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Daniel Billings
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February 8, 2011

Dear Mr. Billings:

I received your letter of February 7 indicating that the Governor's Office is working on the Conservation Law Foundation's January 28 Freedom of Access Act (FOAA) request. In that correspondence you state that you intend to limit the scope of the response to our request to "documents generated during the period from January 5, 2011 until February 4, 2011" and you explicitly deny our request to the extent that it seeks records generated prior to the inauguration of Governor LePage.

Your response is concerning on several levels. First, its exclusion of records generated during Governor LePage's transition period is strikingly at odds with the Governor's own characterization of that process as "the most transparent transition process in Maine history." More important, it is inconsistent with Maine's Freedom of Access law, which is designed to shed light on the operations of government.

Indeed, Maine's Law Court has been unequivocal and consistent in identifying the purpose of FOAA as "to open public proceedings and require that public actions and records be available to the public." *Dow v. Caribou Chamber of Commerce and Industry*, 2005 ME 113, ¶ 9, 884 A.2d 667, 669 (quoting *Town of Burlington v. Hosp. Admin. Dist. No. 1*, 2001 ME 59, ¶ 13, 769 A.2d 857, 861). Consistent with the plain language of the FOAA, the Court has found that "to promote such objectives, FOAA must be liberally construed." *Citizens Communications Co. v. Attorney General*, 2007 ME 114, ¶ 9, 931 A.2d 503, 504 *citing* 1 M.R.S. §401. As a consequence of this liberal construction, "[t]he burden of proof is on the agency or political subdivision to establish just and proper cause for the denial of a FOAA request." *Dow*, 2005 ME 113, ¶ 9, 884 A.2d 667, 669-70 (quoting *Town of Burlington*, 2001 ME 59, ¶ 13, 769 A.2d at 861).

CLF's FOAA request seeks the disclosure of public records from the Governor's Office. The Freedom of Access Act defines "public records" to mean those records that are 1) in the possession or custody of a public official and 2) have been received or prepared for

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use in connection with the transaction of public or governmental business or contain information relating to the transaction of public or governmental business.1 M.R.S. § 402(3).

There can be no argument that records related to the "red tape audits" or "red tape workshop" meetings, the Governor's Regulatory Reform Proposals and to the nomination of Darryl Brown to the position of Commissioner of the Department of Environmental Protection were "received or prepared for use in connection with the transaction of public or governmental business," irrespective of when they were generated. Any such records were clearly created in the preparation of the Governor's agenda and the establishment of his executive staff. Consequently, *any* such records that are now in the possession of the Governor's Office - even if prepared by non-governmental employees, organized privately and using private monies - are public records that must be made available unless otherwise protected by law.

This question has been addressed in opinions of the Maine Attorney General. For example, the Attorney General has opined that although Maine's Blue Ribbon Commission on Corrections was not a "state agency or authority" for FOAA purposes at the time that it was in operation, "upon the formal transmission of any report of the Commission to the Governor, such a document would lose its character as an internal Commission document; and, because it would then be in the possession of a 'public official of this State,' it would become public at that time." Op. Me. Att'y Gen. 85-19. Similarly, in Op. Me. Att'y Gen. 79-139, the Attorney General opined that a policy review committee's documents, that were not public records when generated, became public records once transmitted to a public official.

For these reasons, I would respectfully request that the Governor's Office reconsider its denial of our request for records responsive to our January 28 letter, including records prepared or generated prior to the Governor's inauguration. In order to preserve our rights to seek judicial redress under the FOAA, I would appreciate it if you could provide a formal response to this letter no later than February 10, 2011. Thank you for this consideration.

Respectfully,

Greg Cunningham
Senior Attorney