Subcommittee of the
RIGHT TO KNOW ADVISORY COMMITTEE
Public Employee Disciplinary Records Subcommittee

Thursday, November 12, 9:00am

Location: Cross State Office Building, Room 214 (Hybrid Meeting)
Public access also available through the Maine Legislature's livestream:
https://legislature.maine.gov/Audio/#214

1. Introductions
2. Overview of meeting materials
3. Further ideas and discussion on how to define disciplinary action or a tiered system
4. Further discussion on developing and sending a survey or outreach to stakeholders to collect feedback
5. Recommendations and next steps
6. Adjourn

Public Employee Disciplinary Records Subcommittee

Notes from October 23, 2026 Subcommittee Discussion*

Proposal #1 for Discussion:

Levels of Potential Disciplinary Conduct	
Performance and Attendance	**Level 1**
Repeated or Willful Policy Violations	**Level 2**
Misconduct that Harms Others or Harms the Public Trust	**Level 3**
Breach of the Public Trust, Harm to Others (Bodily or Emotional)	**Level 4**
Criteria to Consider	
Was there intent in the conduct or was there carelessness?	*What is the employee's position? (Are they in a position of authority, specifically?)*
Was the allegation in any way substantiated or was this an unfounded complaint that might have a retaliatory nature comprised in it?	*The value in the public's awareness of this conduct or allegation.*

Proposal #2 for Discussion:

Levels of Potential Disciplinary Conduct and Disciplinary Outcome			
Minor	Conduct of low severity	Requiring some type of either verbal counseling or coaching (nothing written)	**Level 1**
Moderate	Conduct that is repeated or willful/repeated issues	Includes a written reprimand or a performance improvement plan	**Level 2**
Severe	Conduct that is a severe violation	Would result in either a formal suspension or demotion	**Level 3**
Critical	Conduct that is critical or egregious	Resulting in either immediate suspension or dismissal	**Level 4**

**Please note: This document reflects only initial ideas as discussed at the October 23, 2026 meeting. Members noted during the October 23, 2026 meeting that these ideas were shared as a starting point for further discussion at the November 12, 2026 meeting.*

Participant List Excerpted from the 2025 Report Prepared by the Maine State Archives and First Amendment Coalition

TO:	Maine Right to Know Advisory Committee
FROM:	Maine State Archives and New England First Amendment Coalition
RE:	Public Employee Discipline Records Stakeholder Workshop on June 12, 2025
DATE:	August 14, 2025

Introduction and Participants

On June 12, 2025, the Maine State Archives convened a stakeholder discussion on behalf of the Right to Know Advisory Committee to discuss a potential shift to a tiered retention and disclosure system of public employee disciplinary records. Attendees represented a range of state and local agencies, including the Maine State Police, the Maine State Archives, the Maine Education Association, as well as media and freedom of information organizations, including the Maine Freedom of Information Coalition, the Sun Journal, and the New England First Amendment Coalition.

Attendees

- Steve Collins, Sun Journal
- Christian Cotz, Maine State Archivist
- Jesse Hargrove, President, Maine Education Association
- Judith Meyer, Maine Freedom of Information Coalition
- Lincoln Ryder, Interim Executive Director, Maine Criminal Justice Academy
- Lt. Col. Brian P. Scott, Maine State Police
- Justin Silverman, Executive Director, New England First Amendment Coalition
- Christie Young, Human Resources Director at City of Augusta, Maine

Absent

- Steve Bailey, Executive Director, Maine School Management Association
- Mark Brunton, President, MSEA
- Kate Cough, Editor, The Maine Monitor
- Matt Dudley, Director of Organizational Development, State of Maine
- Toni Dyer, Maine County Commissioners Association
- Tom Feeley, General Counsel at MSEA-SEIU Local 1989

MSA Staff

- Tammy Marks, Deputy Director
- Susan Verrier, Records Management Analyst II
- Tiffany Tattan-Awley, Records Management Analyst I

Sent Friday, November 7, 2025

Good afternoon_____,

I am writing on behalf of the Right to Know Advisory Committee, an on-going advisory council, created by Public Law 2005, chapter 631, with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's Freedom of Access laws. The Right to Know Advisory Committee was created to serve as a resource and advisor about Maine's Freedom of Access laws and may make recommendations for changes in statutes to improve public access to records and proceedings and to maintain the integrity of the Freedom of Access laws. Each year, the Committee assembles a select group of subcommittees dedicated to further examination of topics requested of the Advisory Committee for consideration.

This year, the Right to Know Advisory Committee has reconvened a subcommittee dedicated to further exploration of issues related to public access to disciplinary records of public employees. As part of its work this interim, the subcommittee has asked me to contact the [name of organization] to see if you would be willing to share your perspective and the perspective of the public employees your organization serves on the following topics presented for consideration this year.

REQUESTED PERSPECTIVE

At the subcommittee's November 6, 2025 meeting (recording here), members heard from a representative of the Maine State Police to learn about the Maine State Police's Office of Professional Standards policy requiring the completion of any misconduct investigation of an employee to the point of completion, even if an employee who is the subject of the investigation has departed from their employment with the Maine State Police prior to the conclusion of the investigation (such as a resignation or a retirement).

QUESTION 1: From the perspective of your organization and the public employees your organization represents, please share some thoughts about this policy**.** How would your organization or its members feel about a policy requiring the completion of any misconduct investigations of the employees that your organization represents even if an employee who is the subject of the investigation has left their position?

QUESTION 2: From the perspective of your organization and the public employees your organization represents, would it be beneficial for state law to establish uniform definitions for the following terms: "discipline," "suspension," and "final agency action?"

QUESTION 3: From the perspective of your organization and the public employees your organization represents, is employee misconduct best handled through credentialing regulations (e.g., a governing body issuing a suspension of an employee's certification after findings of misconduct) or between an employee and their direct supervisor(s)?

If your organization may be willing to provide any written comments or feedback in response to these questions, please submit any written comments via email to Advisory Committee staff at XXXX@legislature.maine.gov **by Friday, November 14, 2025 at 5:00PM**. If you have any questions, please do not hesitate to contact Advisory Committee staff via email or call 207-287-1670.

Thank you for your time and consideration of this request.

(3) Employment of an individual without the appropriate certification, except in strict accordance with the terms of this Section, shall be a violation of Section 4.2.B of this rule.

(4) A waiver shall be granted to an applicant who receives inaccurate, incomplete or untimely information or action from the Department, a SAU or a local/regional consortium. The waiver must be for a reasonable period to permit the applicant time to complete certification requirements.

(5) A waiver cannot be granted to an individual who is seeking an endorsement in special education.

B. **Course Waivers, Exceptions and Equivalences**

(1) The course requirement for teaching students with an exceptionality in the regular classroom may be documented through completion of an approved course, in-service, or C.E.U.s.

(2) For initial certification, a maximum of twenty four (24) semester hours of course requirements may be met through documenting, to the satisfaction of the Commissioner, that the applicant has taught the course at a post-secondary college or university for at least two semesters within the last 10 years.

(3) Course requirements may be met through demonstration of content knowledge using summative exams such as the College Level Examination Program (CLEP) Exam(s) with a minimum score of 50 on subject examinations for courses not already taken, or using portfolio evidence documenting equivalent knowledge/competencies.

(4) Student teaching may be waived upon documentation of one school year of successful teaching in Maine in the endorsement area, as long as the Commissioner has granted a waiver or the teacher has a conditional certificate to teach prior to the end of the school year. Student teaching may also be waived upon documentation of one school year as an apprentice or resident teacher in a Maine approved teacher apprenticeship or residency program.

SECTION 7. Revocation, Suspension, Denial, and Nonrenewal of a Credential

1. **Grounds for Revocation and Suspension**: The following shall be grounds for revocation or suspension:

A. Evidence, for example a Permanent Protection from Abuse or Protection from Harassment order, that a holder has injured the health or welfare of a child through physical, or sexual abuse or exploitation shall be grounds for revocation or suspension of a credential. Notwithstanding Title 5, Chapter 341, a certified court record that a person certificated under this Title was convicted in any state

or federal court of a criminal offense involving the physical or sexual abuse or exploitation of a child within the previous five (5) years shall be sufficient grounds for revocation or suspension of that person's certificate.

B. Evidence of a criminal conviction pursuant to 5 M.R.S.A. §§ 5301-5303: This applies to conviction information received by the Department through the CHRC or any other means. It is the applicant's burden to prove to the Commissioner's satisfaction that he or she is sufficiently rehabilitated to warrant the public trust.

C. The practice of fraud, deceit, or misrepresentation in obtaining a credential from the Commissioner, or in connection with any services rendered within the scope of the certificate, authorization, or approval, shall be grounds for revocation or suspension of the credential. This includes answering "no" to any question on whether the applicant has been convicted of a crime when subsequent evidence indicates that there is a conviction. The Commissioner may refer cases of fraud to the Attorney General's Office for possible criminal prosecution.

D. Gross Incompetence: Gross incompetence shall be grounds for revocation or suspension of a credential. Gross incompetence includes, but is not limited to, the following:

(1) Conduct evidencing a clear and substantial lack of knowledge, ability, or fitness to perform the services rendered within the scope of the credential.

(2) Conduct evidencing a negligent disregard for the mental or physical health, safety, or welfare of children or that creates a substantial risk of injury as a result of physical or sexual abuse or exploitation, or hazing.

(3) Negligent or fraudulent completion or filing of any school reports required pursuant to the provisions of state or federal law or regulation.

(4) A mental or physical condition, as diagnosed by a physician or other professional competent to make such a diagnosis, that has resulted in the holder performing required duties in a manner endangering the health, safety, or welfare of children, or in the holder's inability to satisfactorily perform the services rendered within the scope of the credential.

(5) Refusal to perform, or repeated negligent disregard of, duties required to be performed by the provisions of state or federal law or regulation.

(6) Habitual intemperance in the use of alcohol or habitual use of narcotic or hypnotic or other substances, the use of which has resulted in, the holder performing required duties in a manner endangering the health, safety, or welfare of students or in the holder's inability to satisfactorily perform the services rendered within the scope of the credential.

(7) Harassment on the basis of sex, including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature in the following situations:

(A) Submission to such conduct is made either explicitly or implicitly a term, condition, or basis for decisions on educational benefits for a student;

(B) Such conduct has the purpose or effect of substantially interfering with a student's academic performance or creating an intimidating, hostile, or offensive educational environment, or

(C) Any other such conduct...

E. Suspension or revocation of a certificate in another jurisdiction: Where a Maine certificate has been issued upon the basis of a reciprocal certification agreement, the Maine certificate shall be revoked or suspended upon evidence, ~~in the form of a certified copy~~, that the authority issuing the original certificate has revoked or suspended the certificate.

F. Breach of superintendent's duty: The certificate of a superintendent of schools may be suspended or revoked for the knowing employment of personnel who do not hold the appropriate certification, authorization, or approval, or for the knowing assignment of educational personnel to duties for which they do not possess appropriate certification, authorization, or approval, as stated in Section 4.3 of this rule.

G. Violation of Code of Ethics and Practice Standards by a school psychologist shall be grounds for the revocation or suspension of the provider's certificate.

2. Administrative Hold

A. All credential holders must provide the Department with an email or address at which the Department may contact them with respect to their credential.

B. If the Department attempts to contact a credential holder at the address provided in subsection A above in order to obtain information with respect to the credential and receives no response, the Department will place the credential on administrative hold until the holder contacts the Department. In cases where an administrative hold is in place, the individual will be treated as if they do not hold the credential.

3. **Procedures for Revocation or Suspension Action**: Except as set forth in subsection (G) and (H), the procedures set forth in this section shall govern the Commissioner's investigation and disposition of matters which may result in the revocation or suspension of any certificate, authorization or approval issued under this Chapter and State Board of Education Rule Chapter 119:

A. **Preliminary Inquiry**: Upon receipt of a written complaint or upon his or her own motion, the Commissioner may initiate a preliminary inquiry concerning allegations that could lead to revocation or suspension of a certificate, authorization or approval.

If the preliminary inquiry indicates that the allegations are unfounded or that the actual basis of the allegations may be true but is not of sufficient gravity to warrant action, the Commissioner shall notify the certificate holder of the

substance of the complaint and any findings. The certificate holder shall be afforded an opportunity to respond in writing to the Commissioner's findings.

B. **Notice of Revocation or Suspension**: If the preliminary inquiry indicates that allegations may be true and are of sufficient gravity to warrant certification action, the Commissioner shall notify the certificate holder that the Department will conduct an investigation that could lead to revocation or suspension. The notice shall contain a general summary of the allegations.

C. **Delay of Commissioner's Action**: The Commissioner may elect to delay action pending completion of any related criminal proceeding and may rely on a criminal conviction to support certification action prior to resolution of any appeals. For the purposes of this chapter, conviction based on a plea of *nolo contendre* will have the same effect as a guilty plea.

D. **Determination of Grounds for Action**: If the Commissioner determines that there is reason to believe that the factual basis of a complaint or allegation is true and that grounds exist for certification action, the certificate holder shall be notified of the substance of the complaint or allegations and the specific grounds for action. The holder shall have 30 days to respond in writing.

E. **Informal Conference**: The Commissioner may request an informal conference with the holder. The certificate holder shall be given adequate notice of the conference and of the issues to be discussed. The holder may be represented by counsel at the informal conference.

F. **Disposition**: If after reviewing all available information, including any information provided by the certificate holder, the Commissioner finds that the factual basis of the complaint is true and that grounds exist for revocation or suspension, the Commissioner may:

(1) Enter into a consent agreement with the certificate holder which provides for the surrender, revocation or suspension of the certificate, authorization or approval. The agreement may contain reasonable conditions for the health, safety and welfare of children including, but not limited to, restrictions of grade levels or subjects taught, restriction of school-related extra-curricular activities, provisions for the education, professional improvement or rehabilitation of the certificate holder and terms designating conditions for reinstatement or identifying evidence of professional improvement or rehabilitation to be considered by the Commissioner on an application for reinstatement.

A consent agreement may be used to terminate a complaint investigation. A consent agreement or consent decree may also be used to terminate a proceeding in the Administrative Court if entered into by the certificate holder and the Attorney General with the approval of the Court.

(2) Refer the matter to the Attorney General with a request that a complaint seeking suspension or revocation be filed in Administrative Court.

G. **Revocation or Suspension by the Commissioner**: The Commissioner may suspend or revoke a certificate in the circumstances permitted by 5 M.R.S.A. Chapter §10004 without first following the provisions of subsections (A)-(F).

H. The procedures set forth in this section shall govern the Commissioner's investigation of alleged violations of the Code of Ethics or practice standards for school psychologists which may result in the revocation or suspension of the school psychologist certificate:

(1) Written complaints alleging violations of the code of ethics or practice standards will be referred by the Commissioner (or his/her designee) to the ethics/complaints consultant of the Advisory Committee of School Psychologists. The ethics/ complaints consultant must be a member of the Advisory Committee of School Psychologists and must be a school psychologist.

(2) The ethics/complaints consultant of the Advisory Committee of the School Psychologists shall review the written complaint. If it is determined that the alleged misconduct, even if true, would not constitute an actual violation of the Code of Ethics, the ethics/complaints consultant shall notify the complainant and the Commissioner's designee of this point.

Then the Commissioner's designee shall notify the individual of the alleged violation of the Code of Ethics and the Commissioner's finding that the alleged violation of the Code of Ethics was not warranted.

(3) If the ethics/complaints consultant determines the information provided by the complainant is insufficient to make a determination regarding the alleged misconduct, then the ethics/complaints consultant may send a written request to the designee, requesting clarification or additional information.

(4) If it is determined that the alleged misconduct, if substantiated, would constitute an actual violation of the Code of Ethics and could warrant certification action, then the ethics/complaints consultant will send a letter to the complainant notifying the complainant (and the Commissioner's designee) that the allegation tentatively will be investigated by the ethics/complaints consultant. The complainant shall be asked to sign a release authorizing that his/her name be revealed to the respondent, the individual against whom the complaint was made.

(5) If the complainant does not execute the release form, the ethics/complaints consultant will consult with the Commissioner's designee, and a decision will be made by the Commissioner regarding whether or not to further proceed.

(6) The ethics/complaints consultant will, in writing, within 15 days of the receipt of the signed release form, notify the respondent of the complaint as well as copy the Commissioner's designee. The letter shall describe the nature of the complaint as well as indicate the principle(s) that appear to have been violated, and request the respondent's cooperation in

obtaining a complete picture of the circumstances which led to the allegations. In the letter, the respondent shall be notified of the investigation which could lead to certification action, and the respondent shall be asked to provide, within 30 days of the date of the letter, a written statement outlining his/her view of the situation. If written permission has been obtained from the complainant, his/her name may be disclosed to the respondent depending on the complaint. A copy of the Code of Ethics may be enclosed.

(7) The ethics/complaints consultant shall review all available information, including any written information provided by the respondent, in the case and shall prepare a written report, attaching all available documents, for the Commissioner's designee. A copy of this confidential report shall be given to the chair of the Advisory Committee of School Psychologists. The report shall explain whether or not there appears to be a factual basis to the complaint and shall elaborate on whether or not grounds which relate to the violation of the Code of Ethics or practice standards seem to exist which would warrant certification action.

(A) The Commissioner's designee will review all documents that are received from the ethics/complaint consultant. As necessary, consultation will occur between the ethics/complaint consultant and the Commissioner's designee. A recommendation will be made by the Commissioner's designee to the Commissioner regarding whether or not certification action is warranted against the respondent.

(8) If the Commissioner determines that certification action is warranted, the certificate holder will be notified and the Commissioner will proceed as provided for in these rules.

4. **Reinstatement of a Surrendered, Suspended or Revoked Credential**: An individual may apply for reinstatement of a surrendered, suspended or revoked credential subject to the requirements of 20-A M.R.S.A. §13020(4), and to the provisions of any consent agreement, court order or administrative order pursuant to which the individual's earlier certificate, authorization or approval was surrendered, suspended or revoked. A reinstated credential shall be effective upon its date of issuance or upon such other designated date that is consistent with 20-A M.R.S.A. §13020(4) and with the provisions of any consent agreement, court order or administrative order pursuant to which the individual's earlier credential was surrendered, suspended or revoked.

Reinstatement of an individual whose credential was surrendered, suspended, or revoked for reasons of child abuse or exploitation, who seeks reinstatement under 20-A M.R.S.A. §13020(4).A, must demonstrate compelling evidence of rehabilitation sufficient to warrant the public trust for the Commissioner to grant reinstatement under 20-A M.R.S.A. §13020(4).B.

5. **Denial or Nonrenewal of Credential**

A. The Commissioner may deny an application for the initial issuance or renewal of any credential on the following grounds:

(1) Failure to meet standards set forth in Part I Sections 6, or Part II of this rule.

(2) Any ground set forth in Section 7.1 of this rule that could constitute grounds for revocation or suspension. With regard to 7.1.A, of this rule: Evidence that an applicant for initial credential or renewal has injured the health or welfare of a child through physical or sexual abuse or exploitation is grounds for a denial of a certificate, authorization or approval. Notwithstanding Title 5, Chapter 341, every person, who within five (5) years of the application for initial certification or renewal, has been convicted in any state or federal court of a criminal offense involving the physical or sexual abuse or exploitation of a child, may be presumed by the Commissioner to lack good moral character for the purposes of this rule. This presumption shall be a rebuttable presumption. Notwithstanding Title 5, Chapter 341, the Commissioner shall be entitled to consider all records of prior criminal convictions involving child abuse or exploitation in determining an applicant's eligibility for a certificate, authorization or approval.

B. The procedures that govern the Commissioner's investigation and disposition of matters that may result in the denial or non-renewal of an application for certification, authorization, or approval issued under this rule are set forth in State Board of Education Rule Chapter 119.

SECTION 8. Records and Reports

1. **Annual Reports by School Officials**: The superintendent of a SAU, the headmaster of an approved private school, or the Child Development Services director shall annually file such information regarding the employment of school personnel as the Commissioner may require consistent with Maine Department of Education and State Board of Education Rule Chapter 125. Failure to timely file required reports shall be grounds, following notice and an opportunity for a hearing, for the withholding of State subsidy from the SAU and for other certification action against the superintendent.

2. **Reports of Dismissals**: Superintendents shall file with the Department, within ten (10) days of issuance, the certificate of dismissal issued by the school board for any credentialed personnel.

3. **Access to Credentialing Records**

A. **Public Access to Records**: Any individual, upon written or oral request, shall be informed of the certification status of any individual subject to credentialing requirements. The credentialing status of an individual is deemed to be a public record.

B. **Confidential Records**

Bishop, Kristin

From: Bishop, Kristin
Sent: Tuesday, October 27, 2026 5:13 PM
To: J. Christopher Parr; Roig, Elena
Subject: RE: Question

Dear Chris,

Thank you for your inquiry.

You are correct that the Public Employee Disciplinary Records Subcommittee did not specifically discuss public accessibility to disciplinary records of Maine Judicial Branch employees or appointees as part of subcommittee discussion at the October 23 or October 16 meetings.

In response to your question about whether disciplinary records for Maine Judicial Branch appointees and employees are exempt from the FOAA, historically, it is my understanding that the state employee personnel records statute (5 M.R.S. §7070) has mostly been discussed in the subcommittee in the context of Executive or Legislative Branch employees as applicable, but it may remain an open question as to whether omission of specific mention to judicial branch employees means such statutory provisions do not apply, or whether the omission could be interpreted to mean the disciplinary records provision of 5 M.R.S. §7070 apply to judicial employees in the same manner as other state employees.

Judicial Branch personnel statutes are largely found in Title 4 and Title 26, Chapter 14. A parallel provision of 5 M.R.S. §7070 is not included specifically in the statutes otherwise governing judicial branch personnel matters.

I am sorry to not be able to provide a clearer answer. If you may wish for your inquiry to be shared directly with subcommittee members, please do not hesitate to let me know if you would like for me to pass this inquiry along to the subcommittee directly.

Most sincerely,
Kristin

From: J. Christopher Parr [redacted]
Sent: Saturday, October 24, 2026 11:26 AM
To: Bishop, Kristin <Kristin.Bishop@legislature.maine.gov>; Roig, Elena <Elena.Roig@legislature.maine.gov>
Subject: Question

This message originates from outside the Maine Legislature.

Kristin, Elena:

Good morning —

I have been following the discussion of the Public Employee Disciplinary Records Subcommittee of the Right to Know Advisory Committee, including the discussion during yesterday morning's meeting.

I have not heard any mention during the conversations about public accessibility to disciplinary records of Maine Judicial Branch appointees and employees.

Would such accessibility be exempt from the FOAA?

I ask this question solely in my personal capacity.

Best, C

J. Christopher Parr
Lewiston, ME
[redacted]

Wraight.Law

Wraight.Law, LLC, 5 Moulton Street (Suite 201), Portland, ME 04101
Tel: (207) 517 6680 (+ SMS and Fax). Email: marcus@wraight.law

November 8, 2026

By Email

Representative Rachel Henderson
Member, Judiciary Committee
2 State House Station
Augusta, ME 04333

Dear Representative Henderson:

Re RTKAC Subcommittee On Public Employee Disciplinary Records

I am writing this letter for you to pass to members of the subcommittee. I have watched recordings of the last two meetings and feel some input based on my experience is going to be helpful for future discussions.

As a criminal defense attorney who uses the Freedom of Access Act for police disciplinary records, I can speak about the utter chaos in implementation of the current statutes related to this issue. Certain terms need statutory definitions because some police departments are driving a coach and horses through the gap left by their absence. My interest started because it became very clear very quickly when I started practicing in Maine that prosecutors were simply not disclosing ANY *Brady / Giglio* material in discovery. This is starting to improve, but slowly and often applied incorrectly.

Firstly, member Cheryl Saniuk-Heinig is absolutely spot on about the problems of defining what *Brady* and *Giglio* material actually is (and is not). It does not end the discussion. That difficulty alone is important for the *broader* context of openness and retention of records for disclosure to know (and for a defense attorney to check) what is and is not being given in discovery in criminal cases. It is far more than the 'lying liar' narrow definition often used by prosecutors. For instance, a police officer who says they have never been disciplined, but been given reprimands for anything, makes those records potential *Giglio* material. This material is not defined by their contents but the ability to impeach on a misstatement in testimony – whatever that discipline is and for whatever reason. Also, *Brady / Giglio* is a post-conviction standard – materiality of a verdict. In the pre-trial context it is impossible to know how a particular issue will play out in a trial yet to happen.

There is also a general presumption both in statute and by the subcommittee that all police departments have union collective bargaining agreements. Some do not. That, in turn, relies on how discipline is imposed (outside of a formal arrangement of tiered discipline in a CBA) and that discipline is even being imposed in the first place or in the same way.

The discussion for the last two meetings has focused on tiers of discipline – and member Judy

Meyer is absolutely right about the problem of that approach. The one issue inadequately addressed in discussion as a starting point (to then work backwards) is how tiers relate to disclosure under FOAA. However, as Ms. Meyers stated, not only is there potential abuse via favoritism, there is an underlying assumption that discipline is imposed (as Ms. Meyers outlined) and if it is that it is for the stated reason given in a record. As she stated, I have been told that it is common that a serious violation can be disguised as something else, made to appear minor, or couched in vague terms, like 'conduct unbecoming.' So, the absolute necessity for openness relates directly back to *Brady / Giglio* material to even know that discipline was imposed and look behind what happened. A hidden 'minor' record may not be as minor as it appears. Not only that but every disciplinary action relates to a violation of a policy or procedure, and that alone makes it potentially useful impeachment material. That is also why there must be openness to *all* discipline for a sufficient period to enable disclosure. Realistically, a uniform violation or tardiness is going to have limited impeachment value – but it still does have value and must be public, at least for a certain period. The fact that something may be embarrassing is *exactly why* it should be public. Mistakes happen in any business involving people, and few people will care much about a minor infraction. But that is still no reason to keep it secret for all the reasons stated. We rely on the good faith of public actors. I hate to break it to some, but there are those who do not act in that way. The State Police is pretty good, as is Portland Police Department. As Judy Meyers also stated from her own experience, there are police departments I am aware of who have NEVER imposed discipline. Really? That does not pass the smell (or laugh) test. It is on the periphery where mischief resides.

This comes to another point. As stated, defining *Brady / Giglio* material is difficult (hence why the Right to Know Advisory Committee should always err on the side of openness and broad disclosure). The obligation to disclose records by prosecutors remains, whether records are retained or not. But, **legal definitions are desperately needed** for what *discipline* is, and what constitutes a *final record* of discipline. There are constant problems I come across about these terms. This MUST be a focus of the RTKAC and this subcommittee because that gap is causing some departments to play fast and loose with their own definitions, leading to a lack of disclosure and openness. One police chief thinks that the failed attempted definition of financial impact is what constitutes discipline. There is nothing to counter that view in the law. The kind of actions taken in the progressive discipline process (again assuming the existence of a CBA which is not universal) range from termination, suspension, oral or written warnings, oral or written reprimands, and counseling / correcting memos. Some or all of those would, could or should, cover the definition of a what a 'final record' of discipline encompasses. Despite assertions made in the subcommittee, a record *is* made of 'oral' warnings and reprimands and has been released in response to my FOAA requests, as have memoranda. Some agencies do not regard them as such and refuse to disclose them. A starting point is requiring *in the relevant statutes*, that when a warning or reprimand is done, it is documented for public release, however it is categorized. These are also specific enumerated documents that can be put into statutes defining a public final record of discipline. Counseling or corrective memorandums almost always dealing with a policy, procedure, or legal violation are therefore potential *Brady / Giglio* material. Their disclosure, and disputes about whether they are covered, relate to a desperately-needed statutory definition of 'discipline.'

So, on a broader note, the difficulty of outlining the meaning of discipline has been expressed, but it can be defined. The question then becomes how, *in statute* it *should* be defined for the purposes of FOAA. Discipline does not just mean financial loss. I certainly do not want to appear facetious, but a dictionary helps. According to Merriam-Webster, "discipline" is both a noun and a verb that variously involves "control gained by enforcing obedience or order," "behavior in accordance with

rules: orderly conduct" punishment (which, in turn, can be both "loss" or "penalty" but has the synonyms of "chastisement" and "correction" that would include, for the purposes of disciplinary records, a *corrective* or *counseling* memorandum, warning, or reprimand), "a rule or system of rules governing conduct or activity," "to punish or penalize as a means of enforcing obedience and perfecting moral character," "to train or develop by instruction and exercise especially in self-control," "to bring (a group) under control," and "to impose order upon." In the context of "penalize" as used above, there are also the synonyms of "criticize" and "castigate." All of these cover the list of actions currently taken by law enforcement agencies against staff in the documents I listed – from termination to a corrective memo and everything in between. The question then becomes whether they *should* be covered as a matter of policy and if NOT covered, why not. I would certainly hope the RTKAC and this subcommittee should err, as does the intent of the statute, on the side of disclosure. After all, we are talking ultimately (with statute) about the legislature holding the actions of the executive to account – and people with enormous power at that.

It has been suggested that some kind of voluntariness arrangement should be in place over statute. I can assure you this does not and will not work. For criminal statutes, by way of example, the intent of the legislature will take second place to a prosecutor's charging decision if a statute's original purpose in charging a particular offense can be warped and shaped to fit completely unrelated behavior and even remotely pass a laugh test. Statutes only work when they are clear, unambiguous, clearly defined, and intent is made clear. There also has to be clear remedy for a violation, something missing from so many statutes in this state.

In the last meeting, there was a discussion about a survey asking law enforcement agencies and public entities about a tiered approach to discipline (and one assumes disclosure of records). Heaven forbid even police unions were brought in as among those whose opinion mattered. Given their support for the recent narrow interpretation of discipline that failed, I think their view is clear. They want as many disciplinary records to be kept as far from public eyes as possible. Seek opinions from others, such as those involved in police accountability and criminal defense attorneys. Judy Meyer also speaks a lot of sense. Her industry represents what the public should see.

So, in sum, **please** focus on legal definitions to make what already exists work as intended. If the subcommittee intends to go down some kind of tiered structure for record retention and public disclosure, bear in mind the prosecutorial obligation of discovery and the rights of criminal defendants to have access to it. Whatever is tiered should ultimately be about disclosure, not what discipline is covered by each tier. The primary focus of that discussion must also be about what should be public rather than getting wrapped around the axle about the definitions for each tier. Work out what should be disclosed and work backwards from that. Lastly, seek more opinions. Foxes can have strong views about henhouses – but they may not be the best opinions to seek.

Yours truly,



Marcus Wraight, Esq.