Legislative BULLETIN
MAINE MUNICIPAL ASSOCIATION
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# Wait FOAA It:
# Proposed Changes to Maine's Right to Know Law

**Recap.** Back in 2011, the Judiciary Committee considered a bill sponsored by Senator Richard Rosen (Hancock Cty.) that would have made Maine's Freedom of Access law significantly more difficult for municipalities and other governmental entities to manage. LD 1465, *An Act to Amend the Law Governing Freedom of Access,* was promoted by the Maine Heritage Policy Center and other interested individuals and groups that felt government was not open enough and information was not being properly shared with the public when requested. This bill would have amended the Freedom of Access Act (FOAA) in significant and numerous ways so to address the governments' alleged shortcomings.

As a starting point, the printed version of LD 1465 created an affirmative duty for a governmental entity to provide copies of public records to people at their request rather than just providing an opportunity to examine those records. Beyond that starting point, some of the proposed changes in the bill that concerned municipal officials included: (1) requiring all records requested to be immediately provided unless the records have to undergo redaction or are in storage; (2) providing the requestor with the right to obtain the copies of those records in all available formats, such as by photocopy or electronic or magnetic formats if available; (3) creating a special standard for "large or multiple requests" which allows for the records to be provided as they become available if they cannot be provided "in the exercise of due diligence" within a 5-day period; (4) requiring a cost estimate to be provided within 3 business days for any request that may exceed $100 in costs calculated at the maximum $10 per hour rate allowed under current law (after the first hour) for searching for, retrieving and compiling requested records; (5) prohibiting a governmental entity from inquiring as to the purpose of a FOAA request; and (6) treating any failure to comply with the established response-time schedules to be considered a denial of the request and subject to enforcement procedures.

The Judiciary Committee decided to carry the bill over to the second session in order to allow the Right to Know Advisory Committee (RTKAC) a chance to review LD 1465 and make recommendations back to the Committee in January of 2012. The RTKAC is a legislatively-created advisory group made up of legislators, governmental representatives, representatives of the press and freedom of access advocates.

**The Recommendations of the RTKAC.** Working through a subcommittee process, and after meeting numerous times throughout the summer and fall of 2011, the RTKAC eventually developed an

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## Legislative Policy Committee to Meet

MMA's 70-member Legislative Policy Committee (LPC) will be holding its first meeting in 2012 on Thursday, January 19 for the purpose of determining the Association's position on at least 35 proposals soon to be taken up by the Legislature that bear directly on local government.

A half-dozen of those initiatives are "carryover bills" that have been substantially re-worked since originally presented to the Legislature during the 2011 session. Matters of significant interest to municipal officials in this category include bills that:

- Make many changes to Maine's Right to Know law
- Establish a "regulatory takings compensation" system
- Attempt to address various issues associated with the administration of the Tree Growth tax program
- Deconstruct the State Planning Office
- Substantially restructure the Maine Land Use Regulation Commission to include significant county involvement

Among the 30-plus newly introduced bills of municipal interest that are being presented to the Legislature, some bills of particular note might include:

- A bill to fix the conflicts in the administration of the Maine Uniform Building and Energy Code (MUBEC) that were created by legislation enacted last session
- A bill making changes to the "school budget validation referendum" process
- A bill creating a stronger interface between Circuit Breaker property tax rebates and the local poverty abatement process
- Two bills making substantial changes to the Workers' Compensation laws and the Unemployment Insurance laws

Most of the bills to be submitted this legislative session have already been printed. Therefore, many of the decisions that need to be made by the Legislative Policy Committee for this 2012 session will be deliberated and voted on during this January meeting.

## Wait FOAA It (cont'd)

alternative version of LD 1465 which it presented to the Judiciary Committee on Tuesday this week. The bill as reworked scales back or drops altogether some of the most controversial changes originally proposed in LD 1465 but the package of changes being recommended will still add a number of new requirements to governmental obligations under FOAA.

The following represents the majority report's proposed changes to the state's Right to Know law:

• Governmental entities must 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 governmental entity or official must acknowledge receipt of the FOAA request within a reasonable time, and must provide a non-binding, good faith estimate of the time within which the agency or official will comply with the request.

• Each state agency, county, municipality, school unit, school board and regional or other political subdivision shall designate an existing employee as a public access officer and require the same training in the Freedom of Access law as is now required of elected officials.

• Inspection, translation and copying may be scheduled to occur at such time as will not delay or inconvenience the regular activities of the agency or official having custody of the public record sought. As used in this section, "reasonable office hours" includes all regular office hours of an agency or official. If the agency or official does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the public records must be posted at a conspicuous public place.

• A person may copy a public record during reasonable office hours or may request that the agency or official having custody of the record provide a copy. A request need not be made in person or in writing; that is, a person can call in a FOAA request by telephone. The agency or official shall mail the requested document upon request.

• As is the case under current law, an agency or official is not required to create or compile a record that does not exist.

• Access to an electronically stored record, or a copy of such a record, must be provided at the requester's option in either a printed document or through any other available medium. A computer file is not an available medium if no means exist to separate or prevent the disclosure of any confidential information contained in that file.

• A public entity is not required to provide an electronically stored record in a different structure, format or organization or provide a requester access to a computer terminal.

• 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, which must be provided for free.

• Fund a new "ombudsman" position in the Attorney General's office so that there is a facilitator of the FOA law than can push the process along when it stalls and provide counsel to both the requester and the government official.

**Actions by the Judiciary Committee.** These recommendations were voted on at the work session held this week. All but one of the Judiciary Committee members present at the work session supported the RTKAC's recommendations. In addition to the vote, the Committee asked the analyst to clarify some of the language related to not requiring agencies or officials to provide requested information in certain formats if the information is not currently stored in that specific format. One committee member also felt that there should be some leeway for a requester to get information in a different format if: (a) the transfer to a different format is not burdensome and (b) the only option, due to proprietary or confidentiality issues, is a voluminous printout.

Another meeting will be scheduled to review the revised language before the bill is reported out of the Judiciary Committee.

**MMA's position.** MMA's Legislative Policy Committee (LPC) is meeting on January 19 to review this and other bills carried over from the first session as well as new bills being introduced this session. Some of the issues that may be brought up at this meeting related to the recommended changes to LD 1465 are:

• Is it necessary to burden certain governments with a mandate to designate an existing employee as the Public Access Officer and require the same FOAA training that elected officials currently receive? Current law focuses the burden of responding to FOAA requests on the custodian of the records, which makes sense. For the smaller communities that operate without a strong or hierarchical management system, requiring a certain staff person to take on a certain job function may not be well appreciated and may not actually work very well. Plus, this expanded training requirement pretty clearly meets the definition of "state mandate".

• As currently written, the package of recommendations in the hands of the Judiciary Committee would not allow a municipality to provide a requester with an electronic version of a requested public record that is protected from easy manipulation, such as a PDF document or a password protected spread sheet, if the electronic document exists in unprotected formats. The RTKAC heard testimony from municipal officials last fall explaining the importance of certain public records, such as draft or proposed budget documents, not being easily manipulated by a requester just to be further distributed as an "official" public record. Despite those expressed concerns, that right for a municipality to protect an electronic public record from easy manipulation through PDF application does not exist in the package being considered.

Any concerns expressed by the majority of the LPC will be shared with the Judiciary Committee, if that opportunity presents itself.


### Legislative Bulletin

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# The Boiler Bill Blow Up

What follows is a recap of what happened to LD 375, *An Act to Exempt Boilers in Municipalities and Schoolhouses from State Inspection Requirements,* which was presented to the Legislature a year ago and converted into a legislative resolve directing a study of the state's policy on the inspection of heating boilers in places of public accommodation.

**The issue.** As is the case in all New England states, there is a long-established program in Maine whereby the state ensures the inspection of large heating boilers, industrial boilers, stream boilers and pressure vessels. For many decades Maine law has exempted all relatively small hot water boilers (built to certain industry safety standards) from the mandatory state inspection program except for the boilers located in municipal and school buildings. All boilers within that category operated by the State, the counties and all other places of public accommodation are exempt from the state's inspection program. This lack of equitable treatment led to the submission of a bill developed by MMA's Legislative Policy Committee in order to alleviate this regulatory discrimination.

This bill, LD 375, was introduced to the Labor, Commerce, Research and Economic Development Committee (LCRED) by the bill's sponsor, Rep. James Gillway (Searsport). As originally drafted, LD 375 would have included municipalities and school systems in the general exemption from state inspection that is provided by law to the owners of all other boilers in that category. At the public hearing last April, MMA was the sole supporter of the bill and the Department of Professional and Financial Regulation (DPFR) along with representatives from the insurance industry and the Cianbro company opposed the bill.

Ultimately, LD 375 was converted into a resolve directing the Commissioner of DPFR to convene a working group of interested parties. The charge to the working group was to: (1) review the current lack of uniformity in the laws and rules governing boilers; (2) develop recommendations to resolve conflicts and improve the regulation of boilers; and (3) consider options for expanding inspection of boilers located in places of public accommodation.

**The study.** Three meetings were held over the summer and fall to discuss the issue and rectify the discrepancy. Participants in these discussions included Rep. Gillway and representatives from DPFR, the insurance industry, Cianbro, MMA, Maine Innkeepers Association, Maine Restaurant Association, Maine Merchants Association, and Maine Hospital Association. The discussions revolved around the following topics: (a) the current Maine law on the topic; (b) other New England states' boiler inspection requirements; and (c) a boiler's impact on public safety.

Of particular interest was the comparison of the various New England states' boiler inspection requirements.

All New England states cause high pressure boilers to be inspected annually. This is where conformity among New England states ends.

For low-pressure boilers, Maine and Massachusetts require annual inspections. The rest of the states require biennial inspections.

Also, all New England states with the exception of Maine require the inspection of the low-pressure boilers in all places of public accommodation, including state and county owned buildings, churches, restaurants, hotels, stores, places of commerce, nursing homes, daycare facilities, and hospitals.

Over the course of the three meetings, a number of suggestions were presented to address the charge that the working group was given. Examples included: (1) requiring the annual inspection process for low-pressure boilers in certain other places of public accommodation so that Maine more closely matched its New England counterparts; (2) inspecting these boilers every other year as opposed to the current annual inspection requirement while keeping the state certification fee at $80/boiler so that if additional boilers were inspected the impact on DPFR would be minimized or eliminated; and for the same reason (3) increasing the current 200,000 BTU threshold that triggers state inspection requirements to over 400,000 BTUs. When the discussions ended DPFR wrote a report that will be presented to the LCRED Committee in mid-January.

**The report.** DPFR finalized its report last week, which is now available for the public perusal on the Department's website – www.maine.gov/pfr/legislative/index.htm. In the report, DPFR identified three options as possible next steps for dealing with the existing boiler inspection law and rules. The options presented in the report are:

- Not changing the current boiler inspection requirements
- Eliminating low-pressure heating boiler inspection requirements for boilers located in school and municipal buildings
- Requiring the inspection of these boilers in all places of public accommodation, as is the case throughout New England.

The Department's position is to stick with the status quo.

The justification for doing nothing revolves around the Department's belief that repealing the inspection requirements for schoolhouses and municipally owned buildings would not be sound public policy; that the public's safety could be at greater risk.

Having said that, following the rest of New England and including all places of public accommodation in the inspection program did not make sense to DPFR because: (a) there is no evidence of harm to the public in the absence of annual inspections to other places of public accommodation; and (b) the potential strain on Departmental resources to review inspections of boilers in other public buildings.

**Now what?** The Department's report will be presented to and reviewed by the LCRED Committee later this month. If a work session is scheduled to review this report, some of the possible discussion topics might be:

- By sticking with the status-quo, is the Committee's charge to the working group being met?
- How does the Department's rationalization for not expanding the program to general places of public accommodation (there is no significant public safety issue) square with its decision to continue the program for municipal buildings (because of public safety concerns)?
- What fault did the Department find with the proposal to spread out the inspection base, lengthen the inspection cycle to two years, and raise the BTU level that triggers exemption, thus creating an equitable system to finance the non-discriminatory inspection program?

# The Fate of the State Planning Office

## *Dead Man Walking or Stay of Execution?*

On Monday this week, the members of the State and Local Government Committee unanimously decided to table further discussion and a vote on LD 769, *An Act to Review the Functions of the State Planning Office*. At issue is whether the final goal should be to redesign the State Planning Office (SPO) or abolish it. The purpose of the delay was two-fold.

**Redesigning SPO.** When originally presented to the Committee in 2011, LD 769 was submitted as a "concept draft" bill. While the bill's sponsor, Rep. Brad Moulton of York, had thoughts on how to better use the resources of SPO, he had not yet formalized those thoughts into legislation. As a result, the bill was carried over into the upcoming legislative session. At Monday's work session Rep. Moulton requested an extension of the deadline to January 18 to craft, if determined necessary, implementing legislation that would refocus, without completely abolishing, the efforts of SPO on "functions that are best performed by that office."

Rep. Moulton's request for the extension was in large part due to the fact David Emery, Deputy Commissioner of the Department of Administrative and Financial Services (DAFS), will be before the State and Local Government Committee next Wednesday (Jan. 18) to present the recommendations of the so-called "Part FF" Working Group to implement the plan abolishing SPO.

**Abolishing SPO.** Included as Part FF of the 2012-2013 biennial General Fund budget adopted by the Legislature last year (2011) was the creation of an 11-member working group to develop a plan for eliminating SPO by transferring all existing responsibilities and programs to other state departments and agencies. As required, the working group submitted its recommendations to the Appropriations Committee on December 1, 2011. The working group's final report, as well as necessary implementing legislation, is posted on the SPO website at: http://www.maine.gov/spo/rightcolumn/partff/Part%20FF%20Working%20Group%20ReportFINAL12-1-11.pdf

The working group's recommendations, which will be included as part of Governor LePage's second supplemental budget, provide the blueprint necessary for reassigning all existing SPO functions to other state agencies by July 1, 2012, the day SPO would cease to exist. Of greatest municipal significance, the working group's proposed implementation plan shifts: code enforcement training and certification responsibilties to the Department of Economic and Community Development (DECD); land use planning responsibilities to the Department of Conservation (DOC); and waste management and recycling responsibilities to the Department of Environmental Protection (DEP).

**Creating the Office of Policy and Management**. In addition to reassigning the tasks of SPO, the working group's plan includes the creation the Office of Policy and Management (OPM) within the Governor's Office. As proposed, OPM would be staffed by six employees, including a deputy director, two public service executives, a secretary, the state economist and deputy state economist. Of the six positions, only the two economists' positions currently exist and are housed in SPO.

According to the working group's report, the purpose of OPM is to "become a potent management and analysis tool by which the Governor will develop state policy, analyze the operation of government and identify efficiencies and savings." Specifically, OPM is tasked with: (1) developing long-range fiscal policies; (2) analyzing government operations; (3) devising and promulgating effective financial management strategies; (4) supporting a continued streamlining effort; and (5) prioritizing policy options and draft legislation.

In its first year (FY 2013), funding for OPM will be derived from the savings associated with the elimination of six positions within SPO. In order to continue to exist in subsequent years, the Office is tasked with identifying at least $1 million in state government savings in both fiscal year 2014 and fiscal year 2015. This Office's ongoing funding would be contingent on the savings it finds elsewhere in state government.

**Committee's Next Steps.** It is anticipated that the Committee will finally determine the fate of LD 769 next Wednesday. Although it is possible that the Part FF working group's recommendations will address the concerns of the Committee, thereby making LD 769 moot, it is more likely that the vote on the bill will be divided. Rep. Moulton has gone on record as expressing grave concerns that the abolishment of SPO will impact municipal and regional land use planning and enforcement efforts. Until Rep. Moulton receives assurances that the working group's plan will continue to provide the technical assistance and fiscal resources necessary to support local and regional planning functions, it is unlikely that he will abandon work on LD 769.

**Legislature's Next Steps**. Although the Part FF working group has published its findings, it is not yet curtains for SPO. The legislation that implements the recommendations of the working group must now be run through the process, which will include a public hearing, work session(s) and final enactment.

**MMA's Next Steps**. At its January 19 meeting, MMA's 70-member Legislative Policy Committee (LPC) will be asked to weigh-in on the working group's recommendations. The information received from the LPC will be transmitted to the Legislature through the public hearing process. Although there has been a somewhat uneven relationship between the municipalities and SPO over the years, it is unlikely that municipal officials will support the agency's abolishment. If history is an adequate indicator, it is more likely that the LPC will continue to support efforts along the lines of the concepts found in LD 769 to focus the efforts of SPO on the provision of services that, among other functions, support and enhance the municipalities' ability to meet state land use planning and enforcement mandates.

Municipal officials interested in being kept up-to-date on the SPO process, including email notification of public hearings and work sessions, are encouraged to contact Kate Dufour for inclusion on the SPO Interested Parties List. Kate can be reached at kdufour@memun.org or 1-800-452-8786.

# Electronic Waste: Giving Back the Take-Back Program?

Earlier this week it was brought to MMA's attention that the Department of Environmental Protection (DEP) has authored a report entitled "Implementing Product Stewardship in Maine." The website address where you can find this report is provided at the end of this article. DEP is accepting comments from the public until Monday, January 16. Certain elements of the report suggest changing, scaling-back or possibly sunsetting the electronic waste take-back program that is widely implemented in municipal transfer stations and solid waste facilities through the state. MMA is hoping to obtain feedback from municipal officials about that idea.

The DEP report reviews the five mandated manufacturer take-back (or "product stewardship") programs: mercury-added lamps, mercury switches in motor vehicle components, mercury-added thermostats, electronic waste, and rechargeable batteries. The report indicates that the cost of Maine's e-waste collection program is high compared to other states and the state's pounds-per-capita recycled amount is lower than other states. DEP goes on to suggest that the higher cost could be due to: (1) low population density; (2) greater distances from recyclers and commodity markets; and (3) rigorous regulatory licensing requirements for the in-state processing of cathode ray tubes as hazardous waste.

Based upon this review, DEP is recommending reevaluating the way that these programs are managed and considering whether certain programs remain appropriate for manufacturer take-back systems. Specific recommendations to modify the product stewardship programs include:

Reducing program costs to create economies of scale among the product stewardship programs by combining outreach, permitting, and other program areas wherever possible.

Developing a unified marketing and promotional initiative with private sector leadership focused on inclusionary participation with existing programs and indentifying ways to reduce program costs and increase recycling rates.

Collaborating with industry groups to encourage public participation and cost-effective efforts.

Developing draft legislation for consideration in 2013 aimed at sun-setting select product categories, where appropriate.

Suspending new products for product stewardship program consideration within the current legislative session.

Improving the method of measuring a take-back program's success by evaluating the quantity of toxin removed from the environment along with a total cost assessment of the program.

MMA would like to get feedback from municipalities as to how they feel about the effectiveness of the electronic waste take-back system and if DEP's recommendations are appropriate modifications to the product stewardship program. We have already encouraged DEP to carefully evaluate what the true cost of sun-setting these programs would be to communities and their property taxpayers before legislation is introduced to sunset or discontinue the electronic waste product stewardship program.

Comments or suggestions with regard to the DEP report can be forwarded directly to DEP's Ron Dyer at ron.dyer@maine.gov or to Greg Connors at MMA (1-800-452-8786 or gconnors@memun.org)

You can find the DEP report at http://www.maine.gov/dep/waste/productstewardship/2012report/productstewardshipreport2012_final.pdf

# Municipal Collaboration Report Published

In an effort to provide improved local government services, municipal officials across the state are providing essential municipal services collaboratively. For example:

• The communities of Cape Elizabeth, Cumberland, Falmouth, Portland, Scarborough, South Portland, Westbrook and Yarmouth share the capital and operating expenses of Portland's crime lab. While the savings associated with the regional lab may not benefit each community equally, all communities benefit from better crime investigation support.

• Canton, Jay, Livermore and Livermore Falls work out winter road maintenance routes that allow each entity to plow segments of roads in neighboring communities, so that backtracking can be minimized.

• For a service charge of $62,000/year, Mount Desert provides wastewater treatment services to Acadia National Park. This partnership saves the federal government the costs associated with building, maintaining and operating a separate treatment facility.

• In Aroostook County, the town of Wade contracts with Washburn to handle all motor and recreational vehicle registrations. Since the town of Washburn has regular business hours, residents of Wade are afforded more flexibility in efforts to conform to the state's registration laws.

These and hundreds of other examples are documented in MMA's recently published *2011 Municipal Collaboration Report.*

As described in the December 2011 edition of the Maine Townsman, the report is a compilation of well over 500 examples of how municipal officials are working with neighboring communities, other levels of governments and the private sector to provide effective municipal services in the most efficient manner possible. The goal of this data collection effort was to generate a single resource that can be made available to municipal officials, state-level decision makers, and the general public documenting the many long-standing and successful local government service delivery collaborations that exists across the state.

The data collected from the 90 participating municipalities are presented in

*(continued on page 6)*

## LEGISLATIVE HEARINGS

*Note: You should check your newspapers for Legal Notices as there may be changes in the hearing schedule. Work Session and Hearing schedules by Committee are available at the Legislative Information page at http://www.mainelegislature.org/legis/bills/phwksched_ps.asp?PID=1456.*

***Tuesday, January 17***

**Taxation**
**Room 127, State House, 3:00 p.m.**
**Tel: 287-1552**

LD 1470 – An Act To Ensure Harvesting of Timber on Land Taxed under the Maine Tree Growth Tax Law.

***Wednesday, January 18***

Energy, Utilities & Technology
Room 211, Cross State Office Building, 10:00 a.m.
Tel: 287-4143

LD 1614 – An Act To Create Efficiency in E-9-1-1 Call Centers.

**State & Local Government**
**Room 214, Cross State Office Building, 10:00 a.m.**
**Tel: 287-1330**

LD 1596 – An Act To Amend the Laws Governing Discontinued Town Ways.

***Thursday, January 19***

**Labor, Commerce, Research & Economic Development**
**Room 208, Cross State Office Building, 1:00 p.m.**
**Tel: 287-1331**

LD 1675 – Resolve, To Establish the Task Force To Facilitate the Development of Unoccupied Mills.

LD 1695 – An Act To Provide Additional In-store Space for Maine's Businesses by Removing License and Permit Posting Requirements.

**Taxation**
**Room 127, State House, 1:00 p.m.**
**Tel: 287-1552**

LD 1680 – An Act To Amend the Circuitbreaker Program To Include Claimants Occupying Property Pursuant to a Trust and To Require Proof of Payment of Rent.

LD 1693 – An Act To Amend the Law Governing Abatements of Property Taxes for Infirmity or Poverty.

***Friday, January 20***

**Criminal Justice & Public Safety**
**Rm. 436, State House, 10:00 a.m.**
**Tel: 287-1122**

LD 1635 – An Act Regarding Inmates on Public Works Projects.

## Collaboration *(cont'd)*

two different formats.

Posted to MMA's general access website is a copy of the final report, which features examples of the collaborative service delivery models being employed. These data are organized in four broad departmental categories, and then by function within each category. The broad categories include public safety, public works, general administration and library /parks and recreation.

Posted to MMA's "members only" section of the website is a searchable database. This spreadsheet provides our members with the greatest amount of flexibility to search and reorganize the data in ways to meet individual community needs. The spreadsheet includes population and county information for each community, allowing users to retrieve the data on the basis of location and size.

Links to both the report and the searchable database are posted on MMA's website at www.memun.org.

For more information about the study, please contact Kate Dufour at kdufour@memun.org or 1-800-452-8786.