

DRAFT OPEGA Response to Right to Know Committee Inquiry on Public Records
Exceptions in OPEGA's Statute

To: Senator Lisa Keim, Chair
and Members of the Right to Know Advisory Committee

From: Beth Ashcroft, Director of OPEGA

Date: November X, 2017

Re: Request for Information on Public Records Exceptions in OPEGA's Statute

OPEGA was established to examine the effectiveness, efficiency, economy, and proper use of resources related to State government programs and activities, as well as non-State entities receiving State funds or State-administered funds. A key part of our mission is to improve the accountability, oversight and performance of State government for the benefit of Maine's citizens and we fully support transparency in government. We also feel strongly, however, that the exceptions to public records contained within our statute are critical to the effectiveness of our function and other functions like ours within government. Consequently, we welcome this opportunity to bring transparency to our position and look forward to discussing it further with you or the Judiciary Committee.

Please find below the answers to questions posed in regards to 3 MRSA § 997, sub-§§ 1, 3, 4-6. Since the provisions interrelate in the conduct of our work, I am responding to the questions about each provision in one memo rather than separating them into a separate document for each provision.

Question # 1- *Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).*

Sub-§1 – This exception applies to all draft reports, draft presentations and related documents provided to the agencies under review as well as letters, memos, or electronic communications related to those documents occurring between OPEGA and the agencies. This exception applies whenever OPEGA is at the point of finalizing its work and developing a final report on an audit. OPEGA typically issues three to six reports a year. This exception is occasionally cited in response to requests by reporters or interested parties seeking an advance copy of a report that has not yet been presented to the Government Oversight Committee. In accordance with 3 MRSA § 997 sub-§2, the report becomes public

at the public meeting where it is first presented to the GOC. I would note that the records exempted by this statutory provision are also considered OPEGA “working papers”, the confidentiality of which is addressed in sub-§3 and sub-§5.

Sub-§4.B – This exception applies to any documents or information obtained by OPEGA during the course of an audit or evaluation that is privileged or confidential under law. OPEGA must treat this information in the same manner as the agency that provides it. OPEGA may only disclose this information as provided by law and with agreement of the agency subject to the audit that provided the information. It is OPEGA’s policy to refer requests for such information to the agency itself rather than provide the information. This exception to public access applies whenever OPEGA has to gather privileged and confidential information. Over the nearly 13 years OPEGA has been in operation, we have performed approximately 12 reviews where this exception applied. We have never cited this exception in addressing requests for production of records.

Sub-§§3, 5 – These exceptions apply to OPEGA’s work papers. "Working paper" is defined in 3 MRSA § 992 as “all documentary and other information acquired, prepared or maintained by the office during the conduct of a program evaluation, including all intra-agency and interagency communications relating to a program evaluation and includes electronic messages and draft reports or any portion of a draft report.”

Performing reviews is OPEGA’s primary function. In accordance with the professional Government Auditing Standards issued by the United States Government Accountability Office, we maintain working papers for every review whether or not it proceeds to a full audit or study. These reviews include the preliminary research work that OPEGA performs on complaints, allegations or review requests that we receive from legislators, citizens or State employees.

Under the Standards, auditors must prepare audit documentation related to the planning, conducting and reporting of a review in sufficient detail to enable an experienced auditor, with no connection to the audit, to understand the nature, timing, extent and results of audit work performed, the audit evidence obtained and its source, and the conclusions reached. Working papers include evidence that supports the auditors’ significant judgments and conclusions. Supervisory review of audit documentation is also an essential element of ensuring audit quality. Consequently, OPEGA documents virtually all planning and audit work performed including decisions and judgments made and the basis for those decisions and judgments.

Working papers (which OPEGA maintains primarily in electronic form using a special computer application) can include a wide variety of documents obtained or prepared like:

- work plans and planning documents;
- listings of individuals contacted during the review and related contact information;
- summaries of interviews;
- summaries of meetings held amongst OPEGA staff, with the auditees or with others;
- flowcharts or narrative descriptions of processes;
- analyses of data or other information (and the original data sources the analyses were based on);
- summaries of research conducted;

- survey responses;
- email communications between OPEGA and agencies or stakeholders;
- copies of reports, policies and procedures or laws and regulations pertaining the audit subject; and
- spreadsheets of transactions or case files tested for particular attributes.

To my best recollection, the exception in sub-§3 has been cited once in OPEGA’s history in denying a request for the production of records when a citizen was seeking an advance copy of a planning document that was to be presented to the Government Oversight Committee while the audit was in progress. The exception in sub-§5 has been cited several times primarily in response to media requests seeking more detail on the support for an OPEGA conclusion or finding after a final report had been released. OPEGA typically tries to try to accommodate legitimate requests for further detail that will not jeopardize information that should remain confidential by providing it in a document prepared for the Government Oversight Committee and made public in conjunction with a public GOC meeting.

Sub-§6 – This exception protects the identities of individuals who submit complaints or allegations to OPEGA, or otherwise provide OPEGA with information relevant to potential, planned or in progress reviews, where those individuals want to remain anonymous. It applies to any documents and electronic communications received or created by OPEGA that include sufficient information to identify the individual. This may be the individual’s name, SSN, phone number, address and etc. or the specific description of a situation such that the identity of the individual could readily be deduced. Over the course of OPEGA’s history, there have been less than a dozen times that this exception applied in that an individual requested anonymity. This exception has never been cited in denying a request for records.

Question # 2 – *Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.*

OPEGA supports the continuation of these exceptions for the following reasons:

1. They are critical to the effectiveness of our function.
 - a. It is imperative that OPEGA have access to records that are otherwise confidential and we occasionally have to include confidential records in our documentation. Keeping OPEGA’s working papers confidential provides an extra layer of protection to ensure those records stay confidential and makes agencies more comfortable in sharing confidential records with us.
 - b. It is essential that individuals feel comfortable sharing information with us openly and candidly without fear of retribution by superiors or public scandal. Our professional standards require us to document the sources of our information (i.e. name or title) as well as what those sources provide us or tell us (if pertinent to the review). The fact that our working papers are kept confidential, and that we can keep identities confidential, allows us to assure our interviewees and informants that others will not have access to the details

of our discussions or the sources of information provided to us via a FOA request.

- c. It is also essential that our work remain as unaffected by political influence or public pressure as possible. Protecting draft reports and working papers from public access helps ensure that OPEGA and the Government Oversight Committee will not be subject to such influence and pressure by those who may not agree with the methods or results.

2. They prevent the spread of misinformation within State Government and to the public at large.

Auditing and evaluating is a process and documentation is created throughout the entire process. The information we receive and document as we proceed through later phases of that process can corroborate, contradict or otherwise add different perspectives to information gathered earlier in the review. The report we issue is the final synthesis of all information gathered with proper context and perspective gleaned over the course of the review. What we report may differ from specific information documented on any particular working paper as our end result may have been informed by many pieces of work that are documented on separate working papers throughout the project documentation. In accordance with the Government Auditing Standards, we strive to maintain and organize documentation such that an independent experienced auditor would be able to follow our process and come to the same final results. However, these same working papers taken individually could lead to specific pieces of work or individual statements being misunderstood or misused.

I would be happy to discuss specific examples with you in more detail.

Question # 3 – *Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?*

Several questions or potential issues have arisen over the years in applying the provisions for public records exceptions in OPEGA's statute. On those occasions I have sought and received guidance on statutory interpretation from the Chief Deputy Attorney General and I can discuss that guidance with your committee if that is desired. The questions that have arisen fall generally into one of the following areas:

- A. Whether OPEGA's working papers remain confidential, i.e. not subject to FOA, after the final report on an audit/evaluation is released to the Government Oversight Committee.

Sub-§5 keeps OPEGA's work papers confidential even after the report has been released. There is opportunity for confusion on this point, however, because of the language in sub-§3. Sub-§3 also covers the confidentiality of working papers but only talks about them being confidential prior to the release of a report, thus leaving the impression that they later become public documents.

- B. Whether the OPEGA Director has discretion to make work papers available to persons other than the entities subject to audit/evaluation.

Although it has been rare, there have been times when it was desirable for OPEGA to share work papers with the State Auditor and the Internal Audit function within the State Controller's office so that we could coordinate and avoid duplicating audit work on a particular subject matter. Similarly, there have been several occasions where it was desirable or necessary to share work papers with the Attorney General's Office on matters OPEGA or the GOC identified involving potential violations of law or that otherwise warranted an AG's review or investigation. Sub-§5, however, limits OPEGA's discretionary disclosure of working papers to only the State agency or other entity that was subject to review.

- C. Whether OPEGA work papers are confidential, i.e. not subject to FOA, in the hands of State agencies, or other entities, subject to OPEGA review both during the course of the review and after the report has been released.

Several agencies have asked us this question over the years and there is a lack of clarity about what the answer should be as the OPEGA statute does not directly address these issues. We have asked agencies to maintain the confidentiality of anything in their possession that met the definition of an OPEGA working paper, and to direct any requests for those records to OPEGA, both during the review and after it was completed. OPEGA thinks this could be reasonably inferred as intended by the current statutory language and the Chief Deputy Attorney General indicated this was her view of it as well. One agency's lawyer, however, interpreted the language as meaning that only OPEGA had the responsibility to maintain the confidentiality of work papers. The Chief Deputy Attorney General has advised clarifying the intent in statute.

Question # 4 – *Does your agency recommend changes to this exception?*

I would make the following recommendations:

- a. Pertinent detail from sub-§3 should be combined into sub-§5 so that the result is one sub-§ that deals with confidentiality of reports and working papers. I also believe the wording could be revised to more clear and simple.
- b. Add language to the new/combined subsection to define and expand what entities OPEGA may release work papers to at the Director's discretion. The language could be similar to what exists in 5 MRSA § 244-C sub-§3 which defines entities that the State Auditor may release working papers to after the report is released.
- c. Add language making it clear that any record meeting the definition of an OPEGA work paper is also confidential, i.e. exempt from FOA, when in the possession of agencies, and other entities, subject to OPEGA review both during and after the evaluation is completed.

I have attached proposed changes to statute that would incorporate these recommendations.

Question # 5 – *Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.*

Under the direction of the Government Oversight Committee, OPEGA's authority and the range of subjects we might review are quite broad. Consequently, there are many stakeholder groups that may have interest in these exceptions or potentially be jeopardized by changes to them. These stakeholder groups include: the Government Oversight Committee; the various State and non-State entities that we may audit; State employees; clients and vendors of State agencies; legislators; the media; members of the public; the State Auditor's Office; the State Controller's Internal Audit Office; and the Attorney General's Office. Soliciting input from representatives of these stakeholder groups would be advisable but I have no specific individuals to suggest.

Question # 6 – *Please provide any further information that you believe is relevant to the Advisory Committee's review.*

I would like to impress upon the Committee that elimination or weakening of any of the confidentiality provisions in OPEGA's statute would have real consequences requiring thorough exploration and serious discussion. There may be questions raised about how one can judge the accuracy and quality of OPEGA's work if not allowed access to the working papers. In other words, who is in a position to audit the auditors? In fact, there are means for auditing the auditors, as well as other mechanisms that can provide sufficient assurances about OPEGA's activities, quality of work, capabilities and performance without making working papers public documents. I would welcome the opportunity to talk with you about this should you consider proposing recommendations that would eliminate or weaken the public records exceptions related to OPEGA.

Attachment

Cc: Government Oversight Committee Members
Craig Nale, Analyst, Office of Policy and Legal Analysis
Colleen McCarthy Reid, Analyst, Office of Policy and Legal Analysis

OPEGA Director's Suggested Revisions to 3 MRSA § 997

§997. Conduct and issuance of program evaluation reports

The director and the office shall adhere to the following provisions relative to conducting and issuing program evaluation reports under this chapter.

1. Review and response. Prior to the presentation of a program evaluation under this chapter to the committee by the office, the director of the evaluated state agency or other entity must have an opportunity to review a draft of the program evaluation report. Within 15 calendar days of receipt of the draft report, the director of the evaluated state agency or other entity may provide to the office comments on the draft report. If provided to the office by the comment deadline, the comments must be included in the final report when it is presented to the committee. Failure by the director of an evaluated agency or other entity to submit its comments on the draft report by the comment deadline may not delay the submission of a report to the committee or its release to the public.

All documents, writings, drafts, electronic communications and information transmitted pursuant to this subsection are confidential and may not be released to the public prior to the time the office issues its program evaluation report pursuant to subsection ~~3~~ **2**. A person violating the provisions of this subsection regarding confidentiality is guilty of a Class E crime.

2. Submission of final report to committee. The director shall issue program evaluation reports, favorable or unfavorable, of any state agency or other entity, and these reports are public records. The director shall notify the committee when each final program evaluation report under this chapter is completed. The report must then be placed on the agenda for a future committee meeting. At the meeting where a report appears on the agenda for the first time, the director will release that report to the committee and to the public simultaneously. The committee, at its discretion, may vote to endorse, to endorse in part or to decline to endorse the report submitted by the director. If the committee determines it is necessary, the committee may report out to the Legislature legislation to implement the findings and recommendations of any program evaluation report presented to it by the office.

3. Confidentiality. ~~The director shall issue program evaluation reports, favorable or unfavorable, of any state agency or other entity, and these reports are public records, except that, prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and exempt from disclosure pursuant to Title 1, chapter 13. All other records or materials in the possession of the director or other entity charged with the preparation of a program~~

evaluation report under this chapter that would otherwise be confidential or exempt from disclosure are exempt from disclosure pursuant to the provisions of Title 1, chapter 13. Prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and may not be released or disclosed by the director to the Legislative Council or an agent or representative of the Legislative Council. This subsection may not be construed to prohibit or prevent public access to the records of a state agency or other entity in the possession of the director that would otherwise be subject to disclosure pursuant to the provisions of Title 1, chapter 13. The director shall refer requests for access to those records directly to the state agency or other entity that is the official custodian of the requested records, which shall respond to the request for public records.

3-A. Confidentiality of working papers. Except as provided in this subsection, working papers related to reports released pursuant to subsection 2, or that are related to any program evaluation no longer being actively pursued, are confidential and exempt from disclosure pursuant to Title 1, chapter 13. Working papers may not be disclosed to any person, including the Legislative Council or an agent or representative of the Legislative Council. For the purposes of this subsection, "working papers" means all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director, other entity charged with the preparation of a program evaluation report, or the agencies and other entities subject to the program evaluation. In accordance with subsection 4, all records or materials in the possession of the director or other entity charged with the preparation of a program evaluation report under this chapter that would otherwise be confidential or exempt from disclosure also remain exempt from disclosure pursuant to the provisions of Title 1, chapter 13. The director may disclose working papers to the following entities as necessary:

- A. The department, commission, agency or other entity subject to the program evaluation;
- B. Federal agencies providing grants to the evaluated entity under paragraph A;
- C. Law enforcement agencies for the purpose of criminal law enforcement or investigations;
- D. Other auditors or evaluators in their work reviewing the office; or
- E. Other auditors existing within State Government.

Prior to the release of the final program evaluation report, the director may only disclose working papers to these entities when disclosure will not prejudice the program evaluation. If working papers are to be released to entities other than the agency subject to the evaluation, the director will notify the agency of the planned release unless to do so would jeopardize an audit or investigation of the entity the working papers are being disclosed to.

Working papers may only be released by the director. Agencies and other entities receiving requests for disclosure of working papers shall refer those requests to the office.

This subsection may not be construed to prohibit or prevent public access to the records of a state agency or other entity in the possession of the director that would otherwise be subject to disclosure pursuant to the provisions of Title 1, chapter 13. The director shall refer requests for access to those records directly to the state agency or other entity that is the official custodian of the requested records, which shall respond to the request for public records.

4. Information available to office. Upon request of the office and consistent with the conditions and procedures set forth in this section, state agencies or other entities subject to program evaluation must provide the office access to information that is privileged or confidential as defined by Title 1, chapter 13, which governs public records and proceedings.

A. Before beginning a program evaluation under this chapter that may require access to records containing confidential or privileged information, the office shall furnish a written statement of its determination that it is necessary for the office to access such records and consult with representatives of the state agency or other entity to discuss methods of identifying and protecting privileged or confidential information in those records. During that consultation, the state agency or other entity shall inform the office of all standards and procedures set forth in its policies or agreements to protect information considered to be confidential or privileged. The office shall limit its access to information that is privileged or confidential by appropriate methods, which may include examining records without copying or removing them from the source.

B. Documentary or other information obtained by the office during the course of a program evaluation under this chapter is privileged or confidential to the same extent under law that that information would be privileged or confidential in the possession of the state agency or other entity providing the information. Any privilege or statutory provision, including penalties, concerning the confidentiality or obligation not to disclose information in the possession of a state agency or other entity or its officers or employees applies equally to the office. Privileged or confidential information obtained by the office during the course of a program evaluation may be disclosed only as provided by law and with the agreement of the state agency or other entity subject to the program evaluation that provided the information.

C. If the office accesses information classified as privileged or confidential pursuant to state agency or other entity policy or procedures or by agreement, the office shall comply with the state agency's or other entity's standards or procedures for handling that information. The office may include in its working papers the excerpts from information classified as confidential or privileged as may be necessary to complete the program evaluation under this chapter, as long as the use does not infringe on department policies or procedures applicable to the original provision of information.

~~**5. Confidentiality of working papers.** Except as provided in this subsection, working papers are confidential and may not be disclosed to any person. Prior to the release of the final program evaluation report, the director has sole discretion to~~

~~disclose working papers to the state agency or other entity subject to the program evaluation when disclosure will not prejudice the program evaluation. After release of the final program evaluation report, working papers may be released as necessary to the state agency or other entity that was subject to the program evaluation under this chapter.~~

6. Confidential sources. If data supplied by an individual are needed to initiate, continue or complete a program evaluation under this chapter, the director may, by written memorandum to the file, provide that the individual's identity will remain confidential and exempt from disclosure under Title 1, chapter 13, and this written memorandum protects the identity of the person from disclosure under Title 1, chapter 13, notwithstanding any other provision of law to the contrary.

7. Disposition of final report. A final copy of a program evaluation report under subsection 2, including recommendations and the evaluated state agency's or other entity's comments, must be submitted to the commissioner or director of the state agency or other entity examined at least one day prior to the report's public release, and must be made available to each member of the Legislature no later than one day following the report's receipt by the committee. The office may satisfy the requirement to provide each Legislator a copy of the report by furnishing the report directly by electronic means or by providing notice to each Legislator of the availability of the report on the office's publicly accessible site on the Internet.