Action: The Judiciary Committee accepted the recommended statutory language of the Advisory Committee as proposed in Part C of LD 1154, enacted as Public Law 2011, chapter 320.

Recommendation: Enact legislation to expand the scope of the process of reviewing proposed public records exceptions to include access issues	Action: The Judiciary Committee accepted the recommended statutory language of the Advisory Committee as proposed in Part D of LD 1154, enacted as Public Law 2011, chapter 320.
Recommendation: Make improvements to the State's Freedom of Access Website www.maine.gov/foaa	Action: The suggested improvements have been forwarded to the Governor's office and Office of Information Technology for consideration.
Recommendation: Support establishment of a project to provide freedom of access services to the public	Action: The Advisory Committee's Law School Extern, Diana DeJesus, has developed a draft Citizen's Guide to Maine's Freedom of Access Laws for distribution and posting on the website. Opportunities for grant funding to support publication of the guide are being explored.

VI. RECOMMENDATIONS

During 2011, the Advisory Committee engaged in the following activities and makes the recommendations summarized below.

Continue without modification, amend and repeal the following existing public records exceptions in Titles 22 through 25

As required by law, the Advisory Committee reviewed the existing public records exceptions identified in Title 22 through Title 25. The Advisory Committee's recommendations are summarized below and are also posted at www.maine.gov/legis/opla/righttoknow.htm.

The Advisory Committee recommends that the following exceptions in Titles 22 through 25 be continued without modification.

- ◆ Title 22, section 1711-C, subsection 2, relating to hospital records concerning health care information pertaining to an individual
- ◆ Title 22, section 1828, relating to Medicaid and licensing of hospitals, nursing homes and other medical facilities and entities
- ◆ Title 22, section 2706, relating to prohibition on release of vital records in violation of section; recipient must have "direct and legitimate interest" or meet other criteria
- ◆ Title 22, section 2706-A, subsection 6, relating to adoption contact files
- ◆ Title 22, section 2769, subsection 4, relating to adoption contact preference form and medical history form
- ◆ Title 22, section 3022, subsections 8, 12 and 13, relating to medical examiner information
- ◆ Title 22, section 4008, subsection 1, relating to child protective records

- ◆ Title 22, section 8824, subsection 2, relating to the newborn hearing program
- ◆ Title 22, section 8943, relating to the registry for birth defects
- ◆ Title 23, section 1980, subsection 2-B, relating to recorded images used to enforce tolls on the Maine Turnpike
- ◆ Title 23, section 1982, relating to patrons of the Maine Turnpike
- ◆ Title 23, section 4251, subsection 10, relating to records in connection with public-private transportation project proposals of at least \$25,000,000 or imposing new tolls
- ◆ Title 24, section 2510, subsection 1, relating to professional competence reports under the Maine Health Security Act
- ◆ Title 24, section 2604, relating to liability claims reports under the Maine Health Security Act
- ◆ Title 24, section 2853, subsection 1-A, relating to action for professional negligence under the Maine Health Security Act
- ◆ Title 24, section 2857, subsections 1 and 2, relating to mandatory prelitigation screening and mediation panels
- ◆ Title 24, section 216, subsections 2 and 5, relating to records of the Bureau of Insurance

The Advisory Committee recommends that the following exception in Titles 22 through 25 be continued without modification for now but that the Advisory Committee to continue to evaluate the exception in 2012.

- ◆ Title 22, section 8754, relating to medical sentinel events and reporting

The Advisory Committee recommends, with one dissenting vote, that the following exceptions in Titles 22 through 25 be continued without modification.

- ◆ Title 22, section 1848, subsection 1, relating to documents and testimony given to the Attorney General under Hospital and Health Care Provider Cooperation Act
- ◆ Title 24-A, section 6807, subsection 7, relating to individual identification data of viators

The Advisory Committee recommended that the following public records exceptions be amended. See draft legislation in Appendix C.

- ◆ Title 22, section 3034, subsection 2, relating to the Chief Medical Examiner missing persons files
- ◆ Title 23, section 63, relating to records of the right-of-way divisions of the Department of Transportation and the Maine Turnpike Authority

The Advisory Committee recommended, although not unanimously, that the following public records exceptions be amended. See draft legislation in Appendix C.

- ◆ Title 23, section 8115, relating to the Northern New England Passenger Rail Authority (Advisory Committee members voted 9-4 to support the amendment)

- ◆ Title 24, section 2510-A, relating to complaints and the sharing of information under the Maine Health Security Act (Advisory Committee members voted 10-2 to support the amendment)

The Advisory Committee recommended a statutory change to the following public records exception in order to remove references to information submitted by health care providers to a now-defunct State agency. See draft legislation in Appendix C.

- ◆ Title 22, section 8707, relating to the Maine Health Data Organization

The Advisory Committee recommended a statutory change, not intended to effect a substantive change, to the following public records exceptions in order to make confidentiality language as consistent as possible throughout the statutes. See draft legislation in Appendix C.

- ◆ Title 24-A, section 2393, relating to workers' compensation pool self-insurance and surcharges

The Advisory Committee recommended that the following public records exception be repealed as the provision is no longer administered as a result of a United States Supreme Court ruling. The Advisory Committee also wrote to the Joint Standing Committee on Health and Human Services to inform of the recommendation from the Attorney General that the entire section be repealed. See letter in Appendix D.

- ◆ Title 22, section 1555-D, subsection 1, relating to lists maintained by the Attorney General of known unlicensed tobacco retailers

The Advisory Committee recommended that the following statutory sections be reviewed by the relevant policy committees because the programs have not been implemented. See letters in Appendix D.

- ◆ Title 22, section 1696-D, relating to the identity of chemical substances in use or present at a specific location if the substance is a trade secret
- ◆ Title 22, section 1696-F, relating to the identity of a specific toxic or hazardous substance if the substance is a trade secret
- ◆ Title 22, section 3188, subsection 4, relating to the Maine Managed Care Insurance Plan Demonstration for uninsured individuals
- ◆ Title 22, section 3192, subsection 13, relating to Community Health Access Program medical data

Support the revision of the Criminal History Record Information Act proposed by the Criminal Law Advisory Commission

The Advisory Committee reviewed the revision of the Criminal History Record Information Act drafted by the Criminal Law Advisory Commission (CLAC) to consider any changes to public access that are made by the revision. The revision divides the current law into two separate subchapters to treat intelligence and investigative information separately from criminal history

information. The public records exceptions have not changed significantly overall; what is confidential under the existing law will generally be confidential under the revision. Some of the clarifications may be interpreted as narrowing particular public records exceptions, and the revision addresses a few substantive issues that are new to CHRIA. Major differences that users will notice are that the terminology used in the revision and the realigned structure make it abundantly clear what is public and what is not.

The Advisory Committee thanks the Criminal Law Advisory Commission for its work and accepts the revision as meeting the public access/confidentiality concerns of the Advisory Committee. CLAC is expected to finalize the draft and introduce it as legislation in the Second Regular Session of the 125th Legislature.

Make no distinction under the freedom of access laws for a request for bulk records with regard to the fees for access or the purpose for which the request is made

The Advisory Committee considered whether there should be a cost differential based on whether the public records are being requested for resale. The Advisory Committee decided not to write special provisions in the FOA laws that try to address the deeds issues, fully expecting the counties to continue to working on finding the appropriate formula. The MacImage case is before the Law Court now, and it will be useful to have the ruling of the Court before there are additional changes in the statute. The Advisory Committee is aware that the Legislature recently amended the freedom of access review statute to ensure that the Judiciary Committee has authority to review proposed legislation that may affect access to public documents. The Advisory Committee decided to not make specific recommendations but noted that it is an ongoing issue on which litigation and legislation are pending.

Enact legislation to require an agency or official to provide an estimate of the time within which the agency or official will comply with a public records request

In lieu of strict response deadlines, the Advisory Committee recommends that agencies and officials provide requesters with a good faith estimate of when the response for public records will be completed. Although that estimate is not binding, the agency or official must try to comply. A minority of the Advisory Committee does support a deadline by which agencies and officials must acknowledge the receipt of the request and give the estimate of completion.

This recommendation is incorporated into the Proposed Committee Amendment to LD 1465, contained in Appendix E.

Minority position: The original draft of LD 1465 contained a set deadline for public officials to respond to FOAA requests. For standard requests, the law would have demanded a certification when records could not be made available immediately. Additionally, the law would have required public bodies or officials to make the records available within five days. As most public records are supplied by public officials immediately upon request, the minority does not believe this change in language would have posed a problem for many in the state. It would, however, have prevented public bodies from deliberately delaying the release of public information in instances where there is reluctance to comply with the

Freedom of Access laws. Representatives of the Maine Heritage Policy Center, which drafted LD 1465, raised the example of the Maine Turnpike Authority stalling for months to provide requested financial information. The law today says public entities must respond within a “reasonable” amount of time when presented with a freedom of access request. This invites delays and leaves members of the public who are requesting information with little recourse, other than the onerous process of filing a complaint in court, when an official or agency wants to stall. While five days may be too short a time frame, even a 30-day deadline would strengthen the law and provide more clarity for both the public and public officials. The language proposed in LD 1465 did provide for a longer response time for large or multiple records requests. Appendix E contains alternative language as a proposed committee amendment to LD 1465 reflecting the minority position.

Enact legislation to increase the hourly fee that may be charged for the actual cost of searching for, retrieving and compiling the requested public record from \$10 per hour to \$15 per hour request

After reviewing information about the wages of public employees who regularly respond to public records requests, a majority of the Advisory Committee agreed to increase the hourly cost of compiling records from \$10 an hour to \$15 and hour, after the first hour. The related provision concerning when an agency or official may ask for payment upfront was adjusted to reflect at least two hours of billable time, going from \$20 to \$30.

These recommendations are incorporated into the Proposed Committee Amendment to LD 1465, contained in Appendix E.

Enact legislation to clarify that an agency or official shall provide access to an electronically stored record in the available medium of the requester’s choice, which is defined as a printed document of the public record or the medium in which the record is stored except that an agency or official is not required to provide access to a computer file if the agency or official has no ability to separate or prevent disclosure of any confidential information contained in the file

The Advisory Committee determined that the requirement in LD 1465 that the requester could dictate the medium of the response created too much of a burden on agencies and officials. The Advisory Committee did, however, approve a requirement that the response must be in the available medium of the requester’s choosing. A print out is always an available medium. The medium in which an electronic record is stored is an available medium, unless that medium does not allow the agency or official to redact confidential information contained in the record. The fact that a recipient of an electronic record can manipulate the information to portray a false or inaccurate picture of the information is not sufficient reason for an agency to deny access to an electronically-stored record.

This recommendation is incorporated into the Proposed Committee Amendment to LD 1465, contained in Appendix E.

- Enact legislation to require State agencies to consider certain factors related to access to public records and protection of confidential information when purchasing or contracting for computer software and other information technology resources**

The Advisory Committee, with one dissenting member, voted to support requiring the consideration of maximizing public access and the exportability of public data while protecting confidential information when agencies are purchasing information technology resources. The dissenting member would go farther and adopt a policy statement that the new use of technology must not reduce the public's access to public records.

This recommendation is incorporated into the Proposed Committee Amendment to LD 1465, contained in Appendix E.

- Enact legislation to require each State agency, county, municipality, school unit, school board and regional or other political subdivision to designate an existing employee as public access officer and require public access officers to complete the same training in the freedom of access laws as elected officials**

The Advisory Committee agreed that there is some utility in each agency designating a current employee to serve as a Public Access Officer as a resource for both the agency and the public requesting public records. LD 1465 proposed significant responsibilities for Public Access Officers, which the Advisory Committee does not believe are necessary. The Public Access Officer should receive the same training as elected officials. Members thought it was important to guarantee there is a "no wrong door policy" to ensure that requesters don't get turned away because they haven't made their request directly to the PAO. The language must provide that the absence of the PAO does not mean fulfillment of requests can wait until the PAO returns. One member could not support the proposal before the language is drafted.

This recommendation is incorporated into the Proposed Committee Amendment to LD 1465, contained in Appendix E.

- Enact legislation to increase the maximum penalty to \$5,000 for willful violation of the freedom of access laws (minority recommendation);**

The minority supports stronger enforcement through the possible imposition of higher fines for willful violation of the Freedom of Access laws. Appendix E contains alternative language as a proposed committee amendment to LD 1465 which incorporates a maximum fine of \$5,000 for violations.

- Support funding for a full-time Ombudsman position within the Department of Attorney General**

LD 1465 recommended funding for a half-time Assistant Attorney General to serve as the Public Access Ombudsman. The Advisory Committee believes that many misunderstandings and problems can be resolved quickly if a full-time Ombudsman is available to both the public and agencies and officials. The Advisory Committee therefore supports funding for a full-time

Ombudsman. The Advisory Committee will formally request the funding by letter to the Governor.

This recommendation is incorporated into the Proposed Committee Amendment to LD 1465, contained in Appendix E.

Enact legislation concerning the confidentiality of working papers of the Office of Governor to mirror the existing confidentiality exception available for working papers of the Legislature

After an in-depth discussion that included the reasoning behind working papers exceptions, the equity of treating co-equal branches of government the same, the role of the Advisory Committee, the question of whether the topic needs more time within the Advisory Committee to hear from more parties and the recognition that making any alterations is a significant change in the Freedom of Access laws and how citizens view and interact with their government, a majority of the Advisory Committee agreed to amend the definition of public record to provide an exception for working papers of the Office of the Governor to parallel the Legislature's exception. Some members opposed any exceptions as antithetical to the purpose of the Freedom of Access laws in general. Concern was also raised about the wording and breadth of the proposal protecting records of the Governor and the Governor's staff.

This recommendation is kept separate from the Proposed Committee Amendment to LD 1465, and is proposed as a separate recommendation of proposed legislation contained in Appendix E.

Minority statement: This proposed exception arose from a complaint sent by the Governor's office about so-called nuisance Freedom of Access requests. Instead of addressing the issue of nuisance requests as a whole, the committee has gone several steps beyond and proposed a blanket exception that would shield the Governor's working papers from scrutiny. This is a significant change that instead of shining light on the process of government puts the Governor's office in the dark. It warrants further discussion and also review by the Public Records Exceptions Subcommittee.

Draft documents and working papers help illuminate the way in which proposals and decisions come about. They in some cases give the public the opportunity to weigh in on information being used before a report or proposal is finalized. Although the Governor's office presented reasons in support of the exception, actual harm to the Governor's office as a result of the release of specific working papers has not been demonstrated. It was also noted in discussion of this proposal that the draft language does not clearly define what constitutes a "working paper."

VII. FUTURE PLANS

In 2012, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 22

through 25. The Advisory Committee is scheduled to begin the review and evaluation of existing public records exceptions contained in Titles 26 through 39-A in 2012. The Advisory Committee will continue its review and evaluation of Title 22, section 8754 relating to medical sentinel events and reporting. Also on the agenda are the issues concerning the application of the Freedom of Access laws to the Maine Public Broadcasting Network, the use of remote access for public members of boards and commissions to participate in public proceedings, templates for drafting specific confidentiality statutes and the storage, management and retrieval of public officials' communications, especially email.

The Advisory Committee looks forward to a full year of activities and working with the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in its sixth annual report.

APPENDIX A

Authorizing Legislation, 1 MRSA §411

CURRENT LAW GOVERNING RIGHT TO KNOW ADVISORY COMMITTEE

§411. Right To Know Advisory Committee

1. Advisory committee established. The Right To Know Advisory Committee, referred to in this chapter as "the advisory committee," is established to serve as a resource for ensuring compliance with this chapter and upholding the integrity of the purposes underlying this chapter as it applies to all public entities in the conduct of the public's business.

2. Membership. The advisory committee consists of the following members:

- A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;
- B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;
- C. One representative of municipal interests, appointed by the Governor;
- D. One representative of county or regional interests, appointed by the President of the Senate;
- E. One representative of school interests, appointed by the Governor;
- F. One representative of law enforcement interests, appointed by the President of the Senate;
- G. One representative of the interests of State Government, appointed by the Governor;
- H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;
- I. One representative of newspaper and other press interests, appointed by the President of the Senate;
- J. One representative of newspaper publishers, appointed by the Speaker of the House;
- K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;
- L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House; and
- M. The Attorney General or the Attorney General's designee.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

3. Terms of appointment. The terms of appointment are as follows.

- A. Except as provided in paragraph B, members are appointed for terms of 3 years.
- B. Members who are Legislators are appointed for the duration of the legislative terms of office in which they were appointed.
- C. Members may serve beyond their designated terms until their successors are appointed.

4. First meeting; chair. The Executive Director of the Legislative Council shall call the first meeting of the advisory committee as soon as funding permits. At the first meeting, the advisory committee shall select a chair from among its members and may select a new chair annually.

5. Meetings. The advisory committee may meet as often as necessary but not fewer than 4 times a year. A meeting may be called by the chair or by any 4 members.

6. Duties and powers. The advisory committee:

- 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;
- 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;
- 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;
- 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;
- 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;
- 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;
- 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;
- H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered;
- 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;
- 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
- K. May undertake other activities consistent with its listed responsibilities.

7. Outside funding for advisory committee activities. The advisory committee may seek outside funds to fund the cost of public hearings, conferences, workshops, other meetings, other activities of the advisory committee and educational and training materials. Contributions to support the work of the advisory committee may not be accepted from any party having a pecuniary or other vested interest in the outcome of the matters being studied. Any person, other than a state agency, desiring to make a financial or in-kind contribution shall certify to the

Legislative Council that it has no pecuniary or other vested interest in the outcome of the advisory committee's activities. Such a certification must be made in the manner prescribed by the Legislative Council. All contributions are subject to approval by the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council along with an accounting record that includes the amount of funds, the date the funds were received, from whom the funds were received and the purpose of and any limitation on the use of those funds. The Executive Director of the Legislative Council shall administer any funds received by the advisory committee.

8. Compensation. Legislative members of the advisory committee are entitled to receive the legislative per diem, as defined in Title 3, section 2, and reimbursement for travel and other necessary expenses for their attendance at authorized meetings of the advisory committee. Public members not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses and, upon a demonstration of financial hardship, a per diem equal to the legislative per diem for their attendance at authorized meetings of the advisory committee.

9. Staffing. The Legislative Council shall provide staff support for the operation of the advisory committee, except that the Legislative Council staff support is not authorized when the Legislature is in regular or special session. In addition, the advisory committee may contract for administrative, professional and clerical services if funding permits.

10. Report. By January 15, 2007 and at least annually thereafter, the advisory committee shall report to the Governor, the Legislative Council, the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Chief Justice of the Supreme Judicial Court about the state of the freedom of access laws and the public's access to public proceedings and records.

APPENDIX B

Membership list, Right to Know Advisory Committee

**Right to Know Advisory Committee
1 MRSA § 411**

Appointments by the Governor

Michael Cianchette 33 Winn Road Cumberland, ME 04021	Representing State Government Interests
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Richard P. Flewelling Maine Municipal Association 60 Community Drive Augusta, ME 04330	Representing Municipal Interests
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Harry Pringle Drummond Woodsum & MacMahon P.O. Box 9781 Portland, ME 04104-5081	Representing School Interests
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Appointments by the President

Sen. David R. Hastings III 955 Main Street Fryeburg, ME 04037	Senate Member of the Judiciary Committee
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Perry B. Antone Sr. Chief, Brewer Police Department 151 Parkway South Brewer, ME 04412	Representing Law Enforcement Interests
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Shenna Bellows Maine Civil Liberties Union 401 Cumberland Ave. Portland, ME 04101	Representing the Public
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Percy L. Brown Jr. County Commissioner, Hancock County 97 Sunset Road Deer Isle, ME 04627	Representing County or Regional Interests
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A.J. Higgins 18 West Street Manchester, ME 04351	Representing Broadcasting Interests
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Kelly Morgan 90 Loggin Road Cape Neddick, ME 04072	Representing Newspapers and Press Interests
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Appointments by the Speaker of the House

Rep. Joan M. Nass
P.O. Box 174
Acton, ME 04001

House Member of the Judiciary Committee

Mal Leary
Capitol News Service
17 Pike Street
Augusta, ME 04330

Representing a Statewide Coalition of
Advocates of Freedom of Access

William P. Logan
6 S. Chestnut Street
Augusta, ME 04330

Representing the Public

Judy Meyer
Lewiston Sun Journal
104 Park Street
Lewiston, ME 04243-4400

Representing Newspaper Publishers

Mike Violette
WGAN
420 Western Ave.
South Portland, ME 04102

Representing Broadcasting Interests

Attorney General

Linda Pistner
Chief Deputy Attorney General
6 State House Station
Augusta, ME 04333

Designee

Chief Justice

James T. Glessner
State Court Administrator
P.O. Box 4820
Portland, ME 04112

Member of the Judicial Branch

Staff:

Colleen McCarthy Reid & Margaret J. Reinsch
Office of Policy and Legal Analysis
(207) 287-1670

APPENDIX C

**Recommended Draft Legislation for Statutory Changes to Public Records Exceptions,
Titles 22 - 25**

RIGHT TO KNOW ADVISORY COMMITTEE
Recommended Draft Legislation:
Proposing Statutory Changes to Public Records Exceptions, Titles 22-25

Sec. 1. **22 MRSA § 1555-D, sub-§ 1** is repealed:

Sec. 2. **22 MRSA § 3034** is amended to read:

22 §3034. Missing persons

1. Files; information. The Office of Chief Medical Examiner shall maintain files on missing persons sufficient for the purpose of identification when there is reason to suspect that those persons may not be found alive. These files may include such material as medical and dental records and specimens, details of personal property and physical appearance, samples of hair, fingerprints and specimens that may be useful for identification. The Chief Medical Examiner may require hospitals, physicians, dentists and other medical institutions and practitioners to provide information, samples and specimens. A person participating in good faith in the provision of the information, samples or specimens under this section is immune from any civil or criminal liability for that act or for otherwise cooperating with the Chief Medical Examiner.

2. Confidentiality; disclosure. ~~All~~ Except as provided in subsection 5, all information and materials gathered and retained pursuant to this section must be used solely for the purposes of identification of deceased persons and persons found alive who are unable to identify themselves because of mental or physical impairment. The files and materials are confidential, except that compiled data that does not identify specific individuals may be disclosed to the public. Upon the identification of a deceased person, those records and materials used for the identification may become part of the records of the Office of Chief Medical Examiner and may then be subject to public disclosure as pertinent law provides.

3. Reporting of missing persons. Missing persons may be reported directly to the Office of Chief Medical Examiner by interested parties. Law enforcement agencies or other public agencies that receive reports of missing persons, or that gain knowledge of missing persons, shall report that information to the Office of Chief Medical Examiner. Law enforcement agencies shall report all attempts to locate missing persons to the Office of Chief Medical Examiner. All absences without leave by individuals from state institutions must also be reported to the Office of Chief Medical Examiner when there exists a reasonable possibility of harm to that individual.

4. Cooperation. All state and law enforcement agencies and public and private custodial institutions shall cooperate with the Office of Chief Medical Examiner in reporting, investigating, clearing and gathering further information and materials on missing persons.

5. Release to assist in search. The Office of the Chief Medical Examiner may release confidential information and materials about a missing person that is gathered and retained pursuant to this section if the Chief Medical Examiner determines that such release may assist in the search for the missing person.

RIGHT TO KNOW ADVISORY COMMITTEE
Recommended Draft Legislation:
Proposing Statutory Changes to Public Records Exceptions, Titles 22-25

Sec. 3. 22 MRSA § 8707, sub-§ 4 is amended to read:

4. Confidential or privileged designation. ~~The rules must determine to be confidential or privileged information all data designated or treated as confidential or privileged by the former Maine Health Care Finance Commission. Information regarding discounts off charges, including capitation and other similar agreements, negotiated between a payor or purchaser and a provider of health care that was designated as confidential only for a limited time under the rules of the former Maine Health Care Finance Commission is confidential to the organization, notwithstanding the termination date for that designation specified under the prior rules. The board may determine financial data submitted to the organization under section 8709 to be confidential information if the public disclosure of the data will directly result in the provider of the data being placed in a competitive economic disadvantage. This section may not be construed to relieve the provider of the data of the requirement to disclose such information to the organization in accordance with this chapter and rules adopted by the board.~~

Sec. 4. 23 MRSA § 63 is repealed and the following enacted in its place:

§63. Confidentiality of records held by Department of Transportation and Maine Turnpike Authority

1. Confidential records. The following records in the possession of the Department of Transportation and the Maine Turnpike Authority are confidential and may not be disclosed except as provided in this section:

A. Records and correspondence relating to negotiations for and appraisals of property; and

B. Records and data relating to engineering estimates of costs on projects to be put out to bid.

2. Engineering estimates. Engineering estimates of total project costs are public after the execution of project contracts.

3. Records relating to negotiations and appraisals. The records and correspondence relating to negotiations for and appraisals of property are public beginning 9 months after the completion date of the project according to the record of the department or authority, except that records of claims that have been appealed to the Superior Court are public following the award of the court.

Sec. 5. 23 MRSA § 8115 is amended to read:

§8115. Obligations of authority

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Proposing Statutory Changes to Public Records Exceptions, Titles 22-25

All expenses incurred in carrying out this chapter must be paid solely from funds provided to or obtained by the authority pursuant to this chapter. Any notes, obligations or liabilities under this chapter may not be deemed to be a debt of the State or a pledge of the faith and credit of the State; but those notes, obligations and liabilities are payable exclusively from funds provided to or obtained by the authority pursuant to this chapter. Pecuniary liability of any kind may not be imposed upon the State or any locality, town or landowner in the State because of any act, agreement, contract, tort, malfeasance, misfeasance or nonfeasance by or on the part of the authority or its agents, servants or employees. ~~The records and correspondence relating to negotiations, trade secrets received by the authority, estimates of costs on projects to be put out to bid and any documents or records solicited or prepared in connection with employment applications are confidential. The authority is deemed to have a lawyer-client privilege.~~

Sec. 6. **23 MRSA §8115-A** is enacted to read:

§8115-A. Authority records

1. Confidential records. The following records of the authority are confidential:

A. Records and correspondence relating to negotiations of agreements to which the authority is a party or in which the authority has a financial or other interest. Once entered into, an agreement is not confidential;

B. Trade secrets;

C. Estimates prepared by or at the direction of the authority of the costs of goods or services to be procured by or at the expense of the authority; and

D. Any documents or records solicited or prepared in connection with employment applications, except that applications, resumes and letters and notes of reference, other than those letters and notes of reference expressly submitted in confidence, pertaining to the applicant hired are public records after the applicant is hired, except that personal contact information is not a public record as provided in Title 1, section 402, subsection 3, paragraph O.

2. Lawyer-client privilege. The authority may claim the lawyer-client privilege in the same manner and circumstances as a corporation is authorized to do so.

Sec. 7. **24 MRSA §2505** is amended to read:

§2505. Committee and other reports

Any professional competence committee within this State and any physician licensed to practice or otherwise lawfully practicing within this State shall, and any other person may, report the relevant facts to the appropriate board relating to the acts of any physician in this State if, in the opinion of the committee, physician or other person, the committee or individual has

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Recommended Draft Legislation:
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reasonable knowledge of acts of the physician amounting to gross or repeated medical malpractice, habitual drunkenness, addiction to the use of drugs, professional incompetence, unprofessional conduct or sexual misconduct identified by board rule. The failure of any such professional competence committee or any such physician to report as required is a civil violation for which a fine of not more than \$1,000 may be adjudged.

Except for specific protocols developed by a board pursuant to Title 32, section 1073, 2596-A or 3298, a physician, dentist or committee is not responsible for reporting misuse of alcohol or drugs or professional incompetence or malpractice as a result of physical or mental infirmity or by the misuse of alcohol or drugs discovered by the physician, dentist or committee as a result of participation or membership in a professional review committee or with respect to any information acquired concerning misuse of alcohol or drugs or professional incompetence or malpractice as a result of physical or mental infirmity or by the misuse of alcohol or drugs, as long as that information is reported to the professional review committee. Nothing in this section may prohibit an impaired physician or dentist from seeking alternative forms of treatment.

The confidentiality of reports made to a board under this section is governed by this chapter.

Sec. 8. **24 MRSA § 2510, sub-§1** is amended to read:

§2510. Confidentiality of information

1. Confidentiality; exceptions. Any reports, information or records received and maintained by the board pursuant to this chapter, including any material received or developed by the board during an investigation shall be confidential, except for information and data that is developed or maintained by the board from reports or records received and maintained pursuant to this chapter or by the board during an investigation and that does not identify or permit identification of any patient or physician; provided that the board may disclose any confidential information only:

- A. In a disciplinary hearing before the board or in any subsequent trial or appeal of a board action or order relating to such disciplinary hearing;
- B. To governmental licensing or disciplinary authorities of any jurisdiction or to any health care providers or health care entities located within or outside this State that are concerned with granting, limiting or denying a physician's privileges, but only if the board includes along with the transfer an indication as to whether or not the information has been substantiated by the board;
- C. As required by section 2509, subsection 5;
- D. Pursuant to an order of a court of competent jurisdiction; ~~or~~

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E. To qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any patient or physician is first deleted; or

F. To other state or federal agencies when the information contains evidence of possible violations of laws enforced by those agencies.

Sec. 9. 24-A MRSA § 2393, sub-§ 2, ¶ D is amended to read:

D. The initial surcharges must be paid in accordance with the following provisions.

(1) Beginning July 1, 1995 every insurer writing workers' compensation insurance in the State shall collect from workers' compensation insurance policyholders and pay to the pool a surcharge on all surchargeable premiums received by the insurer for those policies. During the initial surcharge period, the surcharge is at a fixed rate of 6.32% of the surchargeable premium. The surcharge may be applied only to policies with an effective date on or after 12:01 a.m., July 1, 1995. All surcharges received by each insurer during the preceding calendar quarter must be remitted to the pool within 15 days following the end of each calendar quarter, except that servicing carriers shall remit on February 15th, May 15th, August 15th and November 15th of each year. Any surcharge proceeds not remitted on a timely basis accrue interest at the rate of 10% per annum from the due date until paid in full. The pool is entitled to reimbursement from any insurer failing to remit surcharge proceeds on a timely basis for the pool's costs of collection of those amounts, including all collection costs and fees, reasonable attorney's and paralegal's fees and any other professional fees and expenses associated with the pool's collection efforts. The surcharges described in this subparagraph do not apply to reinsurance recognized by the superintendent pursuant to chapter 250, section 2, paragraph G or section 3, paragraph G, procured by an individual self-insured employer or a self-insured employer group.

(2) Self-insured employers that secured their obligation to provide workers' compensation benefits under the Workers' Compensation Act through issuance or renewal at any point during the fresh start period of an insurance policy for any portion of any of the policy years 1988 to 1992 are subject to a surcharge as provided in the following.

(a) During the initial surcharge period the rate of surcharge is 6.32% of the surchargeable premium as adjusted pursuant to this paragraph for the self-insured employer's current plan year utilizing estimated payroll as submitted with the self-insured employer's renewal application for authority to self-insure, in accordance with Chapter 250, section 2, paragraph C, subparagraph 1, division c or Chapter 250, section 3, paragraph C, subparagraph 1, division g as applicable, subject to audit pursuant to division (d), subdivision (iii). If the plan year in which a surcharge is collected or a credit is distributed is shorter than 12 months, due to a change in accounting period or termination of self-insurance

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authorization, the surcharge or credit for that plan year must be based upon the final audited payroll for the short plan year.

(b) All surcharges must be collected or distributed on a plan year basis. In each plan year, the percentage of the surchargeable premium to be surcharged is the same percentage as is applied to an insured employer whose policy period coincided with the plan year.

(c) Except for a successor self-insured employer, each self-insured employer shall pay surcharges relating to only that portion of the policy years 1988 to 1992 in which the self-insured employer insured its workers' compensation obligations. The surcharge factor, as determined by the board under this chapter, must be adjusted to take into consideration the policy years or portions of policy years 1988 to 1992 in which a self-insured employer was self-insured.

The self-insured employer adjustment is determined as follows. The surcharge factor must be multiplied by the factor attributed to each of the years 1988 to 1992, as set forth in the table below. If a self-insured employer was insured only during a portion of a policy year, then the factor for that year is prorated based on the ratio of the number of days in the policy year during which the self-insured employer was insured to 365 days.

Policy Year	Factor
1988	28.48%
1989	30.70%
1990	23.26%
1991	11.55%
1992	6.01%

(d) The board shall administer the surcharges on self-insured employers as follows.

(i) The board shall issue surcharge billings to self-insured employers, pursue collection of all invoiced surcharges, initiate legal proceedings as necessary to collect surcharges and maintain records adequate to administer the surcharge process. The records of the board and of the bureau form the basis for identifying self-insured employers who are subject to this paragraph.

(ii) Annual surcharges may be paid in a single lump sum within 30 days of the receipt of the pool's invoice or in quarterly installments at the self-insured employer's option. The board shall issue a yearly invoice as soon as practicable after the self-insured employer's plan approval or renewal date and receipt of all necessary supporting information from the

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superintendent. Each invoice must contain a schedule of dates when quarterly installments are due and clearly state the policy year or years for which the surcharge is imposed, the surcharge percentage multiplied by the factor applicable to each policy year and the amount of the surchargeable premium.

(iii) Each individual self-insured employer shall report final audited payrolls to the pool not later than 60 days after the end of each plan year and each self-insured employer that is a member of a self-insured group or the group's administrator, as the group may select, shall report final audited payrolls to the pool not later than 120 days after the end of each plan year and shall remit with the audit information any additional surcharges resulting from the audit.

(iv) Upon the request of a self-insured employer, including a successor self-insured employer or an administrator of a self-insurance group, the board may determine whether there was a factual inaccuracy in the information underlying a surcharge billing issued by the board for the fresh start period or whether the surcharge calculated by the board is consistent with the provisions of this subparagraph. The request must be filed within 180 days from the date on which the final payment is due and must be in writing, including a statement of the reason for the request and the amount, if known, of the alleged overcharge. If an appeal based upon an alleged overcharge is sustained, the board shall refund the overcharge, together with any investment earnings on those amounts. If a self-insured employer is aggrieved by the final action or decision of the board, or if the board does not act on the written request within 60 days, the self-insured employer may appeal to the superintendent within 60 days of such action or decision of the board. Notwithstanding a pending appeal, a self-insured employer must pay any surcharge billing issued by the board.

(e) Self-insured employers have the following obligations with respect to the surcharge process.

(i) As a condition of continuing authorization to self-insure, each self-insured employer and each group self-insurance administrator shall assist the board and the superintendent in the calculation, billing and collection of any applicable surcharge. The required assistance includes maintaining and providing, upon request of the board or the superintendent, actual premium history and all payroll and experience information necessary to calculate self-insured employer premiums, as specified in this subparagraph. Information provided by the self-insured employer is subject to audit by the pool and the superintendent at any time and self-insured employers shall provide to the pool, or its designee, and to the superintendent full and complete access to all books and records relating in any way to the audit. Group self-insurance administrators shall give prompt notice to the superintendent of any changes in group membership.

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(ii) Information provided by self-insured employers to the board pursuant to this paragraph is confidential. The board shall protect the confidentiality of all self-insured employer information in its possession, whether the information is obtained directly from the self-insured employer or from the superintendent or a group administrator. All information relating to a self-insured employer provided pursuant to this paragraph and in the possession of the board or superintendent continues to be confidential until that information is destroyed.

(iii) A self-insurance group may act as the collection agent for its members. Any group so electing shall notify the board. The board shall bill the group on a consolidated basis. The group shall remit its entire quarterly payment to the board within 30 days after receiving the invoice, whether or not any members remain in default and notify the board and the superintendent of any delinquency.

(iv) Each self-insured employer shall make provisions for possible surcharges in the normal course of operations and pay the full amount of any surcharge installment within 30 days after receiving an invoice from the board or the self-insured employer's self-insurance group. Late payments are subject to interest at the rate of 10% per annum.

(v) The failure of any self-insured employer or self-insurance group to comply with its duties under this paragraph constitutes grounds for suspension, revocation, termination of the option to self-insure, expulsion from a self-insurance group or other appropriate sanctions authorized under section 12-A, in addition to all procedures for the collection of past-due accounts otherwise available by law to the board or the governing body of the self-insurance group.

(f) The superintendent has the following responsibilities with respect to the surcharge process.

(i) The superintendent shall furnish to the board, on a monthly basis, a list of all self-insurance plan approvals, renewals and anniversaries that have occurred since the last report or for any other reason were not included in any previous report, including all approvals, terminations and membership changes for group self-insurers. For each employer listed, the superintendent shall provide all available information necessary for the board's imputed calculations under this paragraph, including: the date the new plan year began; the self-insurance group, if any, to which the self-insured employer belongs; the dates of coverage under each policy issued or renewed in policy years 1988 to 1992; the rating information for the current plan year, including estimated payroll by classification, premium rate for each classification, experience modification and other applicable rating adjustments; information relating to changes of ownership or control, changes of operations, changes of name or organizational structure; and other information necessary to determine successorship.

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(ii) The superintendent shall supplement promptly the initial report as necessary, including any revision to the self-insured employer's rating information on audit, any other additions or corrections to incomplete or inaccurate information provided in the initial report and the length of the plan year, if shorter than 12 months.

(g) A successor self-insured employer is subject to surcharge on the same basis as the predecessor employer would be if still actively doing business and self-insured. If a self-insured employer is the successor to more than one employer, then the successor employer's self-insured employer adjustment is the sum of each predecessor employer's self-insured employer adjustment multiplied by the ratio of the employer's surchargeable premium for the 12-month period immediately preceding the succession transaction to the combined surchargeable premium of all predecessor employers for that 12-month period.

(i) If one or more of the predecessor employers was insured at the time of the succession transaction, its self-insured employer adjustment is calculated pursuant to division (c), (h) or (i) as if it had become self-insured at the time of the succession transaction.

(ii) If business operations that were covered under a single workers' compensation policy or certificate of self-insurance authority are subsequently separately owned by virtue of any succession transaction, dissolution, reincorporation or other transaction or series of transactions, for purposes of this subparagraph each business is treated as a distinct employer, subject to surcharge as either an insured employer or a self-insured employer.

(iii) If substantial changes in operations during the 12-month period immediately preceding the succession transaction make the 12-month surchargeable premium an inappropriate measure of a predecessor employer's workers' compensation exposure prior to the transaction, the board may adopt procedures for calculating an annualized premium in a manner consistent with the intent of this subparagraph.

(h) A self-insured employer that secured its obligation to provide workers' compensation benefits under the Workers' Compensation Act through a self-insurance program approved by the superintendent for the entirety of that self-insured employer's policy years 1988 to 1992, in which the self-insured employer actually had an obligation to secure benefits under the Workers' Compensation Act is not subject to the surcharge.

(i) Except for any successor self-insured employer, self-insured employers that commence operations in the State on or after July 1, 1995 are subject to surcharge under this subparagraph on the same basis as self-insured employers that secured compensation under the Workers' Compensation Act by the purchase of an insurance policy throughout the entire fresh start period.

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(3) An employer may, as specified in this subparagraph, prepay all of its surcharges for a period of 10 consecutive policy years or plan years. The 10-year period starts with the employer's first renewal date or plan year following July 1, 1995. Within 30 days after the inception of the first plan year or first policy renewal date following July 1, 1995, if the employer intends to exercise this option, the employer must file with the pool written notice electing to make a lump-sum payment of surcharges and shall include with the notice the employer's full lump-sum payment. If the election is not made within 30 days after the first day of the first plan year or policy year following July 1, 1995, the option expires and is no longer available. The pool shall implement such procedures for administering this option as the board determines necessary. An employer that elects this option shall reimburse the pool for its expenses of administering this option for that employer, including the cost of individually allocating those costs to individual employers, in accordance with billing procedures developed and implemented by the board. This subparagraph does not eliminate or limit the employer's liability to pay adjusted surcharges or supplemental surcharges pursuant to paragraph E or section 2394.

For purposes of this subparagraph, "lump-sum payment" is the surcharge for the first year multiplied by 10 and discounted to net present value using:

- (a) A 5% discount rate;
- (b) The first day of the first plan year or policy year starting on or after July 1, 1995; and
- (c) An assumption that the surcharge for each of the 10 plan years or policy years would have been paid on the first day of each subsequent plan year or policy year.

Summary

This proposed legislation implements the recommendations of the Right to Know Advisory Committee relating to existing public records exceptions in Titles 22 to 25. The legislation does the following.

Section 1 repeals the provision that designates as confidential lists maintained by the Attorney General's Office of known unlicensed tobacco retailers. The Attorney General no longer maintains such lists as a result of a Supreme Court decision that State law is preempted by federal law.

Section 2 gives the Office of the Chief Medical Examiner the discretion to release confidential information and materials about a missing person if the Chief Medical Examiner determines that releasing the information or materials may assist in the search for that missing person.

Section 3 removes language related to confidentiality of data held by the former Maine Health Care Finance Commission. The amendment retains language authorizing the Maine Health Data Organization board to determine certain financial data submitted to the organization

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by health care providers to be confidential if disclosure of the data will place the provider at a competitive economic disadvantage.

Section 4 clarifies that engineering estimates are public after the execution of project contracts.

Section 5 amends Title 23, Section 8115 to remove the confidentiality provisions in current law that apply to the records of the Northern New England Passenger Rail Authority.

Section 6 reenacts the confidentiality provisions applying to the records of the Northern New England Passenger Rail Authority in a new section and clarifies what records are not subject to public access. The legislation provides that records and correspondence relating to negotiations of agreements are confidential, although the final agreements are not designated confidential by this language. The legislation also clarifies that estimates of costs of goods or services to be procured by or at the expense of the authority are confidential if the estimates are prepared by the authority or at the direction of the authority. The legislation also revises the employment application confidentiality to track that of State, county and municipal employee applicants. All documents relating to applicants are confidential except for records pertaining to the applicant who is hired, most of which become public. Personal contact information of public employees is not a public record. Finally, the legislation clarifies the language concerning the lawyer-client privilege; it allows the authority to claim the lawyer-client privilege in the same manner and circumstances as a corporation is authorized to do so.

Section 7 amends Title 24, section 2505 to clarify that the confidentiality provisions of the Maine Health Security Act, of which section 2505 is a part, govern the confidentiality of reports to appropriate medical licensing boards.

Section 8 amends Title 24, section 2510 to authorize medical licensing boards to share confidential information with state and federal agencies when the information contains evidence of possible violations of laws enforced by those agencies.

Section 9 clarifies that information provided by self-insurers to the Maine Residual Market Pool or the Bureau of Insurance related to payment of workers' compensation residual market surcharges continues to be confidential until that information is destroyed.

APPENDIX D

**Recommended Draft Letters to Policy Committees Concerning Public Records Exceptions,
Title 22-25**

RIGHT TO KNOW ADVISORY COMMITTEE
Recommended Draft Letters to Policy Committees:
Concerning Public Records Exceptions, Titles 22-25

Letter to HHS Committee Concerning Title 22, Section 1555-D

Sen. Earle L. McCormick
Rep. Meredith N. Strang Burgess
Joint Standing Committee on Health and Human Services
100 State House Station
Augusta, Maine 04333

Dear. Sen. McCormick and Rep. Strang Burgess:

The Public Records Exceptions Subcommittee of the Right to Know Advisory Committee is reviewing existing public records exceptions in the statutes, and is focusing on the exceptions found in Titles 22 through 25. The Subcommittee is expected to review and evaluate each public records exception and make a recommendation for either keeping it as is, amending it or repealing it altogether. Title 1, section 432 contains the criteria for the review and evaluation.

As part of its review, the Subcommittee considered an exception in Title 22, section 1555-D, subsection 1 relating to lists maintained by the Attorney General's Office of known unlicensed tobacco retailers. Upon reviewing the exception at the request of the Subcommittee, the Attorney General's Office recommended that the confidentiality provision be repealed as the lists required by the statute are no longer collected or maintained as a result of a U.S. Supreme Court decision ruling the Maine's law is preempted under federal law. In light of the Supreme Court ruling, the entire statute, section 1555-D, prohibiting the illegal delivery of tobacco products is not enforceable. In addition to the confidentiality provision in subsection 1, the Attorney General's Office also recommended that all of section 1555-D be repealed.

The Subcommittee declined to recommend that all of section 1555-D be repealed in its entirety because the underlying policy issue is beyond the scope of the Subcommittee's charge. As the Legislature's policy committee with jurisdiction over health and human services matters, we are writing to inform you of the recommendation that section 1555-D be repealed as a result of the U.S. Supreme Court's decision.

Thank you for your time and attention to this matter. Please feel free to contact staff, Peggy Reinsch or Colleen McCarthy Reid, if you have questions. They can be reached at the Office of Policy and Legal Analysis at 287-1670.

Letter to ENR and HHS Committees Concerning Title 22, Community Right to Know Act

Sen. Thomas B. Saviello, Senate Chair
Rep. James M. Hamper, House Chair
Joint Standing Committee on Environment and Natural Resources
100 State House Station
Augusta, Maine 04333

Sen. Earle L. McCormick
Rep. Meredith N. Strang Burgess

RIGHT TO KNOW ADVISORY COMMITTEE
Recommended Draft Letters to Policy Committees:
Concerning Public Records Exceptions, Titles 22-25

Joint Standing Committee on Health and Human Services
100 State House Station
Augusta, Maine 04333

Dear Sen. Saviello, Sen. McCormick, Rep. Hamper and Rep. Strang Burgess:

The Public Records Exceptions Subcommittee of the Right to Know Advisory Committee is reviewing existing public records exceptions in the statutes, and is focusing on the exceptions found in Titles 22 through 25. The Subcommittee is expected to review and evaluate each public records exception and make a recommendation for either keeping it as is, amending it or repealing it altogether. Title 1, section 432 contains the criteria for the review and evaluation.

As part of its review, the Subcommittee considered two exceptions in Title 22 within the "Community Right-to-Know Act" to address public concerns about hazardous substances. We understand that the program within the Department of Health and Human Services has never been implemented.

The Subcommittee worked on draft language to revise the confidentiality provisions to bring the language into conformity with the standard confidentiality wording and to make clear what information collected by the Department under the program would be considered public. Ultimately, however, we are reluctant to make recommendations concerning a program that has not been implemented.

We believe that the Department of Environmental Protection may have programs that parallel or overlap the purposes of the Community-Right-to-Know Act, and we know that the Maine Emergency Management Agency and county emergency management authorities also collect information and develop emergency plans concerning hazardous substances. We hope that your committees will find the time to review the existing programs and determine whether life should be breathed into the Community Right-to-Know Act and amended appropriately, or deleted completely.

Thank you for your time and attention to this matter. Please feel free to contact staff, Peggy Reinsch or Colleen McCarthy Reid, if you have questions. They can be reached at the Office of Policy and Legal Analysis at 287-1670.

Letter to HHS Committee Concerning Title 22, Section 3188 and Section 3192

Sen. Earle L. McCormick
Rep. Meredith N. Strang Burgess
Joint Standing Committee on Health and Human Services
100 State House Station
Augusta, Maine 04333

Dear Sen. McCormick and Rep. Strang Burgess:

RIGHT TO KNOW ADVISORY COMMITTEE
Recommended Draft Letters to Policy Committees:
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The Public Records Exceptions Subcommittee of the Right to Know Advisory Committee is reviewing existing public records exceptions in the statutes, and is focusing on the exceptions found in Titles 22 through 25. The Subcommittee is expected to review and evaluate each public records exception and make a recommendation for either keeping it as is, amending it or repealing it altogether. Title 1, section 432 contains the criteria for the review and evaluation.

As part of its review, the Subcommittee considered 2 exceptions in Title 22 relating to records collected or maintained by programs authorized within the Department of Health and Human Services that have never been implemented:

- Title 22, section 3188, subsection 4 relating to the Maine Managed Care Insurance Plan Demonstration program for uninsured individuals; and
- Title 22, section 3192, subsection 13 relating to medical data of the Community Health Access Program.

The Department of Health and Human Services made a recommendation to the Subcommittee that the specific confidentiality provisions be repealed because the statutes have never been used, and also suggested to the Subcommittee that all of sections 3188 and 3192 should be repealed. The Subcommittee declined to recommend that the sections be repealed in their entirety because the underlying policy issue is beyond the scope of the Subcommittee's charge. As the Legislature's policy committee with jurisdiction over health and human services matters, we are writing to inform you of the recommendation that the statutory provisions authorizing the Maine Managed Care Insurance Plan Demonstration program and the Community Health Access Program be repealed because the programs have never been implemented.

Thank you for your time and attention to this matter. Please feel free to contact staff, Peggy Reinsch or Colleen McCarthy Reid, if you have questions. They can be reached at the Office of Policy and Legal Analysis at 287-1670.

Letter to IFS Committee Concerning Title 24-A, Section 6807, Subsection 7

Sen. Rodney L. Whittemore
Rep. Wesley E. Richardson
Joint Standing Committee on Insurance and Financial Services
100 State House Station
Augusta, Maine 04333

Dear Sen. Whittemore and Rep. Richardson:

The Public Records Exceptions Subcommittee of the Right to Know Advisory Committee is reviewing existing public records exceptions in the statutes, and is focusing on the exceptions found in Titles 22 through 25. The Subcommittee is expected to review and evaluate each public records exception and make a recommendation for either keeping it as is, amending it or repealing it altogether. Title 1, section 432 contains the criteria for the review and evaluation.

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As part of its review, the Subcommittee considered one exceptions in Title 24-A, section 6807, subsection 7 relating to examination and investigation information maintained by the Bureau of Insurance with respect to life settlement or viatical settlement contracts. The Bureau of Insurance and other interested parties recommended that no changes be made to this exception. The Subcommittee agreed with the Bureau's recommendation that no changes be made, but one Subcommittee member voted against the recommendation. The Subcommittee member's objection is based on the breadth of the exception because it states that all examination and investigation information is "...confidential by law and privilege, are not subject to subpoena and are not subject to discovery or admissible in evidence in any private civil action." See 24-A MRSA § 6807, sub-§7, ¶ B. The language is also inconsistent with the statutory language governing the confidentiality of examination records maintained or collected by other state agencies, including the provision governing examination reports of the Bureau of Insurance in Title 24-A, sections 225, 226 and 227. .

As the Legislature's policy committee with jurisdiction over insurance and financial services matters, we are writing to inform you of the Subcommittee's recommendation and to make you aware of the inconsistent statutory language used in Title 24-A, section 6807, subsection 7.

Thank you for your time and attention to this matter. Please feel free to contact staff, Peggy Reinsch or Colleen McCarthy Reid, if you have questions. They can be reached at the Office of Policy and Legal Analysis at 287-1670.

APPENDIX E

Recommended Draft Legislation

Proposed Committee Amendment to LD 1465, Majority Report

Proposed Committee Amendment to LD 1465, Minority Report

Public Records Exception for Working Papers of the Governor, Majority Report

RIGHT TO KNOW ADVISORY COMMITTEE
Recommended Draft Legislation Supported by Majority of Advisory Committee:
Proposed Committee Amendment to LD 1465

**COMMITTEE AMENDMENT “.” To LD 1465, An Act To Amend the
Laws Governing Freedom of Access**

Amend the bill by striking out everything after the enacting clause and inserting in its place the following:

Sec. 1. 1 MRSA §400 is enacted to read:

§400. Short title

This subchapter may be known and cited as the "Freedom of Access Act."

Sec. 2. 1 MRSA §401-A is enacted to read:

§401-A. Public records; information technology

Each agency shall consider the following in the purchase of and contracting for computer software and other information technology resources:

1. Maximize public access. Maximizing public access to public records; and

2. Maximize exportability; protect confidential information. Maximizing the exportability of public data while protecting confidential information that may be part of otherwise public records.

Sec. 3. 1 MRSA §402, sub-§1-B is enacted to read:

1-B. Public access officer. "Public access officer" means the person designated pursuant to section 413, subsection 1.

Sec. 4. 1 MRSA §408 is repealed.

Sec. 5. 1 MRSA §408-A is enacted to read:

§408-A, Public records available for 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 record within a reasonable time of

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making the request to inspect or copy the public record.

2. Clarification. An agency or official may request clarification concerning which public record or public records are being requested.

3. Acknowledgment; time estimate. The agency or official shall acknowledge receipt of the request within a reasonable period of time, and shall provide a good faith, nonbinding estimate of the time within which the agency or official will comply with the request. The agency or official shall make a good faith effort to fully respond to the request within the estimated time.

4. Refusals; denials. If a body or an agency or official who has 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 request for inspection or copying.

5. Schedule. Inspection, conversion and copying may be scheduled to occur at a time that will not delay or inconvenience the regular activities of the agency or official having custody of the public record sought. As used in this section, "reasonable office hours" includes all regular office hours of an agency or official. If a 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. Inspect. A person may inspect any public record during reasonable office hours. An agency or official may not charge for inspection.

7. 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.

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

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

8. Compile or create. An agency or official is not required to create or compile a record that does not exist.

9. Electronically stored public records. An agency or official shall provide access to an electronically stored public record in the available medium of the requester's choice. An available medium is a printed document of the public record or the medium in which the record is stored, except that a computer file is not an available medium if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in that file.

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A. An agency or official is not required to provide an electronically stored public record in a different medium, structure, format or organization, but may do so at the agency's or official's discretion.

B. If in order to provide for inspection or copying the agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format, the agency or official may charge a fee to cover the actual cost of conversion.

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

10. 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 copies of 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. An agency or official may not charge for inspection.

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

11. Estimate. The agency or official shall provide to the requester 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 12 applies.

12. Payment in advance. The agency or official may require a requester to pay all or a portion of the estimated costs to complete the request prior to the conversion, 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.

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

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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.

Sec. 6. 1 MRSA §409 is amended to read:

§409. Appeals

1. Records. ~~If any body or agency or official who has custody or control of any public record refuses permission to inspect or copy or abstract a public record, this denial must be made by the body or agency or official in writing, stating the reason for the denial, within 5 working days of the request for inspection by any person. 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 are privileged in respect to their assignment for trial over all other actions except writs of habeas corpus and actions brought by the State against individuals.~~

Sec. 7. 1 MRSA §412, as amended by PL 2007, c. 576, §2, is further amended to read:

§412. Public records and proceedings training for certain elected officials and public access officers

1. Training required. ~~Beginning July 1, 2008, A public access officer and an elected official subject to this section shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The official or officer shall complete the training not later than the 120th day after the date the elected official takes the oath of office to assume the person's duties as an elected official or the person is designated as a public access officer pursuant to section 413, subsection 1. For elected officials subject to this section serving in office on July 1, 2008, the training required by this section must be completed by November 1, 2008.~~

2. Training course; minimum requirements. The training course under subsection 1 must be designed to be completed by an official or a public access officer in less than 2 hours. At a minimum, the training must include instruction in:

A. The general legal requirements of this chapter regarding public records and public proceedings;

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B. Procedures and requirements regarding complying with a request for a public record under this chapter; and

C. Penalties and other consequences for failure to comply with this chapter.

An elected official or public access officer meets the training requirements of this section by conducting a thorough review of all the information made available by the State on a publicly accessible website pursuant to section 411, subsection 6, paragraph C regarding specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. To meet the requirements of this subsection, any other training course must include all of this information and may include additional information.

3. Certification of completion. Upon completion of the training course required under subsection 1, the elected official or public access officer shall make a written or an electronic record attesting to the fact that the training has been completed. The record must identify the training completed and the date of completion. The elected official shall keep the record or file it with the public entity to which the official was elected. A public access officer shall file the record with the agency or official that designated the public access officer.

4. Application. This section applies to the following elected officials:

A. The Governor;

B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;

C. Members of the Legislature elected after November 1, 2008;

E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;

F. Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments;

G. Officials of school administrative units ~~and school boards~~; and

H. Officials of a regional or other political subdivision who, as part of the duties of their offices, exercise executive or legislative powers. For the purposes of this paragraph, "regional or other political subdivision" means an administrative entity or instrumentality created pursuant to Title 30-A, chapter 115 or 119 or a quasi-municipal corporation or special purpose district, including, but not limited to, a water district, sanitary district, hospital district, school district of

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any type, transit district as defined in Title 30-A, section 3501, subsection 1 or regional transportation corporation as defined in Title 30-A, section 3501, subsection 2.

This section also applies to a public access officer.

Sec. 8. 1 MRS §413 is enacted to read:

§413. Public access officer

1. Designation; responsibility. Each State agency, county, municipality, school administrative unit and regional or other political subdivision shall designate an existing employee as its public access officer to serve as the contact person for that agency, county, municipality, school administrative unit and regional or other political subdivision with regard to requests for public records under this chapter. The public access officer is responsible for ensuring that each public records request is acknowledged within a reasonable period of time and that a good faith estimate when the response to the request will be complete is provided. The public access officer shall serve as a resource within the agency, county, municipality, school administrative unit and regional or other political subdivision concerning freedom of access questions and compliance.

2. Acknowledgement and response required. A State agency, county, municipality, school administrative unit and regional or other political subdivision that receives a request to inspect or copy a public record shall acknowledge and respond to the request regardless of whether the request was delivered to or directed to the public access officer.

3. No delay based on unavailability. The unavailability of a public access officer may not delay a response to a request.

2. Training. A public access officer shall complete a course of training on the requirements of this chapter relating to public records and proceedings as described in section 412.

Sec. 9. Appropriations and allocations. The following appropriations and allocations are made. *(Assumes April 1, 2012 effective date.)*

ATTORNEY GENERAL, DEPARTMENT OF THE

Administration – Attorney General 0310

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Initiative: Provides funds for one Assistant Attorney General position to serve as a Public Access Ombudsman.

GENERAL FUND	2011-12	2012-13
Position – Legislative Count	1,000	1,000
Personal Services	\$18,160	\$75,420
All Other	\$5,178	\$3,178
GENERAL FUND TOTAL	\$23,338	\$78,598

SUMMARY

This amendment replaces the bill.

This amendment titles Chapter 13, subchapter 1 of Title 1 the “Freedom of Access Act.”

This amendment requires government agencies, when making purchases of or contracting for computer software and other information technology resources, to consider maximizing public access to public records, as well as maximizing the exportability of public data while protecting confidential information.

This amendment creates the position of “public access officer” and requires each State agency, county, municipality, school administrative unit and regional or other political subdivision to designate an existing employee to serve in that capacity as a resource for freedom of access questions. Requests for public records do not have to be made to the public access officer. The public access officer must undergo the same freedom of access training as elected officials.

This amendment repeals and replaces the current section of law that lays out the process and fees concerning inspecting and copying public records, although much of the current language is retained. It allows inspection and copying of public records during reasonable office hours. The reasonable office hours must be posted. It requires the agency or official, when acknowledging the receipt of a request for public records, to provide a good faith estimate of when the response to the request will be complete. Although the time estimate is not binding, the agency or official must make a good faith effort to meet that time.

This amendment clarifies that a request for public records does not have to be made in writing or in person. This amendment provides that an agency or official is not required to create or compile a record that does not exist in response to a request for public records.

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This amendment requires an agency or official to provide access to an electronically stored public record in the available medium of the requester's choice. An available medium is a printed document of the public record or the medium in which the record is stored, except that a computer file is not an available medium if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in that file. Although an agency or official is not required to provide an electronically stored public record in a different medium, structure, format or organization, the agency or official may do so at the agency's or official's discretion. If in order to provide for inspection or copying the agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format, the agency or official may charge a fee to cover the actual cost of conversion.

This amendment clarifies that an agency or official is not required to provide a requester with access to a computer terminal.

This amendment increases the per hour cost for compiling a record from \$10 to \$15, after the first hour. Similarly, the threshold for the estimated cost that triggers payment in advance is raised from \$20 to \$30.

This amendment includes funding for a full-time Assistant Attorney General to serve as the Public Access Ombudsman in the Office of the Attorney General.

**COMMITTEE AMENDMENT “.” To LD 1465, An Act To Amend the
Laws Governing Freedom of Access**

Amend the bill by striking out everything after the enacting clause and inserting in its place the following:

Sec. 1. 1 MRSA §400 is enacted to read:

§400. Short title

This subchapter may be known and cited as the "Freedom of Access Act."

Sec. 2. 1 MRSA §401-A is enacted to read:

§401-A. Public records; information technology

Each agency shall consider the following in the purchase of and contracting for computer software and other information technology resources:

1. Maximize public access. Maximizing public access to public records; and

2. Maximize exportability; protect confidential information. Maximizing the exportability of public data while protecting confidential information that may be part of otherwise public records.

Sec. 3. 1 MRSA §402, sub-§1-B is enacted to read:

1-B. Public access officer. "Public access officer" means the person designated pursuant to section 413, subsection 1.

Sec. 4. 1 MRSA §408 is repealed.

Sec. 5. 1 MRSA §408-A is enacted to read:

§408-A, Public records available for 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 record within a reasonable time of

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making the request to inspect or copy the public record.

2. Clarification. An agency or official may request clarification concerning which public record or public records are being requested.

3. Immediately available; acknowledgment; time estimate; time limits. If the public record is immediately available, the agency or official shall immediately make it available for inspection and copying. If the public record is not immediately available, the agency or official shall acknowledge receipt of the request within a reasonable period of time and shall provide a written statement explaining why it is not immediately available. The acknowledgement must include a good faith, nonbinding estimate of the time within which the agency or official will comply with the request, which must be within the following time limits.

A. If the request is complex and will cost more than \$100 in costs under subsection 10, the agency or official shall make the public record available within 45 days of the request.

B. For requests not covered by paragraph A, the agency or official shall make the public record available within 30 days of the request.

The agency or official shall make a good faith effort to fully respond to the request within the estimated time.

Failure to comply with the applicable time limit is a violation of this subchapter.

4. Refusals; denials. If a body or an agency or official who has 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 request for inspection or copying.

5. Deadline; schedule. Inspection, conversion and copying may be scheduled to occur at a time that will not delay or inconvenience the regular activities of the agency or official having custody of the public record sought. As used in this section, "reasonable office hours" includes all regular office hours of an agency or official. If a 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. Inspect. A person may inspect any public record during reasonable office hours. An agency or official may not charge for inspection.

7. 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

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request that the agency or official having custody of the record provide a copy.

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

8. Compile or create. An agency or official is not required to create or compile a record that does not exist.

9. Electronically stored public records. An agency or official shall provide access to an electronically stored public record in the available medium of the requester's choice. An available medium is a printed document of the public record or the medium in which the record is stored, except that a computer file is not an available medium if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in that file.

- A. An agency or official is not required to provide an electronically stored public record in a different medium, structure, format or organization, but may do so at the agency's or official's discretion.
- B. If in order to provide for inspection or copying the agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format, the agency or official may charge a fee to cover the actual cost of conversion.
- C. This subsection does not require an agency or official to provide a requester with access to a computer terminal.

10. 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 copies of 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. An agency or official may not charge for inspection.
- D. The agency or official may charge for the actual mailing costs to mail a copy of a record.

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11. Estimate. The agency or official shall provide to the requester 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 12 applies.

12. Payment in advance. The agency or official may require a requester to pay all or a portion of the estimated costs to complete the request prior to the conversion, 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.

13. Waivers. The agency or official 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.

Sec. 6. 1 MRSA §409 is amended to read:

§409. Appeals

1. Records. ~~If any body or agency or official who has custody or control of any public record refuses permission to inspect or copy or abstract a public record, this denial must be made by the body or agency or official in writing, stating the reason for the denial, within 5 working days of the request for inspection by any person. 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 are privileged in respect to their assignment for trial over all other actions except writs of habeas corpus and actions brought by the State against individuals.~~

Sec. 7. 1 MRSA §410 is amended to read:

§410. Violations

For every willful violation of this subchapter, the state government agency or

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local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture fine of not more than \$500 \$5,000 may be adjudged.

Sec. 8. 1 MRSA §412, as amended by PL 2007, c. 576, §2, is further amended to read:

§412. Public records and proceedings training for certain elected officials and public access officers

1. Training required. ~~Beginning July 1, 2008, A public access officer and an elected official subject to this section shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The official or officer shall complete the training not later than the 120th day after the date the elected official takes the oath of office to assume the person's duties as an elected official or the person is designated as a public access officer pursuant to section 413, subsection 1. For elected officials subject to this section serving in office on July 1, 2008, the training required by this section must be completed by November 1, 2008.~~

2. Training course; minimum requirements. The training course under subsection 1 must be designed to be completed by an official or a public access officer in less than 2 hours. At a minimum, the training must include instruction in:

- A. The general legal requirements of this chapter regarding public records and public proceedings;
- B. Procedures and requirements regarding complying with a request for a public record under this chapter; and
- C. Penalties and other consequences for failure to comply with this chapter.

An elected official or public access officer meets the training requirements of this section by conducting a thorough review of all the information made available by the State on a publicly accessible website pursuant to section 411, subsection 6, paragraph C regarding specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. To meet the requirements of this subsection, any other training course must include all of this information and may include additional information.

3. Certification of completion. Upon completion of the training course required under subsection 1, the elected official or public access officer shall make a written or an electronic record attesting to the fact that the training has been completed. The record must identify the training completed and the date of completion. The elected official shall keep the record or file it with the public entity to which the official was elected. A public access officer shall file the record with the agency or official that

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designated the public access officer.

4. Application. This section applies to the following elected officials:

A. The Governor;

B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;

C. Members of the Legislature elected after November 1, 2008;

E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;

F. Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments;

G. Officials of school administrative units ~~and school boards~~; and

H. Officials of a regional or other political subdivision who, as part of the duties of their offices, exercise executive or legislative powers. For the purposes of this paragraph, "regional or other political subdivision" means an administrative entity or instrumentality created pursuant to Title 30-A, chapter 115 or 119 or a quasi-municipal corporation or special purpose district, including, but not limited to, a water district, sanitary district, hospital district, school district of any type, transit district as defined in Title 30-A, section 3501, subsection 1 or regional transportation corporation as defined in Title 30-A, section 3501, subsection 2.

This section also applies to a public access officer.

Sec. 9. 1 MRSA §413 is enacted to read:

§413. Public access officer

1. Designation; responsibility. Each State agency, county, municipality, school administrative unit and regional or other political subdivision shall designate an existing employee as its public access officer to serve as the contact person for that agency, county, municipality, school administrative unit and regional or other political subdivision with regard to requests for public records under this chapter. The public access officer is responsible for ensuring that each public records request is acknowledged within a reasonable period of time and that a good faith estimate when the response to the request will be complete is provided. The public access officer shall serve as a resource within the agency, county, municipality, school administrative unit

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and regional or other political subdivision concerning freedom of access questions and compliance.

2. Acknowledgement and response required. A State agency, county, municipality, school administrative unit and regional or other political subdivision that receives a request to inspect or copy a public record shall acknowledge and respond to the request regardless of whether the request was delivered to or directed to the public access officer.

3. No delay based on unavailability. The unavailability of a public access officer may not delay a response to a request.

2. Training. A public access officer shall complete a course of training on the requirements of this chapter relating to public records and proceedings as described in section 412.

Sec. 10. Appropriations and allocations. The following appropriations and allocations are made. *(Assumes April 1, 2012 effective date.)*

ATTORNEY GENERAL, DEPARTMENT OF THE

Administration – Attorney General 0310

Initiative: Provides funds for one Assistant Attorney General position to serve as a Public Access Ombudsman.

GENERAL FUND	2011-12	2012-13
Position – Legislative Count	1.000	1.000
Personal Services	\$18,160	\$75,420
All Other	\$5,178	\$3,178
GENERAL FUND TOTAL	\$23,338	\$78,598

SUMMARY

This is the MINORITY REPORT of the Right to Know Advisory Committee.

This amendment replaces the bill.

This amendment titles Chapter 13, subchapter 1 of Title 1 the “Freedom of Access Act.”

RIGHT TO KNOW ADVISORY COMMITTEE
Recommended Draft Legislation Supported by a Minority of Advisory Committee:
Proposed Committee Amendment to LD 1465

This amendment requires government agencies, when making purchases of or contracting for computer software and other information technology resources, to consider maximizing public access to public records, as well as maximizing the exportability of public data while protecting confidential information.

This amendment creates the position of “public access officer” and requires each State agency, county, municipality, school administrative unit and regional or other political subdivision to designate an existing employee to serve in that capacity as a resource for freedom of access questions. Requests for public records do not have to be made to the public access officer. The public access officer must undergo the same freedom of access training as elected officials.

This amendment repeals and replaces the current section of law that lays out the process and fees concerning inspecting and copying public records, although much of the current language is retained. It allows inspection and copying of public records during reasonable office hours. The reasonable office hours must be posted. This amendment differs from the Majority Report by requiring the agency or official to provide the requested public record immediately if it is immediately available. Otherwise, the agency or official, when acknowledging the receipt of a request for public records, must provide a good faith estimate of when the response to the request will be complete. Although the time estimate is not binding, the agency or official must make a good faith effort to meet that time. This Minority Report sets time limits of 45 days for complex requests that will generate over \$100 in costs to provides, and 30 days for all other requests. Failure to comply by the applicable time limit is a violation of the subchapter.

This amendment clarifies that a request for public records does not have to be made in writing or in person. This amendment provides that an agency or official is not required to create or compile a record that does not exist in response to a request for public records.

This amendment requires an agency or official to provide access to an electronically stored public record in the available medium of the requester’s choice. An available medium is a printed document of the public record or the medium in which the record is stored, except that a computer file is not an available medium if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in that file. Although an agency or official is not required to provide an electronically stored public record in a different medium, structure, format or organization, the agency or official may do so at the agency’s or official’s discretion. If in order to provide for inspection or copying the agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format, the agency or official may charge a fee to cover the actual cost of conversion.

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This amendment clarifies that an agency or official is not required to provide a requester with access to a computer terminal.

This amendment increases the per hour cost for compiling a record from \$10 to \$15, after the first hour. Similarly, the threshold for the estimated cost that triggers payment in advance is raised from \$20 to \$30.

This amendment differs from the Majority Report in that it increases the maximum fine amount to \$5,000 for a willful violation of the subchapter.

This amendment includes funding for a full-time Assistant Attorney General to serve as the Public Access Ombudsman in the Office of the Attorney General.

RIGHT TO KNOW ADVISORY COMMITTEE
Recommended Draft Legislation Supported by Majority of Advisory Committee:
Proposed Exception for Legislative Working Papers of the Governor

Sec. 1. 1 MRSA §402, sub-§3, ¶C-2 is enacted to read:

C-2. Proposed legislation and reports until publicly distributed, and records, working papers, drafts and interoffice and intraoffice memoranda used or maintained by the Governor or any employee of the Governor’s office to prepare proposed legislation or reports for consideration by the Legislature or any of its committees during the legislative session or sessions in which the proposed legislation or reports are prepared or considered or to which the proposed legislation or report is carried over;

SUMMARY

This bill, which addresses the legislative working papers of the Governor and the Governor’s office, contains recommendations of a majority of the Right to Know Advisory Committee.

This bill creates a public records exception for the Governor and the Governor’s office that is parallel to the Legislature’s working papers public records exception in existing law. The records do not become public records until they are publicly distributed or until the adjournment of the legislative session for which the proposed legislation or reports were prepared.