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## STATE OF MAINE

## ONE HUNDRED AND TWENTY-FIFTH LEGISLATURE

## COMMITTEE ON JUDICIARY

March 27, 2012

To: Senator Richard W. Rosen, Senate Chair  
 Representative Patrick S. A. Flood, House Chair  
 Joint Standing Committee on Appropriations and Financial Affairs

From: Senator David R. Hastings III, Senate Chair *DRH*  
 Representative Joan M. Nass, House Chair *JMN*  
 Joint Standing Committee on Judiciary

Re: Subpoena powers and confidentiality in Part DD, LR 2847

Thank you for the opportunity to provide our comments concerning specific issues relating to the proposed Office of Policy and Management (OPM) contained in Part DD of LR 2847. We were able to review the proposed language and discuss both the subpoena powers and confidentiality provisions with Jonathan Nass and Jennifer Smith last week, and we offer an alternative to what is included in Part DD. We are generally comfortable with the attached language concerning subpoenas and confidentiality, but we want to be clear that we are not taking a position on the creation of the OPM and its proposed functions. We do not make a recommendation as to whether OPM should have subpoena powers, but should you choose to include that authority for OPM, then we are comfortable with this draft. Please note that Representative Moulton, also a member of the State and Local Government Committee, does not support granting subpoena powers at all.

We would like to express our appreciation to Mr. Nass and Ms. Smith for adjusting the proposal to respond to our concerns that centered on the functions of OPM and the protections for potential recipients of subpoenas. Because subpoenas are issued to carry out the duties of the office, the functions of the office are relevant to the discussion of whether the subpoena powers are appropriate. Mr. Nass and Ms. Smith agreed to delete references to the authority of OPM to conduct investigations and audits, and instead allow the Office to conduct studies, reviews and research. They also agreed to use the current State Planning Office subpoena authority, requiring application and review and opportunity for a hearing before the Superior Court, and to limit the subpoenas to those that are reasonably necessary to carry out the duties of the office that are related to the operations and finances of State Government. These limitations provide the protections we think are necessary and that are missing in Part DD.

Finally, Mr. Nass and Ms. Smith agreed to use the current State Auditor's access to records statute (5 MRSA §244-C, sub-§2) as a model. The redraft requires state government departments, commissions and

agencies to provide, upon the request of the OPM director, access to records necessary to carry out the duties of the office, and provides for the continued protection of privileged and confidential information.

In the process of discussing these issues, the Judiciary Committee discovered the wide range of State Government entities authorized to issue subpoenas. Although we do not have the time to conduct a thorough review of these powers and assess whether they are appropriate, we agree that such a study would be appropriate.

We hope these comments and the attached draft, support by Mr. Nass and Ms. Smith, are helpful to your discussion and deliberations. If we can be of further assistance, please do not hesitate to ask us.

attachment

Committee: JUD  
LA: MJR  
LR # and item number: 2847(xxx)  
Date: 3/23/12

**PROPOSED LANGUAGE**

Part DD  
3/27/2012 4:19 PM

File Name: G:\COMMITTEES\JUD\PROJECTS\State Planning Office report - Part FF\redraft of parts of Part DD 3-27-12.docx (3/27/2012 4:21:00 PM)

**Proposed replacement language for LR 2847, Part DD, in Section DD-6:**

- **Issue 1:** Responsibilities of Director of OPM include conducting investigations, audits and studies
- **Response:** Limit to research, reviews and studies

§3103, sub-§7 – replace sub-§7 to read:

**7. Other studies.** Conduct ~~investigations, audits, research, reviews~~ and studies to fulfill the office's duties as the director ~~deems determines~~ appropriate;

- **Issue 2:** Subpoena power broad in scope and potential recipients, no protections prior to issuance of subpoena
- **Response:** Use SPO current law (5 MRSA §3304, sub-§2, ¶L); witnesses, books, papers, records, and documents must be reasonably necessary in carry out the duties of OPM that are related to the operations and finances of State Government

§3103, sub-§9 – replace sub-§9 to read:

**9. Subpoenas.** Be empowered, in connection with the performance of the office's ~~duties of the office, to apply to the Superior Court for a~~ issue subpoenas subpoena to compel the attendance of witnesses, the production of books, papers, records, and documents of individuals, firms, associations and corporations and all officers, boards, commissions and entities departments of state, county and municipal government, including quasi-governmental and independent agencies. Whenever a person refuses to obey a subpoena duly issued by the director, the Superior Court for Kennebec County or any court of this State, within the jurisdiction of which the person resides or transacts business, shall have jurisdiction to issue to that person an order requiring him to comply with the subpoena and any failure to obey that order may be punished by the court as contempt. Refusal to obey the director's subpoena also constitutes a violation of this

~~chapter~~ *The court, before issuing the subpoena, shall provide adequate opportunity for the director and the party against whom the subpoena is requested to be heard. No such*  
*The court may issue the subpoena may be issued unless only if the court or judge*  
*certifies that the attendance of the witness or the production of the books, papers, records*  
*or documents is reasonably necessary to carry out the purposes of this section in*  
*connection with the performance of the duties of the office that are related to the*  
*operations and finances of State Government and that the director has made reasonable*  
*efforts to secure the attendance or the books, papers, records or documents without*  
*recourse to compulsory process. The director shall afford confidential treatment to any*  
*Any materials or information turned over to the director which is of a confidential or*  
*proprietary nature is confidential; and*

- **Issue 3:** Access to confidential records: who must provide access to confidential records; protection of confidentiality
- Response: Require provision of records by State Government upon request; and use Auditor's confidentiality language (5 MRSA §244-C, sub-§2) as a model

§3107 – replace to read:

### §3107. Access to records

1. Access to records. Upon the request of the director, a department, commission or agency shall provide access to records necessary to carry out of the duties of the office.

2. Confidential information available to the director. Notwithstanding any state law relating to the confidentiality of information, all information in the files of any department, commission or agency of the State must be made available when necessary to the director in connection with the performance of the duties of the office related to the operations and finances of state government.

3. Consultation; limited access. Before beginning a study, review or research that may require access to records containing confidential or privileged information, the director shall consult with representatives of the department, commission or agency to discuss methods of identifying and protecting privileged or confidential information in those records. During that consultation, the department, commission or agency shall inform the director of all standards and procedures set forth in department, commission or agency policies or agreements to protect information considered by the department, commission or agency to be confidential or privileged. The director shall limit access to information that is privileged or confidential by appropriate methods, which may include examining records without copying or removing them from the department, commission or agency.

**4. Removal of identifying information.** In making information available to the director, the department, commission or agency that is subject to the study, review or research or that provides the information may remove information that identifies individuals or institutions to protect privileged or confidential information, so long as the information necessary for the director to fulfill the duties of the office is disclosed to the director.

**5. Confidentiality, privilege apply to director.** Documentary or other information obtained by the director during the course of a study, review or research is privileged or confidential to the same extent under law that that information would be privileged or confidential in the possession of the department, commission or agency providing the information. Any privilege or statutory provision, including penalties, concerning the confidentiality or obligation not to disclose information in the possession of any department, commission or agency or their officers or employees applies equally to the director. Privileged or confidential information obtained by the director during the course of a study, review or research may be disclosed only as provided by law and with the agreement of the department, commission or agency that provided the information.

**6. Compliance with policy.** If the director accesses information classified as privileged or confidential pursuant to department, commission or agency policy or procedures or by agreement, the director shall comply with the department, commission or agency standards or procedures for handling that information.