



121 Middle Street, Suite 301
Portland, Maine 04101
T/ (207) 774-5444
F/ (207) 774-1103
www.aclumaine.org

TESTIMONY OF SHENNA BELLOWS

Regarding: Applying Maine's Freedom of Access Laws to Requests for Bulk Data

Submitted to the

BULK RECORDS SUBCOMMITTEE OF THE RIGHT TO KNOW ADVISORY COMMITTEE

October 14, 2011

The American Civil Liberties Union of Maine (the "ACLU of Maine") is a nonprofit, nonpartisan organization dedicated to protecting the basic civil liberties and civil rights of the people of Maine.¹ The ACLU of Maine has a long history of involvement through policy making, political efforts, and litigation in support of the public's right to open government proceedings and records.

Fortunately, Maine policy makers have taken clear steps to ensure public access to public records. In passing the Freedom of Access Act (the "FOAA"), the Legislature explicitly intended to open public records to the public and for the definition and scope of protected information to be interpreted expansively. 1 M.R.S.A. § 401; *Medical Mut. Ins. Co. of Maine v. Bureau of Ins.*, 866 A.2d 117, 120 (Me. 2005).² Under the FOAA, "[p]ublic records are subject to the right of the public to inspect and copy." *Medical Mut. Ins. Co. of Maine v. Bureau of Ins.*, 866 A.2d 117, 120 (Me. 2005).

The law "declares as a matter of public policy that records of public action shall be open to public inspection. It leaves little room for qualification or restriction." *Bangor Pub. Co. v. City of Bangor*, 544 A.2d 733 (Me. 1988) .

¹ The ACLU of Maine was organized in 1968 as the Maine Civil Liberties Union. It changed its name in 2011 in order to better reflect its status as the Maine affiliate of the American Civil Liberties Union.

² The FOAA is to be "liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent." *Id.* In fact, Maine 's Supreme Court has declared, in interpreting the FOAA, that "to a maximum extent the public's business must be done in public." *Moffett v. City of Portland*, 400 A.2d 340, 347-348 (Me. 1979). In its application and interpretation, "[t]he most effective right-to-know law should assist the public in gaining access to information that is open to the public." Anne C. Lucey, Comment, *A Section-By-Section Analysis of Maine's Freedom of Access Act*, 43 Me. L. Rev. 169, 224 (1991) (arguing that "[t]he benefits to both the agency and public outweigh the expense an open government brings").



121 Middle Street, Suite 301
Portland, Maine 04101
T/ (207) 774-5444
F/ (207) 774-1103
www.aclumaine.org

Therefore, any analysis of policies surrounding requests to copy public records should begin with the premise that access to public records must be maximized. It is from this vantage point and perspective that we offer the following.

Question 1.

What is the definition of bulk record?

Bulk records could reasonably be defined in multiple ways. Bulk data includes information and records that have been compiled into a single, most likely electronic, file or database. This is fast becoming the most common way for government to store new and old data. The definition should not lead to a disparate treatment of the information under Maine's FOAA laws.

Question 2.

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

The fee for copying public records should be reasonably related to the actual cost of copying. Prior to 2003, Maine's FOAA provided that "the cost of copying any public record . . . shall be paid by the person requesting the copy." 1 M.R.S.A. § 408 (2002). However, in response to the recommendations of the Committee to Study Compliance with Maine's Freedom of Access Laws, the Maine legislature completely rewrote the section on fees and explicitly required that any fees charged for the cost of copying must be "reasonable." P.L. 2003, ch. 709, § 2.

Therefore, for example if a government agency has an electronic database containing hundreds or thousands of compiled records, a person requesting a copy of that database should be charged only for the related cost of copying the database in its current electronic form – not for what it would cost to duplicate the records individually with paper photocopies or another format.

This only makes sense: copying an electronic file from one device to another is a task most people in today's world are familiar with. It involves initiating the copy process and walking away from the device (such as an external hard drive costing less than \$1,000) while it runs. Again, the bottom line is that regardless of whether the data is bulk or not, there should be a rational connection to the actual cost of copying the data to the fees charged.

[Because Freedom Can't Protect Itself.](#)



121 Middle Street, Suite 301
Portland, Maine 04101
T/ (207) 774-5444
F/ (207) 774-1103
www.aclumaine.org

Question 3.

Should a requestor of bulk data be entitled to 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?

A requestor of bulk data should be entitled to access records in manner they wish and in the formats requested if it already exists or is reasonably available. They may be charged only reasonably related fees. Anything else would be considered a constructive denial of the request and a violation of the Act. This is a crucial point. Public agencies cannot be permitted to provide public data in an intentionally inconvenient format in order to burden or limit public access.

Further, if already converted, the public has a right to share in the benefits of this conversion. When substantial amounts of taxpayer funds are used to convert paper files into electronic streams of data, among the resulting conveniences are dramatically lowered copying costs. This is precisely the type of benefit that the public has already paid for and which the public should receive in return. *See Margolius v. City of Cleveland*, 584 N.E.2d 665, 669 (1992) (“[A] set of public records stored in an organized fashion on a magnetic medium also contains an added value that inherently is a part of the public record. Here, the added value is not only the organization of the data, but also the compression of the data into a form that allows greater ease of public access”).

Finally, there should be no distinction made between a requestor seeking access to records and a requestor seeking ownership of records. An individual or entity seeking public records for whatever reason should be treated without prejudice or differentiation. It should not be the legislature’s job to create a hierarchy of more or less access depending on what the requestor intends to do with the records.

Question 4.

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

As with the second part of question 3 – the answer is no – the law should not distinguish between those seeking data for commercial and those seeking it for noncommercial purposes. The legislature should not be

[Because Freedom Can’t Protect Itself.](#)



121 Middle Street, Suite 301
Portland, Maine 04101
T/ (207) 774-5444
F/ (207) 774-1103
www.aclumaine.org

in the business of determining more or less worthy motives for accessing public information and burdening some more than others.

Again – because the requestor is a member of the public, fundamentally we are talking about information that *belongs to her already*. If the FOAA is to be effective, all segments of the population must have access to public records.

Conclusion.

There are few public policies more vital than an open government. Maine's Freedom of Access Act is designed to support transparency by providing access to governmental activities and records for all – not just for those with money or those who promise to use the information for non-commercial purposes. Any decisions governing the public's access to bulk information should be made with the intended result of ensuring access to the widest swath of information by the broadest spectrum of the public.