

# **RIGHT TO KNOW ADVISORY COMMITTEE**

**Monday, October 7, 2024**  
**1:00 p.m.**

Location: State House, Room 228 (Hybrid Meeting)  
Public access also available through the Maine Legislature's livestream:  
<https://legislature.maine.gov/Audio/#228>

1. Introductions
2. Subcommittee updates
3. Use of personal email and other communication methods under FOAA and record retention schedules
4. Role of the Public Access Ombudsman
5. Committee discussion of unfulfilled records requests
6. Adjourn
  - Next meeting: Monday, October 21, 2024, 1:00 pm

## Department of the Secretary of State

[Home](#) → [State Archives](#) → [Records Management](#) → [State Government Agencies](#) → [Policy on Preservation of State Government Records](#) → [Acknowledgement Form](#)

### Records Management (State Archives) Preservation of State Government Records 2024 Acknowledgement

I have reviewed and understand the following records management information posted on the State Archives website:

1. General Records Schedules: [www.maine.gov/sos/arc/records/state/generalschedules.html](http://www.maine.gov/sos/arc/records/state/generalschedules.html)
2. State Agency Schedules (pertaining to my agency): [www.maine.gov/sos/arc/records/state/agencyschedules.html](http://www.maine.gov/sos/arc/records/state/agencyschedules.html)
3. Minimum Standards Training:
  - o Records Officers and Assistants (only): [www.maine.gov/sos/arc/records/state/rotrainingstandard.pdf](http://www.maine.gov/sos/arc/records/state/rotrainingstandard.pdf)
  - o State Employees - Records Management Basic Principles: [www.maine.gov/sos/arc/records/state/trainingstandard.employees.ppsx](http://www.maine.gov/sos/arc/records/state/trainingstandard.employees.ppsx)

I understand that I am responsible for preserving official State Government records, made or received in relation to my duties. I will follow the retention policies as described above and as detailed in the General Records Schedules and agency-specific schedules (State Agency Schedules). Please complete the acknowledgement form.

If you have any questions related to Records Management, please contact your [Agency Records Officer](#) or the [Records Management Office](#).

All contact fields marked below are required\*

First Name: \*  Middle Initial:  Last Name: \*

#### Directions for Completing Department and Division

**FIRST - Please select the name of your Department (agency) from the dropdown list.** If you are unsure, please check with your supervisor. If you do not see the name of your Department, please select Other at the end of the list and write in the name of your Department in the Note field. (Independent Agencies, please choose "Independent Agency.")

**SECOND - Please provide the Division (Bureau or Office) you work for within the Department. See examples below:**

- Secretary of State (Is the Department); Maine State Archives (Is the Division)
- Independent Agency (Is the Department); Maine State Library (Is the Division)
- Administrative and Financial Services (Is the Department); Maine Revenue Services (Is the Division)

Department:\*  

001

Division: \*

Date Completed: \* (must be written as 00/00/0000)

Email: \*

Confirm Email: \*

Note:

**Credits**

Copyright © 2015  
All rights reserved.



# Records Management Basic Principles For Maine State Employees

# Maine State Government Needs **All Staff** to Be a Part of Records Management

How records are managed by an agency can directly impact its ability to operate efficiently and effectively.



# Is Managing Records YOUR Responsibility?



All state employees are responsible for creating records needed to do the business of their agency, and documenting activities for which they are responsible. As a government employee, you are responsible for managing all public records (including email) for which you are the custodian.

# Why You Should Care About Records Management

Whether we realize it or not, we are all an integral part of the agency and how it conducts its business. Agency records are an asset which must be protected. They can help to ensure day-to-day business functions while also protecting the integrity and reputation of the agency.



# RM Law and Rules

[Maine Title 5, Chapter 6](#) specifically states what a record is and describes the responsibilities of agencies regarding Records Management.



[Maine State Archives Chapter Rules](#) 1, 2 and 3 give details on Records Management practices including retention schedules, the State Records Center and imaging records.



# Managing Your Records

In order to have the information you need (when it's required), there needs to be a way to identify, manage and retain records for the right amount of time.

This is done by creating Record Retention Schedules.

# Record Retention Schedules

Schedules are a necessary tool for effective and efficient recordkeeping.

Schedules hold great importance, listing records created by agencies and serving as legal authority to retain and purge them.

Schedules identify record retention and disposition, whether they will be destroyed or retained permanently.

Schedules capture all record formats created and used by agencies.

Schedules ensure consistency so everyone in the agency is retaining records for the same amount of time!

# Record Retention Schedules

Schedules also identify which records have archival/historical value. These records will be transferred to the Maine State Archives for permanent preservation when they are no longer needed by the creating agency for business purposes.



# Two Types of Retention Schedules

There are two types of Retention Schedules that must be followed by all agencies.

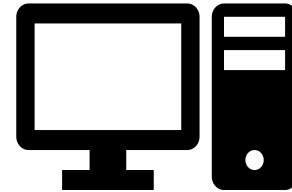
**General Schedules** –issued by the Maine State Archives to provide retention and disposition standards for records common to most State agencies.

**Agency Specific Schedules** – are those created because of unique programs or activities within the agency.

## Schedules cover all records in all formats including:



Paper  
Photographs  
Microfilm  
Email  
Digital Files



# Determining Retention

Retention periods for records depend on content and business process, not the format of the record. There is no single retention period for formats like email, text messages, web pages, and social media postings, just like there is no single retention period for paper. It is the content of the records which will determine retention.



# Determining Retention Periods

## 4 Part Criteria

- 1. Administrative use:** Records with administrative value are the ones that help your office do its day-to-day work. Typical retention is 5 years or less.
- 2. Fiscal requirements:** These records document fiscal obligations and transactions and are often subject to audit. Typical retention is 6 or 7 years. Some Federal requirements may be 10 years.
- 3. Legal requirements:** Records containing evidence of legally enforceable rights or obligations which can be subject to official actions such as investigations or lawsuits. Retentions are sometimes found in law or rule, unfortunately not often in Maine law.
- 4. Historical or research purposes:** Historical or archival records document significant events, actions, and decisions. These are often unique records not found elsewhere and valuable for the government or its citizens for hundreds of years to come.

It is important to understand the retention requirements of the records you work with regularly so you can more easily and effectively manage them.



# What is a Record?

Record means all documentary material, regardless of media or characteristics and regardless of when it was created, made or received or maintained by an agency in accordance with law or rule or in the transaction of its official business. Record does not include extra copies of printed or processed material of which official or record copies have been retained, stocks of publications and processed documents intended for distribution or use or records relating to personal matters that may have been kept in an office for convenience.

State employees are responsible for retaining records which document decisions, activities and the services of their agency.

**Examples of potential records:**

Items created during daily business or to complete a business/financial transaction:

Examples: correspondence, agreements, contracts, grants

Items which document agency activities and actions:

Examples: meeting minutes, project reports, studies, case files

Executive or policy level items:

Examples: guidance documents, policies, procedures



## **The following materials in your office may be considered non-retention material (or non-records):**

### Reference materials:

Example: publications (magazines, books, reports, professional literature or brochures) from outside agencies kept for referral but not part of official study documentation; duplicate copies of other records retained for reference purposes only (never retain these longer than what is considered the “record” copy).

### Copies kept for convenience:

Example: distribution notices or information; email messages you are copied on where no action is required; paper copies of electronic records when electronic is the official record (see note above); data extracts and printouts from agency information systems.

### Items related to your personal affairs:

Example: personal messages or other similar items which do not document or are not related to work activities (“Can we do lunch?”)



# Other Record Types of Note

Drafts

Transitory Records

Temporary Records

Archival Records



## Are Drafts Considered Records?

Drafts or working documents are records but might only need to be retained for a brief time if they do not have significant administrative, legal, fiscal or historical value.

Examples of drafts that might be immediately discarded following the creation of a new draft are those which contain only minor non-substantive changes such as correction of grammar and/or spelling or minor “word-smithing.”

For more information on DRAFTS see the [RM Advice Bulletin](#) available on our website.

# Transitory Records

Can be public records which document work activity but typically have no value once the activity is complete. They document information of temporary, short-term value, provided the records are not needed as evidence of a more specific business transaction. Includes, but is not limited to:

- miscellaneous notices or memos not related to the functional responsibility of the agency
- voicemail to return a phone call
- letters of transmittal not adding any information to the transmitted materials
- email messages requesting office hours or directions

# Temporary Records

These are records which will be destroyed once they have met their agreed to retention period. These can be short or long-term retention records so can encompass a wide range of records including transitory type records.

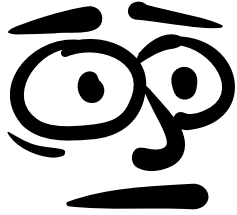
We might think of temporary records for things like general correspondence records, financial transactions or grant records. However, they can also be longer term records such as case files and personnel records.

# Archival Records

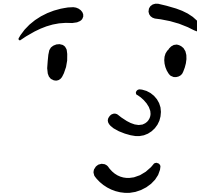
These are records required to be kept indefinitely because they have enduring or historical significance. Once business needs of the agency are met, archival records contain a secondary, research value.

Any records which are deemed archival per record retention schedules must be sent to the Maine State Archives.





The management of records (especially electronic records) can seem daunting, but on the plus side, most employees are only responsible for maintaining a few different types of records on a regular basis to support their job duties.



# 1. How Do You Manage Your Records?

Start by asking yourself: *What types of records you create?*

Examples could include client files, project documents or administrative type records such as invoices or agency general correspondence.

It's important to consider the aspects of your job and the types of records you might be creating.

## 2. What is the Purpose of the Records?

Next Review: *Why are these records created and maintained?*

There are many valid reasons for creating files such as statute, policy, and program administration.

There are also less valid reasons such as reference or personal convenience.

Concentrate your attention on the files that directly support the agency's mission.

### 3. Who is Responsible for the Records?

Then Think About: *Who is responsible for these records?*

Generally, there should only be one “custodian” for each type of record.

All employees in your office should be following the same process and know what records they are responsible for, where records are located and how long records need to be retained.

# Need Help?

## Records Officers and Assistants

Your Records Officer should have a thorough knowledge of agency functions, the records created to fulfill those functions and the schedules which define the retention and disposition of the records. A list of all appointed Records Officers and Assistants can be found on our [website](#).



# Where Records Are Located

**Temporary** material is located at the **Maine State Records Center** in Hallowell. Most of this material has a destroy disposition (once retention has been met) and agencies will be notified when the material is eligible for destruction. Only the agency (authorized agency cardholders) have access to this material. (Note: any pre-archival records will be transferred to the State Archives once retention is met.)

**Archival** material is located at the **Maine State Archives**. As noted previously, once business needs of the agency are met, archival records contain a secondary, research value. When archival records have met any retention time, they will be transferred to the State Archives and be made available for public inspection.

# Electronic Recordkeeping

Many agencies have transitioned to electronic recordkeeping systems or are in the beginning stages of converting from paper to electronic formats.

We understand this is the direction of records and management.

However...



# When Scanning Records

- Contact the Maine State Archives prior to imaging any state government records.
- Comply with guidelines and standards in MSA [Chapter 3 Rule: IMAGING STATE RECORDS](#).
- Identify the appropriate retention schedules for the records involved.
- Consider whether the agency will be able to manage the imaged records for the duration of the retention period.
- Preserve original archival documents which are scanned. These records will be scanned for access only (not for “scan and toss”).



Electronic records are generally suitable for official copies that will be retained for 10 years or less. These records can be saved with reasonable assurance they will remain readable until they have fulfilled their retention periods.



Think beyond your working lifetime for those records being retained 25, 50 years or longer.

Additional action (such as migration plans) are required to ensure the continued readability of electronic records with longer retention periods.

When records are kept in more than one format, you should identify an **official “record copy”** to which the full retention period will be applied. When the record copy is electronic, it’s important to identify the storage location (directory and subdirectory) so that records are purged once they have met their retention.

# What About Email?



Because these are potential records and just like records in paper format, they must be managed so they can be retained, accessed and destroyed at the appropriate times.

- When a message is created or received, determine if it is part of agency business. Non-record materials should be deleted immediately. Examples may include: personal messages, spam, and unsolicited email.
- All email messages do not have the same value. Retention of email records are based on content and functions the messages perform. Just as it wouldn't make sense to retain all paper records under a single retention period (based on the fact they are paper), the same principle applies for email.
- Most employees will have email with short term value. However, email is also used to discuss program records, policy information and other records having significant administrative, legal, or research value requiring longer retentions.
- As public records, email messages must be retained and disposed of according to approved retention schedules.



## Good News

The Maine State Archives is aware of how difficult it is to manage email and has been working with Maine IT (as well as the Council of State Archivists) to create policies for employee email management.

What employees should be doing  
NOW...

# Organizing Email/Set Up Folders

It is best to set up folders in your Outlook mailbox that organize email messages according to your retention schedules, with sub-folders set up by year and month.



This will make it easy to delete messages that have fulfilled their retention periods, without having to look at individual messages again.

# Set Up Rules

Set up Rules for things like listserv items or other informational type materials you get on a regular basis that you may want to review periodically but don't need them cluttering up your inbox. These can be sent to named folders automatically with Rules and are much easier to manage (and delete).





# Get Rid of the ROT



Delete those emails which are **R**edundant, **O**utdated and **T**rivial information or the records past retention.

Search for common keywords for records that are incidental, transitory, junk or spam. Use the lowest “common denominator” types of terms you can think of such as: breakfast, lunch, dinner, birthday, congratulations, announcement, weather, traffic.

Note: You can also use key words to manage records that are needed as proof and evidence of business transactions and file them accordingly.



# Email Items to Consider



Non-retention material such as spam or personal messages should be deleted immediately; transitory messages should be deleted as soon as possible.

If emails are CC's or Forwards where no action is taken or required, they typically can be deleted.

Don't use personal email for professional business - Your personal email account could become subject to FOAA.

Limit the use of email in general. Because email is so convenient, we tend to overuse and misuse its intended state business purpose.

Fill in/use meaningful subject lines. This will help sort, organize, index and search for emails.

Plan daily email management times. Use 10-15 minutes first thing in the morning or at the end of the day to devote to email.

# Records Retention and FOAA

If you become aware of a lawsuit or other type of discovery proceedings, any relevant records cannot be destroyed until it is determined that the matter is resolved, or the legal hold is lifted.

Organizing and managing records (including electronic records) limits any liabilities and preserves the integrity of the agency. Remember, if public records exist (in any format) and someone asks to see them, the agency must produce them (provided there are no confidentiality restrictions).

For more information on Freedom of Access Act go to the FOAA website: [www.maine.gov/foaa/](http://www.maine.gov/foaa/)



# Record Maintenance

We recommend agency schedules are reviewed every 2 years. Schedules that are 40 years old are probably as inefficient as having no schedules at all. (Check with your Records Officer to see if your schedules are up to date.)

When cleaning up files, check applicable retention schedules to identify records that are eligible for transfer to the State Records Center or State Archives.

Systematically, clean out inactive records or those which have met their retention periods, including electronic records.

Destroying records which don't need to be retained makes it easier and faster to find what you need and ensures efficiency and accuracy.

# Records of Employees

When an employee leaves a position, computer files, including email, may NOT be automatically deleted!

Senior administrators should take action to ensure the electronic records of employees are maintained as required, especially if an employee leaves a position.

Maine State Archives must be notified when Commissioner/Executive level employees leave to ensure the preservation of archival records.



# Training Check

The following few pages are questions to test what you have learned.

# What is the correct answer?

**State employees need to be familiar with which record schedules?**

- General Schedules
- Agency Schedules
- Both of the above

The answer is...

Both of the above

# What is the correct answer?

## What is a records schedule?

- A list of series of records which specifies how long each type of record is maintained and what happens to the records at the end of that time
- Records schedules serve as an agency's signed agreement to retain and purge records
- Both of the above



The answer is...

Both of the above

# What is the correct answer?

## How long should employees retain their email?

- Email is a format and retention would be determined by the content of the email.
- All email is retained permanently.
- It is not my job to manage any email.

The answer is...

Email is a format and retention would be determined by the content of the email.

# What is the correct answer?

## What are archival records?

- Any records required to be sent to the State Records Center.
- Records required to be kept with a retention greater than 25 years.
- Records required to be kept indefinitely because they have enduring or historical significance.

The answer is...

Records required to be kept indefinitely because they have enduring or historical significance.

# What is the correct answer?

**How long should you retain an email from a friend asking you to lunch?**

- Personal email should be deleted immediately.
- This should be retained until the action is completed; once I have attended lunch; then the email can be destroyed.
- All email should be retained permanently.

The answer is...

Personal email should be deleted immediately.

# What is the correct answer?

**What do I do if I find a box of documents in my office?**

- Immediately destroy them.
- Check the State General Schedules or Agency Schedules to see if they are listed or consult with my agency Records Officer.
- Immediately send them to the Maine State Archives.



The answer is...

Check the State General Schedules or Agency Schedules to see if they are listed or consult with my agency Records Officer.

# What is the correct answer?

**What is the 4-part criteria for determining record retention?**

- Drafts, Transitory Records, Temporary Records, Archival Records
- Administrative, Fiscal, Legal, Historical/Research
- Records Officer, Agency, State Records Center, Maine State Archives

The answer is...

Administrative, Fiscal, Legal, Historical/Research

# How Long to Keep Files/Documents

## Checklist

- ✓ Determine if these are actual records
- ✓ Determine if you are the official record keeper
- ✓ Determine if records are kept in more than one format and what the official record format is
- ✓ Are these records on the State General Schedules
- ✓ Are these records on the Agency Schedules
- ✓ If not on a schedule, do you know who your Records Officer is
- ✓ Can you look at the 4-part criteria and make a retention recommendation to your RO

## Retention Schedule Process

If you have records you know need to be scheduled, talk to your Records Officer to see if they can write the schedule for you or help you to write a schedule for the records. They would submit an Application for Records Retention Schedule and Inventory Form ([available on our website](#)) with proper justifications for the chosen retention times. Samples of the records would also be included.

Retention Schedules are reviewed and approved by: Agency maintaining records, Records Management, State Archivist, and the Archives Advisory Board



# Maine State Archives Records Management



Our staff can assist with training, schedule or transfer questions or other record related questions.

- Records Management (schedule and retention):  
[recordsmanagement.archives@maine.gov](mailto:recordsmanagement.archives@maine.gov)
- Records Center/transfer of records:  
[recordscenter.archives@maine.gov](mailto:recordscenter.archives@maine.gov)
- Archives (archival records): [maine.archives@maine.gov](mailto:maine.archives@maine.gov)

Also, go to our [website](#) for schedule and records officer listings, training and resource information and records management forms.

# Final Words

Thank you for taking this Records Management Training. As a state employee, your involvement in Records Management is a daily responsibility and vital component for all of us working together towards an agency-wide comprehensive Records Management system.

We covered basic information, but you will need to review the latest versions of the General and Agency Schedules to know your specific responsibilities concerning records retention. [Contact our staff](#) or [visit our website](#) for further information.



To: RTK AC  
From: Brenda Kielty, Public Access Ombudsman  
Date: October 7, 2024

## **FOAA and Record Retention Guidance for Boards/Committees**

*Examples of policies and procedures for managing records created by local or state boards, commissions and committee/subcommittees. This is general guidance—all policies would be tailored to the structure, needs and resources of the particular body.*

### **Public Records**

All board/committee documents, drafts, agendas, minutes, notes, electronic communications and materials relating to the board/committee business are subject to Maine’s public records disclosure law, the Freedom of Access Act, as may be amended. Board/committee members are responsible for responding completely and accurately to any request for public records, with assistance, if necessary, from the (Executive Director/Chair/Public Access Officer). Records related to board/committee business shall be maintained in an accessible format so that they can be produced in response to a FOAA request.

### **Record Retention**

Maine’s record retention law, 5 M.R.S. § 95-B, as may be amended, and relevant record retention schedules apply to all board/committee documents, drafts, agendas, minutes, notes, electronic communications and materials relating to the board/committee. The board or committee shall preserve records required to be maintained pursuant to a relevant records retention schedule for the required retention period in a format that preserves the integrity of the original record and is easily accessible.

Boards and committees are responsible for recording minutes that capture the actions taken by the board/committee, and to maintain all records related to their work. These are all public records, subject to the State record retention laws. The board/committee may designate an officer, such as the committee Secretary, to create and manage these documents. The board/committee (or designated officer) should forward all records to the (Office responsible for the retention of all board and committee meeting records) for preservation and retention. These records include, but are not limited to agendas, minutes, and meeting packet material (such as attachments, presentations, documents, and reports). These materials are posted on the (State’s/board’s/commission’s) website and/or are kept on file in the (Office responsible for retention) for public access and retention purposes. These materials are to be forwarded on a regular basis so that the (Office responsible for retention) will have the materials available upon request.

As part of the winding up of the business of an ad-hoc board/committee that has completed its service, all board/committee materials from individual members and the board/committee generally are to be forwarded to the (Office responsible for retention) so that the materials will be available upon request.



## **Board/Committee Use of Email**

### Retention of Emails

To the extent that board/committee members use email to communicate about the board's/committee's business, all emails are public records, subject to the State record retention laws, no matter what account (personal, office, government) or device is used.

### Use of Board/Committee Email Accounts

If a board/committee requests use of a government email account for board/committee business, absent special circumstances, the IT Director shall obtain a license for one email address for the board/committee. The board/committee's email address will be managed by the board/committee staff liaison, and communications from members can be sent to the board/committee email. The staff liaison will be responsible for sending those communications out to the whole board/committee or on behalf of the board/committee. To the extent that board/committee members use private email for communications related to board/committee business, a "cc" of each email sent or received shall be sent to the email address for the board/committee Inbox.

### Use of Email for Communication with Fellow Board/Committee Members

Board/committee members shall avoid the use of electronic communication for deliberation, discussion or voting on matters properly confined to public meetings. Email should only be used for non-substantive matters such as scheduling meetings, dissemination of information and reports, and developing agendas for future meetings. It is not permissible for board/committee members to deliberate, discuss policy, make decisions, approve meeting minutes, or otherwise take board/committee action through email, telephone, text or other means outside of a properly noticed public meeting.

### Quasi-judicial Matters

Email or other forms of electronic communication shall not be used for any deliberation or discussion related to quasi-judicial matters (*e.g.*, license and permit applications, land use applications, administrative appeals, variance applications, tax abatement appeals). In the event a board/committee member receives an email or other communication related to a quasi-judicial matter, the board/committee member should (a) advise the sender by return email that the board/committee member cannot comment outside a public meeting on the pending matter before the board/committee and that the sender's email is being forwarded to the board/committee staff liaison for inclusion in the public record on the matter; (b) immediately forward the email or other communication to the board/committee staff liaison for inclusion in the public record of the matter; and (c) disclose on the record in the public hearing or meeting on the matter that the email or other communication has been received and is in the record.

**§412. Public records and proceedings training for certain officials and public access officers**

**1. Training required.** A public access officer and an official subject to this section shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The official or public access officer shall complete the training not later than the 120th day after the date the official assumes the person's duties as an official or the person is designated as a public access officer pursuant to section 413, subsection 1.  
[PL 2021, c. 313, §5 (AMD).]

**2. Training course; minimum requirements.** The training course under subsection 1 must be designed to be completed by an official or a public access officer in less than 2 hours. At a minimum, the training must include instruction in:

- A. The general legal requirements of this chapter regarding public records and public proceedings; [PL 2007, c. 349, §1 (NEW).]
- B. Procedures and requirements regarding complying with a request for a public record under this chapter; and [PL 2007, c. 349, §1 (NEW).]
- C. Penalties and other consequences for failure to comply with this chapter. [PL 2007, c. 349, §1 (NEW).]

An official or a public access officer meets the training requirements of this section by conducting a thorough review of all the information made available by the State on a publicly accessible website pursuant to section 411, subsection 6, paragraph C regarding specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. To meet the requirements of this subsection, any other training course must include all of this information and may include additional information.  
[PL 2019, c. 300, §1 (AMD).]

**3. Certification of completion.** Upon completion of the training course required under subsection 1, the official or public access officer shall make a written or an electronic record attesting to the fact that the training has been completed. The record must identify the training completed and the date of completion. The official shall keep the record or file it with the public entity to which the official was elected or appointed. A public access officer shall file the record with the agency or official that designated the public access officer.  
[PL 2019, c. 300, §1 (AMD).]

**4. Application.** This section applies to a public access officer and the following officials:

- A. The Governor; [PL 2007, c. 349, §1 (NEW).]
- B. The Attorney General, Secretary of State, Treasurer of State and State Auditor; [PL 2007, c. 349, §1 (NEW).]
- C. Members of the Legislature elected after November 1, 2008; [PL 2007, c. 576, §2 (AMD).]
- D. [PL 2007, c. 576, §2 (RP).]
- E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments; [PL 2007, c. 576, §2 (NEW).]
- F. Municipal officers; municipal clerks, treasurers, managers or administrators, assessors and code enforcement officers and deputies for those positions; and planning board members and budget committee members of municipal governments; [PL 2021, c. 313, §6 (AMD).]
- G. Superintendents, assistant superintendents and school board members of school administrative units; and [PL 2021, c. 313, §7 (AMD).]

H. Officials of a regional or other political subdivision who, as part of the duties of their offices, exercise executive or legislative powers. For the purposes of this paragraph, "regional or other political subdivision" means an administrative entity or instrumentality created pursuant to Title 30-A, chapter 115 or chapter 119 or a quasi-municipal corporation or special purpose district, including, but not limited to, a water district, sanitary district, hospital district, school district of any type, transit district as defined in Title 30-A, section 3501, subsection 1 or regional transportation corporation as defined in Title 30-A, section 3501, subsection 2. [PL 2007, c. 576, §2 (NEW).]

[PL 2021, c. 313, §§6, 7 (AMD).]

#### SECTION HISTORY

PL 2007, c. 349, §1 (NEW). PL 2007, c. 576, §2 (AMD). PL 2011, c. 662, §7 (AMD). PL 2019, c. 300, §1 (AMD). PL 2021, c. 313, §§5-7 (AMD).

The State of Maine claims a copyright in its codified statutes. If you intend to republish this material, we require that you include the following disclaimer in your publication:

*All copyrights and other rights to statutory text are reserved by the State of Maine. The text included in this publication reflects changes made through the First Regular and First Special Session of the 131st Maine Legislature and is current through November 1, 2023. The text is subject to change without notice. It is a version that has not been officially certified by the Secretary of State. Refer to the Maine Revised Statutes Annotated and supplements for certified text.*

The Office of the Revisor of Statutes also requests that you send us one copy of any statutory publication you may produce. Our goal is not to restrict publishing activity, but to keep track of who is publishing what, to identify any needless duplication and to preserve the State's copyright rights.

PLEASE NOTE: The Revisor's Office cannot perform research for or provide legal advice or interpretation of Maine law to the public. If you need legal assistance, please contact a qualified attorney.

**Right to Know Advisory Committee**  
**Improve the FOAA Subcommittee**  
Wednesday, October 9, 2019  
Meeting Summary

Convened 1:00 p.m., Room 438, Maine State House, Augusta

Present:

Representative Thom Harnett (arrived after meeting started)  
Amy Beveridge  
Jim Campbell  
Phyllis Gardiner  
Judy Meyer  
Chris Parr  
Luke Rossignol  
Eric Stout

Staff:

Peggy Reinsch  
Colleen McCarthy Reid

The Improve the FOAA subcommittee met for the first time on Wednesday, October 9th at 1:00 p.m. The members selected Ms. Beveridge to serve as Subcommittee Chair, which she accepted and proceeded to guide the subcommittee meeting.


Warrants

The Judiciary Committee directed the Right to Know Advisory Committee to review the laws governing certain warrants, and report back to the Judiciary Committee any recommendations for providing public access to aggregate information about the warrants and whether there was a waiver of notice. (Public Law 2019, chapter 489, Section 18.) The warrants subject to the review authorize the installation and monitoring of tracking devices, access to electronic device content and access to electronic device location information. Ms. Gardiner noted that the any information that has been maintained has not been aggregated so far, and questioned whether directing the Judicial Branch to collect and aggregate data might be beyond the scope of the Advisory Committee's mission. The subcommittee discussed the fact that a warrant must be kept in order for evidence to be admissible in a legal proceeding, so law enforcement must maintain them. But do the courts keep records, too? The subcommittee agreed that more information is necessary, and directed staff to provide what can be collected for the next meeting, and tabled the topic.

Other suggestions to improve the FOAA

At the initial meeting of the Advisory Committee, the members agreed to explore several suggestions for improving the Freedom of Access Act. The Subcommittee began discussing each one in turn.

1. *Expand who must participate in training*



Public Access Ombudsman Brenda Kielty had suggested including Planning Boards and other local entities, based on questions and concerns she has received from members of the public. The subcommittee discussed that the required training is not onerous and, although supported by the Maine Municipal Association, may be considered a municipal mandate, requiring state funding or, to avoid the funding obligation, passage by 2/3 of the House and the Senate. The subcommittee agreed to wait for additional information identifying boards and committees that exercise legislative or executive functions. This topic was tabled.

2. *Joint Select or Joint Standing Committee of the Legislature*

Mr. Parr suggested that the Advisory Committee recommend that the Legislature create a Joint Standing or Joint Select Committee to review legislation and public policy issues relating to public access to, and privacy protection of, government records and data, as well as the retention and appropriate disposition of such records and data. The idea behind the suggestion is to ensure more legislators are well-versed in freedom of access and privacy issues to understand the complexities and nuances involved, and that there would be a legislative forum beyond the Advisory Committee to discuss and resolve legislative issues on a comprehensive basis. The subcommittee discussed the fact that reference of bills to committees is not always predictable, and that legislators are already stretched pretty thin so that membership on an additional legislative committee may not have the intended positive result. The subcommittee split on whether to have a recommendation drafted, 3-4. (In favor: Mr. Parr, Mr. Campbell, Mr. Stout; against: Phyllis Gardiner, Luke Rossignol, Amy Beveridge, Judy Meyer; Rep. Harnett entered after the discussion was in full swing and abstained.)

3. *Application of FOAA to Councils of Government*

(Suggested by a member of the public) The subcommittee discussed whether councils of governments (COGs) are or should be subject to the FOAA. They are not specifically listed in the description of "public proceedings" in FOAA, section 402, subsection 2. There is concern that trying to establish an exhaustive list in statute will inevitably leave out appropriate entities. Public Ombudsman Kielty reminded the members that the Law Court has interpreted when the FOAA applies in specific cases. In *Moore v. Abbott*, 952 A.2d 980 (2008) the Law Court established a four-prong test to determine if an entity is subject to the FOAA: (1) Whether the entity is performing a governmental function; (2) Whether the funding of the entity is governmental; (3) The extent of governmental involvement or control; and (4) Whether the entity was created by private or legislative action. These factors must be applied on a case by case basis. Although the statutes include enabling legislation for COGs, because of the multiple options available in the formation and operation of COGs, each one would need to be evaluated separately to determine if it is governed by the FOAA. The subcommittee agreed that current law and practice are sufficient, and no change in the law is necessary.

#### *4. Prioritize fulfillment of requests*

Mr. Parr suggested legislation to allow the prioritization of fulfilling FOAA requests based on whether the requester is a Maine resident and the purpose for which the request is made. The suggested legislation would give first priority to requests to further the public's understanding of the activities or actions of a government official or agency; a request for journalistic purposes is presumed to be made to further the public's understanding of government activities. Second priority is given to requests made for academic or research purposes, then requests made by individuals who have an alleged grievance against an agency or official. Lowest priority would be given to requests made for a commercial or for-profit purpose. In order to apply this order, the official or agency would be able to require the requester to state his or her residence as well as the purpose of the request. Establishing this priority of fulfillment of requests would allow the FOAA to return to its central purpose: making it possible for the people to know what their government is doing, not being a source of data. Mr. Parr noted that data has surpassed oil in value as a commodity.

The subcommittee discussed the proposal, and explored whether tiered response times would be appropriate, and whether it would be permitted to say "no" to a lowest priority request. Mr. Stout raised his experience with what he calls "FOAA mills" – entities that use freedom of access laws to collect volumes of information about, for example, all the routers used in state government, and then use the information for marketing purposes. Mr. Campbell noted that there is nothing in the FOAA that says you can't prioritize now. You can respond by the five-day deadline to say a reasonable time for response is Halloween 2021, the hours to complete the response is XX and the cost is \$YY – do you still want to pursue the request? He believes the law provides a good deal of opportunity to do what you need to do first when fielding a request, particularly those that are complex. Mr. Rossignol agreed that the law currently allows the official or agency to put the burden on the appropriate person; if it is a marketing firm making a request, and that is how the agency responds, then it is up to the requester to challenge the agency. Current law allows the agency to challenge abusive requests now. He expressed discomfort with putting in statute that the government determines the appropriate priority. Mr. Campbell agreed; the point should not be who is requesting or why, but the nature of the request – how big a circus is it to collect the information to respond.

Mr. Parr focused on the residency question; he is paid by the taxpayers of Maine to do his job, and out-of-state requests place costs on Maine taxpayers. Ms. Meyer noted that it is easy to get around the restrictions by asking a resident to make the request; it could lead to a boutique industry that fields out-of-state requests. Representative Harnett reiterated that the purpose of the FOAA is to ensure government is open and transparent, and "public records" is a broad concept, covering everything in possession of the agency or official. But it was never intended to provide, for example, GIS mapping data. He expressed his sympathy for the burden on State and local government when requests are made for a commercial purpose. Mr. Campbell suggested charging a fee – maybe \$25 – if the requester is not a Maine resident.

Public Access Ombudsman Kielty noted that there are so many policy decisions involved in these discussions. The current law provides for requests by anyone for any purpose. The law is wide open and lets the facts determine each case. She compared the FOAA with the federal Freedom of Information Act, which does include tiered responses and costs based on the purpose of the requests. But she noted that the FOIA is a very sophisticated system, and strongly recommended that any changes to the Maine FOAA be done on a systemic basis. She admits there are a large number of commercial requests, but most of them are narrow because the law says the agency does not have to create a new record to respond. The courts are clear that the fact a request is burdensome is not by itself a reason to say no.

The members discussed our evolving notions of privacy, how technology has transformed communication and that perhaps the FOAA needs to be more sophisticated to try to address changes over time. The subcommittee tabled further discussion on the topic.

#### LD 1575

The Judiciary Committee requested the Advisory Committee to review LD 1575, An Act to Improve the Freedom of Access Laws of Maine, Sponsored by Representative Harnett and cosponsored by Senator Breen. The bill has been carried over to the Second Regular Session.

The purpose of the bill is to enhance access to public records without imposing undue burdens on the efficient and effective functioning of government. Representative Harnett explained the provisions of the bill: define “public or governmental business,” require that a requester provide more specifics and establish deadlines for governmental entities to respond. There was also an amendment to limit the cost of copies. Ms. Kielty reminded the subcommittee that the Ombudsman does not have authority to compel production. Ms. Meyer noted the information provided by the Maine Freedom of Information Coalition. The subcommittee concluded that the additional definition was not helpful, as that is the fact analysis that is already applied in responding to each FOAA request. Although there may be no expectation of privacy from the employer on a work computer, for example, the fact that a document or communication was created on a work computer does not make it a public record. Similarly, governmental business conducted in a personal Gmail account does qualify as a public record and must be produced in response to a request (unless confidential for another reason). Ms. Meyer noted that although the MFOIC supports a 20-day deadline, she personally thinks “reasonable” works in all cases to take into account the complexity of the request and the press of other governmental responsibilities. The Public Access Ombudsman’s survey indicated that 96% of requests were fulfilled in 30 days. Should the governmental entity or official notify the requester if the time target can’t be met? The members agreed that should be the practice, but it doesn’t need to be written into the statute. Mr. Parr said the department handles thousands of requests, and it is just easier to process the request than do all the steps required in the bill. The subcommittee agreed to table further discussion of LD 1575 and the additional suggestions for FOAA improvements.

### Remote participation

The subcommittee then discussed remote participation and reviewed the language adopted by the majority of the Judiciary Committee as a committee amendment to LD 1511 (which was not finally enacted). Members noted that there appears to be a philosophical position in the Legislature opposing the legislation, focusing mainly on the proposition that hard votes by policy makers need to be taken personally and physically in front of their constituents. Ms. Gardiner noted that the identified Attorney General opinion cited as the basis for the interpretation that the FOAA does not permit remote participation is 40 years old and was about a specific situation in which members of a board voted on the phone without any members of the public being able to hear the conversation. That is still an appropriate decision and everyone would agree. Ms. Gardiner wondered why the LD 1511 committee amendment prohibits remote participation in executive session, since all members would be bound by their oath to uphold the confidentiality of such proceedings. The subcommittee agreed to table further discussion.

The meeting adjourned at 4:06 p.m.

### Upcoming meetings:

Subcommittee on privacy and record retentions issues: Monday, October 21<sup>st</sup> at 1:00 p.m.

Public Records Exception Subcommittee: Wednesday, November 13th, 9:00 a.m.

Subcommittee on FOAA Improvements: Wednesday, November 13th, 10:00 a.m.

Advisory Committee: Wednesday, November 13th, 1:00 p.m.

G:\STUDIES\STUDIES 2019\RTKAC\Meeting Summaries\Oct 9th - draft summary Improve Subcommittee.docx (10/17/2019 12:07:00 PM)



**Right to Know Advisory Committee**  
**Improve the FOAA Subcommittee**  
Wednesday, November 13, 2019  
Meeting Summary

Convened 10:00 a.m., Room 438, Maine State House, Augusta

Present:

Representative Thom Harnett  
Amy Beveridge  
Jim Campbell  
Julie Finn  
Phyllis Gardiner  
Judy Meyer  
Chris Parr  
Luke Rossignol (arrived after meeting started)  
Eric Stout

Staff:

Peggy Reinsch  
Colleen McCarthy Reid

The Improve the FOAA subcommittee met for the second time on Wednesday, November 13<sup>th</sup> at 10:00 a.m. Subcommittee chair Amy Beveridge called the meeting to order and asked members to introduce themselves.

**Warrants**

At the subcommittee's direction, staff worked with the Judicial Branch to see what information could be provided about the records kept by the courts related to warrants that authorize the installation and monitoring of tracking devices, access to electronic device content and access to electronic device location information. Staff explained that copies of warrants are filed with each court, but that there is not currently a central system or depository for the collection of aggregate information on warrants. Julie Finn reported that the Judicial Branch is in the process of trying to gather aggregate information for the Advisory Committee; Ms. Finn has developed a survey to be completed by court employees, but not all responses have been received. Although there is no written information to share yet, Ms. Finn briefly outlined current practices related to these warrants:

- The process is initiated by law enforcement, who must file affidavits and the warrant application (court form) with the court;
- Information required on the form includes specifics about the electronic device and location information;
- The court form has been amended to add a box to indicate whether notice of the warrant will be provided or if notice is not required (pursuant to PL 2019, c. 489);
- Warrant is presented for court's signature;
- If warrant executed, then copy of signed warrant is required to be filed with the court within 14 days, along with inventory form to catalogue items found.

Ms. Finn noted that the current process is in paper form only and warrants are not recorded/maintained in electronic form. Each court does maintain one docket where each filing is documented. The Judicial Branch is transitioning to an electronic court record system so perhaps in the future this information can be collected in aggregate form. The information from the surveys may provide some preliminary information.


Members of the subcommittee asked why the Judiciary Committee requested that this issue be reviewed. Staff stated that the Judiciary Committee members were concerned about warrants being issued for tracking information and electronic devices without a person's knowledge and members were interested in knowing how often this happens. Rep. Harnett confirmed that the Judiciary Committee raised "civil liberties" concerns. Chris Parr agreed that it would be a good idea to know how often this occurs, but noted that it may not be possible with the current process. Mr. Parr stated that the law seeks to balance the public interest and personal privacy interests with the notice provision. Members agreed that it was important to consider whether there should be a duty to aggregate the information about warrants and suggested that the Judiciary Committee and the Legislature consider whether legislation is needed to ensure that the information is collected and provided.

Mr. Parr moved (motion seconded by Judy Meyer) that the subcommittee recommend that the Advisory Committee include in its report a statement that it believes the information identified by the Judiciary Committee would be useful if it existed in aggregate form and recommend that the Judiciary Committee consider whether to pursue legislation to establish a duty to collect and report the information. The subcommittee voted 9-0 in favor of the motion.

#### **Suggestions to improve the FOAA**

The subcommittee continued discussion of several suggestions for improving the Freedom of Access Act that were not resolved at the first meeting.

- *Expand who must participate in training*



The subcommittee reviewed information provided by staff outlining the 233 State boards and commissions established in law and information provided the Maine Municipal Association outlining the positions in local government required by statute. While several members expressed an interest in expanding training requirements for all members of boards and commissions and local government employees, Public Access Ombudsman Brenda Kielty suggested that, initially, the subcommittee focus on those positions that have generated concerns: members of local planning boards; code enforcement officers; and town managers and/or town administrators who are not already trained in FOAA if they also serve as public access officers. Ms. Kielty also noted that questions have been asked about the definition of "officials of school administrative units" when determining who is required to complete training; she suggested that the statute be clarified to specify that elected and appointed school board members and school superintendents and assistant superintendents complete FOAA training. Finally, Ms. Kielty also asked that the law be amended to clarify the timing of when training must be completed for those appointed to their positions as the current law only refers to when the oath of office is made.

Amy Beveridge expressed her belief that all local employees, especially those answering the telephone and fielding FOAA requests, should be trained as the training requirements are fairly minimal. Ms. Beveridge related an anecdote when a news organization was recently told by a Cumberland County dispatcher that a list of road closures could not be disclosed after recent storms. Ms. Kielty responded that she would like to see the training be taken more seriously and strengthened in the future, but thought that expanding the training requirements on an incremental

basis was an appropriate first step. Rep. Harnett agreed that training should be taken more seriously, but noted the reality that expanding who must complete training beyond a few selected positions would create more of a “mandate” issue, which cannot be ignored by the Legislature.

Ms. Meyer moved (motion seconded by Luke Rossignol) that the subcommittee recommend the statutory changes suggested by Ms. Kielty: 1) expand training to planning board members, code enforcement officers and town managers/administrators; 2) clarify school officials required to complete training; and 3) clarify timeline for completing the training for those in appointed positions. The subcommittee voted 9-0 in favor of the motion.

Rep. Harnett also moved (motion seconded by Mr. Parr) that the Public Access Ombudsman be directed to develop suggestions for improvement and enhancement to FOAA training materials with assistance from the UMaine Law School Extern and to report back to the Advisory Committee in 2020. The subcommittee voted 9-0 in favor of the motion.

- *Responding to requests: distinguishing between requests made by Maine residents/citizens, requests made for commercial purposes, or requests based on a journalistic/news interest or for research*

The subcommittee discussed several suggestions to limit the scope of FOAA requests and to prioritize requests based on the purpose of the request. Ms. Meyer stated that she did not support limiting who may make a request to Maine citizens; she believed it is not necessary and would be difficult to enforce. Mr. Rossignol agreed as he believed there is no need to change the current law. Members also discussed whether to distinguish between requests based on their purpose. Members expressed some willingness to treat requests made for commercial purposes differently, but wondered how best to approach the issue. Ms. Meyer noted it is difficult to distinguish news organizations from other commercial media and wondered how an agency could determine whether a request was made for a journalistic purpose or a commercial one in certain instances. Others suggested that the cost of responding to FOAA requests should be more if the request has a commercial purpose. Mr. Parr and Phyllis Gardiner said it was often the case that the actual cost of complying with FOAA requests were far beyond the limits set out in the statute, capping staff time at \$15 per hour after the first hour. Eric Stout provided the example of the FOAA request related to the bear referendum that, even after negotiation to narrow the request, resulted in more than 900 hours of agency staff time and more than 240 hours of his time, produced more than 65,000 emails and resulted in a cost of \$15,000. Mr. Parr suggested that the Advisory Committee consider updating the cost structure in the current law. Ms. Meyer asked whether state agencies could be surveyed to see if there are common issues affecting agencies related to burdensome FOAA requests or requests for commercial purposes. The subcommittee agreed to consider the issue further and asked staff to gather more information from state agencies and other state laws related to the costs of complying with FOAA requests.

- *Define “public or governmental business” (LD 1575)*

The subcommittee considered whether to support the suggested definition of “public or government business” included in LD 1575. Ms. Gardiner stated her belief that the current definition of “public record” works in practice and allows an agency to distinguish between public and personal communications. Ms. Myer and other members agreed. Mr. Parr moved (motion seconded by Mr. Rossignol) that the subcommittee take no action. The subcommittee voted 7-1 in favor of the motion (Mr. Stout voted against; Rep. Harnett abstained).

- *Describe minimum requirements for a "request" (LD 1575)*

Ms. Meyer suggested that adding the new language as suggested in LD 1575 would be redundant and, if adopted, may allow an agency to ignore a request. Mr. Rossignol also stated his belief that no change is needed in current law. Mr. Parr suggested that perhaps the subcommittee should consider adding language related to "clarifying" a request. Ms. Kielty pointed out that the 5-day time limit under the law to deny or acknowledge a request does not begin to run until an agency has a "sufficient description" of the record being requested; she felt that language is adequate and does not need further change. Ms. Gardiner agreed. Ms. Meyer moved (motion seconded by Mr. Rossignol) that the subcommittee take no action. The subcommittee voted 8-0 in favor of the motion (Rep. Harnett abstained).

- *Change "reasonable time" for responses to specific time periods with deadlines (LD 1575)*

Ms. Meyer expressed her preference for the word "reasonable" in current law and would not support changing to a specific deadline of 30 days as responses would regularly be delayed until close to that deadline. Based on her information, Ms. Meyer noted that more than 95% of FOAA requests are responded to within 30 days already. Mr. Parr moved (motion seconded by Ms. Meyer) that the subcommittee take no action. The subcommittee voted 7-0 in favor of the motion (Mr. Campbell and Rep. Harnett abstained).

- *Cap on copying costs (LD 1575)*

Jim Campbell recommended that the subcommittee support the amendment proposed to LD 1575 to cap the cost of a paper copy (8 ½ by 11) at no more than 10 cents per page. Mr. Campbell moved (motion seconded by Mr. Parr) that the subcommittee support the suggested amendment. The subcommittee voted 7-0 (Rep. Harnett and Ms. Finn abstained) in favor of the motion.

- *How to preserve communications using new and emerging technologies to ensure public access to those communications (LD 1575) and prohibit use of electronic devices during public proceeding by member of body/agency*

Given the limited time remaining for the Advisory Committee to complete its work, Mr. Parr suggested that the Advisory Committee defer further discussion of this issue until next year. Mr. Parr believes it is an important issue to consider. Ms. Gardiner supported the delay, but wondered whether issues related to how to preserve these types of communications could be addressed by the Advisory Committee. Ms. Gardiner felt that input and expertise from the Office of Information Technology and records retention experts would be needed. While Ms. Meyer supported looking at the mechanics of how, she believed it also important to look at the policy and what technology is appropriate for government to use to conduct public business and under what circumstances. Mr. Campbell and Mr. Rossignol agreed with Ms. Meyer. Mr. Parr moved (motion seconded by Mr. Stout) that the Advisory Committee recommend that the Legislature create a study group to address these issues. The subcommittee voted 9-0 in favor of the motion.

- *Other suggestions for changes: FOAA request reporting requirements; costs to respond to FOAA requests; additional factors in consideration of public records exceptions*

Due to time constraints, the subcommittee tabled discussion of these items until the next meeting.

### **Remote participation**

Subcommittee members wondered what more could be done to move this issue forward as last year's language (Committee Amendment to LD 1511) represents the Advisory Committee's best effort to recommend legislation. Ms. Meyer suggested that maybe this time a preamble could be added to the proposal to further explain the rationale for why the Advisory Committee believes the legislation is needed. Mr. Rossignol moved (motion seconded by Mr. Stout) that the subcommittee recommend last year's proposed language on remote participation with the addition of a preamble. The subcommittee voted 8-0 (Ms. Finn abstained) in favor of the motion.

The meeting adjourned at 12:46 p.m.

Upcoming meetings:

Public Records Exception Subcommittee: Wednesday, December 4th, 9:00 a.m.

Subcommittee on FOIA Improvements: Wednesday, December 4th 10:00 a.m.

Advisory Committee: Wednesday, December 4th 1:00 p.m.

Issues Subcommittee: Wednesday, December 18th 10:00 a.m. (tentative)

Advisory Committee: Wednesday, December 18th 1:00 p.m.

G:\STUDIES\STUDIES 2019\RTKAC\Meeting Summaries\Nov 13th - draft summary Improve Subcommittee.docx

**Outline of State Boards and Commissions Based on Function**

There are 233 ongoing, permanent boards and commissions set forth in statute, Title 5, chapter 379. This does not include ad hoc and one-time boards, task forces, commissions, etc. that are not permanently established in statute and required to meet the requirements of Title 5 chapter 379.

Title 5, chapter 379 categorizes ongoing, permanent boards and commissions in separate statutory provisions based on the primary function and responsibility of the particular board or commission.

Primary Function/ Statutory Citation	Statutory Citation	Board or Commission Title
Occupational and Professional Licensing Boards	5 MRSA §12004-A	<ul style="list-style-type: none"> <li>• Board of Accountancy</li> <li>• Maine State Board for Licensure of Architects, Landscape Architects and Interior Designers</li> <li>• Board of Licensing of Auctioneers</li> <li>• Board of Bar Examiners</li> <li>• Board of Chiropractic Licensure</li> <li>• Board of Complementary Health Care Providers</li> <li>• Board of Real Estate Appraisers</li> <li>• Board of Counseling Professionals</li> <li>• Board of Dental Practice</li> <li>• Board of Licensing of Dietetic</li> <li>• Electricians' Examining Board</li> <li>• Emergency Medical Services' Board</li> <li>• State Board of Licensure for Professional Engineers</li> <li>• Board of Licensure of Foresters</li> <li>• State Board of Funeral Service</li> <li>• State Board of Certification for Geologists and Soil Scientists</li> <li>• Board of Licensure of Professional Land Surveyors</li> <li>• Manufactured Housing Board</li> <li>• Nursing Home Administrators Licensing Board</li> <li>• Board of Licensure in Medicine</li> <li>• State Board of Nursing</li> <li>• Board of Occupational Therapy Practice</li> <li>• State Board of Optometry</li> <li>• Board of Osteopathic Licensure</li> <li>• Maine Board of Pharmacy</li> <li>• Board of Examiners in Physical Therapy</li> <li>• Plumbers' Examining Board</li> <li>• Board of Licensure of Podiatric Medicine</li> <li>• State Board of Examiners of Psychologists</li> <li>• Board of Respiratory Care Practitioners</li> <li>• Radiologic Technology Board of Examiners</li> <li>• Real Estate Commission</li> <li>• State Board of Social Work Licensure</li> </ul>

Primary Function/ Statutory Citation	Statutory Citation	Board or Commission Title
		<ul style="list-style-type: none"> <li>• Maine Pilotage Commission</li> <li>• State Board of Alcohol and Drug Counselors</li> <li>• State Board of Veterinary Medicine</li> <li>• Board of Underground Oil Storage Tank Installers</li> <li>• Board of Licensure of Water System Operators</li> <li>• Gambling Control Board</li> <li>• Board of Speech, Audiology and Hearing</li> <li>• Maine Fuel Board</li> </ul>
Arbitration, Mediation, Valuation and Board Appeals	5 MRSA §12004-B	<ul style="list-style-type: none"> <li>• State Board of Arbitration and Conciliation</li> <li>• Maine Labor Relations Board</li> <li>• Panel of Mediators</li> <li>• State Civil Service Appeals Board</li> <li>• State Claims Commission</li> <li>• State Board of Property Tax Review</li> <li>• Maine Agricultural Bargaining Board</li> <li>• Committee on Judicial Responsibility and Disability</li> <li>• Maine Board of Tax Appeals</li> </ul>
Educational Policy Boards	5 MRSA §12004-C	<ul style="list-style-type: none"> <li>• State Board of Education</li> <li>• Board of Trustees, University of Maine System</li> <li>• Board of Trustees, Maine Community College System</li> <li>• Board of Trustees, Maine Maritime Academy</li> <li>• Board of Trustees, Maine Criminal Justice Academy</li> <li>• Board of Trustees, Maine School of Science and Mathematics</li> <li>• School Board of the Governor Baxter School for the Deaf</li> <li>• Science, Technology, Engineering and Mathematics Council</li> <li>• Board of Trustees, Maine School for Marine Science, Technology, Transportation and Engineering</li> </ul>
Environmental Regulation and Control	5 MRSA §12004-D	<ul style="list-style-type: none"> <li>• Maine Land Use Planning Commission</li> <li>• Board of Environmental Protection</li> <li>• Board of Pesticides Control</li> <li>• Nutrient Management Review Board</li> <li>• Interagency Task Force on Invasive Aquatic Plants and Nuisance Species</li> </ul>
Bonding and Financial Organization	5 MRSA §12004-F	<ul style="list-style-type: none"> <li>• Finance Authority of Maine</li> <li>• Maine Municipal Bond Bank, Board of Commissioners</li> <li>• Maine State Housing Authority</li> <li>• Maine Turnpike Authority, Board of Directors</li> </ul>

Primary Function/ Statutory Citation	Statutory Citation	Board or Commission Title
		<ul style="list-style-type: none"> <li>• Maine Public Utility Financing Bank, Board of Commissioners</li> <li>• Maine Health and Higher Educational Facilities Authority</li> <li>• Maine Port Authority</li> <li>• Board of Trustees, Maine Public Employees Retirement System</li> <li>• State Employee Health Commission</li> <li>• Maine Governmental Facilities Authority</li> <li>• Northern New England Passenger Rail Authority</li> <li>• Small Enterprise Growth Board</li> <li>• Maine Rural Development Authority</li> </ul>
General Government	5 MRSA §12004-G	<ul style="list-style-type: none"> <li>• Pull Events Commission</li> <li>• Integrated Pest Management Council</li> <li>• Maine Agricultural Water Management Board</li> <li>• Board of Agriculture</li> <li>• Maine Biomedical Research Board</li> <li>• Maine Agriculture in the Classroom Council</li> <li>• Combat Sports Authority of Maine</li> <li>• Technical Building Codes and Standards Board</li> <li>• Maine Motor Vehicle Franchise Board</li> <li>• State Parole Board</li> <li>• Maine State Cultural Affairs Council</li> <li>• Maine Arts Commission</li> <li>• Maine State Museum Commission</li> <li>• Maine Historic Preservation Commission</li> <li>• Maine Library Commission</li> <li>• Kim Wallace Adaptive Equipment Loan Program Fund Board</li> <li>• Efficiency Maine Trust Board</li> <li>• Maine Charter School Commission</li> <li>• State Education and Employment Outcomes Task Force</li> <li>• Baxter State Park Authority</li> <li>• Clean-up and Response Fund Review Board</li> <li>• Saco River Corridor Commission</li> <li>• State Emergency Response Commission</li> <li>• Maine Water Well Commission</li> <li>• Substance Use Disorder Services Commission</li> <li>• River Flow Advisory Commission</li> <li>• State Liquor and Lottery Commission</li> <li>• Maine Health Data Organization</li> <li>• Newborn Hearing Screening Advisory Board</li> <li>• Board of Trustees of Dirigo Health</li> <li>• Statewide Coordinating Council for Public Health</li> </ul>



Primary Function/ Statutory Citation	Statutory Citation	Board or Commission Title
		<ul style="list-style-type: none"> <li>• Board of Directors of the Maine Guaranteed Access Reinsurance Association</li> <li>• Maine Human Rights Commission</li> <li>• Driver Education and Evaluation Programs Appeals Board</li> <li>• Maine Vaccine Board</li> <li>• Inland Fisheries and Wildlife Advisory Council</li> <li>• ATV Enforcement Grant Review Committee</li> <li>• Maine Self-Insurance Guarantee Association Board of Directors</li> <li>• Board of Occupational Safety and Health</li> <li>• Maine Commission on Indigent Legal Services</li> <li>• State Compensation Commission</li> <li>• Marine Resources Advisory Council</li> <li>• Land for Maine's Future Board</li> <li>• Maine Outdoor Heritage Fund Board</li> <li>• Board of Licensure of Professional Investigators</li> <li>• InforME Board</li> <li>• Maine Library of Geographic Information Board</li> <li>• Telecommunications Relay Services Council</li> <li>• Interagency Review Panel</li> <li>• Maine Length of Service Award Program Board of Trustees</li> <li>• Maine Small Business and Entrepreneurship Commission</li> <li>• State Harness Racing Commission</li> <li>• Commission on Governmental Ethics and Election Practices</li> <li>• Board of Trustees, Mining Excise Tax Trust Fund</li> <li>• Motor Carrier Review Board</li> <li>• Maine Technology Institute</li> <li>• ConnectME Authority</li> <li>• Board of Trustees of the Maine Veterans' Homes</li> <li>• Workers' Compensation Board</li> </ul>
Commodity or Product Protection and Promotion Boards	5 MRSA §12004-H	<ul style="list-style-type: none"> <li>• Seed Potato Board</li> <li>• Potato Marketing Improvement Fund Committee</li> <li>• University of Maine System Blueberry Advisory Commission</li> <li>• Wild Blueberry Commission of Maine</li> </ul>
Advisory Boards; Boards with minimal authority	5 MRSA §12004-I	<ul style="list-style-type: none"> <li>• Maine Arborist Advisory Council</li> <li>• Animal Welfare Advisory Council</li> <li>• Advisory Committee on Fair Competitions with Private Enterprise</li> <li>• Regulatory Fairness Board</li> <li>• Snowmobile Trail Fund Advisory Council</li> </ul>

Primary Function/ Statutory Citation	Statutory Citation	Board or Commission Title
		<ul style="list-style-type: none"> <li>• Allagash Wilderness Waterway Advisory Council</li> <li>• Prison Industries Advisory Council</li> <li>• Sex Offender Management and Risk Assessment Advisory Commission</li> <li>• Board of Visitors (For each institution under the department)</li> <li>• State Poet Laureate Advisory Selection Committee</li> <li>• Maine Veterans' Memorial Cemetery System Care Fund</li> <li>• Maine Innovation Economy Advisory Board</li> <li>• Advisory Committee on Medical Education</li> <li>• Advisory Committee on Dental Education</li> <li>• Archives Advisory Board</li> <li>• Advisory Committee on School Psychologists</li> <li>• Commission to End Student Hunger</li> <li>• Truants and Dropouts</li> <li>• Advisory Committee on Education Savings</li> <li>• Maine Historical Records Advisory Board</li> <li>• Pollution Prevention and Small Business Assistance Advisory Board</li> <li>• Advisory Board for the Licensing of Guides</li> <li>• Advisory Board for the Licensing of Taxidermists</li> <li>• Advisory Board for the Licensing of Whitewater Guides</li> <li>• Advisory Council on Tax-deferred Arrangements</li> <li>• Board of Emergency Municipal Finance</li> <li>• Advisory Committee on Family Development Accounts</li> <li>• Consensus Economic Forecasting Commission</li> <li>• Maine Quality Forum Advisory Council</li> <li>• Passamaquoddy Indian Housing Authority – Indian Township</li> <li>• Passamaquoddy Indian Housing Authority – Pleasant Point</li> <li>• Penobscot Tribal Reservation Housing Authority</li> <li>• Child Care Advisory Council</li> <li>• Temporary Assistance for Needy Families Advisory Council</li> <li>• Tobacco Prevention and Control Advisory Council</li> <li>• Organ Donation Advisory Council</li> <li>• Maine Telehealth and Telemonitoring Advisory Group</li> <li>• Maine HIV Advisory Committee</li> <li>• Maine Public Drinking Water Commission</li> <li>• Acquired Brain Injury Advisory Council</li> </ul>

Primary Function/ Statutory Citation	Statutory Citation	Board or Commission Title
		<ul style="list-style-type: none"> <li>• Palliative Care and Quality of Life Interdisciplinary Advisory Council</li> <li>• Maine Hospice Council</li> <li>• Landowners and Sportsman Relations Advisory Board</li> <li>• Criminal Law Advisory Commission</li> <li>• Family Law Advisory Commission</li> <li>• Marijuana Advisory Commission</li> <li>• New Ventures Maine Advisory Council</li> <li>• Maine Apprenticeship Council</li> <li>• Lobster Management Policy Councils</li> <li>• Sea Urchin Zone Council</li> <li>• Aquaculture Advisory Council</li> <li>• Commercial Fishing Safety Council</li> <li>• Scallop Advisory Council</li> <li>• Shellfish Advisory Council</li> <li>• Seaweed Fisheries Advisory Council</li> <li>• Lobster Advisory Council</li> <li>• Consumer Council System of Maine State Legislature</li> <li>• Maine Developmental Disabilities Council</li> <li>• State Conservation District Advisory Council</li> <li>• Insurance Continuing Education Advisory Committee</li> <li>• Real Estate Continuing Education Committee</li> <li>• Probate and Trust Law Advisory Commission</li> <li>• E-9-1-1 Council</li> <li>• Maine Commission on Domestic and Sexual Abuse</li> <li>• Polygraph Examiners Advisory Board</li> <li>• State Trauma Prevention and Control Advisory Committee</li> <li>• Capitol Planning Commission</li> <li>• State House and Capitol Park Commissions</li> <li>• Blaine House Commission</li> <li>• Participating Local District Advisory Committee</li> <li>• Citizen Trade Policy Commission</li> <li>• Maine Aeronautical Advisory Board</li> <li>• Maine State Ferry Advisory Board</li> <li>• Public Transit Advisory Council</li> <li>• Medical Advisory Board (Licensing of Drivers)</li> <li>• Maine State Film Commission</li> <li>• Permanent Commission of the Status of Women</li> <li>• Homeland Security Advisory Council</li> </ul>
Independent Advisory Boards	5 MRSA §12004-J	<ul style="list-style-type: none"> <li>• Victims' Compensation Board</li> <li>• Maine Fire Protection Services Commission</li> </ul>

Primary Function/ Statutory Citation	Statutory Citation	Board or Commission Title
		<ul style="list-style-type: none"> <li>• Sexual Assault Forensic Examiner Advisory Board</li> <li>• Right to Know Advisory Committee</li> <li>• Maine Developmental Services Oversight and Advisory Board</li> <li>• Maine Children’s Growth Council</li> <li>• Commission for the Deaf, Hard of Hearing and Late Deafened</li> </ul>
Intergovernmental Organizations	5 MRSA §12004-K	<ul style="list-style-type: none"> <li>• New England Board of Higher Education</li> <li>• New England Interstate Water Pollution Control Commission</li> <li>• Northeastern Forest Fire Protection Commission</li> <li>• St. Croix International Waterway Commission</li> <li>• Atlantic States Marine Fisheries Commission</li> <li>• Commission on Uniform State Laws</li> <li>• Maine-Canadian Legislative Advisory Commission</li> <li>• New England and Eastern Canada Legislative Commission</li> <li>• Maine-New Hampshire Interstate Bridge Authority</li> </ul>
Interagency Organizations	5 MRSA §12004-L	<ul style="list-style-type: none"> <li>• Commission on Municipal De-organization</li> <li>• Maine Drug Enforcement Agency Advisory Board</li> <li>• Statewide Homeless Council</li> </ul>

**Right to Know Advisory Committee**  
**Improve the FOAA Subcommittee**  
Wednesday, December 4, 2019  
Meeting Summary

Convened 10:07 a.m., Room 438, Maine State House, Augusta

Present:

Representative Thom Harnett  
Jim Campbell  
Lynda Clancy  
Julie Finn  
Phyllis Gardiner  
Judy Meyer  
Paul Nicklas  
Chris Parr  
Luke Rossignol  
Eric Stout

Staff:

Peggy Reinsch  
Colleen McCarthy Reid

The Improve the FOAA subcommittee met for the third time on Wednesday, December 4th. Acting Subcommittee chair Chris Parr called the meeting to order and asked members to introduce themselves.

**Search warrants**

Julie Finn presented a memo from the Judicial Branch that outlined the search warrant process, and included information about the numbers of search warrants issued in 2017, 2018 and so far in 2019. The numbers were collected by requesting court clerks in each court location to report the data, as search warrants are collected on paper at each court location, but not in a centralized database. The current process does not track whether a waiver of the notice requirement was requested or approved. The Judicial Branch is transitioning to an electronic court record system which, presumably, could be adjusted to include search warrant tracking.

The Subcommittee reviewed draft language reporting to the Judiciary Committee pursuant to Public Law 2019, chapter 489, section 18, explaining that aggregate information about the specific search warrants is not available. The Subcommittee recommends noting the value in the aggregate information, but recommends that the Advisory Committee defer to the Judiciary Committee to determine whether it is appropriate to impose the additional obligation of tracking the search warrant information on the Judicial Branch. (Approved 7-0, Ms. Finn abstained)

**Cap on copying charges**

The Subcommittee reviewed language capping copying charges. After discussing how to deal with records that are provided electronically, either transmitted electronically or provided on a storage device such as a disk or thumb drive, the Subcommittee agreed to wording limiting paper copies to 10¢ a black and white page (8 ½ x 11), with no per-page fee for electronically-provided copies. (Approved 8-0)

### **Expand who must participate in FOAA training**

The Subcommittee reviewed language addressing two elements of the mandatory FOAA training. First, because the requirement was recently extended to appointed officials, the statute needs to be amended to appropriately refer to the date the person assumes the duties of the office. Second, the Subcommittee had agreed to follow Public Access Ombudsman Brenda Kielty's suggestion about including certain municipal officials – town managers or administrators, code enforcement officers and planning board members – as well as clarifying which officials in school administrative districts should be included. The Subcommittee discussed whether there are other municipal boards that should be required to receive training, but ultimately agreed to add just planning boards for now, based on Ms. Kielty's report on the sources of questions and concerns that she fields. (Approved 8-0)

### **Enhanced FOAA training**

The Subcommittee reviewed language recommending that the Public Access Ombudsman, with the assistance of the UMaine Law School Extern for the spring semester, develop suggestions for improving and enhancing the FOAA training materials, including possible interactive online components, reporting the recommendations back to the Advisory Committee in 2020. (Approved 8-0)

### **Remote participation**

The Subcommittee reviewed and revised language to be included in the Preamble for remote participation legislation. The Subcommittee agreed to resubmit the language included in the Committee Amendment to LD 1511 approved by the majority of the Judiciary Committee during the First Regular Session. The Preamble will be useful in explaining the need for and the benefit of legislation governing the use of remote participation. (Approved 8-0)

### **Study on emerging technologies**

LD 1575, carried over to the Second Regular Session by the Judiciary Committee, proposed directing the Right to Know Advisory Committee to conduct a study focusing on the question of making and preserving records when emerging technologies, such as Snap Chat, are used for governmental communications. Transparency in governmental activities includes the public's access to communications and other records of government officials, so when technology that by design does not create and retain a record of the communication is used, one of the underlying principles of the Freedom of Access Act is thwarted. The Subcommittee agreed that it is important to understand the technology landscape and develop recommendations effectively supporting transparency, but does not believe that the Advisory Committee has the expertise to successfully carry out the study. The Subcommittee therefore recommends that the Advisory Committee support the establishment of a study that includes stakeholders with a better collection of skills and experiences. It also supports including in the study the consideration and development of best practices and guiding principles on the use of all communication technologies by public body officials during public proceedings. (Approved 8-0)

### **Responding to requests**

The Subcommittee reviewed information about the fees and costs structures other states employ when responding to public records requests. The Subcommittee also reviewed the response information reported to the Public Access Ombudsman listed in the 2018 annual report, especially the data on the number of requests, hours spent and fees collected, keeping in mind that the data is self-reported by State agencies and may not include all requests and responses. The Maine Municipal Association conducted a survey at the request of the Subcommittee, and provided very helpful information. The responses to the MMA survey particularly pointed out the frustration of municipal officials in providing information for data miners (who then make a profit on the

information). The Subcommittee also noted that the respondents reported the fact that some requests for public records are made in bad faith as a way to spite those in office. The Subcommittee discussed various aspects of the responsibilities and the resultant burdens that officials and agencies face in responding to requests for public records. Recognizing that changing the fee structure does not solve all concerns, the Subcommittee recommends that the statute be amended to establish a three-tiered fee for that agency's costs, other than translation, copying and mailing costs. Current law provides the first hour of searching for, retrieving and compiling the requested public record to be provided for free. After that, current law allows the agency to charge up to \$15 an hour. The Subcommittee proposes that the first three hours of labor be provided for free, that the agency may charge up to \$25 an hour for the next three hours, and that the agency can charge up to the "actual costs" of any labor conducted after those six hours. The Subcommittee proposes to define "actual costs" to cover the personnel or labor costs, not to include overhead or other expenses of the agency. (Approved 8-0)

The Subcommittee continued to discuss the fee issue to try to address the concern that agencies, especially on the state level, do not waive fees when the request can be considered to be in the public interest because releasing the information would likely contribute to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester. Agencies have discretion under Title 1, section 408-A, subsection 11, as to whether to grant such a waiver. The result is that most requests from journalists and news media are not given the benefit of a whole or partial fee waiver, despite the fact that their requests appear to meet the description of "in the public interest" as expressed in subsection 11. The Subcommittee was reluctant to make a waiver mandatory, and agreed to table the issue for further discussion. (Tabled 8-0)

#### **Add to criteria considered in evaluating public records exceptions**

The Subcommittee reviewed proposed language that directs the Judiciary Committee, when considering new public records exceptions, to weigh the fact that public access to the record ensures or would ensure that members of the public are able to make informed health and safety decisions. (The same criteria apply to the existing public records exceptions review conducted by the Right to Know Advisory Committee.) The members discussed whether the proposed consideration is currently covered, or could be easily worked into existing criteria, and decided a stand-alone paragraph is appropriate. (Approved 8-0)

#### **Eliminate agency FOA request reporting requirement**

Mr. Parr requested that the Subcommittee consider repealing the requirement that agencies report information about public records requests and response efforts to the Public Access Ombudsman. His concerns stem from the fact that it takes significant time and effort, which are not always available. The resulting data, therefore, may not be accurate. The Subcommittee discussed the concerns and also recognized that the information agencies reported had played a significant role in the discussion on responses, including appropriate fees. The Subcommittee agreed to table the discussion on the proposal. (Tabled 8-0)

#### **Adjournment**

Mr. Parr adjourned the meeting at 12:40 p.m.

#### **Next meeting:**

The Improve the FOAA Subcommittee will meet Wednesday, December 18th at 9:30 a.m. in Room 436 of the State House.

**Right to Know Advisory Committee**  
**Improve the FOAA Subcommittee**  
Wednesday, December 18, 2019  
Meeting Summary

Convened 9:38 a.m., Room 438, Maine State House, Augusta

Present:

Representative Thom Harnett  
Amy Beveridge  
Jim Campbell  
Lynda Clancy  
Julie Finn  
Judy Meyer  
Chris Parr  
Luke Rossignol  
Eric Stout

Staff:

Peggy Reinsch  
Colleen McCarthy Reid

The Improve the FOAA subcommittee met for the fourth and final time in 2019 on Wednesday, December 18th. Acting Subcommittee chair Chris Parr called the meeting to order and asked members to introduce themselves.

**Review final language of recommendations approved at prior subcommittee meetings**

The subcommittee unanimously voted to approved the language for the following recommendations for consideration by the full Advisory Committee. The subcommittee agreed to make changes to recommendations as noted below.

1. *Warrants recommendation.* The subcommittee approved draft language reporting to the Judiciary Committee pursuant to Public Law 2019, chapter 489, section 18, explaining that aggregate information about the specific search warrants is not available. The subcommittee recommends noting the value in the aggregate information, but recommends that the Advisory Committee defer to the Judiciary Committee to determine whether it is appropriate to impose the additional obligation of tracking the search warrant information on the Judicial Branch.
2. *Cap on copying fees.* The subcommittee approved the amendment to LD 1575 that was proposed to the Judiciary Committee that sets an upper limit on per page copying costs. The language also prohibits a per page copy fee for electronic records.
3. *Changes to FOAA training statute.* The subcommittee approved the statutory changes suggested by Ms. Kiely: 1) expand training to planning board members, code enforcement officers and town managers or administrators; 2) clarify school officials required to complete training; and 3) clarify timeline for completing the training for those in appointed positions. Ms. Kiely also brought an additional issue to the subcommittee's attention raised in a question from the Maine Municipal Association about whether deputy clerks and deputy treasurers are required by law to complete training. Ms. Kiely suggested that the



subcommittee clarify the training statute to include deputies in those positions. The subcommittee unanimously agreed to amend the draft proposal to include the deputy for any municipal position required to complete the training. (Motion by Jim Campbell; second by Luke Rossignol; vote 9-0)

4. *Request to Public Access Ombudsman for training recommendations.* The subcommittee also supports directing the Public Access Ombudsman to develop suggestions for improvement and enhancement to FOAA training materials with assistance from the University of Maine Law School Extern and to report back to the Advisory Committee in 2020. After discussion of the tiered fee schedule proposal, the subcommittee also agreed to request that the Ombudsman, with help from the Law School Extern, develop methods for gathering data and research on FOAA requests and requesters related to unfulfilled requests and costs.
5. *Remote participation – preamble.* The subcommittee agreed to add a preamble to the proposed legislation put forward last session to further explain the rationale for why the Advisory Committee believes the legislation is needed. The subcommittee approved the draft language related to remote participation with the preamble added.
6. *Emerging technologies study committee recommendations.* The subcommittee approved a recommendation that the Advisory Committee support the establishment of a study to examine the specific challenges emerging technologies create for governmental entities and the public under the Freedom of Access Act. The subcommittee agreed that the committee should include stakeholders with a better collection of skills and experiences, but approved the addition of language to the recommendation that the membership of the study committee should include at least one person who is also a member of the Right to Know Advisory Committee to ensure continuity and coordination.
7. *Additional criterion for public records exceptions reviews.* The subcommittee approved proposed language that directs the Judiciary Committee, when considering new public records exceptions, to weigh the fact that public access to the record ensures or would ensure that members of the public are able to make informed health and safety decisions. This new exception would also be included in the Advisory Committee’s review of existing public records exceptions.

#### **Review and discussion of proposal related to tiered fee schedule**

Based on discussion at the December 4<sup>th</sup> meeting, staff prepared a draft proposal to amend the fee provision to establish a three-tiered fee for an agency’s costs, other than translation, copying and mailing costs. Current law provides the first hour of searching for, retrieving and compiling the requested public record to be provided for free. After that, current law allows the agency to charge up to \$15 an hour. The subcommittee discussed proposing that the first three hours of labor be provided for free, that the agency may charge up to \$25 an hour for the next three hours, and that the agency can charge up to the “actual costs” of any labor conducted after those six hours. The subcommittee suggested defining “actual costs” to cover the personnel or labor costs, not to include overhead or other expenses of the agency.

The subcommittee discussed the draft and agreed to table the issue for future consideration. While the subcommittee recognizes that changing the fee structure is worthy of discussion, members did not feel that they had enough information or time to fully understand the potential problems a change in costs would address and what consequences could result from any changes. The subcommittee believed it would be prudent to take more time and asked that the Public

Ombudsman help with gathering additional data and information on who makes FOAA requests, the time it takes to respond to FOAA requests and the impact of costs on FOAA requests and responses.

Jim Campbell shared a letter from the Maine Freedom of Information Coalition articulating the Coalition's concerns with the proposal as drafted, particularly the difficulty with identifying "actual costs". While there is interest in designing a proposal, Mr. Campbell explained that the Coalition members are concerned about the potential inequities in how different agencies might determine "actual costs" and the impact of those increased costs on requesters. Ms. Meyer, Rep. Harnett and Ms. Clancy agreed that additional time for discussion seemed warranted. Mr. Parr thought more time would be helpful to discuss "actual costs", but asked if members would consider moving forward with a modified proposal that provide the first three hours of staff time for free and increase the cap on the charge for additional staff time at \$25 for requests that take more than three hours to complete. Ms. Meyer suggested that the subcommittee should look at the proposal in its totality and, after more discussion, prepare a recommendation for next year. Ms. Beveridge and Mr. Campbell supported that suggestion.

The subcommittee voted to table the discussion of changes to the fee structure. (Motion by Mr. Campbell; second by Mr. Rossignol; voted 8-1 with Mr. Parr opposed)

#### **Review and discussion of issues not previously voted or considered by subcommittee**

1. *FOAA request reporting requirements.* At Mr. Parr's suggestion, the subcommittee agreed to table consideration of changes to the FOAA request reporting requirements.
2. *Fee waiver.* Given the subcommittee's decision to table discussion of the changes to the fee structure, Mr. Campbell suggested that the subcommittee also table discussion of this issue. The subcommittee agreed to table.
3. *Add to RTKAC membership: having legal or professional expertise in the field of data or personal privacy, appointed by the Governor.* The subcommittee briefly discussed a proposal made by Mr. Parr to recommend adding a member to the Advisory Committee who has legal or professional expertise in the field of data or personal privacy. Ms. Meyer suggested that the proposal should be brought to the Issues Subcommittee for discussion since that part of that subcommittee's focus is on privacy. The subcommittee agreed that the Issues Subcommittee should have the opportunity to discuss.

#### **Adjournment**

Mr. Parr adjourned the meeting at 11:10 a.m.

**§200-I. Public Access Division; Public Access Ombudsman**

**1. Public Access Division; Public Access Ombudsman.** There is created within the Department of the Attorney General the Public Access Division to assist in compliance with the State's freedom of access laws, Title 1, chapter 13. The Attorney General shall appoint the Public Access Ombudsman, referred to in this section as "the ombudsman," to administer the division.

[PL 2007, c. 603, §1 (NEW).]

**2. Duties.** The ombudsman shall:

A. Prepare and make available interpretive and educational materials and programs concerning the State's freedom of access laws in cooperation with the Right To Know Advisory Committee established in Title 1, section 411; [PL 2007, c. 603, §1 (NEW).]

B. Respond to informal inquiries made by the public and public agencies and officials concerning the State's freedom of access laws; [PL 2007, c. 603, §1 (NEW).]

C. Respond to and work to resolve complaints made by the public and public agencies and officials concerning the State's freedom of access laws; [PL 2007, c. 603, §1 (NEW).]

D. Furnish, upon request, advisory opinions regarding the interpretation of and compliance with the State's freedom of access laws to any person or public agency or official in an expeditious manner. The ombudsman may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under Title 1, chapter 13. Advisory opinions must be publicly available after distribution to the requestor and the parties involved; [PL 2013, c. 229, §1 (AMD).]

E. Make recommendations concerning ways to improve public access to public records and proceedings; and [PL 2013, c. 229, §1 (AMD).]

F. Coordinate with the state agency public access officers the compilation of data through the development of a uniform log to facilitate record keeping and annual reporting of the number of requests for information, the average response time and the costs of processing requests. [PL 2013, c. 229, §2 (NEW).]

[PL 2013, c. 229, §§1, 2 (AMD).]

**3. Assistance.** The ombudsman may request from any public agency or official such assistance, services and information as will enable the ombudsman to effectively carry out the responsibilities of this section.

[PL 2007, c. 603, §1 (NEW).]

**4. Confidentiality.** The ombudsman may access records that a public agency or official believes are confidential in order to make a recommendation concerning whether the public agency or official may release the records to the public. The ombudsman's recommendation is not binding on the public agency or official. The ombudsman shall maintain the confidentiality of records and information provided to the ombudsman by a public agency or official under this subsection and shall return the records to the public agency or official when the ombudsman's review is complete.

[PL 2007, c. 603, §1 (NEW).]

**5. Report.** The ombudsman shall submit a report not later than January 15th of each year to the Legislature and the Right To Know Advisory Committee established in Title 1, section 411 concerning the activities of the ombudsman for the previous year. The report must include:

A. The total number of inquiries and complaints received; [PL 2007, c. 603, §1 (NEW).]

B. The number of inquiries and complaints received respectively from the public, the media and public agencies or officials; [PL 2007, c. 603, §1 (NEW).]

C. The number of complaints received concerning respectively public records and public meetings; [PL 2007, c. 603, §1 (NEW).]

D. The number of complaints received concerning respectively:

- (1) State agencies;
- (2) County agencies;
- (3) Regional agencies;
- (4) Municipal agencies;
- (5) School administrative units; and
- (6) Other public entities; [PL 2007, c. 603, §1 (NEW).]

E. The number of inquiries and complaints that were resolved; [PL 2007, c. 603, §1 (NEW).]

F. The total number of written advisory opinions issued and pending; and [PL 2007, c. 603, §1 (NEW).]

G. Recommendations concerning ways to improve public access to public records and proceedings. [PL 2007, c. 603, §1 (NEW).]

[PL 2015, c. 250, Pt. B, §1 (AMD).]

#### **6. Repeal.**

[PL 2009, c. 240, §7 (RP).]

#### **SECTION HISTORY**

PL 2007, c. 603, §1 (NEW). PL 2009, c. 240, §7 (AMD). PL 2013, c. 229, §§1, 2 (AMD). PL 2015, c. 250, Pt. B, §1 (AMD).

The State of Maine claims a copyright in its codified statutes. If you intend to republish this material, we require that you include the following disclaimer in your publication:

*All copyrights and other rights to statutory text are reserved by the State of Maine. The text included in this publication reflects changes made through the First Regular Session and the First Special Session of the 131st Maine Legislature and is current through November 1, 2023. The text is subject to change without notice. It is a version that has not been officially certified by the Secretary of State. Refer to the Maine Revised Statutes Annotated and supplements for certified text.*

The Office of the Revisor of Statutes also requests that you send us one copy of any statutory publication you may produce. Our goal is not to restrict publishing activity, but to keep track of who is publishing what, to identify any needless duplication and to preserve the State's copyright rights.

PLEASE NOTE: The Revisor's Office cannot perform research for or provide legal advice or interpretation of Maine law to the public. If you need legal assistance, please contact a qualified attorney.

82 A.3d 104  
Supreme Judicial Court of Maine.

MAINETODAY MEDIA, INC.

v.

STATE of Maine.

Docket No. Cum–13–155

|

Argued: Sept. 9, 2013.

|

Decided: Nov. 14, 2013.

### Synopsis

**Background:** Newspaper petitioned for review of state's denial of request to inspect and copy Enhanced 9–1–1 (E–9–1–1) call transcripts regarding altercation that resulted in homicide investigation. Following a trial de novo, the Superior Court, Cumberland County, Cole, J., upheld the denial. Newspaper appealed.

The Supreme Judicial Court, [Gorman, J.](#), held that as matter of first impression, state failed to establish reasonable possibility that disclosure of transcripts in question would interfere with law enforcement proceedings, as asserted basis under Criminal History Record Information Act (CHRIA) for keeping transcripts confidential in response to newspaper's FOAA request.

Judgment vacated; remanded with instructions.

**Procedural Posture(s):** On Appeal.

### Attorneys and Law Firms

\***106** [Sigmund D. Schutz](#), Esq. (orally), and [Jonathan G. Mermin](#), Esq., Preti Flaherty Beliveau & Pachios, LLP, Portland, for appellant MaineToday Media, Inc.

[Janet T. Mills](#), Attorney General, and [William R. Stokes](#), Dep. Atty. Gen. (orally), Office of Attorney General, Augusta, for appellee State of Maine.

[Patrick Strawbridge](#), Esq., Bingham McCutchen LLP, Boston, Massachusetts, for amici curiae The Reporters Committee for Freedom of the Press, New England First Amendment Center, Maine Association of Broadcasters, Maine Freedom of Information Coalition, Maine Press Association, and Associated Press.

\***107** Panel: [SAUFLEY](#), C.J., and [ALEXANDER](#), [LEVY](#), [SILVER](#), [MEAD](#), [GORMAN](#), and [JABAR](#), JJ.

### Opinion

[GORMAN](#), J.

[¶ 1] MaineToday Media, Inc., d/b/a Portland Press Herald/Maine Sunday Telegram, appeals from a decision of the Superior Court (Cumberland County, *Cole, J.*) upholding the State of Maine's denial of Maine Today's request to inspect and copy Enhanced 9–1–1 (E–9–1–1) call transcripts. MaineToday argues that the Freedom of Access Act (FOAA), 1 M.R.S. §§ 400–414

(2012), mandates disclosure of the transcripts as public records and that no exception to their disclosure applies.<sup>1</sup> We vacate the judgment.

## I. BACKGROUND

[¶ 2] The parties stipulated to the following facts. During 2012, Derrick Thompson, his mother Susan Johnson, and his girlfriend Alivia Welch were renting an apartment in Biddeford from landlord James Earl Pak. On December 29, 2012, at 6:07 p.m., Thompson placed a call to E-9-1-1 regarding an altercation with Pak. Biddeford police responded to the call and left after speaking with Thompson and Pak. Three minutes after police left the scene, and forty-seven minutes after Thompson's initial E-9-1-1 call, Johnson placed a second call to E-9-1-1 to report that Pak had shot her, Thompson, and Welch.<sup>2</sup> Eight minutes after that, Pak's wife, Armit Pak, placed a third call to E-9-1-1. All three calls were recorded and transcripts for each have been prepared.

[¶ 3] On January 2, 2013, MaineToday sent the first of a series of requests to inspect and copy the three Pak transcripts to the Biddeford Police Department, the Maine State Police within the Department of Public Safety (MSP), the Attorney General's Office, and the Bureau of Consolidated Emergency Communications.<sup>3</sup> The State<sup>4</sup> denied the requests on the ground that the transcripts constituted “intelligence and investigative information” in a pending criminal matter, and therefore were confidential pursuant to the Criminal History Record Information Act (the CHRIA), 16 M.R.S. §§ 611–623 (2012).

[¶ 4] MaineToday petitioned the Superior Court for review of the State's denial pursuant to 1 M.R.S. § 409(1). In March of 2013, after conducting a hearing and an \*108 *in camera* review of the unredacted transcripts and the audio recordings of each E-9-1-1 call in the Pak matter, the court affirmed in its entirety the State's denial of MaineToday's request. MaineToday appeals.

## II. DISCUSSION

[¶ 5] This case “highlights the conflict that exists between the public interest in open access to governmental records, on the one hand, and the public interest in protecting the integrity of criminal investigations... on the other.” *Lewiston Daily Sun v. City of Lewiston*, 596 A.2d 619, 622 (Me.1991). We consider, for the first time, the public disclosure of information transmitted through E-9-1-1 calls by evaluating the interplay of three distinct Maine statutes—FOAA; the CHRIA; and the emergency services communication statute (the ESC), 25 M.R.S. §§ 2921–2935 (2012).

[¶ 6] In interpreting these provisions, we first look to the plain language of the provisions to determine their meaning. *Anastos v. Town of Brunswick*, 2011 ME 41, ¶ 9, 15 A.3d 1279. If the language is unambiguous, we interpret the provisions according to their unambiguous meaning “unless the result is illogical or absurd.” *Cyr v. Madawaska Sch. Dep't*, 2007 ME 28, ¶ 9, 916 A.2d 967. If the plain language of a statute is ambiguous—that is, susceptible of different meanings—we will then go on to consider the statute's meaning in light of its legislative history and other indicia of legislative intent. *Anastos*, 2011 ME 41, ¶ 9, 15 A.3d 1279; *Competitive Energy Servs. LLC v. Pub. Utils. Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039.

[¶ 7] Pursuant to 1 M.R.S. § 409(1), the Superior Court conducted “a trial de novo” to determine whether the denial of MaineToday's FOAA request “was not for just and proper cause.” Although the parties filed an agreed-to statement of facts, we review any additional findings made by the Superior Court for clear error, and consider its legal conclusions, including the interpretation of the relevant statutory provisions, de novo. *Blethen Me. Newspapers, Inc. v. State*, 2005 ME 56, ¶ 10, 871 A.2d 523.

### A. Applicable Statutes

## 1. Freedom of Access Act

[¶ 8] Like its federal counterpart, the Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (West, Westlaw through P.L. 113–31 approved 8–9–13),<sup>5</sup> FOAA's “basic purpose ... is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>6</sup> *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989) (quotation marks omitted). The Legislature has declared that “public proceedings exist to aid in the conduct of the people's business,” and enacted FOAA with the express intent that public actions “be taken openly and that the records of [public] actions be open to public inspection and [public] deliberations be conducted \*109 openly.” 1 M.R.S. § 401; see *Citizens Commc'ns Co. v. Att'y Gen.*, 2007 ME 114, ¶ 9, 931 A.2d 503. To that end, FOAA requires generally that, “[e]xcept as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a reasonable time of making the request to inspect or copy the public record.”<sup>7</sup> 1 M.R.S. § 408–A; see *S. Portland Police Patrol Ass'n v. City of S. Portland*, 2006 ME 55, ¶ 6, 896 A.2d 960. To best promote its “underlying purposes and policies as contained in the declaration of legislative intent,” FOAA explicitly states that it must be “liberally construed and applied.” 1 M.R.S. § 401.

[¶ 9] Excepted from the definition of public records, however, and therefore exempt from the general rule of disclosure, are records that fall within any one of nineteen categories set out in 1 M.R.S. § 402(3)(A)–(R). See *S. Portland Police Patrol Ass'n*, 2006 ME 55, ¶ 6, 896 A.2d 960. “The burden of proof is on the agency or political subdivision [from which the information is sought] to establish just and proper cause for the denial of a FOAA request.”<sup>8</sup> *Anastos*, 2011 ME 41, ¶ 5, 15 A.3d 1279 (quotation marks omitted); see 1 M.R.S. § 408–A(4). Further, the necessary corollary of the directive to liberally construe FOAA is the “strict construction of any exceptions to the required public disclosure,” *Citizens Commc'ns*, 2007 ME 114, ¶ 9, 931 A.2d 503.

[¶ 10] The parties do not dispute that the audio recordings of E–9–1–1 calls and documents transcribing those audio recordings are in the possession of one or more government agencies—here, the Bureau of Emergency Services Communication, the Attorney General's Office, the Biddeford Police Department, the Maine State Police, and the Department of Public Safety, at least—and are used in connection with public or governmental business, that is, the provision of public emergency services. See 1 M.R.S. § 402(3); *Dow v. Caribou Chamber of Commerce & Indus.*, 2005 ME 113, ¶¶ 10–18, 884 A.2d 667 (discussing whether an entity is a government agency with reference to its function, source of funding, whether the government maintains involvement in or control over the entity, and whether it was created by private or legislative action).

[¶ 11] The audio recordings of E–9–1–1 calls and the transcripts of those calls therefore are subject to disclosure as public records unless they fall within one of the exceptions found in 1 M.R.S. § 402(3)(A)–(R). Of these, the only exception relevant to the present matter is one for “[r]ecords that have been designated confidential by statute.” \*110 1 M.R.S. § 402(3)(A). Whether the transcripts of the Pak E–9–1–1 calls do not qualify as public records and are exempt from FOAA because they are confidential pursuant to a statute first depends on an analysis of the ESC, and then on the application of the CHRIA.

## 2. Emergency services communication

[¶ 12] Pursuant to the ESC, it is the duty of the Emergency Services Communication Bureau (the Bureau), within the Public Utilities Commission, to “implement and manage” the E–9–1–1 system.<sup>9</sup> 25 M.R.S. § 2926(1). Pursuant to 25 M.R.S. § 2926(3), the Bureau has promulgated various rules regarding the E–9–1–1 system. 9 C.M.R. 65 625 001 (2007). These rules provide, inter alia, that both sides of the conversation for every incoming E–9–1–1 call must be recorded, with the year, date, and time of each call contemporaneously documented. 9 C.M.R. 65 625 001–4 § 3(4)(B). Those recordings must be retained for at least thirty days, and ideally, for at least sixty days. 9 C.M.R. 65 625 001–4 § 3(6)(B)(3). The statute further provides that “[t]he system databases, wherever located or stored, are the property of the bureau and their confidentiality is governed by section 2929.” 25 M.R.S. § 2926(6).

[¶ 13] Section 2929, in turn, draws a distinction between the transcripts of E-9-1-1 calls and the audio recordings of the calls; it states that although the E-9-1-1 audio recordings are “confidential and may not be disclosed,” the “information contained in the audio recordings is public information and must be disclosed in transcript form.” 25 M.R.S. § 2929(4).

[¶ 14] When an E-9-1-1 transcript is requested pursuant to section 2929(4), however, “confidential information” from that call, as defined in 25 M.R.S. § 2929(1), may not be disclosed.<sup>10</sup> For purposes of section 2929, only the names, addresses, telephone numbers, and certain medical information of particular people qualifies as “confidential information.” In addition, the statute expressly provides that when a transcript contains such “confidential information,” any other information from those calls that is not “confidential information” remains subject to the disclosure requirements of FOAA. 25 M.R.S. § 2929(3).

[¶ 15] In short, title 25 may be read consistently with FOAA to require that, upon request, E-9-1-1 transcripts—but not the audio recordings themselves—must be disclosed after any “confidential information” as defined in section 2929(1) is removed.<sup>11</sup> The next issue, then, is \*111 whether, even if redacted pursuant to section 2929, the Pak E-9-1-1 transcripts are otherwise “designated confidential by statute” such that they do not meet the definition of public records and the disclosure generally mandated by FOAA does not apply. 1 M.R.S. § 402(3)(A). The statute on which the State relies in arguing that the E-9-1-1 transcripts are “designated confidential by statute” is the CHRIA.

### 3. Criminal History Record Information Act

[¶ 16] The CHRIA dictates whether, when, to whom, and how criminal history information may be disclosed. 16 M.R.S. §§ 611–623. As it applies to the present matter, the CHRIA limits the “dissemination of intelligence and investigative information” as follows:<sup>12</sup>

**1. Limitation on dissemination of intelligence and investigative information.** Reports or records that contain intelligence and investigative information and that are prepared by, prepared at the direction of or kept in the custody of a local, county or district criminal justice agency; the Bureau of State Police; [or] the Department of the Attorney General ... are confidential and may not be disseminated if there is a reasonable possibility that public release or inspection of the reports or records would:

- A. Interfere with law enforcement proceedings;
- B. Result in public dissemination of prejudicial information concerning an accused person or concerning the prosecution's evidence that will interfere with the ability of a court to impanel an impartial jury;
- C. Constitute an unwarranted invasion of personal privacy;
- D. Disclose the identity of a confidential source;
- E. Disclose confidential information furnished only by the confidential source;
- F. Disclose trade secrets or other confidential commercial or financial information designated as such by the owner or source of the information or by the Department of the Attorney General;
- G. Disclose investigative techniques and procedures or security plans and procedures not generally known by the general public;
- H. Endanger the life or physical safety of any individual, including law enforcement personnel;
- I. Disclose conduct or statements made or documents submitted by any person in the course of any mediation or arbitration conducted under the auspices of the Department of the Attorney General;
- J. Disclose information designated confidential by some other statute; or



K. Identify the source of complaints made to the Department of the Attorney General involving violations of consumer or antitrust laws.

....

\*112 16 M.R.S. § 614(1). The unambiguous language of section 614 demonstrates the Legislature's intent to shield law enforcement from the obligation to disclose materials that might compromise its public safety mission. As we have said, the “important policy objectives” of section 614 are those of

(1) protecting the integrity of criminal prosecutions and the constitutional right of those charged with crimes to a fair and impartial jury; (2) maintaining individual privacy and avoiding the harm that can result from an unjustified disclosure of sensitive personal or commercial information; and (3) ensuring the safety of the public and law enforcement personnel.

*Blethen Me. Newspapers, Inc.*, 2005 ME 56, ¶ 12, 871 A.2d 523 (footnotes omitted).

[¶ 17] Despite these important objectives, confidentiality pursuant to the CHRIA is afforded only if the record that the government seeks to shield (1) contains intelligence or investigative information; (2) was prepared by or at the direction of, or is kept in the custody of, a criminal justice agency; and (3) would, if disclosed, create a reasonable possibility of one or more of the harms detailed in section 614(1)(A)-(K).

## B. Analysis

### 1. Intelligence or investigative information

[¶ 18] For purposes of section 614, “intelligence and investigative information” is defined as

information collected by criminal justice agencies or at the direction of criminal justice agencies in an effort to anticipate, prevent or monitor possible criminal activity, including operation plans of the collecting agency or another agency, *or* information compiled in the course of investigation of known or suspected crimes, civil violations and prospective and pending civil actions. “Intelligence and investigative information” does not include information that is criminal history record information.

16 M.R.S. §§ 611(8) (emphasis added). Section 611(8) therefore presents two alternatives by which a record could meet this definition—if it is collected by or at the direction of a criminal justice agency with regard to criminal activities *or* if it is compiled in the course of investigating a crime.<sup>13</sup>

#### a. Collected by or at the direction of a criminal justice agency

[¶ 19] Because the ESC makes clear that E-9-1-1 transcripts are the property of the Bureau no matter where they are located or stored, the entity at issue in determining whether E-9-1-1 transcripts are collected by or at the direction of a criminal justice agency is the Bureau itself. 25 M.R.S. § 2926(6).

[¶ 20] A “[c]riminal justice agency” is defined as “a federal, state, district, county or local government agency or any subunit thereof that performs the administration of criminal justice under a statute or executive order, and that allocates a substantial part of its annual budget to the administration of criminal justice” and includes “[c]ourts and the Department of the Attorney General.” 16 M.R.S. § 611(4).

[¶ 21] The Bureau is part of the Public Utilities Commission. \*113 25 M.R.S. § 2926(1). It “implement[s] and manage[s] E-9-1-1” by developing system elements, providing quality assurance, and providing call coverage and technical support, and is funded through statewide surcharges on telecommunications services. 25 M.R.S. §§ 2926, 2927. Although the Bureau's product is certainly used for criminal justice purposes on a daily basis, the Bureau manages the telecommunications necessary for the provision of emergency services, and does not meet the definition of a criminal justice agency.

b. Compiled in investigating a crime

[¶ 22] Alternatively, the E-9-1-1 transcripts qualify as intelligence or investigative information if they were “compiled” for purposes of investigating known or suspected crimes. 16 M.R.S. § 611(8).

[¶ 23] The United States Supreme Court has had occasion to consider the meaning of “compile” pursuant to FOIA. In *John Doe Agency*, the Supreme Court noted that a compilation, “in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents” and “seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes.” 493 U.S. at 153, 110 S.Ct. 471. The Supreme Court also took pains to note that “compiled” is not synonymous with “originally compiled,” and thus includes information gathered from multiple sources, and created at previous times and for different purposes. *Id.* at 154, 110 S.Ct. 471. In short, the Supreme Court held, “information originally compiled for a non-law-enforcement purpose” can nevertheless be exempt from disclosure “when it is recompiled at a future date for law enforcement purposes.” *Id.* at 157, 110 S.Ct. 471.

[¶ 24] According to the plain language of this portion of section 614, as informed by the analyses in *John Doe Agency*, the State has established that the transcripts are intelligence and investigative information pursuant to this alternative.<sup>14</sup> Although the audio recordings and transcripts were created by the Bureau for administrative purposes, we agree that the Maine State Police, the Attorney General's Office, and/or the Biddeford Police Department have “compiled” them for the purpose of investigating the crimes with which Pak was charged.

2. Preparation or custody

[¶ 25] Next, section 614 applies only to that information prepared for or maintained by particular government agencies or types of agencies. Here, the E-9-1-1 transcripts, even if not prepared by or at the direction of law enforcement, are kept in the custody of the Bureau of State Police or the Department of the Attorney General, two entities specifically named in section 614(1).<sup>15</sup>

\*114 3. Reasonable possibility

[¶ 26] Finally, it was the State's burden to establish that disclosing the transcripts would create a reasonable possibility of one or more of the harms detailed in section 614(1)(A)-(K).<sup>16</sup> Because the CHRIA does not define a “reasonable possibility” for purposes of determining the scope of a FOAA exception, we look to the plain and ordinary meaning of the terms. *See State v. Paradis*, 2010 ME 141, ¶ 6, 10 A.3d 695. “Reasonable” means “the product of a rational thought process.” *State v. Estes*, 418 A.2d 1108, 1115 (Me.1980) (quotation marks omitted). It may be defined as “[f]air, proper, or moderate under the circumstances,” Black's Law Dictionary 1379 (9th ed.2009), or as “not absurd,” “not ridiculous,” “not extreme,” or “not excessive,” Webster's Third New International Dictionary 1892 (2002).

[¶ 27] As we have stated in other contexts, a reasonable possibility is different, and less burdensome to prove, than a reasonable probability; it is synonymous with a “reasonable likelihood,” and is a lower standard than a preponderance of the evidence. See *State v. Pabon*, 2011 ME 100, ¶ 35, 28 A.3d 1147 (considering the reasonable possibility standard for determining the likelihood that a different jury instruction would have led to a more favorable verdict); *Terry v. T.J.C. Coin & Stamp Co.*, 447 A.2d 812, 814 (Me.1982) (“Reasonable possibility is a standard less onerous than proof that success is more likely than not.” (quotation marks omitted)); *Bowman v. Dussault*, 425 A.2d 1325, 1328 (Me.1981) (evaluating the propriety of an attachment order based on whether the underlying claim has a “reasonable possibility of recovery”).

[¶ 28] The State asserted to MaineToday and before the Superior Court that disclosing the E–9–1–1 transcripts would create the reasonable possibility of interfering with law enforcement proceedings pursuant to 16 M.R.S. § 614(1)(A).<sup>17</sup> We considered a similar issue in *Campbell v. Town of Machias*, in \*115 which a woman sought—and was denied—access to police records regarding a report lodged against her by her bank. 661 A.2d 1133, 1134 (Me.1995). We discussed the ways in which the disclosure of records could interfere with law enforcement proceedings—by “prematurely reveal[ing] the scope, nature or direction of the government’s case”; “allow[ing] the target of a criminal investigation to construct defenses or to fabricate alibis”; “creat[ing] the possibility of harassment or intimidation of witnesses”; or “result[ing] in the destruction of evidence.” *Id.* at 1136. We concluded that the prosecutor’s justification for denying the request on grounds that disclosure would “compromise the case by providing discovery prior to a formal charged being lodged” against her, and would “interfere with the collection of evidence and might result in the harassment of witnesses” was sufficient to meet the State’s burden because it was “the kind of showing approved” by federal courts in FOIA matters. *Id.* at 1136.

[¶ 29] Here, in contrast, the State identified no such specific concerns, but instead offered an explanation for the denial that merely reiterated the language of the statute itself. The timing of the charges also affects the comparison of *Campbell* with the present matter. Whereas the State in *Campbell* had not yet pursued any charges against the defendant, Pak had already been the subject of an initiating criminal complaint when MaineToday first requested the transcripts.<sup>18</sup> Although the State contends that, even while an indictment is pending, the investigation remains ongoing, it did not identify any particular investigation yet to be completed in the Pak matter or how those portions of the investigation could be affected by the availability of the Pak E–9–1–1 transcripts.<sup>19</sup> Rather, the State seeks a blanket rule that “in any active homicide investigation (including unsolved cases) and/or prosecutions, any E–911 recording and transcript constitutes intelligence and investigative information subject to 16 M.R.S. § 614,” and that such recordings and transcripts fulfill the requirements of section 614 and therefore are confidential as a matter of course.

[¶ 30] The United States Supreme Court has rejected such “universal” approaches that ask the court to “presume that virtually every [record] is confidential” and render these rebuttable presumptions “in practice all but irrebuttable.” *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 175, 177, 113 S.Ct. 2014, 124 L.Ed.2d 84 (1993). The Supreme Court instead interpreted FOIA to require a “more particularized approach” based on the circumstances surrounding each record at issue, which is an approach that more closely aligns with the purposes and language of the statute. *Id.* at 180, 113 S.Ct. 2014. If the Maine Legislature had intended to exempt \*116 from disclosure all E–9–1–1 transcripts, or even all E–9–1–1 transcripts that relate to active homicide cases, it could have, as it did with juvenile fire setter records and ambulance medical reports, for example. See 1 M.R.S. § 402(3)(H)-(I); *Landano*, 508 U.S. at 178, 113 S.Ct. 2014 (noting that there is “no persuasive evidence that Congress intended for [a law enforcement agency] to be able to satisfy its burden in every instance simply by asserting that [the record was obtained] during the course of a criminal investigation”).

[¶ 31] Here, the Attorney General did not present any particularized possibility of harm. For example, there is no suggestion that other witnesses at the scene would amend their testimony to be consistent with that of the 9–1–1 callers. Given the broad purpose of FOAA and the narrow reach of its exceptions, and mindful of the presumptive right of public access to criminal court proceedings, see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), we conclude that the State failed to meet its burden of establishing the reasonable possibility that disclosure of the Pak E–9–1–1 transcripts would interfere with law enforcement proceedings pursuant to section 614(1)(A). Thus, the Pak E–9–1–1 transcripts, as redacted pursuant to 25 M.R.S. § 2929(2)-(3), are public records subject to disclosure pursuant to the Freedom of Access Act.

The entry is:

Judgment vacated and remanded to the Superior Court with instructions to enter a judgment requiring the State to disclose the E-9-1-1 call transcripts associated with the Pak matter, as redacted pursuant to 25 M.R.S. § 2929(2)-(3) (2012).

### All Citations

82 A.3d 104, 41 Media L. Rep. 2673, 2013 ME 100

---

### Footnotes

- 1 The Reporters Committee for Freedom of the Press, the New England First Amendment Center, the Maine Association of Broadcasters, the Maine Freedom of Information Coalition, the Maine Press Association, and the Associated Press have filed a joint amicus curiae brief in support of MaineToday's position.
- 2 Pak, was charged by criminal complaint on December 31, 2012, and held without bail. *State v. Pak*, ALFSC-CR-2012-2747 (Me.Super. Ct., York Cty.). On February 5, 2013, he was indicted on two counts of intentional or knowing murder, 17-A M.R.S. § 201(1)(A) (2012); one count of aggravated attempted murder (Class A), 17-A M.R.S. § 152-A(1) (2012); one count of elevated aggravated assault (Class A), 17-A M.R.S. § 208-B(1)(A) (2012); and one count of burglary (Class A), 17-A M.R.S. § 401(1)(B)(1) (2012). Pak pleaded not guilty to all charges, is undergoing psychiatric evaluations, and remains in jail awaiting his trial.
- 3 Although MaineToday eventually requested “all E-9-1-1 transcripts in connection with all active homicide investigations and all ongoing homicide prosecutions, including but not limited to the three calls on the day of the James Pak shooting,” the parties' argument focuses only on the Pak transcripts, and those are the only transcripts we consider in this appeal.
- 4 The State, as represented by the Attorney General's office, apparently accepted the ultimate responsibility for responding to MaineToday's requests.
- 5 “Cases decided pursuant to FOIA inform our analysis of Maine's FOAA.” *Blethen Me. Newspapers, Inc. v. State*, 2005 ME 56, ¶ 13, 871 A.2d 523.
- 6 “The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up to.*” *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (quotation marks omitted).
- 7 A “public record” is  
  
any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business.

1 M.R.S. § 402(3) (2012).

- 8 To the extent we have suggested that the party who submitted a FOAA request bears the burden of establishing a FOAA violation, we clarify now that it is the agency's burden—in denying the request, before the Superior Court, and before us—to show that some exception to FOAA applies. *See, e.g., Yusem v. Town of Raymond*, 2001 ME 61, ¶ 16, 769 A.2d 865; *Chase v. Town of Machiasport*, 1998 ME 260, ¶ 9, 721 A.2d 636.
- 9 Although MaineToday filed its FOAA request with the Bureau of Consolidated Emergency Communications, that agency is part of the Department of Public Safety and provides call-taking and dispatching services for municipalities and entities that do not have their own public safety answering point. 25 M.R.S. §§ 1533, 2923–A (2012). It is the Emergency Services Communication Bureau, within the Public Utilities Commission, that administers the E–9–1–1 system and maintains E–9–1–1 records. 25 M.R.S. § 2926(1), (6) (2012).
- 10 The statute contains exceptions that allow the disclosure of E–9–1–1 audio recordings, including “confidential information” from those recordings, to certain agencies for specific purposes. 25 M.R.S. § 2929(2)(A)–(D), (4)(A)–(D) (2012). None of these exceptions applies here.
- 11 The issue of redaction itself is also the subject of some dispute. The statute requires the excising of confidential information from an otherwise public document. 25 M.R.S. § 2929(1)–(3) (2012); *see Springfield Terminal Ry. Co. v. Dep't of Transp.*, 2000 ME 126, ¶ 11 n. 4, 754 A.2d 353. In some instances, however, the information “cannot be dissected into sensitive and nonsensitive information because [it is contained in] a single, integrated [document].” *Anastos v. Town of Brunswick*, 2011 ME 41, ¶ 12, 15 A.3d 1279. The Superior Court in this matter determined that redaction was not appropriate: “Due to the abstract nature of the danger, redacting the transcripts is not feasible....” The State does not argue that the transcripts here are too integrated with confidential information to redact, but rather that “surgical redaction” is too burdensome for it to accomplish. The statute contains no exception to disclosure based on the onerousness of the task, however.
- 12 The intentional dissemination of confidential intelligence and investigative information is a Class E crime. 16 M.R.S. § 614(4) (2012).
- 13 To the extent MaineToday suggests that information compiled in the investigation of a crime only qualifies as intelligence or investigative information if it was compiled by a criminal justice agency, it has misread the plain terms and structure of the statute, which provides for two distinct alternatives. 16 M.R.S. § 611(8) (2012).
- 14 There is no dispute that the information requested by MaineToday does not constitute “criminal history record information,” defined as “notations or other written evidence of an arrest, detention, complaint, indictment, information or other formal criminal charge relating to an identifiable person,” including “the identification or description of the person charged and any disposition of the charge.” 16 M.R.S. §§ 611(3), (8) (2012).
- 15 Maine Today suggests that even if the copies of the transcripts in the police and prosecutors' files are confidential pursuant to section 614, the copies in the Bureau files are not, given that the transcripts continue to be the property of the Bureau no matter where they are stored or how they now are being used, *see* 25 M.R.S. §§ 2926(6), 2929(3) (2012). This argument is not persuasive. We have held that the “location of the document has no bearing on its status” unless the statute affording confidentiality states that such confidentiality depends on where the information is physically kept. *S. Portland Police Patrol Ass'n v. City of S. Portland*, 2006 ME 55, ¶ 8, 896 A.2d 960; *see Cyr v. Madawaska Sch. Dep't*, 2007 ME 28, ¶ 17, 916 A.2d 967 (Calkins, J., dissenting) (“The physical location of the information is not important.”). Indeed, allowing the dissemination of the Bureau version of a transcript while maintaining the statutory confidentiality of the AG's identical copy of the same transcript would render the purpose of that statutory confidentiality a complete nullity. The danger is not, as MaineToday contends, that law enforcement can render confidential any document merely by placing it in a police file, but instead that one agency would disclose a document that another agency is entitled to keep confidential. *See Lewiston Daily Sun v. City of Lewiston*, 596 A.2d 619, 622 (Me.1991) (“[T]he consequences

of an erroneous public release are irreversible.”). In fact, the Legislature clearly intended that the requirements of the CHRIA, in conjunction with those of the ESC, be rigorous enough to preclude the sheltering of a public document in an unrelated confidential file. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989) (stating that “[e]vasional commingling” is prevented by the language of the statute requiring consideration of the nature of each document).

- 16 As a practical matter, this may need to be accomplished through the submission of sealed files or an *in camera* review. *See Springfield Terminal Ry. Co.*, 2000 ME 126, ¶ 14, 754 A.2d 353.
- 17 The State also asserted that disclosing the transcripts would interfere with its ability to impanel an impartial jury pursuant to 16 M.R.S. § 614(1)(B), and would invade the personal privacy of those involved pursuant to 16 M.R.S. § 614(1)(C). The Superior Court determined that the State did not meet its burden as to either of these two grounds, and the State did not appeal those portions of the court's decision. Thus, we do not consider the State's contentions that it established these two alternative bases for maintaining the confidentiality of the Pak transcripts because they are not preserved for appellate review. *See M.R.App. P. 2(b)(4)*; *Langevin v. Allstate Ins. Co.*, 2013 ME 55, ¶ 6 n. 4, 66 A.3d 585 (stating that when a party does not cross-appeal, its contentions of error by the trial court are not preserved for appellate review); *Lyle v. Mangar*, 2011 ME 129, ¶ 22, 36 A.3d 867 (same); *Millien v. Colby Coll.*, 2005 ME 66, ¶ 9 n. 3, 874 A.2d 397 (same).
- 18 By the time MaineToday filed its petition with the Superior Court, Pak had already been indicted on the five counts.
- 19 Even the Superior Court was unable to determine any specific evils that disclosure of the transcripts would cause, referring to the possibility of any resulting harm as “abstract,” “hypothetical[ ],” and “impossible to conceive.” Such unidentified and speculative harms are not the types of harm that FOAA seeks to prevent. FOAA's exceptions are to be narrowly construed to serve its larger purpose of transparency in government. 1 M.R.S. § 401; *Citizens Commc'ns Co. v. Att'y Gen.*, 2007 ME 114, ¶ 9, 931 A.2d 503.



**Right to Know Advisory Committee**  
September 23, 2024 (Hybrid: Zoom and Room 228)  
Meeting Summary

Convened 1:02 p.m. in person and remote on Zoom; public access on Legislature's website at:  
<https://legislature.maine.gov/audio/#228?event=91783&startDate=2024-09-23T13:00:00-04:00>

**Present in Room 228:**

Rep. Erin Sheehan  
Jon Bolton  
Lynda Clancy  
Julie Finn  
Kevin Martin  
Judy Meyer  
Connor Schratz  
Eric Stout

**Remote:**

Amy Beveridge  
Justin Chenette  
Jen Lancaster  
Brian MacMaster  
Kim Monaghan  
Tim Moore  
Cheryl Saniuk-Heinig

**Absent:**

Sen. Anne Carney  
Linda Cohen  
Betsy Fitzgerald

**Staff:**

Lindsay Laxon  
Anne Davison  
Elena Roig  
Sam Senft

**Welcome and introductions**

Rep. Erin Sheehan convened the meeting and all members introduced themselves and identified the interests they were appointed to represent on the Advisory Committee.

**Subcommittees and topics for full committee review**

Staff reviewed the subcommittees established at the last Advisory Committee meeting and noted that members are still able to participate in subcommittees if they wish. Two of the subcommittees, Public Employee Disciplinary Records Subcommittee and the Burdensome FOAA Requests Subcommittee held their first meetings in the morning on September 23<sup>rd</sup>.

Regarding issues and topics for the full committee review, staff also advised that they had contacted the Maine Chiefs of Police Association regarding the recommendation in last year's report on the reporting on or releasing information related to public safety incidents and ongoing criminal investigations, but they had not yet been able to schedule an update to the Advisory Committee from the Association. Staff will follow up with the Association to see if someone would be available for the Advisory Committee's next meeting.

**Statutory requirements and guidance regarding public employee use of personal email**

Staff reviewed a memo to the Advisory Committee regarding the use of personal email and other personal communication methods by public employees under FOAA. The members discussed concerns about the level of familiarity individuals subject to FOAA's requirements may have with their obligations to retain public records. Rep. Sheehan asked to see materials for trainings on this topic that public employees may

receive to see if personal emails and devices and personal communication technologies are addressed. Jon Bolton asked if there are public officials who are not provided with maine.gov email accounts and noted that compliance with record retention requirements may be more difficult when emails are on non-state email accounts. Eric Stout responded that there are many boards and commissions that do not have maine.gov email addresses and in those cases, members use their personal or professional email accounts to conduct their board or commission-related business. He added that the State of Maine has policies in place prohibiting the use of personal email accounts and violations of that policy could result in the employee being subject to a disciplinary process. Rep. Sheehan expressed interest in finding out whether boards and commissions receive training regarding FOAA/record retention and what is contained in those materials; staff will look into this question.

### **Update from Brenda Kielty**

Brenda Kielty, the Public Access Ombudsman, shared her annual report with the Advisory Committee members and explained her role as the Ombudsman. Her role involves getting involved early in the process and providing an informal dispute resolution process, but she noted that she does not adjudicate disputes or provide advocacy for one party or the other. Ms. Kielty specifically directed members' attention to the chart on page 10 of her report which provides data on FOAA records requests that have response times in excess of 6 months or a year. This data is provided by responding agencies and Ms. Kielty shared some specific comments from these agencies regarding the longer response times. In several cases, the requestor did not respond for a period of time to agency questions or time and cost estimates, which increased the overall time that the request was considered open. She shared that the Department of Public Safety (DPS) had noted an increase in the complexity of the requests it had received for the prior year. Judy Meyer commented that the shooting in Lewiston, Maine may have caused an increase in the number and complexity of the FOAA records requests received by DPS.

In connection with the Advisory Committee's prior discussion of training for employees, Ms. Kielty noted the distinction between the requirements of FOAA and the record retention schedules. While the FOAA trainings she provides touch on record retention requirements, she explained that private individuals such as those serving on boards or commissions may not be used to retaining records or having their records subject to public inspection in the same way as state employees.

Lynda Clancy asked if Ms. Kielty needs additional resources for her work. Ms. Kielty explained that while she is a part of the Office of the Attorney General (OAG), she is the only one doing this work and if her role were to be expanded, she would need additional resources. Eric Stout asked what an expansion of the role of the Public Access Ombudsman would look like. Ms. Kielty explained that her current role does not provide for subpoena power or other authorities that one may associate with the OAG and she believes she would need an additional statutory grant to exercise such authority. Jon Bolton noted that the OAG has authority under FOAA to commence civil actions, but that has traditionally been used in only exceptional circumstances.

### **Committee discussion of unfulfilled requests**

This issue was raised at the first Advisory Committee meeting, as members were concerned about requests for public records that go unfulfilled. Rep. Sheehan shared with the Advisory Committee a situation in which an individual submitted a request for records pursuant to FOAA, received the acknowledgement and, after not receiving a response for a period of time, followed up and was told that the records were not public. Judy Meyer commented that the Advisory Committee has anecdotally heard of instances of unfulfilled requests, but the challenge is in getting more information about the circumstances of these requests. Rep. Sheehan asked if the RTKAC has requested specific information on this topic in the past; staff will look back at past meeting records for any historical data that may be useful. Tim Moore suggested that agencies could send a survey regarding unfulfilled requests and Rep. Sheehan commented that there may be resource challenges that make that difficult to implement. Eric



Stout added that the statute may not be specific enough with requiring a reason for a denial of a request for records. Brian MacMaster indicated that there is a Maine Law Court decision that addresses denial reasons. Staff will share this decision with the members.

**Public comment**

The Advisory Committee had invited public comment, written and/or oral, at the meeting regarding additional topics the Advisory Committee could consider in 2024. No members of the public provided comment.

**November meeting date**

At the last meeting, the Advisory Committee had discussed the possible need for a fifth meeting date. Rep. Sheehan asked members if they are available for a November 18<sup>th</sup> meeting. Staff will send out an email to members to see who will be unavailable on that date in the event that Advisory Committee decides to hold five meetings.

Lynda Clancy asked that the Advisory Committee discuss possible expansion of the Public Access Ombudsman's role at the next meeting and asked for information regarding funding. Staff will look to find funding information and include this topic on the agenda for the next meeting.

The meeting was adjourned at 2:27 p.m.