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The following comments have been provided by John Simpson, owner and General Manager of MacImage of Maine LLC, an information technology business located in Cumberland, Maine.

MacImage of Maine has challenged the fees several Maine registries of deeds charge for copies of public records in court. The Maine Supreme Judicial Court will hear oral arguments in the case on Dec. 12-13, 2011. Court records related to the case can be found online at:

<http://www.macimage.com/foaa/case.html>

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1. What is bulk data and how should it be defined?

Bulk data can not and should not be distinguished from other types of public. Why?

First, the term "bulk" will have different meanings depending on the type of public records at issue or the content of those records. For example, consider the following public records:

- (a) a single 200-page report printed on paper
- (b) 200 one-page paper documents
- (c) one electronic file containing a list of 200 addresses
- (d) one electronic file containing 200 scanned pages
- (e) 200 electronic files which each contains a single scanned page

There could be considerable debate about whether a request for any of the above records would be "bulk" requests.

Second, even if there were a way to define "bulk" records, quantity is often not a good measure of either the cost of producing records or the value of those records.

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

People concerned about the cost issue generally have one of the following goals:

- (1) to allow government to recover costs associated with responding to requests for public records
- (2) to allow a government agency to recover unrelated operating costs (costs that would be incurred even if no copies of bulk records were requested)

(3) to allow government to profit by selling public records ... and use those profits instead of taxes and other sources of revenue to fund unrelated operations

(4) to prevent or limit access to certain public records

(5) to prevent anyone from reselling products or services derived from public records for a profit.

Goal 1 (recovering copy costs) is permitted under current law and enables the public to obtain copies of public records at no cost to taxpayers. A person must only pay for costs incurred because of her request. Copy costs are fairly easy to calculate. Thus, it is fairly easy to ensure that persons requesting copies pay all costs associated with their request.

In this case, the agency should charge a requestor for incremental expenses incurred solely to make the requested copies. In addition to incremental expenses, an agency could allocate overhead costs incurred solely to provide copies proportionally to all persons requesting copies. For example; a portion of the cost of a photocopier or fax machine used only to make copies for the public could be recovered through copy fees.

However, an agency should not recover overhead costs more than once by over-allocating overhead costs to multiple requestors.

The basic rule must be that operating costs that would be incurred even if no copies were made may not be recovered through copy fees. An agency may only recover costs only when the agency makes or assists in making copies by providing equipment, materials or labor. For example; an agency could not charge a copying fee to persons who use their own cameras to copy public records. The FOAA gives every person the right to inspect public records at no cost. Thus, all costs related to photographing records would be required to allow inspection, and would be incurred even if no copies/photographs were made.

Goal 2 and Goal 3 (recovering agency operating costs) shifts the burden of funding some or all costs of operating a government agency from all taxpayers to persons requesting copies of public records.

The question of who should pay agency operating costs is a policy question. There is no inherent benefit to funding an agency through fees instead of taxes. A tax is a fee to the person paying the fee, and in most cases copy fees are paid by taxpayers either directly or indirectly (when they purchase products or services from a business that bought the copy).

However, there can be a hidden cost to funding agencies with profits obtained by selling copies of public records. Whenever fees exceed the cost of producing copies, there is a risk that the fees will block access to public records. Persons who could afford to pay fees based on the incremental cost of producing a copy may not be able to afford higher copy fees. Thus, the public may be denied access to the value of public records with no offsetting public benefit.

Goal 4 (blocking access to certain records) is more effectively addressed by creating an exemption in the FOAA for specific types of records.

Goal 5 (blocking some or all commercial uses of public records) is contrary to the policy behind the FOAA. Allowing public resources to be used for commercial purposes allows companies to provide products and services that government can not or does not provide. Public records are no different than other public resources such as water and roads. Public benefits are maximized when more people have access to a public resource. In short, profit is a good thing.

3(a). Should a requestor of bulk data be entitled to the records in the format and type of access requested?

The public will benefit if access is provided in different formats upon request, especially when the records already exist in multiple formats. People request a specific format because they will benefit from that format. There is simply no reason to deny a request for a specific format if the requestor is willing to all costs of producing copies in that format.

3(b). Should a distinction be made between a requester seeking access to records and a requester seeking ownership of records?

Clearly the government has an interest in preserving the integrity of its records. Thus, the government must maintain possession of original records and an official electronic copy if one exists. However, the distinction between access and ownership serves no purpose (other than to restrict access) with regards to copies of public records. People need to have copies of public records in their possession for many reasons. In theory, the government could retain "ownership" of all copies of public records and attempt to force people to pay a copy fee whenever they made a copy of a copy of a public record in their possession. Practically, however, a law forcing people to pay such copy fees could not be enforced. And, in any case, such a law would restrict access to public records with little or no offsetting benefit. Taxpayers do not benefit by paying copy fees instead of taxes because virtually all copy fees are paid by or passed on to taxpayers.

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

The public benefits when commercial entities use public records to provide services that government does not provide or services that are better or less expensive than services provided by government. The public incurs no costs when businesses pay copy fees equal to the cost of producing copies of public records. However, charging higher copy fees to businesses could be counter-productive. The businesses will either stop offering a valuable service or pass on the higher fees to their customers (the public).

The notion that the public would benefit if government use profits from selling copies of public records instead of taxes to pay its bills is false. Businesses must pass on their

costs to their customers (the public) or go out of business. Its a zero-sum game. Every dollar of government operating expenses that is funded by higher fees will be passed on to the public.

If out-of-state businesses purchased large numbers of copies of Maine public records, and these copy costs were not passed on to Mainers, then charging higher copy fees to businesses could reduce our tax burden. But, there is no evidence this happens. Out-of-state businesses buy Maine public records because they can resell products or services based on these records to Mainers. There is no out-of-state market for copies of Maine public records.