RIGHT TO KNOW ADVISORY COMMITTEE

Thursday, September 13, 2018
4:00 p.m.
State House Room 438

Meeting Agenda

1. Introductions
2. Review and discussion of the Twelfth Annual Report of the Right to Know Advisory Committee (January 2018) and actions related to those recommendations
3. Report of Subcommittee on Penalties, Judy Meyer, Chair
4. Subcommittee to review existing public records exceptions: Plans
5. Discussion of issues and topics to cover
6. Establish future meeting dates
7. Adjourn

Not enacted
(failed 2/3 vote
in House)

128th MAINE LEGISLATURE

SECOND REGULAR SESSION-2018

Legislative Document **No. 1821**

H.P. 1263 House of Representatives, February 5, 2018

An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Freedom of Access Training for Public Officials

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Reported by Representative MOONEN of Portland for the Joint Standing Committee on Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph G.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

Robert B. Hunt

ROBERT B. HUNT
Clerk

JUD: Majority OTPA
Minority ONTP

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 1 MRSA §412, as amended by PL 2011, c. 662, §7, is further amended to read:

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

1. Training required. A public access officer and an ~~elected~~ 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 ~~elected~~ official takes the oath of office to assume the person's duties as an ~~elected~~ official or the person is designated as a public access officer pursuant to section 413, subsection 1.

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;

B. Procedures and requirements regarding complying with a request for a public record under this chapter; and

C. Penalties and other consequences for failure to comply with this chapter.

An ~~elected~~ 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.

3. Certification of completion. Upon completion of the training course required under subsection 1, the ~~elected~~ 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 ~~elected~~ 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.

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

A. The Governor;

B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;

C. Members of the Legislature elected after November 1, 2008;

E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;

F. Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments;

G. Officials of school administrative units; and

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 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.

SUMMARY

Current law requires officials elected to certain positions to complete training on the requirements of the Freedom of Access Act but does not require officials appointed to those positions to complete that training. This bill implements the recommendation of the Right To Know Advisory Committee that appointed officials also be required to complete the training.

L.D. 1821

Date: 3/23/18 Majority (Filing No. H-680)

JUDICIARY

Reproduced and distributed under the direction of the Clerk of the House.

STATE OF MAINE

HOUSE OF REPRESENTATIVES

128TH LEGISLATURE

SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 1263, L.D. 1821, Bill, "An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Freedom of Access Training for Public Officials"

Amend the bill by inserting after the title and before the enacting clause the following:

'**Mandate preamble.** This measure requires one or more local units of government to expand or modify activities so as to necessitate additional expenditures from local revenues but does not provide funding for at least 90% of those expenditures. Pursuant to the Constitution of Maine, Article IX, Section 21, 2/3 of all of the members elected to each House have determined it necessary to enact this measure.'

SUMMARY

This amendment is the majority report of the Joint Standing Committee on Judiciary. It adds a mandate preamble to the bill. The costs incurred by local governments to comply with the bill's provisions have been estimated to be insignificant.

FISCAL NOTE REQUIRED

(See attached)

Revised: 03/05/18 mac

128th MAINE LEGISLATURE

LD 1821 LR 2889(02)

An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Freedom of Access Training for Public Officials

Fiscal Note for Bill as Amended by Committee Amendment A. (H-680)
Committee: Judiciary
Fiscal Note Required: Yes

Fiscal Note

State Mandate - Exempted

State Mandates

Required Activity	Unit Affected	Local Cost
Training appointed officials on the requirements of the Freedom of Access Act.	County Municipality School	Insignificant statewide

Pursuant to the Mandate Preamble, the two-thirds vote of all members elected to each House exempts the State from the constitutional requirement to fund 90% of the additional costs.

Not enacted

128th MAINE LEGISLATURE

SECOND REGULAR SESSION-2018

Legislative Document **No. 1831**

H.P. 1273 House of Representatives, February 8, 2018

An Act Concerning Remote Participation in Public Proceedings

Reported by Representative MOONEN of Portland for the Joint Standing Committee on Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph G.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

Robert B. Hunt

ROBERT B. HUNT
Clerk

JUD: Majority ONTP
Minority OTP

Be it enacted by the People of the State of Maine as follows:

PART A

Sec. A-1. 1 MRSA §403-A is enacted to read:

§403-A. Remote participation in public proceedings

1. Remote participation. This section governs participation in a public proceeding of a body subject to this subchapter by a member of that body when the member is not physically present. It is the intent of the Legislature that actions of those bodies be taken openly and their deliberations be conducted openly. Remote participation through telephonic, video, electronic or other similar means of communication may not be used to defeat the purposes of this subchapter as stated in section 401.

2. Prohibition. Except as provided in subsection 3, a body subject to this subchapter may not allow a member of the body to participate in any of its public proceedings through telephonic, video, electronic or other similar means of communication.

3. Exceptions. A member of the following bodies may participate in a public proceeding of the body when not physically present to the extent authorized in the respective statute:

A. The Finance Authority of Maine, as authorized in Title 10, section 971-A;

B. The Commission on Governmental Ethics and Election Practices, as authorized in Title 21-A, section 1002, subsection 2;

C. The Maine Health and Higher Educational Facilities Authority, as authorized in Title 22, section 2054, subsection 4-A;

D. The Maine State Housing Authority, as authorized in Title 30-A, section 4723, subsection 2, paragraph B-1;

E. The Maine Municipal Bond Bank, as authorized in Title 30-A, section 5951, subsection 4-A;

F. The Emergency Medical Services' Board, as authorized in Title 32, section 88, subsection 1, paragraph E; and

G. The Workers' Compensation Board, as authorized in Title 39-A, section 151, subsection 5-A.

PART B → Sunsets all authority on July 1, 2020.

Sec. B-1. 10 MRSA §971, as amended by PL 1995, c. 117, Pt. C, §1, is repealed.

Sec. B-2. 10 MRSA §971-A is enacted to read:

§971-A. Actions of the members

1. Quorum required. Seven members of the authority constitute a quorum of the members. The affirmative vote of the greater of 5 members, present and voting, or a

majority of those members present and voting is necessary for any action taken by the members. A vacancy in the membership of the authority does not impair the right of the quorum to exercise all powers and perform all duties of the members.

2. Emergency meeting. Notwithstanding any other provision of law, in a situation determined by the chief executive officer to be an emergency requiring action of the members on not more than 3 days' oral notice, an emergency meeting of the members may be conducted by telephone in accordance with the following.

A. A conference call to the members must be placed by ordinary commercial means at an appointed time.

B. The authority shall arrange for recordation of the conference call when appropriate and prepare minutes of the emergency meeting.

C. Public notice of the emergency meeting must be given in accordance with Title 1, section 406 and that public notice must include the time of the meeting and the location of a telephone with a speakerphone attachment that enables all persons participating in the telephone meeting to be heard and understood and that is available for members of the public to hear the business conducted at the telephone meeting.

This subsection is repealed July 1, 2020.

Sec. B-3. 21-A MRSA §1002, sub-§2, as amended by PL 2011, c. 389, §2, is further amended to read:

2. Telephone meetings. The commission may hold meetings over the telephone if necessary, as long as the commission provides notice to all affected parties in accordance with the rules of the commission and the commission's office remains open for attendance by complainants, witnesses, the press and other members of the public. Notwithstanding Title 1, chapter 13, telephone meetings of the commission are permitted:

A. During the 28 days prior to an election when the commission is required to meet within 2 business days of the filing of any complaint with the commission; or

B. To address procedural or logistical issues before a monthly meeting, such as the scheduling of meetings, deadlines for parties' submission of written materials, setting of meeting agenda, requests to postpone or reschedule agenda items, issuing subpoenas for documents or witnesses and recusal of commission members.

This subsection is repealed July 1, 2020.

Sec. B-4. 22 MRSA §2054, sub-§4, as amended by PL 2015, c. 449, §2, is further amended to read:

4. Powers of authority. The powers of the authority are vested in its members, and 5 members of the authority constitute a quorum at any meeting of the authority. A vacancy in the membership of the authority does not impair the right of a quorum to exercise all the rights and perform all the duties of the authority. An action taken by the authority under this chapter may be authorized by resolution approved by a majority of the members present at any regular or special meeting, which resolution takes effect

immediately, or an action taken by the authority may be authorized by a resolution circularized or sent to each member of the authority, which resolution takes effect at such time as a majority of the members have signed an assent to such resolution. Resolutions of the authority need not be published or posted. The authority may delegate by resolution to one or more of its members or its executive director such powers and duties as it considers proper.

~~The authority may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:~~

~~A. Each member can hear all other members, speak to all other members and, to the extent reasonably practicable, see all other members by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all members participating from other locations by videoconferencing or other similar means of communication;~~

~~B. Each member who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication identifies all persons present at the location from which the member is participating;~~

~~C. A member who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the member's attendance is not reasonably practical. The reason that the member's attendance is not reasonably practical must be stated in the minutes of the meeting; and~~

~~D. Each member who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate an action taken by the authority at the public proceeding.~~

Sec. B-5. 22 MRSA §2054, sub-§4-A is enacted to read:

4-A. Remote participation in meetings. The authority may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:

A. Each member can hear all other members, speak to all other members and, to the extent reasonably practicable, see all other members by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required

by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all members participating from other locations by videoconferencing or other similar means of communication;

B. Each member who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of communication identifies all persons present at the location from which the member is participating;

C. A member who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the member's attendance is not reasonably practicable. The reason that the member's attendance is not reasonably practicable must be stated in the minutes of the meeting; and

D. Each member who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate an action taken by the authority at the public proceeding.

This subsection is repealed July 1, 2020.

Sec. B-6. 30-A MRSA §4723, sub-§2, ¶B, as amended by PL 2015, c. 449, §3, is further amended to read:

B. The Maine State Housing Authority, as authorized by Title 5, chapter 379, must have 10 commissioners, 8 of whom must be appointed by the Governor, subject to review by the joint standing committee of the Legislature having jurisdiction over economic development and to confirmation by the Legislature. The 9th commissioner is the Treasurer of State who serves as an ex officio voting member. The Treasurer of State may designate the Deputy Treasurer of State to serve in place of the Treasurer of State. The 10th commissioner is the director of the Maine State Housing Authority who serves as an ex officio nonvoting member. At least 3 gubernatorial appointments must include a representative of bankers, a representative of elderly people and a resident of housing that is subsidized or assisted by programs of the United States Department of Housing and Urban Development or of the Maine State Housing Authority. In appointing the resident, the Governor shall give priority consideration to nominations that may be made by tenant associations established in the State. Of the 5 remaining gubernatorial appointments, the Governor shall give priority to a representative involved in the housing business and a representative of people with disabilities. The powers of the Maine State Housing Authority are vested in the commissioners. The commissioners may delegate such powers and duties to the director of the Maine State Housing Authority as they determine appropriate.

The Governor shall appoint the chair of the commissioners from among the 8 gubernatorial appointments. The chair serves as a nonvoting member, except that the chair may vote only when the chair's vote will affect the result. The commissioners shall elect a vice-chair of the commissioners from among their number.

Following reasonable notice to each commissioner, 5 commissioners of the Maine State Housing Authority constitute a quorum for the purpose of conducting its business, exercising its powers and for all other purposes, notwithstanding the existence of any vacancies. Action may be taken by the commissioners upon a vote of a majority of the commissioners present, unless otherwise specified in law or required by its bylaws.

~~The Maine State Housing Authority may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:~~

~~(1) Each commissioner can hear all other commissioners, speak to all other commissioners and, to the extent reasonably practicable, see all other commissioners by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all commissioners participating from other locations by videoconferencing or other similar means of communication;~~

~~(2) Each commissioner who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication identifies all persons present at the location from which the commissioner is participating;~~

~~(3) A commissioner who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the commissioner's attendance is not reasonably practical. The reason that the commissioner's attendance is not reasonably practical must be stated in the minutes of the meeting; and~~

~~(4) Each commissioner who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the commissioner not physically present during the public proceeding if the transmission technology is available. Failure to comply with this subparagraph does not invalidate an action taken by the Maine State Housing Authority at the public proceeding.~~

Sec. B-7. 30-A MRSA §4723, sub-§2, ¶B-1 is enacted to read:

B-1. The Maine State Housing Authority may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:

(1) Each commissioner can hear all other commissioners, speak to all other commissioners and, to the extent reasonably practicable, see all other commissioners by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all commissioners participating from other locations by videoconferencing or other similar means of communication;

(2) Each commissioner who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of communication identifies all persons present at the location from which the commissioner is participating;

(3) A commissioner who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the commissioner's attendance is not reasonably practicable. The reason that the commissioner's attendance is not reasonably practicable must be stated in the minutes of the meeting; and

(4) Each commissioner who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the commissioner not physically present during the public proceeding if the transmission technology is available. Failure to comply with this subparagraph does not invalidate an action taken by the Maine State Housing Authority at the public proceeding.

This paragraph is repealed July 1, 2020.

Sec. B-8. 30-A MRSA §5951, sub-§4, as amended by PL 2015, c. 449, §4, is further amended to read:

4. Officers of board; exercise of powers. The board of commissioners shall elect one of its members as chair and one as vice-chair and shall appoint an executive director who also serves as both secretary and treasurer. The powers of the bank are vested in the commissioners of the bank in office from time to time. Three commissioners of the bank constitute a quorum at any meeting of the commissioners. Action may be taken and motions and resolutions adopted by the bank at any meeting by the affirmative vote of at least 3 commissioners of the bank. A vacancy in the office of commissioner of the bank does not impair the right of a quorum of the commissioners to exercise all the powers and perform all the duties of the bank.

~~The board of commissioners may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:~~

~~A. Each commissioner can hear all other commissioners, speak to all other commissioners and, to the extent reasonably practicable, see all other commissioners by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all commissioners participating from other locations by videoconferencing or other similar means of communication;~~

~~B. Each commissioner who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication identifies all persons present at the location from which the commissioner is participating;~~

~~C. A commissioner who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the commissioner's attendance is not reasonably practical. The reason that the commissioner's attendance is not reasonably practical must be stated in the minutes of the meeting; and~~

~~D. Each commissioner who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the commissioner not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate an action taken by the bank at the public proceeding.~~

Sec. B-9. 30-A MRSA §5951, sub-§4-A is enacted to read:

4-A. Remote participation. The board of commissioners may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:

A. Each commissioner can hear all other commissioners, speak to all other commissioners and, to the extent reasonably practicable, see all other commissioners by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all commissioners participating from other locations by videoconferencing or other similar means of communication;

B. Each commissioner who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of

communication identifies all persons present at the location from which the commissioner is participating;

C. A commissioner who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the commissioner's attendance is not reasonably practicable. The reason that the commissioner's attendance is not reasonably practicable must be stated in the minutes of the meeting; and

D. Each commissioner who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the commissioner not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate an action taken by the bank at the public proceeding.

This subsection is repealed July 1, 2020.

Sec. B-10. 32 MRSA §88, sub-§1, ¶D, as amended by PL 2007, c. 274, §19, is further amended to read:

D. A majority of the members appointed and currently serving constitutes a quorum for all purposes and no decision of the board may be made without a quorum present. A majority vote of those present and voting is required for board action, except that for purposes of either granting a waiver of any of its rules or deciding to pursue the suspension or revocation of a license, the board may take action only if the proposed waiver, suspension or revocation receives a favorable vote from at least 2/3 of the members present and voting and from no less than a majority of the appointed and currently serving members. ~~The board may use video conferencing and other technologies to conduct its business but is not exempt from Title 1, chapter 13, subchapter 1. Members of the board, its subcommittees or its staff may participate in a meeting of the board, subcommittees or staff via video conferencing, conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection constitutes presence in person at such meeting.~~

Sec. B-11. 32 MRSA §88, sub-§1, ¶E is enacted to read:

E. The board may use videoconferencing and other technologies to conduct its business but is not exempt from Title 1, chapter 13, subchapter 1. Members of the board, its subcommittees or its staff may participate in a meeting of the board, subcommittees or staff via videoconferencing, conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this paragraph constitutes presence in person at such meeting.

This paragraph is repealed July 1, 2020.

Sec. B-12. 39-A MRSA §151, sub-§5, as amended by PL 2003, c. 608, §9, is further amended to read:

5. Voting requirements; meetings. The board may take action only by majority vote of its membership. The board may hold sessions at its central office or at any other place within the State ~~and shall establish procedures through which members who are not physically present may participate by telephone or other remote-access technology~~. Regular meetings may be called by the executive director or by any 4 members of the board, and all members must be given at least 7 days' notice of the time, place and agenda of the meeting. A quorum of the board is 4 members, but a smaller number may adjourn until a quorum is present. Emergency meetings may be called by the executive director when it is necessary to take action before a regular meeting can be scheduled. The executive director shall make all reasonable efforts to notify all members as promptly as possible of the time and place of any emergency meeting and the specific purpose or purposes for which the meeting is called. For an emergency meeting, the 4 members constituting a quorum must include at least one board member representing management and at least one board member representing labor.

Sec. B-13. 39-A MRSA §151, sub-§5-A is enacted to read:

5-A. Remote participation. The board shall establish procedures through which members who are not physically present may participate by telephone or other remote-access technology.

This subsection is repealed July 1, 2020.

PART C

Sec. C-1. 1 MRSA §431, sub-§4 is enacted to read:

4. Remote participation. "Remote participation" means participation in a public proceeding by a member of the body that is holding or conducting the public proceeding while the member is not physically present at the location of the public proceeding identified in the notice required by section 406.

Sec. C-2. 1 MRSA §435 is enacted to read:

§435. Review of proposed remote participation authorization

1. Procedures before legislative committees. Whenever a legislative measure containing a new remote participation authorization or a change that affects the accessibility of a public proceeding is proposed, the joint standing committee of the Legislature having jurisdiction over the proposal shall hold a public hearing and determine the level of support for the proposal among the members of the committee. If there is support for the proposal among a majority of the members of the committee, the committee shall request the review committee to review and evaluate the proposal pursuant to subsection 2 and to report back to the committee of jurisdiction. A proposed remote participation authorization or proposed change that affects the accessibility of a

public proceeding may not be enacted into law unless review and evaluation pursuant to subsection 2 have been completed.

2. Review and evaluation. Upon referral of a proposed remote participation authorization or proposed limitation on accessibility from the joint standing committee of the Legislature having jurisdiction over the proposal, the review committee shall conduct a review and evaluation of the proposal and shall report in a timely manner to the committee to which the proposal was referred. The review committee shall use the following criteria to determine whether the proposed remote participation authorization should be enacted:

A. Geographic distribution of members;

B. Demonstrated need based on emergency nature of action;

C. Demonstrated need based on exigent circumstances, such as a natural disaster or an emergency declaration by the Governor directly related to the activities of the body; and

D. Any other criteria that assist the review committee in determining the value of the proposed remote participation authorization as compared to the public's interest in all members participating.

3. Report. The review committee shall report its findings and recommendations on whether the proposed remote participation authorization or proposed limitation on accessibility to public proceedings should be enacted to the joint standing committee of the Legislature having jurisdiction over the proposal.

SUMMARY

This bill is in response to recommendations contained in the Right To Know Advisory Committee's 12th annual report concerning remote participation in public proceedings by members of public bodies that are subject to the Freedom of Access Act. The bill expressly prohibits a member of a body subject to the Freedom of Access Act from participating in the body's public proceedings if the member is not physically present.

Part A prohibits a member of a public body from participating in a public proceeding when that member is not physically present at the location of the public proceeding as indicated in the required public notice. The members of 7 specific public bodies are currently statutorily authorized to participate remotely in the public proceedings of those bodies, and they may continue to do so as long as the statutes still authorize such participation. The 7 bodies are the Finance Authority of Maine, the Commission on Governmental Ethics and Election Practices, the Maine Health and Higher Educational Facilities Authority, the Maine State Housing Authority, the Maine Municipal Bond Bank the Emergency Medical Services' Board and the Workers' Compensation Board.

Part B amends the statutes enabling remote participation for the 7 bodies to repeal the authorization for remote participation July 1, 2020.

Part C amends the Freedom of Access Act to require the joint standing committee of the Legislature having jurisdiction over judiciary matters to conduct a review of any proposed statutory authorization of remote participation or change in accessibility with respect to public proceedings.

Not enacted

128th MAINE LEGISLATURE

SECOND REGULAR SESSION-2018

Legislative Document **No. 1832**

H.P. 1274 House of Representatives, February 8, 2018

An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation

Reported by Representative MOONEN of Portland for the Joint Standing Committee on Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph G.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

Robert B. Hunt

ROBERT B. HUNT
Clerk

JUD: Majority ONTP
Minority OTPA

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Be it enacted by the People of the State of Maine as follows:

Sec. 1. 1 MRSA §403-A is enacted to read:

§403-A. Remote participation in public proceedings

It is the intent of the Legislature that actions of bodies subject to this subchapter be taken openly and their deliberations be conducted openly. This section governs participation in a public proceeding of such a body by a member of that body when the member is not physically present. Remote participation, which means participation through telephonic, video, electronic or other similar means of communication may not be used to defeat the purposes of this subchapter as stated in section 401. The Legislature may not allow its members to participate remotely in public proceedings of the Legislature.

1. Remote participation; requirements. Except as provided in subsection 2, a body subject to this subchapter may not allow a member of the body to participate remotely in any of its public proceedings unless the participation is in accordance with this subchapter and:

A. After notice and public hearing, the body has adopted a written policy or rule that authorizes a member of the body who is not physically present to participate in a public proceeding of that body in a manner that allows all members to simultaneously hear and speak to each other during the public proceeding and allows members of the public attending the public proceeding at the location identified in the notice required by section 406 to hear all members of the body. If the policy allows remote participation in executive sessions, the policy must establish procedures and requirements that ensure the privacy of the executive session;

B. A quorum is physically present at the location identified in the notice required by section 406, unless immediate action is imperative and physical presence of a quorum is not reasonably practicable within the period of time in which action must be taken. The determination that a quorum is not required under this paragraph must be made by the presiding officer of the body and the facts supporting that determination must be included in the record of the meeting. A body may not consider matters other than those requiring immediate action in a public proceeding held pursuant to this subsection when a quorum is not physically present;

C. Each member of the body who is participating in the public proceeding remotely identifies for the record all persons present at the location from which the member is participating. The member shall note for the record when any person enters or leaves the location throughout the course of the public proceeding;

D. All votes taken during the public proceeding are taken by roll call;

E. A member of the body who is not physically present at the location identified in the notice required by section 406 does not participate and does not vote in an adjudicatory proceeding; and

F. Each member of the body who is participating in the public proceeding remotely receives any documents or other materials presented or discussed at the public

proceeding in advance or when made available at the public proceeding if the transmission technology is available. Failure to comply with this subsection does not invalidate an action of the body.

2. Exceptions. The following bodies are exempt from the provisions of this section and a member of the following bodies may participate in a public proceeding of the body when the member is not physically present:

A. The Finance Authority of Maine, as provided in Title 10, section 971;

B. The Commission on Governmental Ethics and Election Practices, as provided in Title 21-A, section 1002, subsection 2;

C. The Maine Health and Higher Educational Facilities Authority, as provided in Title 22, section 2054, subsection 4;

D. The Maine State Housing Authority, as provided in Title 30-A, section 4723, subsection 2, paragraph B;

E. The Maine Municipal Bond Bank, as provided in Title 30-A, section 5951, subsection 4;

F. The Emergency Medical Services' Board, as provided in Title 32, section 88, subsection 1, paragraph D; and

G. The Workers' Compensation Board, as provided in Title 39-A, section 151, subsection 5.

SUMMARY

This bill implements the recommendation of the Right To Know Advisory Committee to clarify when members of public bodies may participate remotely in public proceedings of those bodies. The bill prohibits a body subject to the Freedom of Access Act from allowing its members to participate in its public proceedings through telephonic, video, electronic or other similar means of communication unless the body has adopted a written policy that authorizes remote participation in a manner that allows all members to simultaneously hear and speak to each other during the public proceeding and allows members of the public attending the public proceeding at the location identified in the meeting notice to hear all members of the body. If the policy allows remote participation in executive sessions, the policy must establish procedures and requirements that ensure the privacy of the executive session. The bill requires a quorum of the body to be physically present at the location identified in the meeting notice unless immediate action is imperative and physical presence of a quorum is not reasonably practicable within the period of time requiring action. The bill requires that each member participating remotely identify all persons present at the remote location, that all votes be taken by roll call and that members participating remotely receive documents or other materials presented or discussed at the public proceeding in advance or when made available at the meeting, if the technology is available. The bill prohibits members who are not physically present at the meeting location from participating and voting in adjudicatory proceedings.

The bill prohibits the Legislature from allowing its members to participate in its public proceedings through telephonic, video, electronic or other similar means of communication, but allows the Finance Authority of Maine, the Commission on Governmental Ethics and Election Practices, the Maine Health and Higher Educational Facilities Authority, the Maine State Housing Authority, the Maine Municipal Bond Bank, the Emergency Medical Services' Board and the Workers' Compensation Board to continue allowing remote participation at their public proceedings as currently authorized in law.

SMCX ROLLS

L.D. 1832

Date: 4/9/18 Minority (Filing No. H-735)

JUDICIARY

Reproduced and distributed under the direction of the Clerk of the House.

STATE OF MAINE

HOUSE OF REPRESENTATIVES

128TH LEGISLATURE

SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 1274, L.D. 1832, Bill, "An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation"

Amend the bill by striking out everything after the enacting clause and before the summary and inserting the following:

'**PART A**

Sec. A-1. 1 MRSA §403-A is enacted to read:

§403-A. Remote participation in public proceedings

It is the intent of the Legislature that actions of public bodies subject to this subchapter be taken openly and their deliberations be conducted openly. This section governs participation in a public proceeding of such a public body by a member of that public body when the member is not physically present. Remote participation, which means participation through telephonic, video, electronic or other similar means of communication may not be used to defeat the purposes of this subchapter as stated in section 401. The Legislature may not allow its members to participate remotely in public proceedings of the Legislature.

1. Remote participation; requirements. Except as provided in subsection 5, a public body subject to this subchapter may not allow a member of the public body to participate remotely in any of its public proceedings unless the participation is in accordance with this subchapter and:

A. After notice and public hearing, the public body has adopted a written policy or rule that authorizes a member of the public body who is not physically present to participate in a public proceeding of that public body in a manner that allows all members to simultaneously hear and speak to each other during the public proceeding and allows members of the public attending the public proceeding at the location identified in the notice required by section 406 to hear all members of the public body. The policy may not allow remote participation in executive sessions. The

policy must prohibit a member who is participating remotely from voting on an issue that was discussed in an executive session if the executive session immediately precedes the proceeding in which the vote is taken;

B. For public bodies consisting of 3 or fewer members, at least one member is physically present at the location identified in the notice required by section 406; and, for public bodies of more than 3 members, a quorum is physically present at the location identified in the notice required by section 406, unless immediate action is imperative and physical presence of a quorum is not reasonably practicable within the period of time in which action must be taken. The determination that a quorum is not required under this paragraph must be made by the presiding officer of the public body and the facts supporting that determination must be included in the record of the meeting. A public body of 3 or more members may not consider matters other than those requiring immediate action in a public proceeding held pursuant to this subsection when a quorum is not physically present. Every member must be physically present for at least one proceeding each year;

C. Each member of the public body who is participating in the public proceeding remotely identifies for the record all persons present at the location from which the member is participating. The member shall note for the record when any person enters or leaves the location throughout the course of the public proceeding;

D. All votes taken during the public proceeding are taken by roll call;

E. A member of the public body who is not physically present at the location identified in the notice required by section 406 does not participate and does not vote in an adjudicatory proceeding; and

F. Each member of the public body who is participating in the public proceeding remotely receives any documents or other materials presented or discussed at the public proceeding in advance or when made available at the public proceeding if the transmission technology is available. Failure to comply with this subsection does not invalidate an action of the body.

2. State public bodies. The policy under subsection 1 applicable to a state public body must be adopted by the public body as a major substantive rule under the Maine Administrative Procedure Act.

3. County and municipal public bodies. A county or municipality may by ordinance require stricter requirements than those set out in this section and may prohibit remote participation by any public body under its jurisdiction.

4. Elected public bodies. A public body consisting of elected members may adopt a policy under subsection 1 only after the constituents of the public body have voted to authorize the public body to adopt the remote participation policy. The public body must provide notice and hold a separate hearing before adopting the remote participation policy.

5. Exceptions. The following public bodies are exempt from the provisions of this section and a member of the following bodies may participate in a public proceeding of the public body when the member is not physically present:

A. The Finance Authority of Maine, as provided in Title 10, section 971;

B. The Commission on Governmental Ethics and Election Practices, as provided in Title 21-A, section 1002, subsection 2;

C. The Maine Health and Higher Educational Facilities Authority, as provided in Title 22, section 2054, subsection 4;

D. The Maine State Housing Authority, as provided in Title 30-A, section 4723, subsection 2, paragraph B;

E. The Maine Municipal Bond Bank, as provided in Title 30-A, section 5951, subsection 4;

F. The Emergency Medical Services' Board, as provided in Title 32, section 88, subsection 1, paragraph D; and

G. The Workers' Compensation Board, as provided in Title 39-A, section 151, subsection 5.

This subsection is repealed July 1, 2022.

PART B Sunsets special authority July 1, 2022

Sec. B-1. 10 MRSA §971, as amended by PL 1995, c. 117, Pt. C, §1, is repealed.

Sec. B-2. 10 MRSA §971-A is enacted to read:

§971-A. Actions of the members

1. Quorum required. Seven members of the authority constitute a quorum of the members. The affirmative vote of the greater of 5 members, present and voting, or a majority of those members present and voting is necessary for any action taken by the members. A vacancy in the membership of the authority does not impair the right of the quorum to exercise all powers and perform all duties of the members.

2. Emergency meeting. Notwithstanding any other provision of law, in a situation determined by the chief executive officer to be an emergency requiring action of the members on not more than 3 days' oral notice, an emergency meeting of the members may be conducted by telephone in accordance with the following.

A. A conference call to the members must be placed by ordinary commercial means at an appointed time.

B. The authority shall arrange for recordation of the conference call when appropriate and prepare minutes of the emergency meeting.

C. Public notice of the emergency meeting must be given in accordance with Title 1, section 406 and that public notice must include the time of the meeting and the location of a telephone with a speakerphone attachment that enables all persons participating in the telephone meeting to be heard and understood and that is available for members of the public to hear the business conducted at the telephone meeting.

This subsection is repealed July 1, 2022.

Sec. B-3. 21-A MRSA §1002, sub-§2, as amended by PL 2011, c. 389, §2, is further amended to read:

2. Telephone meetings. The commission may hold meetings over the telephone if necessary, as long as the commission provides notice to all affected parties in accordance with the rules of the commission and the commission's office remains open for attendance by complainants, witnesses, the press and other members of the public. Notwithstanding Title 1, chapter 13, telephone meetings of the commission are permitted:

A. During the 28 days prior to an election when the commission is required to meet within 2 business days of the filing of any complaint with the commission; or

B. To address procedural or logistical issues before a monthly meeting, such as the scheduling of meetings, deadlines for parties' submission of written materials, setting of meeting agenda, requests to postpone or reschedule agenda items, issuing subpoenas for documents or witnesses and recusal of commission members.

This subsection is repealed July 1, 2022.

Sec. B-4. 22 MRSA §2054, sub-§4, as amended by PL 2015, c. 449, §2, is further amended to read:

4. Powers of authority. The powers of the authority are vested in its members, and 5 members of the authority constitute a quorum at any meeting of the authority. A vacancy in the membership of the authority does not impair the right of a quorum to exercise all the rights and perform all the duties of the authority. An action taken by the authority under this chapter may be authorized by resolution approved by a majority of the members present at any regular or special meeting, which resolution takes effect immediately, or an action taken by the authority may be authorized by a resolution circularized or sent to each member of the authority, which resolution takes effect at such time as a majority of the members have signed an assent to such resolution. Resolutions of the authority need not be published or posted. The authority may delegate by resolution to one or more of its members or its executive director such powers and duties as it considers proper.

~~The authority may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:~~

~~A. Each member can hear all other members, speak to all other members and, to the extent reasonably practicable, see all other members by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all members participating from other locations by videoconferencing or other similar means of communication;~~

~~B. Each member who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication identifies all persons present at the location from which the member is participating;~~

~~C. A member who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the member's attendance is not reasonably practical. The reason that the member's attendance is not reasonably practical must be stated in the minutes of the meeting; and~~

~~D. Each member who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate an action taken by the authority at the public proceeding.~~

Sec. B-5. 22 MRSA §2054, sub-§4-A is enacted to read:

4-A. Remote participation in meetings. The authority may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:

A. Each member can hear all other members, speak to all other members and, to the extent reasonably practicable, see all other members by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all members participating from other locations by videoconferencing or other similar means of communication;

B. Each member who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of communication identifies all persons present at the location from which the member is participating;

C. A member who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the member's attendance is not reasonably practicable. The reason that the member's attendance is not reasonably practicable must be stated in the minutes of the meeting; and

D. Each member who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the member not physically present during the public proceeding if the transmission technology is available.

ROFS

Failure to comply with this paragraph does not invalidate an action taken by the authority at the public proceeding.

This subsection is repealed July 1, 2022.

Sec. B-6. 30-A MRSA §4723, sub-§2, ¶B, as amended by PL 2015, c. 449, §3, is further amended to read:

B. The Maine State Housing Authority, as authorized by Title 5, chapter 379, must have 10 commissioners, 8 of whom must be appointed by the Governor, subject to review by the joint standing committee of the Legislature having jurisdiction over economic development and to confirmation by the Legislature. The 9th commissioner is the Treasurer of State who serves as an ex officio voting member. The Treasurer of State may designate the Deputy Treasurer of State to serve in place of the Treasurer of State. The 10th commissioner is the director of the Maine State Housing Authority who serves as an ex officio nonvoting member. At least 3 gubernatorial appointments must include a representative of bankers, a representative of elderly people and a resident of housing that is subsidized or assisted by programs of the United States Department of Housing and Urban Development or of the Maine State Housing Authority. In appointing the resident, the Governor shall give priority consideration to nominations that may be made by tenant associations established in the State. Of the 5 remaining gubernatorial appointments, the Governor shall give priority to a representative involved in the housing business and a representative of people with disabilities. The powers of the Maine State Housing Authority are vested in the commissioners. The commissioners may delegate such powers and duties to the director of the Maine State Housing Authority as they determine appropriate.

The Governor shall appoint the chair of the commissioners from among the 8 gubernatorial appointments. The chair serves as a nonvoting member, except that the chair may vote only when the chair's vote will affect the result. The commissioners shall elect a vice-chair of the commissioners from among their number.

Following reasonable notice to each commissioner, 5 commissioners of the Maine State Housing Authority constitute a quorum for the purpose of conducting its business, exercising its powers and for all other purposes, notwithstanding the existence of any vacancies. Action may be taken by the commissioners upon a vote of a majority of the commissioners present, unless otherwise specified in law or required by its bylaws.

~~The Maine State Housing Authority may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:~~

~~(1) Each commissioner can hear all other commissioners, speak to all other commissioners and, to the extent reasonably practicable, see all other commissioners by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all commissioners~~

~~participating from other locations by videoconferencing or other similar means of communication;~~

~~(2) Each commissioner who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication identifies all persons present at the location from which the commissioner is participating;~~

~~(3) A commissioner who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the commissioner's attendance is not reasonably practical. The reason that the commissioner's attendance is not reasonably practical must be stated in the minutes of the meeting; and~~

~~(4) Each commissioner who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the commissioner not physically present during the public proceeding if the transmission technology is available. Failure to comply with this subparagraph does not invalidate an action taken by the Maine State Housing Authority at the public proceeding.~~

Sec. B-7. 30-A MRSA §4723, sub-§2, ¶B-1 is enacted to read:

B-1. The Maine State Housing Authority may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:

(1) Each commissioner can hear all other commissioners, speak to all other commissioners and, to the extent reasonably practicable, see all other commissioners by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all commissioners participating from other locations by videoconferencing or other similar means of communication;

(2) Each commissioner who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of communication identifies all persons present at the location from which the commissioner is participating;

(3) A commissioner who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the commissioner's attendance is not reasonably practicable.

The reason that the commissioner's attendance is not reasonably practicable must be stated in the minutes of the meeting; and

(4) Each commissioner who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the commissioner not physically present during the public proceeding if the transmission technology is available. Failure to comply with this subparagraph does not invalidate an action taken by the Maine State Housing Authority at the public proceeding.

This paragraph is repealed July 1, 2022.

Sec. B-8. 30-A MRSA §5951, sub-§4, as amended by PL 2015, c. 449, §4, is further amended to read:

4. Officers of board; exercise of powers. The board of commissioners shall elect one of its members as chair and one as vice-chair and shall appoint an executive director who also serves as both secretary and treasurer. The powers of the bank are vested in the commissioners of the bank in office from time to time. Three commissioners of the bank constitute a quorum at any meeting of the commissioners. Action may be taken and motions and resolutions adopted by the bank at any meeting by the affirmative vote of at least 3 commissioners of the bank. A vacancy in the office of commissioner of the bank does not impair the right of a quorum of the commissioners to exercise all the powers and perform all the duties of the bank.

~~The board of commissioners may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:~~

~~A. Each commissioner can hear all other commissioners, speak to all other commissioners and, to the extent reasonably practicable, see all other commissioners by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all commissioners participating from other locations by videoconferencing or other similar means of communication;~~

~~B. Each commissioner who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication identifies all persons present at the location from which the commissioner is participating;~~

~~C. A commissioner who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the commissioner's attendance is not reasonably practical. The reason that the commissioner's attendance is not reasonably practical must be stated in the minutes of the meeting; and~~

~~D. Each commissioner who is not physically present at the location of the public proceeding and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the commissioner not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate an action taken by the bank at the public proceeding.~~

Sec. B-9. 30-A MRSA §5951, sub-§4-A is enacted to read:

4-A. Remote participation. The board of commissioners may meet by telephonic, video, electronic or other similar means of communication with less than a quorum assembled physically at the location of a public proceeding identified in the notice required by Title 1, section 406 only if:

A. Each commissioner can hear all other commissioners, speak to all other commissioners and, to the extent reasonably practicable, see all other commissioners by videoconferencing or other similar means of communication during the public proceeding, and members of the public attending the public proceeding at the location identified in the notice required by Title 1, section 406 are able to hear and, to the extent reasonably practicable, see all commissioners participating from other locations by videoconferencing or other similar means of communication;

B. Each commissioner who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of communication identifies all persons present at the location from which the commissioner is participating;

C. A commissioner who participates while not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 does so only when the commissioner's attendance is not reasonably practicable. The reason that the commissioner's attendance is not reasonably practicable must be stated in the minutes of the meeting; and

D. Each commissioner who is not physically present at the location of the public proceeding identified in the notice required by Title 1, section 406 and who is participating through telephonic, video, electronic or other similar means of communication has received prior to the public proceeding all documents and materials discussed at the public proceeding, with substantially the same content as those presented at the public proceeding. Documents or other materials made available at the public proceeding may be transmitted to the commissioner not physically present during the public proceeding if the transmission technology is available. Failure to comply with this paragraph does not invalidate an action taken by the bank at the public proceeding.

This subsection is repealed July 1, 2022.

Sec. B-10. 32 MRSA §88, sub-§1, ¶D, as amended by PL 2007, c. 274, §19, is further amended to read:

D. A majority of the members appointed and currently serving constitutes a quorum for all purposes and no decision of the board may be made without a quorum present. A majority vote of those present and voting is required for board action, except that for purposes of either granting a waiver of any of its rules or deciding to pursue the suspension or revocation of a license, the board may take action only if the proposed waiver, suspension or revocation receives a favorable vote from at least 2/3 of the members present and voting and from no less than a majority of the appointed and currently serving members. ~~The board may use video conferencing and other technologies to conduct its business but is not exempt from Title 1, chapter 13, subchapter 1. Members of the board, its subcommittees or its staff may participate in a meeting of the board, subcommittees or staff via video conferencing, conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection constitutes presence in person at such meeting.~~

Sec. B-11. 32 MRSA §88, sub-§1, ¶E is enacted to read:

E. The board may use videoconferencing and other technologies to conduct its business but is not exempt from Title 1, chapter 13, subchapter 1. Members of the board, its subcommittees or its staff may participate in a meeting of the board, subcommittees or staff via videoconferencing, conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this paragraph constitutes presence in person at such meeting.

This paragraph is repealed July 1, 2022.

Sec. B-12. 39-A MRSA §151, sub-§5, as amended by PL 2003, c. 608, §9, is further amended to read:

5. Voting requirements; meetings. The board may take action only by majority vote of its membership. The board may hold sessions at its central office or at any other place within the State ~~and shall establish procedures through which members who are not physically present may participate by telephone or other remote-access technology~~. Regular meetings may be called by the executive director or by any 4 members of the board, and all members must be given at least 7 days' notice of the time, place and agenda of the meeting. A quorum of the board is 4 members, but a smaller number may adjourn until a quorum is present. Emergency meetings may be called by the executive director when it is necessary to take action before a regular meeting can be scheduled. The executive director shall make all reasonable efforts to notify all members as promptly as possible of the time and place of any emergency meeting and the specific purpose or purposes for which the meeting is called. For an emergency meeting, the 4 members constituting a quorum must include at least one board member representing management and at least one board member representing labor.

Sec. B-13. 39-A MRSA §151, sub-§5-A is enacted to read:

5-A. Remote participation. The board shall establish procedures through which members who are not physically present may participate by telephone or other remote-access technology.

This subsection is repealed July 1, 2022.

PART C

Sec. C-1. 1 MRSA §431, sub-§4 is enacted to read:

4. Remote participation. "Remote participation" means participation in a public proceeding by a member of the body that is holding or conducting the public proceeding while the member is not physically present at the location of the public proceeding identified in the notice required by section 406.

Sec. C-2. 1 MRSA §435 is enacted to read:

§435. Review of proposed remote participation authorization

1. Procedures before legislative committees. Whenever a legislative measure containing a new remote participation authorization or a change that affects the accessibility of a public proceeding is proposed, the joint standing committee of the Legislature having jurisdiction over the proposal shall hold a public hearing and determine the level of support for the proposal among the members of the committee. If there is support for the proposal among a majority of the members of the committee, the committee shall request the review committee to review and evaluate the proposal pursuant to subsection 2 and to report back to the committee of jurisdiction. A proposed remote participation authorization or proposed change that affects the accessibility of a public proceeding may not be enacted into law unless review and evaluation pursuant to subsection 2 have been completed.

2. Review and evaluation. Upon referral of a proposed remote participation authorization or proposed limitation on accessibility from the joint standing committee of the Legislature having jurisdiction over the proposal, the review committee shall conduct a review and evaluation of the proposal and shall report in a timely manner to the committee to which the proposal was referred. The review committee shall use the following criteria to determine whether the proposed remote participation authorization should be enacted:

A. Geographic distribution of members;

B. Demonstrated need based on emergency nature of action;

C. Demonstrated need based on exigent circumstances, such as a natural disaster or an emergency declaration by the Governor directly related to the activities of the body; and

D. Any other criteria that assist the review committee in determining the value of the proposed remote participation authorization as compared to the public's interest in all members participating.

3. Report. The review committee shall report its findings and recommendations on whether the proposed remote participation authorization or proposed limitation on accessibility to public proceedings should be enacted to the joint standing committee of the Legislature having jurisdiction over the proposal.'

SUMMARY

This amendment is the minority report of the Joint Standing Committee on Judiciary. This amendment makes the following changes to the bill.

1. It prohibits remote participation in executive session. It also prohibits a member who is participating remotely in a proceeding from voting on an issue that was discussed in executive session that immediately preceded the vote in the public proceeding.

2. It changes, for public bodies that consist of 3 or fewer members, the requirement that a quorum be physically present. It requires at least one member of the public body of 3 or fewer members to be physically present at the location identified in the meeting notice.

3. It requires that each member of a public body subject to the Freedom of Access Act be physically present in at least one public proceeding each year.

4. It requires that a state public body adopt its remote participation policy as a major substantive rule under the Maine Administrative Procedure Act.

5. It authorizes municipalities and counties to impose stricter requirements than are provided in this amendment and allows municipalities and counties to prohibit the use of remote participation by any public body under their jurisdictions. The stricter requirements or the prohibition must be imposed through the adoption of an ordinance by the municipality or the county.

6. It provides that an elected public body may adopt a remote participation policy only after the constituency of the elected public body has voted to authorize the body to adopt the policy.

7. It provides, in Parts A and B, that the exemptions for the 7 entities whose statutes currently provide for remote participation expire on July 1, 2022. Those entities will need to adopt policies that comply with the law to continue any remote participation.

8. It amends, in Part C, the Freedom of Access Act to require the joint standing committee of the Legislature having jurisdiction over judiciary matters to conduct a review of any proposed statutory authorization of remote participation or change in accessibility with respect to public proceedings.

FISCAL NOTE REQUIRED
(See Attached)

Approved: 04/02/18 mac

128th MAINE LEGISLATURE

LD 1832 **LR 2890(02)**

An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation

Fiscal Note for Bill as Amended by Committee Amendment 'A' (H-735)
Committee: Judiciary
Fiscal Note Required: Yes

Fiscal Note

Minor cost increase - General Fund

Fiscal Detail and Notes

Any additional costs to affected departments or agencies are assumed to be minor and can be absorbed within existing budgeted resources.

RIGHT TO KNOW ADVISORY COMMITTEE
Penalties Subcommittee
April 3, 2018
Meeting Summary

Convened 1:07 p.m., Room 600, Cross State Office Building, Augusta

Present:	Absent:
Judy Meyer, Chair	Rep. Chris Babbidge
Luke Rossignol	Chris Parr
Eric Stout	Linda Pistner

Staff:
Adam Bohanan

Welcome and introductions

Ms. Meyer, Chair of the Subcommittee, called the meeting to order and all members introduced themselves.

Discussion of penalty provisions

Ms. Meyer opened the discussion by noting that the subject of penalties has been raised in the full committee for each of the past ten years or more and led to the formation of the subcommittee. It was further noted that while the training requirement has been very successful in promoting good behavior with respect to fulfilling FOAA requests, changes to the current statute governing penalties for violations might do more to modify behavior. Such changes could include increasing the amount of the penalty, awarding the civil forfeiture to the requestor in addition to or instead of the state general fund, or allowing a private right of action.

Public Access Ombudsman Brenda Kielty then addressed the subcommittee and pointed out that FOAA is fundamentally a remedial statute rather than a punitive one. There are civil penalties, but the main recourse a requestor has is appealing a denial in court. However, she noted that court costs can be a significant barrier for a requestor who wishes to challenge a denial. Ms. Kielty encouraged the Subcommittee to consider unintended consequences of any changes to the law. For instance, would increasing the penalty change behavior? Could making attorney's fees more readily available lead to a flood of FOAA appeals led by plaintiff's attorneys? Ms. Kielty further emphasized the need for more education and training regarding the statute and renewed the recommendation to expand the list of public officials required to have FOAA training to include appointed officials as well as elected officials.

The discussion then turned to potential changes to law and an examination of approaches taken in other states. (An updated staff analysis of penalty statutes and legal remedies in all fifty states was distributed and is attached.) Mr. Rossignol expressed the opinion that allowing a

private right of action might be the only thing that would significantly alter behavior. He added that requiring that a requestor exhaust all administrative remedies or providing (or requiring) alternative dispute resolution (ADR) before a requestor could proceed to court could be a way to resolve disputes over records requests without resorting to costly litigation. Ms. Kielty added that while this could help resolve disputes, it could also delay the process of gaining access to records.

Mr. Stout suggested that holding state employees liable for fines in their individual capacities rather than as government employees could have a greater effect on behavior. He pointed out that this is more in line with how federal law addresses violations and noted that violations of the Federal Privacy Act, a companion to the Freedom of Information Act, levies a fine of up to $5,000 that is paid by the individual and not by the agency. Ms. Kielty stated that training would be crucial if state employees were to be held individually and personally liable for FOAA violations.

Next, the Subcommittee highlighted certain models from the fifty-state survey and asked staff to do additional research to be discussed at the next meeting. Particular types of measures taken in other states that were of interest include levying fines against individual state employees, awarding fines collected to the requestor as well as the state, lowering the legal standard necessary for a prevailing plaintiff to be awarded attorney's fees, and the availability of ADR before proceeding to court.

Next meeting

The Subcommittee will hold its next meeting on April 26, 2018 at 11:00 a.m. in Room 437 of the State House, Augusta.

Adjournment

Ms. Meyer adjourned the meeting at 3:15 p.m.

Respectfully submitted,

Adam Bohanan

RIGHT TO KNOW ADVISORY COMMITTEE
Penalties Subcommittee
April 26, 2018
Meeting Summary [DRAFT]

Convened 11:06 p.m., Room 437, State House, Augusta

Present:
Judy Meyer, Chair
Luke Rossignol

Absent:
Rep. Chris Babbidge
Chris Parr
Linda Pistner
Eric Stout

Staff:
Craig Nale
Adam Bohanan

Discussion of research compiled since previous meeting

First, the Subcommittee heard from staff about research compiled since the last meeting. Staff distributed and described an updated version of the fifty-state survey, a breakdown of that survey by type of penalty, and a chart detailing the legal standard for the award of attorney's fees by state. Staff also briefly pointed out a few noteworthy items from these compilations and from other research done in response to questions from the previous meeting. There was no evidence of mediation or alternative dispute resolution (ADR) being offered or mandated in any state's freedom of access statutes, but it was noted that such a requirement may exist in states' rules of civil procedure or other court rules. Only two states, Iowa and New Hampshire, hold public employees personally liable for civil fines in a way similar to the Federal Privacy Act. There was insufficient time to do a fifty-state survey on whether there was a fiscal note on each state's attorney fee provision, but it was determined that it was reasonable to expect that the unpredictable cost to any state awarding attorney's fees would have resulted in a fiscal note, as was the case in Maine.

Proposed recommendations to the full Committee

Next, the Subcommittee discussed possible recommendations to present to the full committee based on their priorities and on models from other states. The priorities discussed included making attorney's fees more readily available to prevailing parties, increasing the civil penalty for violations, making damages available to aggrieved parties, and making ADR available.

1) Attorney's fees

The Subcommittee thought it was important to make attorney's fees available to either party. Fees are currently only available to a substantially prevailing plaintiff, and they are at the discretion of the court.

- The recommendation would be change the word "may" to "shall" in § 409(4) to make the award of fees mandatory for a plaintiff.
- Further, the "bad faith" standard would be removed from that subsection, shifting the court's discretion from whether attorney's fees should be awarded to focus on whether the plaintiff has prevailed.
- Language granting attorney's fees to the public entity would need to be added and a standard for fees decided upon. For instance, some states award fees to the public defendant if the claim was frivolous or in bad faith.

2) Civil penalty amount and damages for plaintiff

A number of possible changes to § 410 were discussed for recommendation to the full committee.

- One idea was to simply raise the amount of the civil forfeiture to account for inflation since the $500 amount was instituted.
- It was also suggested that public employees could be held individually liable for the forfeiture, as is the case in Iowa, New Hampshire, and at the federal level. In this instance, the standard for a violation would only be for "willful" violations and not for good faith errors.
- Some states, such as New Jersey and Virginia, have a tiered structure for the civil penalty. There is a fine for the first violation, and the fine increases with subsequent violations.
- Michigan law assesses a civil fine that is paid to the state general fund. The law also provides statutory damages paid directly to the person seeking a public record.

3) Alternative Dispute Resolution

The availability of ADR could be an important way to come to agreed upon resolution to public access issues. Mr. Rossignol felt strongly about this issue and cited the process already in use in Maine Superior Court that requires ADR in civil actions before proceeding to trial. Public Access Ombudsman Brenda Kielty pointed out that her office did not have the resources or staff to provide this service at this time. AAG Kielty also noted that the imposition of an additional layer of process could be at odds with the presumption of a speedy resolution in FOAA matters. The Subcommittee acknowledged these issues and tensions but believes that ADR could have a place in the FOAA context and warrants further discussion.

4) Reconciling standards in § 409 and § 410

The Subcommittee expressed a desire to make §§ 409 and 410 work together better. Currently, the standards for an award of attorney's fees under § 409 and for a violation under § 410 are different. Further, according to AAG Kielty, appeals under § 409 tend to involve access to records rather than public meetings. There is a sense that open meeting infractions are less

often reported or more difficult to prove. Violations under § 410 are enforced, in practice, by the Attorney General's Office. A more direct expression of the process for how violations are discovered and investigated and of how enforcement could overlap with citizens' right to appeal was suggested. Further discussion in the full Committee is warranted.

Next meeting

The Subcommittee will not meet further at this time but will be prepared to present recommendations to the full Committee at its next meeting.

Adjournment

Ms. Meyer adjourned the meeting at 12:15 p.m.

Respectfully submitted,

Adam Bohanan

CHAPTER 13
PUBLIC RECORDS AND PROCEEDINGS

SUBCHAPTER 1
FREEDOM OF ACCESS

§409. Appeals

1. Records. Any person aggrieved by a refusal or denial to inspect or copy a record or the failure to allow the inspection or copying of a record under section 408-A may appeal the refusal, denial or failure within 30 calendar days of the receipt of the written notice of refusal, denial or failure to the Superior Court within the State for the county where the person resides or the agency has its principal office. The agency or official shall file a statement of position explaining the basis for denial within 14 calendar days of service of the appeal. If a court, after a review, with taking of testimony and other evidence as determined necessary, determines such refusal, denial or failure was not for just and proper cause, the court shall enter an order for disclosure. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

2. Actions. If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action is illegal and the officials responsible are subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for the action to be null and void. Appeals may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.

3. Proceedings not exclusive. The proceedings authorized by this section are not exclusive of any other civil remedy provided by law.

4. Attorney's fees. In an appeal under subsection 1 or 2, the court may award reasonable attorney's fees and litigation expenses to the substantially prevailing plaintiff who appealed the refusal under subsection 1 or the illegal action under subsection 2 if the court determines that the refusal or illegal action was committed in bad faith. Attorney's fees and litigation costs may not be awarded to or against a federally recognized Indian tribe.

This subsection applies to appeals under subsection 1 or 2 filed on or after January 1, 2010.

§410. Violations

For every willful violation of this subchapter, the state government agency or local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture of not more than $500 may be adjudged.

Reinsch, Margaret

From: Mackenzie Andersen <mackenziana@gmail.com>
Sent: Tuesday, September 11, 2018 9:08 AM
To: Reinsch, Margaret
Subject: Improvements needed to serve public benefit in Freedom of Access Law.

Dear Ms Reinsch,

Thank you for sending notice of the Right To Know committee meeting. I would like to submit this testimony of my own experience of how Freedom Of Access currently works and how the law can help to improve it.

I have observed that the Maine Legislative Library is excellent in providing information in the most usable form which is digital, searchable, and it is possible to copy specific information relevant to one's project. It is also sent in digital format free of charge.

The Maine Department of Corporations provides much information which can be downloaded for a reasonable $3.00 fee.

However, when I request information from other government agencies from the town to the state, I usually receive it in a form in which is impossible to search with database tools, either because it is not in digital form or because it is in a PDF which has blocked searching and copying functions. I believe this is an intentional choice as is reflected in the response I received in 2014 from the Maine Ombudsman, Brenda Kielty.

> 1.Information made available on an agency website but not in a searchable database format may not provide the research and investigative tool needed by the public. The Freedom of Access Act does not require that public information be posted online in any particular format, just that public records be made available. While there is a strong argument for increasing the accessibility and usefulness of information, there is no current requirement that the technology in place achieve that objective.
>
> > 2.The collection of data and reports generated from that data may be public records but the agency is not required under the law to create a new record or report in response to a FOAA request. If the dataset you request does not exist, the agency may choose to produce it for any number of reasons but not because they are legally required to take such an action. I appreciate your comments on this topic and I will continue to bring attention to the need for accessible, useful public data.
>
> Brenda Kielty

Transparency is best served by a searchable online database but if that is not an option the public should be granted the right to request the information in digital form, which is searchable with functioning copying capability. It seems that the government will only allow the public to request information in the most usable form if there is a law mandating the government to do so- and so there should be.

To take this even further. Since the seventies, we have a public-private government in Maine in which much of its activity is concealed from public transparency by privacy laws specific to the private sector. The public-private government can use its public identity to access public funds for its own use and use the private side of

the partnership to conceal information from the public. Given that the public-private government is deeply entrenched, the rules of privacy and transparency could be rewritten to better serve public transparency.

Sincerely

Mackenzie Andersen

Preserving the American Political Philosophy

On 9/10/2018 3:01 PM, Reinsch, Margaret wrote:

> The Right to Know Advisory Committee will hold its first meeting of 2018 on Thursday, September 13th at 4:00 p.m. (we're trying to accommodate the House and Senate Sessions that day) in Room 438 of the State House.
>
> We apologize for the short notice. The meeting is open to the public and the audio will be streamed live over the Internet: http://legislature.maine.gov/Audio/#438
>
> The plan is to post the agenda tomorrow: https://www.maine.gov/legis/opla/righttoknow.htm
>
> Please let me know if you have any questions.
>
> Thanks
>
> Peggy
>
> Margaret J. Reinsch, Esq., Legislative Analyst
>
> Joint Standing Committee on Judiciary
>
> Maine State Legislature
>
> Office of Policy and Legal Analysis
>
> Room 215, Cross State Office Building
>
> 13 State House Station
>
> Augusta, Maine 04333
>
> (207) 287-1670 (office number)
>
> (207) 287-1673 (direct and voice mail)
>
> (207) 287-1275 (fax)
>
> margaret.reinsch@legislature.maine.gov
>
> ---
> ========== About This E-Mail List ==========
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---

RIGHT TO KNOW ADVISORY COMMITTEE

Tuesday, October 2, 2018
9:00 a.m.
State House Room 438

Meeting Agenda

1. Introductions

2. Discussion on enforcement and penalties
   A. Alternative dispute resolution options
   B. Fines
      (1) Payable by agency or individual
      (2) Tiered
      (3) Payable to
         General Fund
         Aggrieved Party
         Special fund
   C. Additional remedies – standards?
      (1) Attorney's fees
      (2) Court costs
      (3) Damages – actual or minimum amount
   D. Criminal sanctions

3. Additional topics for Advisory Committee to discuss

4. Subcommittee to review existing public records exceptions: Plans

5. Establish future meeting dates?

6. Adjourn

yellow)

Dispute resolution before resorting to court action

Questions

- Who oversees, arranges the dispute resolution
- Costs
- Enforcement
- Timing

Examples of states that provide an avenue in addition to court action for compliance (This information comes from the 2015 report by the Colorado Freedom of Information Coalition's report Freedom of Information: State-by-State Evaluation of Alternative Dispute Resolution Processes; Ohio and Colorado information is new.):

Arizona

Arizona Ombudsman-Citizens' Aide Office is a neutral resource for both citizens and government officials. Part of the legislative branch and has the authority to investigate any governmental bodies (other than the judiciary and state universities). Engages in coaching, informal assistance (including mediation) and investigation, but it does not have the power to write legally binding opinions.

Arkansas

Attorney General is statutorily required to review custodians' decisions concerning the release of "personnel records" or "employee evaluation or job performance records" that a records custodian has identified as responsive to a request. The records cannot be disclosed until the AG has issued an opinion. Otherwise, the AG issues legal opinions that are not binding but may possess persuasive power.

Colorado (new in 2017)

At least 14 days before filing in district court, person who has been denied the right to inspect record files written notice with custodian that has denied inspection. During the 14-day period, the custodian is required to meet in person to communicate over the telephone to determine if the dispute may be resolved without filing with the district court. Any method of dispute resolution agreeable to both parties. Common expenses shared among the parties unless parties agree to something different. If person who has been denied access states in the written notice to the custodian that the person needs to pursue access on an expedited basis, the notice includes statement of factual basis for the expedited access, and the notice is provided at least three days before the person files with the district court, no meeting to determine if dispute resolution may resolve the dispute is required

Connecticut

Connecticut Freedom of Information Commission provides an appeals process outside of the courts, and its decisions have the force of law. If parties

don't resolve disputes with the assistance of a CFOIC staff attorney, the Commission conducts hearings and issues decisions, which have the force of law. (But consolidation of government activities and budget cuts have reduced effectiveness.)

Florida

Office of the Attorney General administers a formal mediation program: Open Government Mediation Program. Voluntary and both parties must consent. Not mandatory, so unresolved cases result when the government agency refuses mediation, forcing the requester to go through the court system.

Georgia

Attorney general has the authority to help citizens and government agencies mediate public records and open meetings disputes, usually resolved through education. But if a local government refuses to comply, the AG can bring both civil and criminal actions to enforce compliance; because of limited budget, the AG usually does not file in court but advises the complainant to hire independent counsel.

Hawaii

The Office of Information Practices (within the lieutenant governor's office): to provide an informal dispute resolution process as an alternative to court actions. Also offers "attorney-of-the-day" service which advises members of the public and government agencies. The Office has the power to order agency compliance, and the law requires courts to defer to decisions requiring disclosure unless the factual and legal determinations are found to be "palpably erroneous." No cost to participants, but timeliness has deteriorated because of decreased resources and budget cuts.

Illinois

Public Access Counselor leads the Public Access and Opinions Division of the Office of the Attorney General. After a non-commercial records request has been denied, the requester can ask that the case be reviewed. If the agency does not cooperate, the AG can issue a subpoena to gather additional information. The AG has authority to make findings of act and conclusions of law and issue binding opinions, subject to administrative review. The AG can also opt for mediation, and can issue advisory opinions.

Indiana

The Office of the Indiana Public Access Counselor can respond to informal requests from the public and public agencies. Public bodies must cooperate with the Public Access Counselor, which can issue advisory opinions, but a complainant must go to court to appeal a denial. Must file a complaint with the Public Access Counselor first to collect attorney's fees.

Iowa

The Office of Citizen's Aide/Ombudsman is an independent state agency to which citizens can bring complaints about government. The position of Citizens' Aide is appointed by the Legislative Counsel. The office can investigate and make recommendations but has no formal enforcement powers.

The Iowa Public Information Board was created to provide a free, efficient way for Iowans to receive information and resolve public records disputes. Once the Board accepts a complaint, it has the power to stay any court actions. Board attorneys try to negotiate compromises to satisfy both parties. A decision made by the Board is a final decision, and the Board is empowered to enforce its decisions with legal action and civil penalties. Parties can opt to use an administrative law judge. A final Board order is subject to judicial review.

Kentucky

The attorney general serves as an impartial tribunal, issuing legally binding decisions in disputes related to the open records and open meetings laws. Both parties can appeal the AG's decision in court; appeal must be filed within 30 days or the AG decision will have the force and effect of law and can be enforced in court.

Maryland

The Maryland Open Meetings Compliance Board (OMCB) and the State Public Information Compliance Board (PICB) can resolve disputes over public meetings and unreasonable fees, respectively. In addition, the Public Access Ombudsman may review any dispute "relating to requests for public records." OMBC opinions are advisory.

Massachusetts

The Supervisor of Public Records is responsible for maintaining the commonwealth's public records and handling administrative appeals in disputes relating to the Public Records Law. The Supervisor can order the custodian to comply, and ask the attorney general for assistance. Judicial remedies are available directly.

Minnesota

The Information Policy Analysis Division of the Department of Administration provides an alternative appeal mechanism for FOI request denials. Commissioner of Administration may issue written advisory opinions; opinions are not binding but must be given deference by a court. Complainant must bring a court action to compel compliance.

Nebraska

A person denied access under either the open meetings or public records law can request the attorney general to review. The attorney general also issues decisions interpreting the laws. The attorney general can order the public agency

to comply, but if the agency refuses, the requester can bring suit or demand in writing that the attorney general bring suit.

New Jersey

The Government Records Council (GRC) created to establish an informal mediation program for facilitating the resolution of records disputes, hear complaints concerning denials of access to records, issue advisory opinions and prepare information for requesters and custodians.

After a requester files a formal complaint of denial of access, the GRC offers an opportunity to resolve the dispute through mediation with an impartial third-party attorney with knowledge of the law serving as mediator. Mediation is voluntary and at no cost to either party. If no mediation or mediation not successful, GRC can initiate a more formal investigation. Does not apply to the legislature or judiciary.

New York

Committee on Open Government provides advice, issues written advisory opinions and provides the public with resources to file requests or appeal denials of requests. Advisory opinions do not have the force of law, so requester must bring court action to enforce.

North Dakota

Any interested party may ask the attorney general for an opinion regarding an alleged violation of records or meetings laws. The AG issues opinions free of charge. If the AG finds the public entity violated the law, the entity has seven days to address and correct the issue; failing to comply can result in potential personal liability for the person or persons responsible, although the AG does not have the authority to change, void or overrule a decision of or action taken by the public entity. At any time, the aggrieved party can bring a civil action.

Ohio (new in 2016)

Requesters can file a complaint with the Ohio Court of Claims ($25 filing fee), and require the public office to work with the requester and a mediator to try to resolve any issues. If mediation is not successful, the question is referred to a "Special Master" who will decide whether the public office must turn over the records.

The alternative (existing law) is for the requester to file a mandamus action – which allows the requester to collect court costs if wins, plus attorney's fees if records withheld in bad faith.

Addresses "vexatious litigator" who repeatedly brings baseless complaints for the purpose of harassing a defendant: can be prevented from bringing further complaints without prior permission from the courts.

Pennsylvania

Office of Open Records is authorized to hear and decide appeals from requesters who have been denied access to records by state and local agencies.

Informal mediation program to resolve disputes without undergoing a formal administrative review process and appellate litigation. An administrative appeal process is required before any court action. Mediation is voluntary. If mediation does not resolve the issues, the Office will issue a final determination within 30 days. If the parties do not opt for mediation, the Office has 30 days to issue a final determination, with or without a hearing. The final determination is binding on the agency and the requester, but the requester must seek court help to enforce, as the Office does not have enforcement powers.

Rhode Island

The attorney general investigates complaints on both public records and open meetings. The chief administrative office for the agency responsible for the records handles administrative appeals after a denial. If the chief administrator officer does not release the record, the requester can file a formal complaint with the AG. The AG may file suit in superior court. If the AG decides not to take legal action, citizens can file suit in superior court.

South Dakota

The Open Meetings Commission (five attorneys appointed by the Attorney General) handles disputes related to the open meetings law; the Office of Hearing Examiners handles disputes over public records. Citizens can take complaints about open meetings to the state's attorney or the AG; the AG decides whether to prosecute, or can send the complaint to the Open Meetings Commission for further action. The Commission evaluates the complaint and issues a written determination, which is final, reprimanding the offending official or government entity rather than imposing criminal charges or a fine. Citizens with public records access disputes can file notice of review with the Office of Hearing Examiners, which will make written findings of fact and conclusions of law, which could be after a hearing. State's attorneys and the AG do not prosecute any decisions.

Tennessee

Office of Open Records Counsel (in the Comptroller of the Treasury) was created to deal with local government open records issues. The office issues informal advisory opinions, informally mediates disputes with local governmental entities (not state) and works with the Advisory Committee on Open Government on open meetings and open records issues. Opinions are advisory and citizens seeking enforcement of public records or open meetings laws must go to court.

Texas

Requesters and governmental bodies are required to consult with the attorney general before claiming exemptions or proceeding to litigation. If a governmental body wishes to withhold records from a requester, and there has not been a previous AG's determination on the disclosure of those records, it must ask the AG for a decision within 10 business days of receiving the request. The AG must issue a written opinion within 60 working days after the request. If the AG

determines that the information is public, the governmental body must file a cause of action seeking relief from compliance in order to avoid criminal violation of the act. The AG can pursue civil actions in open-government cases but cannot prosecute those complaints in criminal court. The AG does not have jurisdiction over Texas Open Meetings Act violations (district courts and county and district attorneys do). Citizen has to bring an action for refusal to request an AG's decision or for refusal to supply public information or information that the AG determined is a public record.

Utah

Requesters can appeal a records denial by appealing to the head of the state agency, or they can appeal to the State Records Committee. If unsuccessful, they can appeal to district court. The State Records Committee serves as an appeals board from agency denials, including local agencies

Government Records Ombudsman provides information.

Virginia

Freedom of Information Advisory Council (FOIAC), within the legislative branch, renders advisory opinions that clarify the law and provide guidance to government agencies. FOIAC cannot compel production of documents or issue orders, does not have authority to mediate, but can be called upon as a resource to issue advisory opinions that have persuasive value. FOIAC issues formal written opinions as well as informal opinions. Opinions are merely advisory and not binding; appeals and remedies are still funneled through the courts systems.

Washington

Open Government Ombudsman, also called the Assistant Attorney General for Open Government, to help public agencies and citizens comply with laws. A citizen or public agency can call or email the ombudsman, who may provide an informal written analysis and follow up with the agency and ask it to reconsider its position where appropriate. The opinions of the ombudsman are nonbinding, but they may be persuasive to the agency or to a court considering a public access dispute.

State Fines, Penalties, and Attorneys' Fees
For Open Records Violations – By Category

Updated April 26, 2018

Type of penalty or remedy	States
Criminal sanctions (fine and/or imprisonment)	Arkansas, DC, Florida, Georgia, Hawaii, Louisiana, Missouri, Nebraska, North Dakota, Oklahoma, Texas, Utah, West Virginia
Civil penalty/fine/forfeiture	Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, Wisconsin, Wyoming
Public employee personally liable for civil penalty/damages	Iowa (damages for violation, higher if "knowingly" violated); New Hampshire (if acted in bad faith)
No criminal or civil penalty	Alabama, Alaska, Arizona, California, Delaware, Maryland, Massachusetts, Montana, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Tennessee, Vermont
Attorney fees available to plaintiff (usually if prevails or substantially prevails; standard varies)	Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin
Attorney fees available to defendant agency (usually if request or appeal is deemed frivolous)	California, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Kansas, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, Texas, Vermont
Damages available to plaintiff	Arizona, Iowa (paid by person who violated), Kentucky, Michigan (statutory damages, paid by agency), New Mexico, North Dakota, Ohio, Washington, Wisconsin
Injunctive, declaratory, or equitable relief available	Alaska, Arkansas, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Utah, West Virginia

State Fines, Penalties and Attorneys' Fees
For Open Records Violations
Updated April 2018

State	Entity	Standard	Civil or criminal	Fines/penalties/Attorneys fees (*Other relief available*)
ALABAMA				-No provision for fines for wrongful failure to disclose -Public Records Law does not reference sanctions for noncompliance, but attorneys' fees have been awarded (2001 case)
ALASKA				-No sanctions for noncompliance -Full attorneys' fees have traditionally been available to the prevailing plaintiff in a public interest suit -(*Court may issue order to enjoin future violations*)
ARIZONA	Officer or the public body			-If wrongfully denied access to public records, has a cause of action for damages -If custodian acted in bad faith or in an arbitrary and capricious manner, superior court may award to petitioner legal costs, including reasonable attorneys' fees
ARKANSAS	A person	Negligent violation	Misdemeanor Civil	-Fine of up to $500, imprisonment for up to 30 days or both; alternatively, the defendant may be sentenced to "appropriate public service, education or both" -FOIA permits civil suits to enforce -Attorneys' fees maybe awarded to a substantially prevailing plaintiff unless the court finds the position of the defendant was substantially justified or that other circumstances make award unjust
CALIFORNIA	Public agency			-Court will award costs and reasonable attorneys' fees to prevailing plaintiff -Agency can recover attorneys' fees if agency prevails and court finds lawsuit was clearly frivolous - If an agency fails to obey a court order requiring disclosure of public records, contempt sanctions may be imposed after a hearing

State Fines, Penalties and Attorneys' Fees
For Open Records Violations
Updated April 2018

State	Entity	Standard	Civil or criminal	Fines/penalties/Attorneys fees (*Other relief available*)
COLORADO	Custodian	Arbitrary or capricious		-No criminal penalty or fine -Violation had been a misdemeanor carrying a fine or up to $100 and jail for 90 days; **repealed in 2009** -If criminal justice agency arbitrarily or capriciously withheld a criminal justice record, court may impose a penalty of up to $25 per day -Unless denial was proper, court shall order court costs and reasonable attorneys' fees to prevailing applicant -If denial was proper, court will award court costs and reasonable attorneys' fees to the custodian if the action was "frivolous, vexatious or groundless"
CONNECTICUT	Custodian or other official Any person Any member of any public agency	"without reasonable grounds" "willfully, knowingly, and with intent"	Civil Class A misdemeanor Class B misdemeanor	-Freedom of Information Commission can assess civil penalty of not less than $20 and not more than $1,000 for denial of a right under FOIA "without reasonable grounds." -Destroying, mutilating, or otherwise disposing of any public record without approval is a Class A misdemeanor -Failing to comply with an order of the Freedom of Information Commission is Class B misdemeanor
DELAWARE				-Court may award attorneys' fees and costs to a successful defendant if the action was frivolous or was brought solely for the purpose of harassment
DISTRICT OF COLUMBIA	Any person	Arbitrary and capricious violation	Misdemeanor	-Fine of up to $100
FLORIDA	Public officer Agency	Willing and knowing violation	First degree Misdemeanor Civil	-Fine of up to $1,000, imprisonment of up to one year or both -If court finds agency unlawfully refused. Court will assess and award against the agency responsible the reasonable costs of enforcement including reasonable attorneys' fees

State Fines, Penalties and Attorneys' Fees
For Open Records Violations
Updated April 2018

State	Entity	Standard	Civil or criminal	Fines/penalties/Attorneys fees (*Other relief available*)
GEORGIA	Any person or entity	Knowingly and willfully Negligently	Misdemeanor Civil penalty	-Fine for criminal or civil penalty of up to $1,000 for first violation; up to $2,500 for additional violation within 12 mos -Court may award prevailing party reasonable attorneys' fees where it determines that either party acted without substantial justification either in complying with the chapter or in instituting the litigation
HAWAII	Officer or employee of an agency	Intentionally	Misdemeanor	-Fine of up to $2,000
IDAHO	Public official	Deliberately and in bad faith	Civil penalty	-Up to $1,000 -Court shall award reasonable costs and attorneys' fees to the prevailing party or parties if it finds that the request or refusal to provide records was frivolously pursued
ILLINOIS	Public body	Willfully and intentionally, or otherwise in bad faith	Civil penalty	- Fine of $2,500 to $5,000; court may impose additional penalty of up to $1,000 for each day the violation continues under certain circumstances - Prevailing party entitled to reasonable attorney's fees and costs
INDIANA	Individual or public agency		Civil penalty	-Up to $100 for first violation; up to $500 for each additional -The court will award attorneys' fees, court costs and other reasonable expenses of litigation to the prevailing plaintiff -An award of attorneys' fees to a prevailing defendant is discretionary if the court finds the action was frivolous or vexatious.
IOWA			Civil	-Court may assess the persons who participated in violation damages of not more than $500 nor less than $100 -The court will order the payment of all costs and reasonable attorneys fees, including appellate attorneys' fees, to any plaintiff successfully establishing a violation of the Open Records Act.
KANSAS	Agency	Knowingly	Civil penalty	-Fine up to $500 for each violation -Attorneys' fees are allowable to either party, if the denial or the request was not in good faith and without reasonable basis in fact or law.

State Fines, Penalties and Attorneys' Fees
For Open Records Violations
Updated April 2018

State	Entity	Standard	Civil or criminal	Fines/penalties/Attorneys fees (*Other relief available*)
KENTUCKY			Civil	-Any person prevailing against an agency may be awarded costs and reasonable attorney's fees. -Court may also award up to $25 for each day the person was denied access to the record.
LOUISIANA	Any person having custody or control of a public record	Violation of any provision	Criminal	-1st offense: fine of not less than $100 and not more than $1,000, imprisonment for not less than one month and not more than six months -Subsequent offense: fine of not less than $250 and not more than $2,000, imprisonment for not less than two months and not more than six months or both -If a person seeking the right to inspect or to receive a copy of a public record prevails in such a suit, the person will be awarded reasonable attorneys' fees and other costs of litigation. If such person prevails in part, the court may award that person reasonable attorneys' fees or an appropriate portion.
MAINE	State government agency or local government entity	Willful	Civil violation	-Forfeiture of up to $500 -The court may award reasonable attorney's fees and litigation expenses to the substantially prevailing plaintiff if the court determines that the refusal or illegal action was committed in bad faith. Attorney's fees and litigation costs may not be awarded to or against a federally recognized Indian tribe.
MARYLAND				-Penalty had been fine of up to $1,000 plus damages; **repealed in 2014** -Court may award actual damages and attorneys' fees to complainant if court finds by clear and convincing evidence that the complainant substantially prevailed
MASSACHUSETTS				-No sanctions for noncompliance -Court may award attorney's fees and costs
MICHIGAN	Public body	Arbitrary and capricious	Civil	-Reasonable attorneys' fees, costs, and disbursements will be awarded to any person who prevails in an action to compel disclosure. -$1,000 civil fine paid to the state general fund; $1,000 damages to person seeking public record

State Fines, Penalties and Attorneys' Fees
For Open Records Violations
Updated April 2018

State	Entity	Standard	Civil or criminal	Fines/penalties/Attorneys fees (*Other relief available*)
MINNESOTA			Civil	-$1,000 civil penalty; injunctive relief also available
MISSISSIPPI	Any person		Civil	-$100 per violation
MISSOURI	Any official		Criminal	-Misdemeanor and punishment of up $100 and/or up to 90 days in jail
MONTANA				-A plaintiff, who prevails in an action brought in district court to enforce their rights under the Open Records Act, may be awarded costs and reasonable attorneys' fees.
NEBRASKA	Any official	Violation	Criminal Civil	-Class III misdemeanor - Fine of up to $500, imprisonment of up to three months or both -Equitable relief available; reasonable attorneys' fees and other litigation costs reasonably incurred by the complainant.
NEVADA	Public officer or employee	Acts in good faith		-Immune -Requestor may appeal denial to district court; if requestor prevails, the requestor is entitled to recover costs and reasonable attorney's fees in the proceeding from the agency whose officer has custody of the book or record.
NEW HAMPSHIRE	Public body Public official or employee of public body	Knew or should have known in violation Bad faith	Civil	-Injunctive relief available by filing in superior court -Reasonable attorneys' fees if the court finds that a public body knew or should have known that it violated statute -Fees may be awarded personally against a public official or employee of a public body who acted in bad faith -Court may impose civil penalty of between $250 and $2,000 if official or body acted in bad faith
NEW JERSEY	Custodian Public official, officer, employee, or custodian	Willfully	Civil Civil penalty	-Requestor may appeal denial in court; entitled to fees upon prevailing -$1,000 for first violation; $2,500 for second within 10 years; $5,000 for third within 10 years
NEW MEXICO				-Injunctive relief or writ of mandamus may be issued to enforce public records act -Damages, costs, and reasonable attorneys' fees to person whose written request has been denied and is successful in court.

State Fines, Penalties and Attorneys' Fees
For Open Records Violations
Updated April 2018

State	Entity	Standard	Civil or criminal	Fines/penalties/Attorneys fees (*Other relief available*)
NEW YORK				-Court may award reasonable attorneys' fees and other litigation costs reasonably incurred in any case in which the requestor has substantially prevailed, provided, however, that the court finds that: (1) the record involved was, in fact, of clearly significant interest to the general public; and (2) the agency lacked a reasonable basis in law for withholding the record.
NORTH CAROLINA				-Requester who prevails may seek attorneys' fees, which is discretionary with the judge
NORTH DAKOTA	Public entity Public servant	Intentional or knowing Knowingly	Civil Criminal	-Declaratory relief, an injunction, or writ of mandamus may be issued -Court may award costs, fees -Court may award damages of $1,000 or actual damages, whichever is greater -Class A misdemeanor
OHIO				-Court has discretion to award attorneys' fees when the person bringing suit obtains a writ of mandamus -Statutory damages of $100 per day up to $1,000 may be assessed; to be construed as compensation and not penalty
OKLAHOMA	A public official	Willful violation	Criminal Civil	-Fine of up to $500 and/or imprisonment of up to one year -May sue for declarative or injunctive relief -Reasonable attorney fees if requestor prevails
OREGON				-Upon denial, requestor may petition the Attorney General; may be entitled to fees if requestor prevails
PENNSYLVANIA			Civil	-If the court finds that the requestor or the agency has acted in bad faith in pursuing an appeal or refusing access to records, it can award reasonable attorneys' fees to the prevailing party -Court may impose $1,500 civil penalty if agency acted in bad faith; may assess additional penalty of $500 per day for failure to comply with court order to produce records

State Fines, Penalties and Attorneys' Fees
For Open Records Violations
Updated April 2018

State	Entity	Standard	Civil or criminal	Fines/penalties/Attorneys fees (*Other relief available*)
RHODE ISLAND	Public body or official	Knowing and willful	Civil	-Fine of not more than $5,000 -Attorney General may investigate and file for injunctive or declaratory relief on behalf of requestor; fees available for requestor
SOUTH CAROLINA	Public body	Arbitrary and capricious	Civil	-Civil fine of $500 (formerly criminal misdemeanor) -Equitable relief available -Court may award a successful plaintiff reasonable attorneys' fees and other costs of litigation.
SOUTH DAKOTA	Public entity	Bad faith	Civil	-Court may award costs, disbursements, and a civil penalty of up to $50 for each day the records were delayed
TENNESSEE				-Attorneys' fees may be awarded if the refusal to disclose was willful
TEXAS	An officer for public information	With criminal negligence	Misdemeanor	-Fine of up to $1,000, imprisonment of up to six months or both -The court shall assess costs of litigation and reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails. When determining whether or not to award attorneys' fees, the court considers whether the conduct of the officer for public information of the governmental body had a reasonable basis in law and whether the litigation was brought in good faith.
UTAH	Public employee	Intentionally	Class B misdemeanor Civil	-Fine of not more than $1,000, imprisonment of up to six months or both -Injunctive relief available -Court may assess against governmental entity reasonable attorneys' fees and other litigation costs reasonably incurred if requestor substantially prevails - but subject to Governmental Immunity Act
VERMONT			Civil	-Court may award reasonable attorneys' fees and litigation costs to a substantially prevailing complainant

State Fines, Penalties and Attorneys' Fees
For Open Records Violations
Updated April 2018

State	Entity	Standard	Civil or criminal	Fines/penalties/Attorneys fees (*Other relief available*)
VIRGINIA	Individual member of public body	Willfully and knowingly	Civil penalty	-First offense: fine of not less than $500 and not more than $2,000 -Subsequent offense: fine of not less than $2,000 and not more than $5,000 -Costs and attorneys' fees will be awarded where the petitioner substantially prevails and where there are no special circumstances making the award unjust
WASHINGTON			Civil	-Court may award up to $100 per day to requestor for each day records were withheld -A requesting party who prevails against the agency is entitled to its costs and attorneys' fees
WEST VIRGINIA	Custodian	Willful	Misdemeanor Civil	-Fines between $200 and $1,000 and/or up to 20 days in jail -Injunctive or declaratory relief available; custodian may be punished as being in contempt of court -If requestor prevails, attorney fees and court costs awarded
WISCONSIN	An authority or legal custodian	Arbitrarily and capriciously	Civil	-Forfeiture of up to $1,000 -If the requester prevails in whole or in substantial part, the court will award reasonable attorneys' fees, costs, and damages of not less than $100 -Court may award punitive damages to requestor
WYOMING	Any person	Knowingly or intentionally	Civil penalty	-Fine of up to $750 (formerly misdemeanor)

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Legal Standard for Attorneys' Fees for Plaintiffs
For Open Records Violations – By State
April 26, 2018

State	Standard (in statute and/or case law)
ALABAMA	Not in statute. An award of reasonable attorney's fees "may be proper where the case results in a benefit to the general public even though there was no bad faith involved" *Tuscaloosa News v. Garrison*, CV-99-408 (Cir. Ct. of Tuscaloosa County, Ala., Jan. 15, 2001).
ALASKA	Not in Open Records statute or case law. There is a "loser pays" provision in Alaska Rules of Civil Procedure for most civil litigation. (Rule 82).
ARIZONA	By statute, a court may award attorney fees that are reasonably incurred if person seeking public records has "substantially prevailed." Ariz. Rev. Stat. § 39-121-02(B). In case law, for plaintiff to prevail, denial must have been "wrongful." For government to defend a denial, must show that "considerations of confidentiality, privacy, or the best interests of the state" outweigh the presumption of public disclosure. *See* Lake v. City of Phoenix, 207 P.3d 725,
ARKANSAS	By statute, attorneys' fees may be awarded to a substantially prevailing plaintiff unless the court finds the position of the defendant was substantially justified or that other circumstances make award unjust. § 25-19-107. In case law, "court need not make a fee award in every FOIA case; indeed, the purpose of the fee-shifting provision is to assess fees and costs where public officials have acted arbitrarily or in bad faith." Hamilton v. Simpson, 993 S.W.2d 501, 502 (Ark. Ct. of App. 1999).
CALIFORNIA	By statute, attorney fees shall be awarded to the plaintiff upon prevailing. (Ca. Govt. Code § 6259). No clarification in case law.
COLORADO	By statute, attorney fees shall be awarded if plaintiff prevails and custodian acted arbitrarily and capriciously. § 24-72-204. No clarification in case law.
FLORIDA	By statute, attorney fees shall be awarded if court determines that an agency "unlawfully refused" access to a public record. § 119.12. In case law, entitlement to attorney fees for unlawful refusal to permit inspection or copying of a public record is based upon whether the public entity had a "reasonable" or "good faith" belief in the soundness of its position in refusing production. Knight Ridder, Inc. v. Dade Aviation Consultants, App. 3 Dist., 808 So.2d 1268 (2002).
GEORGIA	By statute, unless special circumstances exist, the prevailing plaintiff shall be awarded fees if the agency acted "without substantial justification." § 50-18-73. In case law, there is a two-prong test for attorney's fees. Plaintiff (appellants) must show that agency violated the access law, and if there was a violation, plaintiff must who that agency lacked substantial justification. Jaraysi v. City of Marietta, 2008, 294 Ga.App. 6, 668 S.E.2d 446.

Legal Standard for Attorneys' Fees for Plaintiffs
For Open Records Violations – By State
April 26, 2018

State	Standard (in statute and/or case law)
IDAHO	By statute, court shall award reasonable fees to prevailing party if refusal to provide records was frivolously pursued. § 74-116. No clarification in case law.
ILLINOIS	By statute, court shall award prevailing plaintiff reasonable atty fees. § 140/11. In case law, a court may only deny fees if "special circumstances would render such an award unjust." Callinan v. Prisoner Review Bd., 862 N.E.2d 1165. Record must be "of clearly significant interest to the general public, and the public body lacked any reasonable basis in law for withholding the record." Lieber v. Board of Trustees of Southern Illinois University, 736 N.E.2d 213.
INDIANA	By statute, court shall award substantially prevailing plaintiff reasonable atty fees. § 5-14-3-9. In case law, atty fees are more discretionary, considering factors including whether the plaintiff substantially prevailed and the defendant's violation was knowing or intentional. *See* City of Elkhart v. Agenda: Open Government, Inc., App.1997, 683 N.E.2d 622; Indiana Civil Liberties Union v. Indiana General Assembly, App. 4 Dist.1987, 512 N.E.2d 432.
IOWA	By statute, court shall award atty fees to any plaintiff successfully establishing a violation. § 22.10. In case law, good faith or reasonable delay appears to be sufficient for agency to defend. City of Riverdale v. Diercks, 2011, 806 N.W.2d 643.
KANSAS	By statute, court shall award atty fees if the denial was not in good faith and without reasonable basis in fact or law. § 45-222. No meaningful clarification in case law.
KENTUCKY	By statute, court may award reasonable atty fees to prevailing plaintiff if court finds that records were "willfully withheld." § 61.882. No meaningful clarification in case law.
LOUISIANA	By statute, court shall award reasonable atty fees if plaintiff prevails. § 35. In case law, plaintiff must show that custodian acted arbitrarily and capriciously. Bacino v. City of Kenner, 131 So.3d 283, (La.App. 5 Cir. 12/12/13).
MAINE	By statute, court may award reasonable attorney's fees and litigation expenses to the substantially prevailing plaintiff if the court determines that the refusal or illegal action was committed in bad faith. § 409.
MASSACHUSETTS	By statute, court may award reasonable atty fees to prevailing plaintiff. § 10A. No clarification in case law.
MICHIGAN	By statute, court shall award reasonable atty fees to prevailing plaintiff. § 15.240. In case law, court may not limit prevailing party's access to atty fees; statute provides without qualification that court must award fees to prevailing plaintiff. Meredith Corp. v. City of Flint (2003) 671 N.W.2d 101,

Legal Standard for Attorneys' Fees for Plaintiffs
For Open Records Violations – By State
April 26, 2018

State	Standard (in statute and/or case law)
MONTANA	By statute, court may award costs to plaintiff who prevails in action brought under Right to Know provision in MT constitution. § 2-3-221. In case law, award of fees is discretionary, but outright denial without rationale is an abuse of discretion. Yellowstone County v. Billings Gazette, 143 P.3d 135, 333 Mont. 390 (2006). Atty fees may be awarded even if agency acted in good faith. (This was a public meeting case but reasoning should apply.) Associated Press v. Board of Public Educ., 1991, 246 Mont. 386, 804 P.2d 376.
NEBRASKA	By statute, court may award reasonable atty fees if requestor substantially prevails. § 84-712.07. No clarification in case law.
NEVADA	By statute, requester is entitled to recover reasonable atty fees upon prevailing. § 239.011. No clarification in case law.
NEW HAMPSHIRE	By statute, court shall award reasonable atty fees if agency knew or should have known it was in violation and if the lawsuit was necessary in order to make the information available. § 91-A:8. No clarification in case law.
NEW JERSEY	By statute, a prevailing requestor shall be entitled to reasonable atty fees. § 47:1A-6. No clarification in case law.
NEW MEXICO	By statute, court shall award damages, costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of the Inspection of Public Records Act. § 14-2-12. No clarification in case law.
NEW YORK	By statute, court may award reasonable atty fees if requestor substantially prevails and there is a showing that the record was of public interest and that the agency had no reasonable basis for denying access. § 89. No further clarification in case law.
NORTH CAROLINA	By statute, court shall allow a prevailing requestor to recover reasonable atty fees unless agency acted in reasonable reliance on a court order or judgment or on an opinion of the Attorney General. § 132-9. In case law, bad faith is not standard to be used in determining whether withholding of public records was without substantial justification. North Carolina Press Ass'n, Inc. v. Spangler, 1989, 381 S.E.2d 187.
NORTH DAKOTA	By statute, court may award reasonable atty fees in a civil action based on any violation. (Damages for intentional or knowing violation.) § 44-04-21.2. No clarification in case law.

Legal Standard for Attorneys' Fees for Plaintiffs
For Open Records Violations – By State
April 26, 2018

State	Standard (in statute and/or case law)
OHIO	By statute, court may award reasonable atty fees. Fees shall be construed as remedial and not punitive. § 149.43. In case law, award of fees is not mandatory. State ex re. Cincinnati Enquirer v. Daniels, 844 N.E.2d 1181. Reasonableness and good faith by the agency refusing to disclose may be considered. State ex re. Cincinnati Enquirer v. Dinkelacker, 761 N.E.2d 656.
OKLAHOMA	By statute, prevailing requestor shall be entitled to reasonable atty fees. § 24a.17. No clarification in case law.
OREGON	By statute, prevailing requestor shall be awarded reasonable atty fees. § 192.490. No clarification in case law.
PENNSYLVANIA	By statute, court may award reasonable atty fees if the court finds that agency refused access "willfully or with wanton disregard" or "otherwise acted in bad faith" or if the agency defended its refusal using an unreasonable interpretation of law. § 67.1304. Case law echoes these factors.
RHODE ISLAND	By statute, court shall award reasonable atty fees to prevailing requestor when imposing civil fine for knowing and willful or for reckless violation. § 38-2-9. No clarification in case law.
SOUTH CAROLINA	By statute, court may award reasonable atty fees to prevailing requestor. § 30-4-100. In case law, the only prerequisite for an award of fees is prevailing. Campbell v. Marion County Hosp. Dist. 580 S.E.2d 163. There is no good faith exception for an award of fees. New York Times Co. v. Spartanburg County School Dist. No. 7, 649 S.E.2d 28.
TENNESSEE	By statute, court has discretion to award reasonable atty fees to prevailing requestor if the court finds that the agency knowingly and willfully refused access. § 10-7-505. In case law, there is a good faith exception for agencies. *See, e.g.*, Friedmann v. Corrections Corp. of America, 310 S.W.3d 366.
TEXAS	By statute, court shall assess reasonable atty fees for substantially prevailing plaintiff unless agency acted in reasonable reliance on a court judgment or order or on a decision of the AG. § 552.323. Case law emphasizes that agencies are protected if they act in good faith (Texas Comptroller of Public Accounts v. Atty General, 244 S.W.3d 629) and suggest that courts have more discretion than the statute seems to say (Adkisson v. Paxton, 459 S.W.3d 761).
UTAH	By statute, court may assess reasonable atty fees if requestor substantially prevails. Factors for award include "the public benefit derived from the case, the nature of the requester's interest in the records, and whether the [agency] had a reasonable basis." § 63G-2-802. No case law.

Legal Standard for Attorneys' Fees for Plaintiffs
For Open Records Violations – By State
April 26, 2018

State	Standard (in statute and/or case law)
VERMONT	By statute, court has discretion to award reasonable atty fees if requestor substantially prevails if agency concedes that the records are public and provides them to requestor within the time allowed for service of an answer under VT Rules of Civil Procedure. § 319. Case law echoes statute.
VIRGINIA	By statute, court shall award reasonable atty fees if requestor substantially prevails unless special circumstances would make an award unjust. § 2.2-3713. Case law echoes statute.
WASHINGTON	By statute, court shall award reasonable atty fees if requestor prevails. § 42.56.550. In case law, a showing of bad faith is not required. Spokane Research & Defense Fund v. City of Spokane, 117 P.3d 1117.
WEST VIRGINIA	By statute, court shall award atty fees to prevailing plaintiff. § 29B-1-7. No clarification in case law.
WISCONSIN	By statute, court shall award reasonable atty fees if requester prevails in whole or in substantial part. § 19.37. In case law, must be a causal connection between civil action and release of information. WTMJ, Inc. v. Sullivan, 555 N.W.2d 140.

STATE OF MAINE
ONE HUNDRED AND TWENTY-EIGHTH LEGISLATURE
COMMITTEE ON JUDICIARY

January 16, 2018

Senator Lisa Keim, Chair
Right to Know Advisory Committee
Committee Members

Re: Criminal History Record Information Database – Bulk Information Requests

Dear Right to Know Advisory Committee Members:

During the Second Regular Session of the 128th Legislature, the Judiciary Committee heard and worked LD 1658, An Act To Make Criminal History Record Information Maintained in a Database Confidential. The bill as originally drafted designated as confidential criminal history record information contained in a database maintained by the Department of Public Safety's State Bureau of Identification (SBI), except to the extent necessary to disclose criminal history record information to persons who are authorized by law to receive the information and who submit a request for that information.

Matthew Ruel, Director of the SBI, explained at the public hearing that LD 1658's purpose was to protect the state criminal history repository maintained by SBI from bulk data requests, which the SBI anticipates may be made in the future by private companies that wish to create on-line searchable criminal history databases for commercial purposes. These types of requests have been made in other states in the past; similarly, bulk requests for data from the Sex Offender Registry have been made in Maine. Bulk requests will not only create administrative burdens for the SBI—requiring the Bureau to segregate confidential criminal history information from the public data contained in its database—but more importantly will create a risk that inaccurate, incomplete and potentially confidential criminal history information will be publicly available on commercial websites. Although the information requested through a bulk data request may be complete and non-confidential on the date that the information is disseminated by the SBI in response to a bulk request, over time the information will become out-of-date and inaccurate. Moreover, criminal history information that is public on one day may, over time, become confidential; for example, pursuant to 16 M.R.S. §703(2)(F), information that a criminal charge has been filed becomes confidential once a year has elapsed since the day of the filing.

Matthew Ruel nevertheless agreed that both the title and the content of LD 1658 were misleading, and he proffered a proposed amendment to the bill in an attempt to clarify that while the *databases* maintained by the SBI would be protected under the bill, any public criminal

history information *contained within* those databases "may be disseminated . . . in response to a request for an individual's criminal history record information . . . in accordance with Title 25, section 1541, subsection 6." In addition, the proposed amendment would re-title the bill: "An Act To Prohibit the Dissemination of Criminal History Record Information Databases Maintained by or for the State Bureau of Identification."

Judith Meyer, of the Maine Freedom of Information Coalition, strongly opposed LD 1658 at the public hearing because it would make otherwise public criminal history information confidential solely because the information is stored electronically in database form. She explained:

> Criminal history record information includes, among other things, summonses, arrests, bail, criminal charges, indictments, dispositions of criminal cases and information on post-trial appeals. That information is undeniably public. What the Department of Public Safety is asking is to classify these non-confidential records as confidential by virtue of their being stored in a database, which is in sharp contrast with the spirit of the Freedom of Access Act. In fact, FOAA was amended in 2011 specifically to note that public records stored electronically must be as accessible as records drafted on paper "*or in the medium in which the record is stored, at the requester's option,*" whether records are requested singly or by entire database. (Emphasis by Ms. Meyer.)

Limiting bulk requests, she explained, would limit the ability of members of the public, the legislature, the media and others from conducting research involving criminal history record information. She noted, by example, that a legislator might not be permitted to access compiled criminal history information from the SBI database in an attempt to study the crime rate or recidivism rates in his or her legislative district under either LD 1658 or the proposed amendment presented to the bill. Ms. Meyer further noted that neither the Right to Know Advisory Committee nor the Criminal Law Advisory Commission has been asked to review the SBI's concerns regarding bulk data requests for public criminal history record information.

The Judiciary Committee ended up voting Ought Not to Pass on LD 1658, with the understanding that we would ask the Right to Know Advisory Committee to collaborate with the Criminal Law Advisory Commission to examine the issues raised by the bill and make recommendations back to the Judiciary Committee in January next year.

The Judiciary Committee will be happy to share all files and correspondence on this bill. Please feel free to contact us or our committee analyst if you have any questions.

Thank you.

Sincerely,

Senator Lisa Keim
Senator Chair

Representative Matthew W. Moonen
House Chair

Attachments: LD 1658 (original bill)
Department of Public Safety proposed amendment to LD 1658

cc: Matthew Ruel, Director, State Bureau of Identification
Members, Maine Criminal Law Advisory Commission

for (1)

128th MAINE LEGISLATURE

SECOND REGULAR SESSION-2018

Legislative Document **No. 1658**

H.P. 1143 House of Representatives, November 29, 2017

An Act To Make Criminal History Record Information Maintained in a Database Confidential

Submitted by the Department of Public Safety pursuant to Joint Rule 203.
Received by the Clerk of the House on November 27, 2017. Referred to the Committee on Judiciary pursuant to Joint Rule 308.2 and ordered printed pursuant to Joint Rule 401.

Robert B. Hunt

ROBERT B. HUNT
Clerk

Presented by Representative COREY of Windham.
Cosponsored by Senator DIAMOND of Cumberland and
Representatives: GERRISH of Lebanon, HICKMAN of Winthrop, LONGSTAFF of Waterville, MAREAN of Hollis, NADEAU of Winslow, RECKITT of South Portland, WARREN of Hallowell, Senator: CYRWAY of Kennebec.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 16 MRSA §711 is enacted to read:

§711. Criminal history record information in database confidential

Notwithstanding any other provision of law to the contrary, criminal history record information contained in a database maintained or caused to be maintained by the Department of Public Safety, State Bureau of Identification is confidential and not a public record for the purposes of Title 1, chapter 13 and may not be disseminated in whole or part, except to the extent necessary to generate and disclose an individual's criminal history record information to persons requesting and authorized by law to receive an individual's criminal history record information from the State Bureau of Identification.

SUMMARY

This bill makes criminal history record information contained in a database maintained or caused to be maintained by the Department of Public Safety, State Bureau of Identification confidential.

STATE OF MAINE
DEPARTMENT OF PUBLIC SAFETY
MAINE STATE POLICE

PAUL R. LEPAGE
GOVERNOR

JOHN E. MORRIS
COMMISSIONER

COL. ROBERT A. WILLIAMS
CHIEF

LT. COL. JOHN E. COTE
DEPUTY CHIEF

TESTIMONY OF MATTHEW RUEL
DIRECTOR, STATE BUREAU OF IDENTIFICATION

In Support of
An Act To Make Criminal History Record Information Maintained in a Database Confidential

Senator and Representative, Members of the Committee:

My name is Matt Ruel, and I am the Director of the State Bureau of Identification at the Maine Department of Public Safety. I present this testimony on behalf of the Administration in support of LD 1658.
The purpose of this bill is simply to protect the state criminal history repository from bulk data requests, or having to provide access to repository data in ways that are not already defined in state statute. Our intent is not to change or prohibit public access that is already provided by state statute. Yearly, we receive roughly half a million public requests for individual criminal history and that process will continue unchanged.

I am looking to ensure that the record remains as accurate, timely, and complete as possible and as the only agency responsible for receiving all segments of the criminal history no other entity can meet that requirement. Supporting this LD will protect consumers and the subjects with criminal history by making it difficult for privately maintained criminal history websites from maintaining and disseminating information that could become inaccurate, or that shouldn't be disseminated because of state statute.

For these reasons, the Administration is in support of LD 1658, and asks the Committee to report the bill out as "Ought to Pass."
Thank you. I would be happy to try to answer any questions you might have and be available for the work session.

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STATE OF MAINE
DEPARTMENT OF PUBLIC SAFETY
MAINE STATE POLICE

COL. ROBERT A. WILLIAMS
CHIEF

LT. COL. JOHN E. COTE
DEPUTY CHIEF

LD 1659, *An Act To Make Criminal History Record Information Maintained in a Database Confidential*

*** AGENCY AMENDMENT ***

Sec. 1. Amend the bill title by striking the current title and replacing it with the following title:

'An Act to Prohibit the Dissemination of Criminal History Record Information Databases Maintained by or for the State Bureau of Identification'

Sec. 2. Amend Section 1 of the bill by striking the current text of the proposed bill and replacing it with the following text:

'§711. Dissemination of Criminal History Record Information Databases Prohibited

'Databases that contain criminal history record information and are maintained by or for the Bureau of State Police, State Bureau of Identification are not public records, either in whole or in part, for the purposes of Title 1, chapter 13.

'Public criminal history record information may be disseminated by the State Bureau of Identification in response to a request for an individual's criminal history record that includes the individual's name and date of birth, in accordance with Title 25, Section 1541, subsection 6.'

AMENDMENT SUMMARY

The amendment replaces the bill. The amendment –

1. Replaces the bill title to better reflect the intent of the original bill and the proposed bill amendment;

45 COMMERCE DRIVE, SUITE 1, 42 STATE HOUSE STATION, AUGUSTA, ME 04333-0042
TEL: (207) 624.7200 * TTY: (207) 287.3659 * FAX: (207) 287.3042

2. Clarifies that the bill prohibits the public dissemination, in whole or part, of criminal history databases maintained by or for the Bureau of State Police, State Bureau of Identification; and

3. Provides a cross-reference to the statutory provision that currently authorizes dissemination of public criminal history record information based on name and date of birth requests.

45 COMMERCE DRIVE, SUITE 1, 42 STATE HOUSE STATION, AUGUSTA, ME 04333-0042
TEL: (207) 624.7200 * TTY: (207) 287.3659 * FAX: (207) 287.3042

(2)

Reinsch, Margaret

see other side

From: Fouts, Henry
Sent: Monday, August 27, 2018 7:48 AM
To: Nale, Craig
Subject: FW: Right To Know

Follow Up Flag: Follow up
Flag Status: Flagged

Hey Craig,

FYI – see below concern from the public. I punted to Brenda, but have copied you in case you thought this was worthy of adding to the running list of RTKAC possible biz.

Thanks!

- Henry

From: Fouts, Henry
Sent: Monday, August 27, 2018 7:45 AM
To: 'Mackenzie Andersen'
Cc: Kielty, Brenda
Subject: RE: Right To Know

Dear Ms. Anderson,

Thank you for sharing your concern. I've copied the Public Access Ombudsman, Brenda Kielty, who would be a good resource if you care to follow up with this concern any further.

I will also share this with the staff for the Right to Know Advisory Committee, in case the Committee wishes to discuss this or investigate further.

Thank you,

Henry

Henry D. Fouts, Esq.
Legislative Analyst
Office of Policy and Legal Analysis
Maine State Legislature
Office Tel.: (207) 287-1670

From: Mackenzie Andersen [mailto:mackenziana@gmail.com]
Sent: Friday, August 24, 2018 11:00 AM
To: Fouts, Henry
Subject: Right To Know

Dear Mr Fouts,

I am contacting you in regards to a right to know concern.

I sent an FOA request to Dawn Seagroves at the Department of Transportation.

The response came back with the following notice attached, which when I objected to it, I was told to disregard it, stating that it does not apply to my FOA request. None the less it was included automatically and I had to ask to be told it does not apply. Since I was asking a public agency for information which should be a matter of public record. the effect of including this message automatically with any email correspondence by DOT, and especially an FOA request has an intimidating effect over freedom of speech. I am increasingly finding these kinds of notices posted on government and media sites and elsewhere which I do not believe would be upheld in a court of law, but none the less has a potential intimidating and silencing effect on a percentage of the population. I am submitting my objection to the automatic use of this notice by the DOT, which despite its public-private agreements, is still a public agency.

3

Reinsch, Margaret

From: Fouts, Henry
Sent: Wednesday, August 29, 2018 12:23 PM
To: Nale, Craig
Subject: FW: Right To Know

Hi Craig,

FYI – another suggested RTKAC topic from Ms. Anderson.

Best,

Henry

From: Mackenzie Andersen [mailto:mackenziana@gmail.com]
Sent: Wednesday, August 29, 2018 7:31 AM
To: Fouts, Henry
Subject: Re: Right To Know

Dear Mr. Fouts,

Thank You for the suggestion. I have already brought the notice to Ms. Keilty's attention

However,

In 2014 I made a suggestion to Ms. Keilty, of a searchable online database. At the time, the Maine Legislature was working on a transparency bill, shortly after having received a negative transparency review from the Center for Public Integrity. The response, I received follows:

> 1.Information made available on an agency website but not in a searchable database format may not provide the research and investigative tool needed by the public. The Freedom of Access Act does not require that public information be posted online in any particular format, just that public records be made available. While there is a strong argument for increasing the accessibility and usefulness of information, there is no current requirement that the technology in place achieve that objective.
>
> 2.The collection of data and reports generated from that data may be public records but the agency is not required under the law to create a new record or report in response to a FOAA request. If the dataset you request does not exist, the agency may choose to produce it for any number of reasons but not because they are legally required to take such an action. I appreciate your comments on this topic and I will continue to bring attention to the need for accessible, useful public data.
>
> Brenda Kielty

The Right To Know Committee can be influential in establishing as the law that public records be made available in a searchable database format, for public benefit. That would solve many problems.

In 2015, after passing a new transparency bill, Maine received another F for transparency from The Center for Public Integrity

Sincerely,
Mackenzie Andersen

4

(duplicate of 3)

Reinsch, Margaret

From: Mackenzie Andersen <mackenziana@gmail.com>
Sent: Tuesday, September 11, 2018 9:08 AM
To: Reinsch, Margaret
Subject: Improvements needed to serve public benefit in Freedom of Access Law.

Dear Ms Reinsch,

Thank you for sending notice of the Right To Know committee meeting. I would like to submit this testimony of my own experience of how Freedom Of Access currently works and how the law can help to improve it.

I have observed that the Maine Legislative Library is excellent in providing information in the most usable form which is digital, searchable, and it is possible to copy specific information relevant to one's project. It is also sent in digital format free of charge.

The Maine Department of Corporations provides much information which can be downloaded for a reasonable $3.00 fee.

However, when I request information from other government agencies from the town to the state, I usually receive it in a form in which is impossible to search with database tools, either because it is not in digital form or because it is in a PDF which has blocked searching and copying functions. I believe this is an intentional choice as is reflected in the response I received in 2014 from the Maine Ombudsman, Brenda Kielty.

> 1.Information made available on an agency website but not in a searchable database format may not provide the research and investigative tool needed by the public. The Freedom of Access Act does not require that public information be posted online in any particular format, just that public records be made available. While there is a strong argument for increasing the accessibility and usefulness of information, there is no current requirement that the technology in place achieve that objective.
>
> > 2.The collection of data and reports generated from that data may be public records but the agency is not required under the law to create a new record or report in response to a FOAA request. If the dataset you request does not exist, the agency may choose to produce it for any number of reasons but not because they are legally required to take such an action. I appreciate your comments on this topic and I will continue to bring attention to the need for accessible, useful public data.
>
> Brenda Kielty

Transparency is best served by a searchable online database but if that is not an option the public should be granted the right to request the information in digital form, which is searchable with functioning copying capability. It seems that the government will only allow the public to request information in the most usable form if there is a law mandating the government to do so- and so there should be.

To take this even further. Since the seventies, we have a public-private government in Maine in which much of its activity is concealed from public transparency by privacy laws specific to the private sector. The public-private government can use its public identity to access public funds for its own use and use the private side of

the partnership to conceal information from the public. Given that the public-private government is deeply entrenched, the rules of privacy and transparency could be rewritten to better serve public transparency.

Sincerely

Mackenzie Andersen

Preserving the American Political Philosophy

On 9/10/2018 3:01 PM, Reinsch, Margaret wrote:

> The Right to Know Advisory Committee will hold its first meeting of 2018 on Thursday, September 13th at 4:00 p.m. (we're trying to accommodate the House and Senate Sessions that day) in Room 438 of the State House.
>
> We apologize for the short notice. The meeting is open to the public and the audio will be streamed live over the Internet: http://legislature.maine.gov/Audio/#438
>
> The plan is to post the agenda tomorrow: https://www.maine.gov/legis/opla/righttoknow.htm
>
> Please let me know if you have any questions.
>
> Thanks
>
> Peggy
>
> Margaret J. Reinsch, Esq., Legislative Analyst
>
> Joint Standing Committee on Judiciary
>
> Maine State Legislature
>
> Office of Policy and Legal Analysis
>
> Room 215, Cross State Office Building
>
> 13 State House Station
>
> Augusta, Maine 04333
>
> (207) 287-1670 (office number)
>
> (207) 287-1673 (direct and voice mail)
>
> (207) 287-1275 (fax)
>
> margaret.reinsch@legislature.maine.gov
>
> ---
> ========== About This E-Mail List ==========
> ---
>
> Archives of this list: http:// https://lists.legislature.maine.gov/sympa/arc/right.to.know-ip

5

Reinsch, Margaret

From: Mary-Anne LaMarre <mlamarre@rsu18.org>
Sent: Monday, September 24, 2018 9:54 AM
To: Reinsch, Margaret
Subject: Re: Right to Know Advisory Committee - October 2nd

Good morning and thank you for this information.

I do have another question, unrelated from the previous topic. This email originated from Bruce Smith of Drummond Woodsum.

There is an issue about whether school surveillance video is a public record if it is not considered a student record. The federal FPCO says that the video is a student record if it is used for discipline or other specific purpose with regard to one or more students appearing in the video. If it is not used for that purpose, FERPA would not apply. My concern is that if it not a FERPA record, any member of the public might have the right to inspect and copy school and/or bus surveillance videos. My concern was increased when I read the attached Pennsylvania court decision this morning. The court there held that a video showing a teacher roughing up a student is neither a FERPA record nor a personnel record, and is therefore a public record under that state's right to know law.

This reminded me that I have thought we should consider trying to get the FOAA amended to make school surveillance videos confidential. I think that schools and parents would be quite concerned about the notion that any member of the public could have access to in-school or school bus video footage.

I agree with Bruce's concerns and believe it's an appropriate topic for the RTKAC. If you would like the attachment Bruce refers to in his email, please let me know.

Please let me know your thoughts and thank you,

Mary-Anne

2018 WL 3483126
Only the Westlaw citation is currently available.
Commonwealth Court of Pennsylvania.

EASTON AREA SCHOOL DISTRICT,
Appellant
v.
Rudy **MILLER** and The Express Times

No. 1897 C.D. 2017
|
Argued June 4, **2018**
|
Decided July 20, **2018**

Synopsis
Background: **School district** challenged determination by Office of Open Records (OOR) that school bus surveillance video should be disclosed to newspaper pursuant to a public-record request. The Court of Common Pleas, County of Northampton, No. C-0048-CV-2017-5558, Murray, J., concluded that the video recording was disclosable. **School district** appealed.

Holdings: The Commonwealth Court, No. 1897 C.D. 2017, Leavitt, P.J., held that:

[1] school bus surveillance video depicting a school teacher roughly disciplining a student was not an "education record" under the federal Family Educational Rights and Privacy Act;

[2] **school district** failed to show that school bus surveillance video qualified under Right-to-Know Law disclosure exemption for information on employee discipline; and

[3] **school district** waived argument that school bus surveillance video was exempt from disclosure as evidence presented at an arbitration proceeding.

Affirmed.

West Headnotes (12)

[1] **Records**
Judicial enforcement in general

Commonwealth Court's review in a Right-to-Know Law appeal determines whether the trial court committed an error of law and whether its findings of fact are supported by substantial evidence. 65 Pa. Stat. Ann. § 67.101 et seq.

Cases that cite this headnote

[2] **Records**
Judicial enforcement in general

The statutory construction of the Right-to-Know Law is a question of law subject to Commonwealth Court's plenary, de novo review. 65 Pa. Stat. Ann. § 67.101 et seq.

Cases that cite this headnote

[3] **Records**
Exemptions or prohibitions under other laws

School bus surveillance video depicting a school teacher roughly disciplining a student was not an "education record" under the federal Family Educational Rights and Privacy Act, and therefore, video did not qualify under Right-to-Know Law exemption for disclosures that would lead to a loss of federal funding; although video captured images of students who were on the bus, it was not directly relevant to those students, rather, it was directly relevant to the teacher's performance, who roughly disciplined a child. 20 U.S.C.A. § 1232g(a)(4)(A); 65 Pa. Stat. Ann. § 67.708(b)(1)(i).

Cases that cite this headnote

[4] **Records**

⇦Evidence and burden of proof

Under the standard of proof placed on agency asserting that a record is exempt from public disclosure, the existence of a contested fact must be more probable than its nonexistence. 65 Pa. Stat. Ann. § 67.708(a)(1).

Cases that cite this headnote

[5] **Records**
⇦Matters Subject to Disclosure; Exemptions

Exceptions to disclosure of public records under the Right-to-Know Law must be narrowly construed. 65 Pa. Stat. Ann. § 67.708.

Cases that cite this headnote

[6] **Records**
⇦Regulations limiting access; offenses

The federal Family Educational Rights and Privacy Act prohibits schools receiving federal financial assistance from disclosing sensitive information about students without parental consent. 20 U.S.C.A. § 1232g.

Cases that cite this headnote

[7] **Administrative Law and Procedure**
⇦Plain, literal, or clear meaning; ambiguity
Administrative Law and Procedure
⇦Permissible or reasonable construction

Under the *Chevron* test used to determine Congressional intent in a statute, first, courts must determine whether Congress has directly spoken to the precise question at issue—if so, courts must give effect to the unambiguously expressed intent of the Congress; if the statute is silent or ambiguous with respect to the specific issue, courts must defer to the agency's interpretation as long as it is based on a permissible construction of the statute.

Cases that cite this headnote

[8] **Records**
⇦Regulations limiting access; offenses

Federal Family Educational Rights and Privacy Act does not apply to the disclosure of teacher records. 20 U.S.C.A. § 1232g.

Cases that cite this headnote

[9] **Records**
⇦Regulations limiting access; offenses

A video does not become an "educational record" under the federal Family Educational Rights and Privacy Act simply because it captures images of students who are bystanders at an event recorded on video; it is only an educational record with respect to a student in the video for whom the video may have consequences. 20 U.S.C.A. § 1232g.

Cases that cite this headnote

[10] **Records**
⇦Personal privacy considerations in general; personnel matters

School district failed to show that school bus surveillance video depicting a school teacher roughly disciplining a student qualified under Right-to-Know Law disclosure exemption for information on discipline, demotion, or discharge of an agency employee; district did not establish that video was contained in teacher's personnel file, and teacher had not been disciplined, demoted, or discharged at time **school district** declined requester access to the video recording. 65 Pa. Stat. Ann. § 67.708(b)(7)(viii).

Cases that cite this headnote

[11] **Records**
⇦Judicial enforcement in general

By raising issue for first time on appeal to Commonwealth Court, **school district** waived argument that school bus surveillance video depicting a school teacher roughly disciplining a student was exempt from disclosure under Right-to-Know Law as evidence presented at an arbitration proceeding. 65 Pa. Stat. Ann. § 67.708(b)(8)(ii).

Cases that cite this headnote

[12] **Records**
⇦Judicial enforcement in general

In asserting that a record is exempt from disclosure under the Right-to-Know Law, an agency must raise all its challenges before the fact-finder closes the record. 65 Pa. Stat. Ann. § 67.708.

Cases that cite this headnote

Appealed from No. C-0048-CV-2017-5558, Common Pleas Court of the County of Northampton, Murray, J.

Attorneys and Law Firms

Rebecca A. Young, Bethlehem, for appellant.

Douglas J. Smillie, Center Valley, for appellees.

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge, HONORABLE PATRICIA A. McCULLOUGH, Judge, HONORABLE CHRISTINE FIZZANO CANNON, Judge

Opinion

OPINION BY PRESIDENT JUDGE LEAVITT

***1 Easton Area School District (School District)** appeals an order of the Court of Common Pleas of Northampton County (trial court) granting a request under the Right-to-Know Law[1] for a school bus surveillance video. In doing so, the trial court affirmed the determination of the Office of Open Records (OOR) that the recording, which depicts a school teacher roughly disciplining a student on the school bus, was disclosable. The **School District** contends that the video is an exempt public record because its disclosure will lead to a loss of federal funding; provides information on discipline, demotion or discharge of an agency employee; and was admitted as evidence at an arbitration proceeding. For the following reasons, we affirm the trial court.

Background

On February 21, 2017, Rudy **Miller**, on behalf of The Express Times (Requester), submitted a written request to the **School District**, which stated in pertinent part:

> As per Pennsylvania's right-to-know law I'm requesting information in connection with an incident on a school bus outside Paxinosa Elementary School, which is temporarily located in the rear of **Easton Area** Middle School in Forks Township. It's come to my attention that elementary school teacher Aaron Dufour disciplined a child roughly on a school bus in front of the school on the morning of Feb. 8, 2017; Feb. 9, 2017; or Feb. 10, 2017. It's my understanding he grabbed a child and "slammed" him down in a bus seat. It's my understanding that Mr. Dufour has either been suspended or terminated as a result of this incident.
>
> * * *
>
> It's my understanding that each school bus is outfitted with a security camera. I would like a copy of the surveillance video if any exists that captured this incident involving Mr. Dufour on the school bus in front of Paxinosa Elementary School on either Feb. 8, Feb. 9 or Feb. 10, 2017.

Reproduced Record at 9a (R.R. __). The written request also sought information about Dufour's employment status and his annual salary.

The **School District** denied the request for the stated

reason that disclosure of the video would imperil federal funding and, thus, it was exempt under Section 708(b)(1)(i) of the Right-to-Know Law, 65 P.S. § 67.708(b)(1)(i). Requester appealed to the OOR. The **School District** contended that disclosure of the video would violate the federal Family Educational Rights and Privacy Act (Privacy Act), 20 U.S.C. § 1232g, and, therefore, result in a loss of federal funding. Alternatively, the **School District** argued that the video recording was exempt under Section 708(b)(7)(viii) of the Right-to-Know Law, 65 P.S. § 67.708(b)(7)(viii), because the video was used "in the pending action to discipline, demote or discharge [ ] Dufour." R.R. 15a. In support, the **School District** submitted an affidavit of John Castrovinci, its human resources director and open records officer, which stated that Dufour was the subject of a disciplinary proceeding pending with the School Board and that the video had been admitted into evidence in that proceeding.

OOR's Final Determination

***2** On May 24, 2017, the OOR issued a final determination partially granting Requester's appeal. It held that the exemption under Section 708(b)(1)(i) of the Right-to-Know Law was inapplicable because the video was not an "education record" within the meaning of the federal Privacy Act. The OOR did not address whether the exemption under Section 708(b)(7)(viii) of the Right-to-Know Law for information concerning employee discipline applied to the video recording. On the other hand, the OOR held that Requester's questions about Dufour's employment status and salary, which were not put in the form of document requests, did not have to be answered by the **School District**.[2]

Trial Court Decision

The **School District** appealed to the trial court, again relying on Sections 708(b)(1)(i) and 708(b)(7)(viii) of the Right-to-Know Law. The trial court affirmed the OOR and held that the video recording is not an "education record" for purposes of the federal Privacy Act. In so holding, the trial court relied upon a New York trial court decision, *Rome City* ***School District*** *Disciplinary Hearing v. Grifasi*, 10 Misc.3d 1034, 806 N.Y.S.2d 381 (N.Y. Sup. Ct. 2005). In *Grifasi*, a **school district** video camera captured images of students involved in an altercation along with bystanders. A student who was suspended for the incident subpoenaed the **school district** for copies of the video recordings.[3] The court rejected the **school district's** argument that the videotape was an educational record protected by the Privacy Act, stating:

> [The Privacy Act] is intended to protect records relating to an individual student's performance. [It] is *not* meant to apply to records, such as the videotape in question which was recorded to maintain the physical security and safety of the school building and which does not pertain to the educational performance of the students captured on this tape....

Id. at 383 (internal citation omitted).

Relying on the *Grifasi* analysis, the trial court concluded that because the video sought by Requester did not concern any student's academic performance, it was not an educational record. Accordingly, disclosure of the video would not jeopardize the **School District's** federal funding under the Privacy Act, and the **School District** did not prove an exemption under Section 708(b)(1)(i) of the Right-to-Know Law.

The trial court also rejected the **School District's** argument that the video recording was exempt from disclosure under Section 708(b)(7)(viii) of the Right-to-Know Law as " 'information regarding' discipline, demotion or discharge [of Dufour]." Trial Ct. Op. 12/1/2017, at 6 (citing 65 P.S. § 67.708(b)(7)(viii)); R.R. 49a. In so ruling, the trial court found that "no final action resulting in demotion or discharge has occurred." *Id.*

Appeal

[1] [2]The **School District** appealed to this Court.[4] In this appeal, the **School District** presents three issues for our consideration. The **School District** first argues that the trial court erred in ruling that the video recording is not exempt from disclosure under Section 708(b)(1)(i) of the Right-to-Know Law (loss of federal funding). Second, the **School District** argues that the trial court erred in holding

that Section 708(b)(7)(viii) of the Right-to-Know Law (employee discipline) does not apply to the video. Finally, the **School District** argues that the video is exempt from disclosure under Section 708(b)(8)(ii) of the Right-to-Know Law (arbitration evidence), 65 P.S. § 67.708(b)(8)(ii). We address these issues *seriatim*.

I. Loss of Federal Funding Exemption

*3 [3]The **School District** argues that the trial court erred in holding that the video was not exempt because the Privacy Act prohibits disclosure of a student's education records without parental consent. The **School District** contends that because the video depicts students on the school bus during the school day, it is an "education record." The **School District** argues that the trial court erred in holding that the Privacy Act protects only those records that relate to a student's academic performance.

The Right-to-Know Law requires state and local agencies to provide access to public records upon request. Section 302 of the Right-to-Know Law, 65 P.S. § 67.302 ("A local agency shall provide public records in accordance with this act."). Section 102 of the Right-to-Know Law defines a "public record" as a

> record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708[, 65 P.S. § 67.708]; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.

65 P.S. § 67.102. A "record" is further defined under the Right-to-Know Law as:

> Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

Id.

[4] [5]The burden of proving that a "record" is exempt from public access is placed on the "local agency receiving a request by a preponderance of the evidence." Section 708(a)(1) of the Right-to-Know Law, 65 P.S. § 67.708(a)(1). By this standard of proof, "the existence of a contested fact must be more probable than its nonexistence." *Pennsylvania State Troopers Association v. Scolforo*, 18 A.3d 435, 439 (Pa. Cmwlth. 2011) (quoting *Department of Transportation v. Agricultural Lands Condemnation Approval Board*, 5 A.3d 821, 827 (Pa. Cmwlth. 2010)). In addition, "the exceptions to disclosure of public records must be narrowly construed." *Office of the Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Cmwlth. 2015).

Section 708(b)(1)(i) of the Right-to-Know Law exempts from disclosure "[a] record, the disclosure of which would result in the loss of Federal or State funds by an agency or the Commonwealth[.]" 65 P.S. § 67.708(b)(1)(i). Here, the **School District** argues that the Privacy Act forbids disclosure of the video recording without first obtaining the consent of the parents of all students on the bus that appear in the video. Without this consent, disclosure will cause the **School District** to lose federal funding.

[6]The Privacy Act prohibits schools receiving federal financial assistance from disclosing "sensitive information about students" without parental consent. *Owasso Independent **School District** No. I-011 v. Falvo*, 534 U.S. 426, 428, 122 S.Ct. 934, 151 L.Ed.2d 896 (2002). Specifically, Section 1232g(b)(1) of the Privacy Act provides:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting *the release of education records* (or *personally identifiable information contained therein* other than directory information, as defined in paragraph (5) of subsection (a)) of students *without the written consent of their parents....*

*4 20 U.S.C. § 1232g(b)(1) (emphasis added).

Section 1232g(a)(4)(A) of the Privacy Act defines "education records" as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."[5] 20 U.S.C. § 1232g(a)(4)(A).

The **School District** argues that the school bus video satisfies this definition of "education record" because it contains personally identifiable information about the students on the school bus and is maintained by the **School District**.

In support, the **School District** directs the Court to a decision of the Court of Appeals of Utah, *Bryner v. Canyons* ***School District***, 351 P.3d 852 (Utah Ct. App. 2015), which involved a surveillance video capturing an altercation between students.[6] The **school district** declined to disclose the video, arguing that it was an educational record under the Privacy Act. The court agreed, holding that the term "education record" was not limited to academic records, and noting that Congress had made no "content-based judgments with regard to its 'education records' definition." *Id.* at 857 (quoting *United States v. Miami University*, 294 F.3d 797, 812 (6th Cir. 2002)). The *Bryner* court held that the video fell within that definition because the video contained information "identifying the student." *Id.* at 858 (quoting *United States v. Miami University*, 91 F.Supp.2d 1132, 1149 (S.D. Ohio 2000), *aff'd*, 294 F.3d 797 (6th Cir. 2002)). *Bryner* also cited guidance from the United States Department of Education that videotapes of this type "do not constitute the education records of students who did not participate in the altercation [; however,] ... the images of the students involved in the altercation do constitute the education records of those students." *Bryner*, 351 P.3d at 858 (quoting Opinion of the Texas Attorney General, OR2006-07701 (July 18, 2006)).

5** Requester counters that Congress did not intend the Privacy Act to cover "all records pertaining to a school's activities"; rather, the Privacy Act has been more narrowly construed by various state and federal courts. Requester Brief at 10 (citing, *e.g.*, *Ellis v. Cleveland Municipal* ***School District, 309 F.Supp.2d 1019 (N.D. Ohio 2004)).

[7]In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the United States Supreme Court outlined a two-step procedure to determine Congressional intent in a statute. First, courts must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. 2778. If so, courts "must give effect to the unambiguously expressed intent of the Congress."[7] *Id.* at 843, 104 S.Ct. 2778. If the statute is silent or ambiguous with respect to the specific issue, courts must defer to the agency's interpretation as long as it is "based on a permissible construction of the statute." *Id.*

The trial court found that the school bus video was not an "education record" under the Privacy Act simply because it captured a teacher's misconduct that was irrelevant to the academic performance of any student on the bus. Section 1232g(a)(4)(A) of the Privacy Act defines "education records" as those that "contain information directly related to a student[.]" 20 U.S.C. § 1232g(a)(4)(A). The statute does not require an educational record to be related to a student's academic performance, but it does require the information to be "directly related to a student." "Directly" means "in a direct manner." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 327 (10th ed. 2001).

The video captured images of the students who were on the bus, but it is not directly relevant to those students. Rather, it is directly relevant to the teacher's performance, who roughly disciplined a child. Several federal court decisions have held that a video recording that concerns a teacher, not a student, is not an "education record" under the Privacy Act.

In *Young v. Pleasant Valley* ***School District*** (M.D. Pa., No. 3:07-CV-854, filed June 26, 2008), 2008 **WL** 11336157 (unreported), a school teacher was charged with giving students sexually offensive materials. The parents of one minor student sought emails sent to the **school district** by other parents with complaints about the teacher. The **school district** argued, *inter alia*, that the emails were educational records within the meaning of the Privacy Act and could not be disclosed without consent of all other parents. The United States District Court for the Middle District of Pennsylvania rejected the district's argument, stating:

> The records in question here – e-mails containing complaints about a teacher's performance – do not appear to be the types of records covered by [the Privacy Act]. *Those complaints do not necessarily contain any information directly related to a student. Instead, they are directly related to a teacher and only tangentially related to the student....* As such, we could

> probably conclude after examining the e-mails that they are not an educational record and not subject to [the Privacy Act's] requirement.

*6 *Id.* at *7 (emphasis added).

Likewise, in *Ellis*, 309 F.Supp.2d 1019, the plaintiff sought discovery of "incident reports related to altercations between substitute teachers and students, student and employee witness statements related to these incidents, and information related to subsequent discipline, if any, imposed on the substitute teachers[.]" *Id.* at 1021. The United States District Court for the Northern District of Ohio ruled that the Privacy Act did not prohibit disclosure of the information sought by the plaintiff:

> First, [the Privacy Act] applies to the disclosure of student records, not teacher records. *While it is clear that Congress made no content-based judgments with regard to its "education records" definition, ... it is equally clear that Congress did not intend [the Privacy Act] to cover records directly related to teachers and only tangentially related to students.*

Id. at 1022 (emphasis added) (internal quotations omitted).

[8]Here, as in *Young* and in *Ellis*, the video recording is "directly related" to the teacher disciplining a student and is only "tangentially related" to the students on the bus. *Bryner* is inapposite because the video contained information directly related to the students committing misconduct. By contrast, here, the video depicts a teacher's alleged misconduct. The Privacy Act does not apply to the disclosure of teacher records.

[9]This interpretation of the Privacy Act is consistent with guidance from the U.S. Department of Education, which addresses when a photo or video of a student constitutes an "education record" under the Privacy Act:

> [The Privacy Act] regulations do not define what it means for a record to be "directly related" to a student. In the context of photos and videos, determining if a visual representation of a student is *directly* related to a student (rather than just incidentally related to him or her) is often context-specific, and educational agencies and institutions should examine certain types of photos and videos on a case by case basis to determine if they directly relate to any of the students depicted therein.

FAQs on Photos and Videos under FERPA, U.S. DEPARTMENT OF EDUCATION, https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa (last visited June 12, **2018**) (emphasis in original). Stated otherwise, a video does not become an educational record simply because it captures images of students who are bystanders at an event recorded on video. *Bryner*, 351 P.3d at 858. It is only an educational record with respect to a student in the video for whom the video may have consequences.

Because the video recording sought by Requester is not an "education record" for purposes of the Privacy Act, its disclosure will not subject the **School District** to a loss of federal funding. The trial court did not err in holding that the **School District** did not prove that the video is exempt from disclosure under Section 708(b)(1)(i) of the Right-to-Know Law.

II. Employee Discipline Exemption

[10]The **School District** argues, next, that the trial court erred in holding that the video was not exempt under Section 708(b)(7)(viii) of the Right-to-Know Law because the video is "[i]nformation regarding discipline, demotion or discharge contained in [Dufour's] personnel file." **School District** Brief at 13. Requester counters that it is unfair to allow the **School District** to "indefinitely or permanently deny access to the [v]ideo under the Right-to-Know Law simply by placing the [v]ideo into the employee's personnel file." Requester Brief at 17. In any event, Requester maintains that the video is not exempt from disclosure under Section 708(b)(7)(viii) because it does not relate to the discipline, demotion or discharge of Dufour.

*7 Section 708(b)(7)(viii) of the Right-to-Know Law states, in pertinent part, as follows:

(b) Exceptions. – Except as provided in subsections (c)

and (d) [regarding financial records and aggregated data], the following are exempt from access by a requester under this act:

* * *

(7) The following records relating to an agency employee:

* * *

(viii) *Information regarding discipline, demotion or discharge contained in a personnel file.* This subparagraph shall not apply to the final action of an agency that results in demotion or discharge.

65 P.S. § 67.708(b)(7)(viii) (emphasis added).

Contrary to the **School District's** assertion, it has not been established that the video is contained in Dufour's personnel file. The affidavit of the district's open records officer, John Castrovinci, states that the video was "admitted into evidence in the pending action to discipline, demote or discharge [ ] Dufour." Castrovinci Affidavit ¶ 7; R.R. 18a. It further states that "[r]ecords responsive to the first part of [the Requester's] request are maintained in [ ] Dufour's personnel file." Castrovinci Affidavit ¶ 3; R.R. 17a. "The first part of the request," as Castrovinci cited in his affidavit, concerned Requester's questions about Dufour's employment status and annual salary, which is not an issue on appeal. R.R. 17a.

Further, although the video was admitted into evidence in the pending action to discipline, demote or discharge Dufour, the affidavit also states that "no final agency action has been taken with regard to [ ] Dufour's employment as a result of the incident referred to in this request." Castrovinci Affidavit ¶¶ 7-8; R.R. 18a. In other words, at the time the **School District** declined Requester access to the video recording, Dufour had not been disciplined, demoted, or discharged. The video, therefore, is not itself "information regarding discipline, demotion or discharge" of Dufour.[8]

The local agency bears the burden of proving that a record is exempt from public access "by a preponderance of the evidence." 65 P.S. § 67.708(a)(1). Because the **School District** did not satisfy its burden of proving that the video was contained in Dufour's personnel file and was information regarding discipline, demotion or discharge of Dufour, we hold that the trial court did not err by concluding that Section 708(b)(7)(viii) of the Right-to-Know Law does not apply to the video.

III. Arbitration Evidence

[11] [12]Finally, the **School District** argues that the video is exempt from disclosure under Section 708(b)(8)(ii) of the Right-to-Know Law because it is evidence presented at an arbitration proceeding. "[A]n agency must raise all its challenges before the fact-finder closes the record." *Levy v. Senate of Pennsylvania*, 94 A.3d 436, 441 (Pa. Cmwlth. 2014). Because the **School District** has raised this issue for the first time on appeal to this Court, the issue is waived.

Conclusion

***8** For the reasons stated above, we conclude that the trial court did not err in ruling that the video recording is not exempt from disclosure under either Section 708(b)(1)(i) or 708(b)(7)(viii) of the Right-to-Know Law. Further, we determine that the **School District** waived the issue that the video is exempt from disclosure under Section 708(b)(8)(ii) of the Right-to-Know Law. Accordingly, we affirm the trial court's December 1, 2017, order.

ORDER

AND NOW, this 20th day of July, **2018**, the order of the Court of Common Pleas of Northampton County dated December 1, 2017, in the above-captioned matter is AFFIRMED.

All Citations

--- A.3d ----, 2018 WL 3483126

Footnotes

1 Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

2 Requester did not cross-appeal this part of the OOR's final determination, and it is not before the Court.

3 Notably, the Privacy Act authorizes the release of educational records without parental consent where required by judicial order or lawfully issued subpoena. 20 U.S.C. § 1232g(b)(2)(B).

4 This Court's review in a Right-to-Know Law appeal determines "whether the trial court committed an error of law and whether its findings of fact are supported by substantial evidence." *Paint Township v. Clark*, 109 A.3d 796, 803 n.5 (Pa. Cmwlth. 2015). The statutory construction of the Right-to-Know Law is a question of law subject to this Court's plenary, *de novo* review. *Hearst Television, Inc. v. Norris*, 617 Pa. 602, 54 A.3d 23, 29 (2012).

5 Section 1232g(a)(4)(B) excludes the following from the definition of "education records":

> (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;
> (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;
> (iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or
> (iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

20 U.S.C. § 1232g(a)(4)(B).

6 The **School District** also directs the Court to an unpublished decision of the Connecticut Superior Court in *Goldberg v. Regional **School District** No. 18* (Conn. Super. Ct., No. KNL-CV-1460200375, filed June 26, 2015), 2015 **WL** 4571079 (unreported). In a prior ruling, the Connecticut court held that a video recording of students and a school bus driver bullying an autistic child was an educational record protected by the Privacy Act. However, the reasons for that holding are nowhere given in the subsequent decision cited by the **School District**, which concerned only a bill of costs in a discovery dispute. Thus, *Goldberg* has no instructive value.

7 Similarly, Pennsylvania rules of statutory construction provide that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa. C.S. § 1921(a). "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b).

8 Section 708(b)(17)(ii) of the Right-to-Know Law exempts from disclosure "[a] record of an agency relating to a noncriminal investigation, including ... [i]nvestigative materials, notes, correspondence and reports." 65 P.S. § 67.708(b)(17)(ii); *see also California Borough v. Rothey*, 185 A.3d 456 (Pa. Cmwlth. **2018**). Here, the **School District** did not assert that the video is exempt as a noncriminal investigative record under Section 708(b)(17)(ii) of the Right-to-Know Law. Accordingly, we do not consider the issue here.

End of Document

6

Reinsch, Margaret

From: Parr, Christopher <Christopher.Parr@maine.gov>
Sent: Saturday, September 22, 2018 3:25 PM
To: Reinsch, Margaret
Subject: *** RTKAC Topic Suggestion

Importance: High

Peggy:

The following is my topic suggestion, and it is inspired by the idea that Sen. Keim had at the last meeting about perhaps having a Legislative panel convened to study the remote participation issue on which the RTKAC has been working for years:

Topic Suggestion:

That the RTKAC consider recommending to the Judiciary Committee that the Maine Legislature establish a joint select committee dedicated primarily to working on government transparency-related and data privacy-related public policy issues.

Creating such a committee – which perhaps might work at times with the RTKAC – would ensure that more Legislators are able to directly work on, more thoroughly discuss, and more fully appreciate the very often complex public policy issues about which the RTKAC frequently deliberates in its work.

Such a Legislative committee would not necessarily need to be one that hears proposed legislation.

Rather, the select committee instead might be responsible for carefully considering government transparency-related and data privacy-related public policy issues that State and local governments frequently encounter, and trying to craft legislation designed to address those issues. Such legislation, in turn, then could be referred by the select committee to the existing joint standing Legislative committees by which – based on the subject matter of the respective bills being referred – it would make the most sense for the legislation to be heard and further worked on.

A few examples of some of the topics on which such a select committee might work are:

- **Remote participation in public proceedings/meetings;**
- **Public access to, and the protection of private/personal information in, administrative professional licensing files;**
- **Whether to increase fines and penalties for intentional violations of the FOAA;**
- **Public access to government electronic information systems (such as the new e-records system that is being implemented by the Judicial Branch), and the protection of private/personal information that is included in such systems;**
- **Creation and implementation of an electronic information system in which to store, and through which the public would be able to access, text messages sent to and from public officials that constitute "public records" (as that term is defined in the FOAA).**

Best, C

Chris

CHRISTOPHER PARR
STAFF ATTORNEY | MAINE STATE POLICE

(e) christopher.parr@maine.gov

RIGHT TO KNOW ADVISORY COMMITTEE

Monday, November 19, 2018
9:00 a.m.
State House Room 438

Meeting Agenda

1. Introductions

2. Reports of Subcommittees

   A. Public Records Exceptions Subcommittee
      Proposed recommendations

   B. Remedies Subcommittee

3. Discussion: issues identified for review

   A. School surveillance cameras

   B. Accessing public records in electronic databases

   C. Study on Remote Participation

   D. Joint Select Committee on government transparency and data privacy policy issues

4. Possible legislation proposals

   A. Proposed in report but not enacted by 128th Legislature
      (1) FOA training for appointed public officials
      (2) Remote participation

   B. Other

5. Establish future meeting dates

6. Adjourn

4A-(2)

128th MAINE LEGISLATURE

SECOND REGULAR SESSION-2018

Legislative Document **No. 1832**

H.P. 1274 House of Representatives, February 8, 2018

An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation

Reported by Representative MOONEN of Portland for the Joint Standing Committee on Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph G.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

Robert B. Hunt

ROBERT B. HUNT
Clerk

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 1 MRSA §403-A is enacted to read:

§403-A. Remote participation in public proceedings

It is the intent of the Legislature that actions of bodies subject to this subchapter be taken openly and their deliberations be conducted openly. This section governs participation in a public proceeding of such a body by a member of that body when the member is not physically present. Remote participation, which means participation through telephonic, video, electronic or other similar means of communication may not be used to defeat the purposes of this subchapter as stated in section 401. The Legislature may not allow its members to participate remotely in public proceedings of the Legislature.

1. Remote participation; requirements. Except as provided in subsection 2, a body subject to this subchapter may not allow a member of the body to participate remotely in any of its public proceedings unless the participation is in accordance with this subchapter and:

A. After notice and public hearing, the body has adopted a written policy or rule that authorizes a member of the body who is not physically present to participate in a public proceeding of that body in a manner that allows all members to simultaneously hear and speak to each other during the public proceeding and allows members of the public attending the public proceeding at the location identified in the notice required by section 406 to hear all members of the body. If the policy allows remote participation in executive sessions, the policy must establish procedures and requirements that ensure the privacy of the executive session;

B. A quorum is physically present at the location identified in the notice required by section 406, unless immediate action is imperative and physical presence of a quorum is not reasonably practicable within the period of time in which action must be taken. The determination that a quorum is not required under this paragraph must be made by the presiding officer of the body and the facts supporting that determination must be included in the record of the meeting. A body may not consider matters other than those requiring immediate action in a public proceeding held pursuant to this subsection when a quorum is not physically present;

C. Each member of the body who is participating in the public proceeding remotely identifies for the record all persons present at the location from which the member is participating. The member shall note for the record when any person enters or leaves the location throughout the course of the public proceeding;

D. All votes taken during the public proceeding are taken by roll call;

E. A member of the body who is not physically present at the location identified in the notice required by section 406 does not participate and does not vote in an adjudicatory proceeding; and

F. Each member of the body who is participating in the public proceeding remotely receives any documents or other materials presented or discussed at the public

proceeding in advance or when made available at the public proceeding if the transmission technology is available. Failure to comply with this subsection does not invalidate an action of the body.

2. Exceptions. The following bodies are exempt from the provisions of this section and a member of the following bodies may participate in a public proceeding of the body when the member is not physically present:

A. The Finance Authority of Maine, as provided in Title 10, section 971;

B. The Commission on Governmental Ethics and Election Practices, as provided in Title 21-A, section 1002, subsection 2;

C. The Maine Health and Higher Educational Facilities Authority, as provided in Title 22, section 2054, subsection 4;

D. The Maine State Housing Authority, as provided in Title 30-A, section 4723, subsection 2, paragraph B;

E. The Maine Municipal Bond Bank, as provided in Title 30-A, section 5951, subsection 4;

F. The Emergency Medical Services' Board, as provided in Title 32, section 88, subsection 1, paragraph D; and

G. The Workers' Compensation Board, as provided in Title 39-A, section 151, subsection 5.

SUMMARY

This bill implements the recommendation of the Right To Know Advisory Committee to clarify when members of public bodies may participate remotely in public proceedings of those bodies. The bill prohibits a body subject to the Freedom of Access Act from allowing its members to participate in its public proceedings through telephonic, video, electronic or other similar means of communication unless the body has adopted a written policy that authorizes remote participation in a manner that allows all members to simultaneously hear and speak to each other during the public proceeding and allows members of the public attending the public proceeding at the location identified in the meeting notice to hear all members of the body. If the policy allows remote participation in executive sessions, the policy must establish procedures and requirements that ensure the privacy of the executive session. The bill requires a quorum of the body to be physically present at the location identified in the meeting notice unless immediate action is imperative and physical presence of a quorum is not reasonably practicable within the period of time requiring action. The bill requires that each member participating remotely identify all persons present at the remote location, that all votes be taken by roll call and that members participating remotely receive documents or other materials presented or discussed at the public proceeding in advance or when made available at the meeting, if the technology is available. The bill prohibits members who are not physically present at the meeting location from participating and voting in adjudicatory proceedings.

The bill prohibits the Legislature from allowing its members to participate in its public proceedings through telephonic, video, electronic or other similar means of communication, but allows the Finance Authority of Maine, the Commission on Governmental Ethics and Election Practices, the Maine Health and Higher Educational Facilities Authority, the Maine State Housing Authority, the Maine Municipal Bond Bank, the Emergency Medical Services' Board and the Workers' Compensation Board to continue allowing remote participation at their public proceedings as currently authorized in law.

4A-(1)

128th MAINE LEGISLATURE

SECOND REGULAR SESSION-2018

Legislative Document **No. 1821**

H.P. 1263 House of Representatives, February 5, 2018

An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Freedom of Access Training for Public Officials

Reported by Representative MOONEN of Portland for the Joint Standing Committee on Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph G.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

Robert B. Hunt

ROBERT B. HUNT
Clerk

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 1 MRSA §412, as amended by PL 2011, c. 662, §7, is further amended to read:

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

1. Training required. A public access officer and an ~~elected~~ 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 ~~elected~~ official takes the oath of office to assume the person's duties as an ~~elected~~ official or the person is designated as a public access officer pursuant to section 413, subsection 1.

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;

B. Procedures and requirements regarding complying with a request for a public record under this chapter; and

C. Penalties and other consequences for failure to comply with this chapter.

An ~~elected~~ 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.

3. Certification of completion. Upon completion of the training course required under subsection 1, the ~~elected~~ 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 ~~elected~~ 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.

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

A. The Governor;

B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;

C. Members of the Legislature elected after November 1, 2008;

E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;

F. Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments;

G. Officials of school administrative units; and

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 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.

SUMMARY

Current law requires officials elected to certain positions to complete training on the requirements of the Freedom of Access Act but does not require officials appointed to those positions to complete that training. This bill implements the recommendation of the Right To Know Advisory Committee that appointed officials also be required to complete the training.

3B-6

Reinsch, Margaret

From: Stout, Eric <Eric.Stout@maine.gov>
Sent: Thursday, October 18, 2018 1:12 PM
To: Reinsch, Margaret
Subject: RTKAC - electronic records, databases and public records requests

Hi, Peggy.

I only occasionally get involved with support for "database" searches. My work is mostly for email and lesser so for documents.

Asking about database information is particularly difficult for the reasons you mention below (elements that may have PII or be non-relevant to the request). But it is also difficult because of the mechanics (and skill) for getting specifically what the requestor wants. Here are some points that come to mind:

1. **The requestor thinks you can just "Google it":** The FOAA requestors (public or press) typically assume that because information is automated, that it's as easy as "Googling it" to pull out what you want. Because of the 3 reasons below, it's not that easy (or may not even be possible at all) to pull specific data out of pre-structured databases and systems. "Googling it" works well if it's searching Internet sites. But not so with internal agency systems and databases.
2. **Is it creating a record?** FOAA does not require the agency to create a record. Databases typically have many data elements, and if the requestor only wants certain data, that's an extract of the larger database. Is that then "creating a record"? Or is it a slice of the existing records, just assembled in a special way.
3. **Is the agency system designed to pull that data?** Database systems are designed to serve specific purposes – "governmental functions"... You can't assume that the system can easily "slice and dice" data in ways that the system wasn't designed to do. Typically, there is a menu of canned reports – Report A, B, C. If the FOAA request matches one of those canned reports, then it's easy. Typically, it would not match, and so the system can't produce it easily. Some agency systems cost up to millions of dollars. It's no easy trick to customize reporting, and have it be verified for accuracy and completeness. For example, when I was at HUD, I was manager of an enterprise data warehouse. One day, the technicians were pulling data from one source, and combining with another source. The result was so "whacked" that it made no sense at all... They didn't recognize how bad it was because they didn't have sufficient subject matter expertise to know that they couldn't combine the data elements in the way they had.
4. **Does the agency staff have the technical skill to pull specialized reports for the specific FOAA request?** Like #3 above, even if the system is designed to allow special data queries, the typical agency staff doesn't have the skill to do so. They can pull Report A, B, C, but beyond that, it's questionable.
5. **Security is another concern:** Data in agency systems is usually restricted to a small number of staff with a need to have access – for "governmental functions." It's few systems/ databases that can be opened up to public access. This is because of the nature of data that often has personally identifiable information (PII) as part of the larger database. Each item of information is a "database element" that is like a column of an Excel spreadsheet, but structured differently. Pulling certain data means selecting those database elements. But if it's not part of a canned report, it can be challenging, and require IT support. See #3 and 4.

I hope this helps. Beyond these 5 points, I don't know what other sources I might point you to. Brenda may have some thoughts on this as well, since she deals with complaints, including local entities. I only deal with State agencies, and mostly email searches.

Eric.Stout@maine.gov, (207) 624-9981, cell 446-2438
IT Consultant
Roles: CIO staff support; FOAA/litigation e-discovery; contract administrator for www.maine.gov; OIT Records Officer; Member of Right to Know Advisory Committee
State of Maine, Office of Information Technology, www.maine.gov/oit/
51 Commerce Drive, 145 SHS, Augusta, Maine 04333-0145

From: Reinsch, Margaret [mailto:Margaret.Reinsch@legislature.maine.gov]
Sent: Wednesday, October 17, 2018 5:16 PM
To: Stout, Eric <Eric.Stout@maine.gov>
Subject: [EXTERNAL SENDER] RTKAC - electronic records, databases and public records requests

Hi, Eric –

I'm trying to build my own foundation of knowledge and background resources on how jurisdictions officially respond to requests for public records when the records being requesting are part (or all?) of a database maintained by the government. And what if the database also contains confidential or proprietary information. I have found a couple of state laws on the topic but I am wondering if you can point me in the direction of more comprehensive resources. And, although I don't want to tie up your time, any thoughts you would care to share I would appreciate hearing!

I'm actually out of the office for the next few days, but I will try to check my email daily.

Thanks for any help you can provide.
Peggy

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Electronic database access

If a public records contains disclosable and nondisclosable information, the public agency must separate the material that may be disclosable and make it available. Many states do not allow the agency to charge for separating the public information from the nondisclosable information.	Indiana 5-14-3-6 Wisconsin 19.36 (6) North Dakota 44-04-18(3) New Hampshire 91-A:4 Connecticut 1-211 Arkansas 29-19-105 Florida 119.01 Minnesota 13.03 Utah 63G-2-201 Virginia 2.2-3704
Format of open record. Any record made open to the public pursuant to this chapter shall be maintained in its original format or in any searchable and reproducible electronic or other format. This chapter does not mandate that any record or document be kept in a particular format nor does it require that a record be provided to the public in any format or media other than that in which it is stored.	South Dakota 1-27-4
(h) Nothing in this section shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was made except to the extent that such records are in an electronic format and the public body would not be unduly burdened in providing such data.	Rhode Island 38-2-3
(f) Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.	California Gov Code 6253.9

2. A government body may provide, restrict, or prohibit access to data processing software developed by the government body, regardless of whether the data processing software is separated or combined with a public record. A government body shall establish policies and procedures to provide access to public records which are combined with its data processing software. A public record shall not be withheld from the public because it is combined with data processing software.	Iowa 22.3A
(a) Databases purchased, leased, created, or otherwise acquired by every public agency containing public records shall be designed and maintained in a manner that does not impair or impede the public agency's ability to permit the public inspection and examination of public records and provides a means of obtaining copies of such records. Nothing in this subsection shall be construed to require the retention by the public agency of obsolete hardware or software.	North Carolina 132-6.1
C. The state agency that has inserted data in a database may authorize a copy to be made of a computer tape or other medium containing a computerized database of a public record for any person if the person agrees: (1) not to make unauthorized copies of the database; (2) not to use the database for any political or commercial purpose unless the purpose and use is approved in writing by the state agency that created the database; (3) not to use the database for solicitation or advertisement when the database contains the name, address or telephone number of any person unless such use is otherwise specifically authorized by law; (4) not to allow access to the database by any other person unless the use is approved in writing by the state agency that created the database; and (5) to pay a royalty or other consideration to the state as may be agreed upon by the state agency that created the database.	New Mexico 14-3-15.1

(3) If, in response to a specific request, the state or any of its agencies, institutions, or political subdivisions has performed a manipulation of data so as to generate a record in a form not used by the state or by said agency, institution, or political subdivision, a reasonable fee may be charged to the person making the request. Such fee shall not exceed the actual cost of manipulating the said data and generating the said record in accordance with the request. Persons making subsequent requests for the same or similar records may be charged a fee not in excess of the original fee. (4) If the public record is a result of computer output other than word processing, the fee for a copy, printout, or photograph thereof may be based on recovery of the actual incremental costs of providing the electronic services and products together with a reasonable portion of the costs associated with building and maintaining the information system. Such fee may be reduced or waived by the custodian if the electronic services and products are to be used for a public purpose, including public agency program support, nonprofit activities, journalism, and academic research. Fee reductions and waivers shall be uniformly applied among persons who are similarly situated.	Colorado 24-72-205

3B-4

Freedom of Access Act (selected)

TITLE 1
GENERAL PROVISIONS

CHAPTER 13
PUBLIC RECORDS AND PROCEEDINGS

SUBCHAPTER 1
FREEDOM OF ACCESS

§402. Definitions

3. Public records. The term "public records" means 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, except:

§408-A. Public records available for inspection and copying

7. Electronically stored public records. An agency or official having custody or control of a public record subject to a request under this section shall provide access to an electronically stored public record either as a printed document of the public record or in the medium in which the record is stored, at the requester's option, except that the agency or official is not required to provide access to an electronically stored public record as a computer file if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in or associated with that file.

A. If in order to provide access to an electronically stored public record the agency or official converts the record into a form susceptible of visual or aural comprehension or into a usable format for inspection or copying, the agency or official may charge a fee to cover the cost of conversion as provided in subsection 8.

B. This subsection does not require an agency or official to provide a requester with access to a computer terminal.

§414. Public records; information technology

An agency shall consider, in the purchase of and contracting for computer software and other information technology resources, the extent to which the software or technology will:

1. Maximize public access. Maximize public access to public records; and

2. Maximize exportability; protect confidential information. Maximize the exportability of public records while protecting confidential information that may be part of public records.

InforME Statutes (selected)

TITLE 1
GENERAL PROVISIONS

CHAPTER 14
ELECTRONIC ACCESS TO PUBLIC INFORMATION

§533. InforME established; purposes

Information Resource of Maine, referred to as "InforME," is established with the following purposes:

1. Electronic gateway. To serve as a self-supporting and cost-effective electronic gateway to provide and enhance access to the State's public information for individuals, businesses and other entities and to provide electronic services;

2. Rational, standardized, comprehensive services. To provide rational, standardized and comprehensive services by enabling universal continuous access to accurate, current public information that may be searched to suit the user's own purposes. These services include, at a minimum, providing standardized access to customized databases, data custodians' databases and links to other information sources;

3. Electronic transactions. To conduct electronic transactions;

4. Electronic dissemination of public information. To assist state agencies in electronically disseminating public information in their custody;

5. Constantly improve access and utility. To constantly improve access to and the utility of the public information available through InforME by exploring and, where appropriate, implementing ways to:

A. Expand the amount and kind of public information available free of charge;

B. Increase the utility of the public information provided and the form in which it is provided;

C. Expand the base of users who access the public information; and

D. Improve individual and business access to public information through improvements in technology;

6. Accuracy of information. To provide opportunities for individuals, businesses and other entities to review public information for accuracy and to indicate to the data custodian when corrections may be appropriate;

7. Information conduit. To provide a mechanism for the authorized transfer of nonpublic information;

8. Private-public partnerships and interagency cooperation. To promote opportunities for private-public partnerships and interagency cooperation;

9. Innovative uses of information. To provide opportunities for innovative uses of public information; and

10. Collection of funds. To collect funds for information and electronic services provided and transactions conducted electronically. State funds must be either directly deposited into an account of the Treasurer of State or transferred in a timely manner to a state deposit account as mutually agreed upon by the Treasurer of State and InforME.

Nothing in this Act may be construed to affect the rights of persons to inspect or copy public records under chapter 13, subchapter I or the duty of data custodians to provide for public inspection and copying of those records.

§536. Network manager and data custodian responsibilities

1. Voluntary cooperation. All data custodians may voluntarily cooperate with the network manager in providing public information, access to public information and assistance as may be requested for achieving InforME's purposes.

2. Duplication of fee services. Executive branch and semiautonomous state agencies may not provide services that duplicate fee services offered by InforME except as authorized by the board.

3. Service level agreements. Services provided by the network manager and information to be provided by a data custodian are governed by service level agreements between the network manager and the data custodian. A service level agreement may include a provision for the network manager to receive a portion of the agency fee for information or services in return for electronically providing that information or service.

4. Data custodian responsibilities. Data custodians are responsible for:

A. Ensuring that the public information is accurate, complete and current;

B. Updating the source data bases following verification of suggested corrections that users send to InforME;

C. Identifying how and from whom the information was acquired by the data custodian; and

D. Providing reasonable safeguards to protect confidentiality to the level required by law.

5. InforME network manager responsibilities. The network manager is responsible for:

A. Transmitting or providing access to public information;

B. Providing reasonable safeguards to protect confidentiality to the level required by law; and

C. Providing notices and disclaimers that include at least the following:

(1) How to address concerns if the public information appears to be inaccurate; and

(2) That InforME assumes no role for monitoring the information content to determine if it is accurate, complete or current.

6. Redacting data. When developing new systems, a data custodian shall consult with the network manager regarding current practices for efficiently redacting data.

7. Disclaimer. If the network manager provides public information that is stored, gathered or generated by the legislative branch, the network manager shall include the following disclaimer:"This data was compiled from information made public by the legislative branch."

The disclaimer is not required if the information is prepared pursuant to a contract between the network manager and the Legislative Council.

§538. Copyrights, licensing restrictions and confidentiality

1. Information. The information developed by the network manager for InforME and public information made available through InforME is owned by the public, and copyright or licensing restrictions may not be fixed to this information by the board, the network manager or data custodians.

2. Custody of network manager. The fact that information is in the custody of the network manager does not by itself make that information a public record.

3. User records. Information in records of the network manager or collected by InforME relating to the identity of or use by users of electronic services is confidential and may be released only with the express permission of the user or pursuant to court order. This subsection does not affect the public record status of any records of data custodians regarding users.

Accessible databases

TITLE 10
COMMERCE AND TRADE

CHAPTER 301-A
THE REGISTRATION AND PROTECTION OF MARKS

§1527-C. Access to Secretary of State's database

The Secretary of State may provide public access to the database of the Department of the Secretary of State through a dial-in modem, public terminals and electronic duplicates of the database. If access to the database is provided to the public, the Secretary of State may promulgate rules in accordance with the Maine Administrative Procedure Act to establish a fee schedule and governing procedures.

TITLE 31
PARTNERSHIPS AND ASSOCIATIONS

CHAPTER 15
LIMITED LIABILITY PARTNERSHIPS

§814. Access to database

The Secretary of State may provide public access to the database through a dial-in modem, through public terminals and through electronic duplicates of the database. If access to the database is provided to the public, the Secretary of State may adopt rules in accordance with the Maine Administrative Procedure Act to establish a fee schedule and governing procedures.

CHAPTER 17
UNIFORM PARTNERSHIP ACT

§1016. Access to Secretary of State's database

The Secretary of State may provide public access to the database of the Department of

the Secretary of State through a dial-in modem, public terminals and electronic duplicates of the database. If access to the database is provided to the public, the Secretary of State may adopt rules to establish a fee schedule and governing procedures. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

CHAPTER 21
LIMITED LIABILITY COMPANIES

§1670. Access to database

The Secretary of State may provide public access to the database through a medium approved by the Secretary of State, through public terminals and through electronic duplicates of the database. If access to the database is provided to the public, the Secretary of State may adopt rules in accordance with the Maine Administrative Procedure Act to establish a fee schedule and governing procedures.

TITLE 12
CONSERVATION

CHAPTER 201-A
GEOLOGY AND NATURAL RESOURCES

§544. Natural Areas Program

1. Establishment. The Natural Areas Program is established within the Department of Agriculture, Conservation and Forestry and is administered by the commissioner.

2. Definitions. As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

A. "Commissioner" means the Commissioner of Agriculture, Conservation and Forestry.

B. "Critical area" means any natural area documented by the Natural Areas Program that is conserved or protected in its natural condition through voluntary action.

C. "Endangered plant" means any native plant species that is in danger of extinction throughout all or a significant portion of its range within the State or any species determined to be an endangered species pursuant to the United States Endangered Species Act of 1973, Public Law 93-205, as amended.

D. "Natural area" means any area of land or water, or both land and water, whether publicly or privately owned, that retains or has reestablished its natural character, though it need not be completely natural and undisturbed, and that supports, harbors or otherwise contains endangered, threatened or rare plants, animals and native ecological systems, or rare or unique geological, hydrological, natural historical, scenic or other similar features of scientific and educational value benefiting the citizens of the State.

E. "Register of critical areas" means the official listing of critical areas.

F. "Species" means any recognized taxonomic category of the biota including species, subspecies or variety.

G. "Threatened plant" means any species of native plant likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range in the State or any species of plant determined to be a threatened species pursuant to the

federal Endangered Species Act of 1973, Public Law 93-205, as amended.

3. Functions of the Natural Areas Program. The Natural Areas Program shall perform the following functions.

A. The Natural Areas Program shall conduct an ongoing, statewide inventory of the State's natural areas, including, but not limited to, rare plants, animals, natural communities and ecosystems or other geological, hydrological, natural historical, scenic or other similar features, and may conduct investigations related to the population, habitat needs, limiting factors and other biological and ecological data to support the mandates of the Natural Areas Program or other cooperating agencies.

B. The Natural Areas Program shall maintain a biological and conservation database that must contain data from inventories and other data sources and other relevant biological, ecological or other information about natural features described in paragraph A and about ecologically significant sites that harbor these features. Information contained in the biological and conservation database may be made available as necessary or appropriate for conservation and land use planning, environmental review, scientific research and inquiry, education or other appropriate use. For the purpose of this paragraph, an appropriate use is one that will not jeopardize sensitive species or habitats.

C. The Natural Areas Program may coordinate inventory and data management and planning activities with other appropriate state agencies or entities to maximize efficiency and increase communication among agencies and to provide appropriate data interpretation and technical services to support the mandates and programs of those agencies.

D. The Natural Areas Program may levy appropriate charges to those using, for commercial gain, the inventory and information services provided by the Natural Areas Program to recover the costs of providing the services and a reasonable portion of the costs associated with building and maintaining the biological and conservation database. Charges must be fixed in a schedule prepared and revised as necessary by the Natural Areas Program and supported and explained by accompanying information.

E. The Natural Areas Program may enter into cooperative agreements with federal or state agencies, political subdivisions of this State or private persons or organizations to receive or disburse funds for the purposes of this subchapter.

F. The Natural Areas Program shall maintain a database of areas designated as ecological reserves as defined in section 1801, subsection 4-A and other public lands designated and managed for equivalent purposes and shall provide scientific review of areas on state land proposed as ecological reserves.

G. The Natural Areas Program shall provide staff assistance to support the Land for Maine's Future Board established under Title 5, chapter 353.

Driver's records and motor vehicles

TITLE 29-A
MOTOR VEHICLES AND TRAFFIC

CHAPTER 3
SECRETARY OF STATE

SUBCHAPTER 3
RECORDS

§251. Records and databases related to driver's licenses and motor vehicles

1. Records required to be kept. The Secretary of State shall keep a record of applications for driver's licenses, motor vehicle registrations and certificates of title and of issued driver's licenses, learner's permits, motor vehicle registrations and certificates of title.

2. Public access to records. Records of the Secretary of State pertaining to the applications, registrations and certifications of vehicles and to driver's licenses must be open to public inspection during office hours. The Secretary of State shall provide a copy of a record pertaining to the applications, registrations and certifications of vehicles or to driver's licenses for a fee of $5 each.

2-A. Databases. The Secretary of State may provide databases of records pertaining to applications, registrations and certifications of vehicles and to driver's licenses to individuals, businesses and other entities. The Secretary of State shall adopt rules to establish a fee schedule and governing procedures.

3. Complaints confidential. Written complaints and certain control numbers used in the titling of motor vehicles may be kept confidential.

4. Confidentiality of e-mail addresses. If a person submits an e-mail address as part of the application process for a license or registration under this Title, the e-mail address is confidential and may not be disclosed to anyone outside the Department of the Secretary of State except for law enforcement officers or for purposes of court proceedings.

§252. Driver history records and databases

1. Reports furnished. The Secretary of State shall provide a copy of a record pertaining to convictions, adjudications, accidents, suspensions and revocations of a driver's license for a fee of $5 each for a driving record covering 3 years and $10 each for a driving record covering more than 3 years. Certified copies are an additional $1. A person receiving a report by electronic transmittal shall pay the fee associated with that transmittal. The Secretary of State shall adopt rules to establish a fee schedule and procedures governing electronic transmittal of a record.

1-A. Databases. The Secretary of State may provide databases of records pertaining to convictions, adjudications, accidents, suspensions and revocations to individuals, businesses and other entities. The Secretary of State shall adopt rules to establish a fee schedule and governing procedures under this subsection.

2. Fee waived for official requests. There is no fee for requests from other motor vehicle departments, state, county and federal agencies and law enforcement agencies.

§253. Confidentiality of nongovernment vehicle records

Upon receiving a written request by an appropriate criminal justice official and showing cause that it is in the best interest of public safety, the Secretary of State may determine that records of a nongovernment vehicle may be held confidential for a specific period of time, which may not exceed the expiration of the current registration.

§254. Rented vehicles; records

1. Owner of vehicle to keep record. A person engaged in the business of renting motor vehicles with or without a driver, other than as a transaction involving the sale of the vehicle, shall maintain a record of the identity of the person to whom the vehicle is rented, including a record of the driver's license of the person to whom the vehicle is rented and the exact time the vehicle is subject to that rental or in the person's possession. A person who violates this subsection commits a Class E crime. Violation of this subsection is a strict liability crime as defined in Title 17-A, section 34, subsection 4-A.

2. Records open to inspection. A person required to maintain records pursuant to subsection 1 shall allow inspection of those records by any law enforcement officer. A person who violates this subsection commits a Class E crime. Violation of this subsection is a strict liability crime as defined in Title 17-A, section 34, subsection 4-A.

3. Offense.

4. Form. If the Secretary of State prescribes a form for the keeping of the record required in subsection 1, the owner shall use that form. The form must be carried in the vehicle during the period of lease or hire.

§255. Confidentiality for public safety

1. Confidential records. Notwithstanding any other provision of law, the Secretary of State or a designee of the Secretary of State may hold records relating to a person's motor vehicle registration and driver's license confidential for a specified period of time when the following conditions are met:

A. The Secretary of State has received a written request along with a copy of a protection order that has been issued under Title 5, section 4654 or 4655; Title 15, section 321; Title 19, section 765 or 766; or Title 22, chapter 1071 to protect the requestor from harassment or abuse; or

B. The Secretary of State or a designee of the Secretary of State has:

(1) Received a written request showing cause that a person is in danger of serious bodily injury or death by another person and that the endangered person is relocating for the specific purpose of avoiding harm;

(2) Consulted with the Commissioner of Public Safety or a designee of the commissioner and the Attorney General or a designee of the Attorney General; and

(3) Determined that holding the endangered person's driver's license and motor vehicle registration records as confidential is in the best interest of public safety.

2. Release of records. The Secretary of State may release information held in confidence pursuant to subsection 1 to law enforcement officers, insurance companies and municipal, county, state or federal agencies that demonstrate a necessity for the information. The Secretary of State shall prescribe the conditions under which the information may be used and the person receiving the information may only use the information as prescribed.

3. Liability for release. Neither failure of the Secretary of State or an employee of the Secretary of State to perform the requirements of this section nor compliance with it subjects the Secretary of State or employees of the Secretary of State to liability in a civil action.

4. Rules. The Secretary of State may, in consultation with the Commissioner of Public Safety and the Attorney General, adopt rules necessary for the implementation of this section.

Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter II-A.

§256. Federal Driver's Privacy Protection Act of 1994

The Secretary of State shall adopt routine technical rules to implement the provisions of 18 United States Code, Chapter 123 in disclosing records.

Accident reports

TITLE 29-A
MOTOR VEHICLES AND TRAFFIC

CHAPTER 19
OPERATION

SUBCHAPTER 3
ACCIDENT AND THEFT REPORTS

§2251. Accident reports

1. Definition. As used in this section, "reportable accident" means an accident on a public way or a place where public traffic may reasonably be anticipated, resulting in bodily injury or death to a person or apparent property damage of $1,000 or more. Apparent property damage under this subsection must be based upon the market value of the necessary repairs and may not be limited to the current value of the vehicle or property.

2. Report required. A reportable accident must be reported immediately by the quickest means of communication to a state police officer, or to the nearest state police field office, or to the sheriff's office, or to a deputy sheriff, within the county in which the accident occurred, or to the office of the police department, or to an officer, of the municipality in which the accident occurred. The accident must be reported by:

A. The operator of an involved vehicle;

B. A person acting for the operator; or

C. If the operator is unknown, the owner of an involved vehicle having knowledge of the accident.

3. Form. The Chief of the State Police:

A. Shall prepare and supply forms and approve the format for electronic submission for reports that require sufficiently detailed information to disclose the cause, conditions, persons and vehicles involved, including information to permit the Secretary of State to determine whether the requirement for proof of financial responsibility is inapplicable;

B. Shall receive, tabulate and analyze accident reports;

B-1. Shall send all accident reports to the Secretary of State; and

C. May publish statistical information on the number, cause and location of accidents.

4. Investigation. A law enforcement officer who investigates a reportable accident shall:

A. Interview participants and witnesses; and

B. Within 5 days from the time of notification of the accident, transmit an electronic report or the original written report containing all available information to the Chief of the State Police.

Every reported accident must be promptly investigated.

If the accident results in serious bodily injury or death of any person, the investigation must be conducted by an officer who has met the training standards of a full-time law enforcement officer. A law enforcement officer who investigates an accident involving a bus or truck with a gross vehicle weight rating or a registered weight in excess of 10,000 pounds that results in the death of any person shall request a certified accident reconstructionist and the Bureau of State Police Commercial Vehicle Enforcement Unit to assist in the investigation of the accident. The Attorney General shall designate an assistant attorney general familiar with federal commercial vehicle laws and regulations to serve as a resource to any district attorney who initiates a prosecution arising from an accident involving a bus or truck with a gross vehicle weight rating or a registered weight in excess of 10,000 pounds that results in the death of any person.

5. Forty-eight-hour report.

6. Financial responsibility information. The owner or operator of a vehicle involved in an accident shall furnish additional relevant information as the Secretary of State requires to determine the applicability of the requirement of proof of financial responsibility.

The Secretary of State may rely on the accuracy of the information until there is reason to believe that the information is erroneous.

7. Report information. An accident report made by an investigating officer or a report made by an operator as required by subsection 2 is for the purposes of statistical analysis and accident prevention.

A report or statement contained in the accident report, or a report as required by subsection 2, a statement made or testimony taken at a hearing before the Secretary of State held under section 2483, or a decision made as a result of that report, statement or testimony may not be admitted in evidence in any trial, civil or criminal, arising out of the accident.

A report may be admissible in evidence solely to prove compliance with this section.

Notwithstanding subsection 7-A, the Chief of the State Police may disclose the date, time and location of the accident and the names and addresses of operators, owners, injured persons, witnesses and the investigating officer. On written request, the chief may furnish a photocopy of the investigating officer's report at the expense of the person making the request. The cost of furnishing a copy of the report is not subject to the limitations of Title 1, section 408-A.

7-A. Accident report database; public dissemination of accident report data. Data contained in an accident report database maintained, administered or contributed to by the Department of Public Safety, Bureau of State Police must be treated as follows.

A. For purposes of this subsection, the following terms have the following meanings.

(1) "Data" means information existing in an electronic medium and contained in an accident report database.

(2) "Nonpersonally identifying accident report data" means any data in an accident report that are not personally identifying accident report data.

(3) "Personally identifying accident report data" means:

(a) An individual's name, residential and post office box mailing address, social security number, date of birth and driver's license number;

(b) A vehicle registration plate number;

(c) An insurance policy number;

(d) Information contained in any free text data field of an accident report; and

(e) Any other information contained in a data field of an accident report that may be used to identify a person.

B. Except as provided in paragraph B-1 and Title 16, section 805, subsection 6, the Department of Public Safety, Bureau of State Police may not publicly disseminate personally identifying accident report data that are contained in an accident report database maintained, administered or contributed to by the Bureau of State Police. Such data are not public records for the purposes of Title 1, chapter 13.

B-1. The Department of Public Safety, Bureau of State Police may disseminate a vehicle registration plate number contained in an accident report database maintained, administered or contributed to by the Bureau of State Police to a person only if that person provides the Bureau of State Police an affidavit stating that the person will not:

(1) Use a vehicle registration plate number to identify or contact a person; or

(2) Disseminate a vehicle registration plate number to another person.

C. The Department of Public Safety, Bureau of State Police may publicly disseminate nonpersonally identifying accident report data that are contained in an accident report database maintained, administered or contributed to by the Bureau of State Police. The cost of furnishing a copy of such data is not subject to the limitations of Title 1, section 408-A.

8. Violation. A person commits a Class E crime if that person:

A. Is required to make an oral or written report and knowingly fails to do so within the time required;

B. Is an operator involved in a reportable accident and knowingly fails to give a correct name and address when requested by an officer at the scene;

C. Is the operator involved in a reportable accident or the owner of a vehicle involved in a reportable accident and knowingly fails to produce the vehicle or, if the vehicle is operational, return it to the scene when requested by the investigating officer; or

D. Obtains a vehicle registration plate number pursuant to subsection 7-A, paragraph B-1 and knowingly uses that vehicle registration plate number to identify or contact a person or knowingly disseminates that vehicle registration plate number to another person.

9. Prima facie evidence. The absence of notice to a law enforcement agency with jurisdiction where the accident occurred is prima facie evidence of failure to report an accident.

10. Suspension. The Secretary of State may suspend or revoke the motor vehicle driver's license and certificate of registration of a person who is required to make a report and fails to do so or who fails to provide the information required by the Secretary of State.

11. Exemption. The operator of a snowmobile or an all-terrain vehicle as defined by Title 12, section 13001, unless the all-terrain vehicle is registered for highway use by the Secretary of State under this Title, is exempt from the reporting requirements of subsection 2.

Maine Criminal History Record Information Act
Maine Intelligence and Investigative Information Act

TITLE 16
COURT PROCEDURE -- EVIDENCE
CHAPTER 7
CRIMINAL HISTORY RECORD INFORMATION ACT

§701. Short title

This chapter may be known and cited as "the Criminal History Record Information Act."

§702. Scope; application

This chapter governs the dissemination of criminal history record information by a Maine criminal justice agency. This chapter establishes 2 distinct categories of criminal history record information and provides for the dissemination of each:

1. Public criminal history record information. Public criminal history record information, the dissemination of which is governed by section 704; and

2. Confidential criminal history record information. Confidential criminal history record information, the dissemination of which is governed by section 705.

§703. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Administration of criminal justice. "Administration of criminal justice" means activities relating to the apprehension or summonsing, detention, pretrial release, post-trial release, prosecution, adjudication, sentencing, correctional custody and supervision or rehabilitation of accused persons or convicted criminal offenders. "Administration of criminal justice" includes the collection, storage and dissemination of criminal history record information.

2. Confidential criminal history record information. "Confidential criminal history record information" means criminal history record information of the following types:

A. Unless the person remains a fugitive from justice, summons and arrest information without disposition if an interval of more than one year has elapsed since the date the person was summonsed or arrested and no active prosecution of a criminal charge stemming from the summons or arrest is pending;

B. Information disclosing that the responsible law enforcement agency or officer has elected not to refer a matter to a prosecutor;

C. Information disclosing that the responsible prosecutorial office or prosecutor has elected not to initiate or approve criminal proceedings;

D. Information disclosing that a grand jury has determined that there is insufficient evidence to warrant the return of a formal charge;

E. Information disclosing that a criminal proceeding has been postponed for a period of more than one year or dismissed because the person charged is found by the court to be mentally incompetent to stand trial or to be sentenced;

F. Information disclosing that a criminal charge has been filed, if more than one year has elapsed since the date of the filing;

G. Information disclosing that a criminal charge has been dismissed by a court with

prejudice or dismissed with finality by a prosecutor other than as part of a plea agreement;

H. Information disclosing that a person has been acquitted of a criminal charge. A verdict or accepted plea of not criminally responsible by reason of insanity, or its equivalent, is not an acquittal of the criminal charge;

I. Information disclosing that a criminal proceeding has terminated in a mistrial with prejudice;

J. Information disclosing that a criminal proceeding has terminated based on lack of subject matter jurisdiction;

K. Information disclosing that a criminal proceeding has been terminated because the court lacked jurisdiction over the defendant; and

L. Information disclosing that a person has petitioned for and been granted a full and free pardon.

3. Criminal history record information. "Criminal history record information" means information of record collected by a criminal justice agency or at the direction of a criminal justice agency or kept in the custody of a criminal justice agency that connects a specific, identifiable person, including a juvenile treated by statute as an adult for criminal prosecution purposes, with formal involvement in the criminal justice system either as an accused or as a convicted criminal offender. "Criminal history record information" includes, but is not limited to, identifiable descriptions or notations of: summonses and arrests; detention; bail; formal criminal charges such as complaints, informations and indictments; any disposition stemming from such charges; post-plea or post-adjudication sentencing; involuntary commitment; execution of and completion of any sentencing alternatives imposed; release and discharge from involuntary commitment; any related pretrial and post-trial appeals, collateral attacks and petitions; and petitions for and warrants of pardons, commutations, reprieves and amnesties. "Criminal history record information" does not include: identification information such as fingerprints, palmprints, footprints or photographic records to the extent that the information does not indicate formal involvement of the specific individual in the criminal justice system; information of record of civil proceedings, including traffic infractions and other civil violations; intelligence and investigative record information as defined in section 803; or information of record of juvenile crime proceedings or their equivalent. Specific information regarding a juvenile crime proceeding is not criminal history record information notwithstanding that a juvenile has been bound over and treated as an adult or that by statute specific information regarding a juvenile crime proceeding is usable in a subsequent adult criminal proceeding. "Formal involvement in the criminal justice system either as an accused or as a convicted criminal offender" means being within the jurisdiction of the criminal justice system commencing with arrest, summons or initiation of formal criminal charges and concluding with the completion of every sentencing alternative imposed as punishment or final discharge from an involuntary commitment based upon a finding of not criminally responsible by reason of insanity or its equivalent.

4. Criminal justice agency. "Criminal justice agency" means a federal, state or State of Maine government agency or any subunit of a government agency at any governmental level that performs the administration of criminal justice pursuant to a statute or executive order. "Criminal justice agency" includes federal courts, Maine courts, courts in any other state, the Department of the Attorney General, district attorneys' offices and the equivalent departments or offices in any federal or state jurisdiction. "Criminal justice agency" also includes any equivalent agency at any level of Canadian government and the government of any federally recognized Indian tribe.

5. Disposition. "Disposition" means information of record disclosing that a criminal proceeding has been concluded, although not necessarily finalized, and the specific nature of the concluding event. "Disposition" includes, but is not limited to: an acquittal; a dismissal, with or without prejudice; the filing of a charge by agreement of the parties or by a court; the determination that a defendant is currently a fugitive from justice; a conviction, including the acceptance by a court of a plea of guilty or nolo contendere; a deferred disposition; a proceeding indefinitely continued or dismissed due to a defendant's incompetence; a finding of not criminally responsible by reason of insanity or its equivalent; a mistrial, with or without prejudice; a new trial ordered; an arrest of judgment; a sentence imposition; a resentencing ordered; an execution of and completion of any sentence alternatives imposed, including but not limited to fines, restitution, correctional custody and supervision, and administrative release; a release or discharge from a commitment based upon a finding of not criminally responsible by reason of insanity or its equivalent; the death of the defendant; any related pretrial and post-trial appeals, collateral attacks and petitions; a pardon, commutation, reprieve or amnesty; and extradition. "Disposition" also includes information of record disclosing that the responsible law enforcement agency or officer has elected not to refer a matter to a prosecutor, that the responsible prosecutorial office or prosecutor has elected not to initiate or approve criminal proceedings or that a grand jury has determined that there is insufficient evidence to warrant the return of a formal charge.

6. Dissemination. "Dissemination" means the transmission of information by any means, including but not limited to orally, in writing or electronically, by or to anyone outside the criminal justice agency that maintains the information.

7. Executive order. "Executive order" means an order of the President of the United States or the chief executive of a state that has the force of law and that is published in a manner permitting regular public access.

8. Public criminal history record information. "Public criminal history record information" means criminal history record information that is not confidential criminal history record information, including information recorded pursuant to section 706.

9. State. "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam and American Samoa. "State" also includes the federal government of Canada and any provincial government of Canada and the government of any federally recognized Indian tribe.

10. Statute. "Statute" means an Act of Congress or an act of a state legislature or a provision of the Constitution of the United States or the constitution of a state.

§704. Dissemination of public criminal history record information

1. Generally. Public criminal history record information is public for purposes of Title 1, chapter 13. Public criminal history record information may be disseminated by a Maine criminal justice agency to any person or public or private entity for any purpose. Public criminal history record information is public whether it relates to a crime for which a person is currently within the jurisdiction of the criminal justice system or it relates to a crime for which a person is no longer within that jurisdiction. There is no time limitation on dissemination of public criminal history record information.

2. Required inquiry to State Bureau of Identification. A Maine criminal justice agency, other than a court, shall query the Department of Public Safety, State Bureau of Identification before disseminating any public criminal history record information for a

noncriminal justice purpose to ensure that the most up-to-date disposition information is being used. "Noncriminal justice purpose" means a purpose other than for the administration of criminal justice or criminal justice agency employment.

§705. Dissemination of confidential criminal history record information

1. Generally. A Maine criminal justice agency, whether directly or through any intermediary, may disseminate confidential criminal history record information only to:

A. Other criminal justice agencies for the purpose of the administration of criminal justice and criminal justice agency employment;

B. Any person for any purpose when expressly authorized by a statute, executive order, court rule, court decision or court order containing language specifically referring to confidential criminal history record information or one or more of the types of confidential criminal history record information;

C. Any person with a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice or to conduct investigations determining the employment suitability of prospective law enforcement officers. The agreement must specifically authorize access to data, limit the use of the data to purposes for which given, ensure security and confidentiality of the data consistent with this chapter and provide sanctions for any violations;

D. Any person for the express purpose of research, evaluation or statistical purposes or under an agreement with the criminal justice agency. The agreement must specifically authorize access to confidential criminal history record information, limit the use of the information to research, evaluation or statistical purposes, ensure the confidentiality and security of the information consistent with this chapter and provide sanctions for any violations;

E. Any person who makes a specific inquiry to the criminal justice agency as to whether a named individual was summonsed, arrested or detained or had formal criminal charges initiated on a specific date;

F. The public for the purpose of announcing the fact of a specific disposition that is confidential criminal history record information, other than that described in section 703, subsection 2, paragraph A, within 30 days of the date of occurrence of that disposition or at any point in time if the person to whom the disposition relates specifically authorizes that it be made public; and

G. A public entity for purposes of international travel, such as issuing visas and granting of citizenship.

2. Confirming existence or nonexistence of information. A Maine criminal justice agency may not confirm the existence or nonexistence of confidential criminal history record information to any person or public or private entity that would not be eligible to receive the information itself.

3. Required inquiry to State Bureau of Identification. A Maine criminal justice agency, other than a court, shall query the Department of Public Safety, State Bureau of Identification before disseminating any confidential criminal history record information for a noncriminal justice purpose to ensure that the most up-to-date disposition information is being used. "Noncriminal justice purpose" means a purpose other than for the administration of criminal justice or criminal justice agency employment.

§706. Public information about persons detained following arrest

1. Requirement of record. A Maine criminal justice agency that maintains a holding facility, as defined in Title 34-A, section 1001, subsection 9, or other facility for pretrial detention shall record the following information concerning each person delivered to it for pretrial detention for any period of time:

A. The identity of the arrested person, including the person's name, year of birth, residence and occupation, if any;

B. The statutory or customary description of the crime or crimes for which the person was arrested including the date and geographic location where the crime is alleged to have occurred;

C. The date, time and place of the arrest; and

D. The circumstances of the arrest including, when applicable, the physical force used in making the arrest, the resistance made to the arrest, what weapons were involved, the arrested person's refusal to submit and the pursuit by the arresting officers.

2. Time and method of recording. A Maine criminal justice agency shall record the information under subsection 1 immediately upon delivery of an arrested person to the criminal justice agency for detention. The criminal justice agency shall record and maintain the information in chronological order and keep the information in a suitable, permanent record. The information required by this section may be combined by a sheriff with the record required by Title 30-A, section 1505.

3. Information public. The information required to be recorded and maintained by this section is public criminal history record information.

§707. Unlawful dissemination of confidential criminal history record information

1. Offense. A person is guilty of unlawful dissemination of confidential criminal history record information if the person intentionally disseminates confidential criminal history record information knowing it to be in violation of any of the provisions of this chapter or if the person intentionally disseminates criminal history record information relating to a criminal conviction in violation of Title 15, section 2255 knowing it to be in violation.

2. Classification. Unlawful dissemination of confidential criminal history record information is a Class E crime.

§708. Inapplicability of this chapter to criminal history record information contained in certain records

This chapter does not apply to criminal history record information contained in:

1. Posters, announcements, lists. Posters, announcements or lists used for identifying or apprehending fugitives from justice or wanted persons;

2. Records of entry. Records of entry, such as calls for service, formerly known as "police blotters," that are maintained by criminal justice agencies, that are compiled and organized chronologically and that are required by law or long-standing custom to be made public;

3. Records of public judicial proceedings. Records of public judicial proceedings:

A. Retained at or by the District Court, Superior Court or Supreme Judicial Court. Public access to and dissemination of such records for inspection and copying are as

provided by rule or administrative order of the Supreme Judicial Court; and

B. From federal courts and courts of other states;

4. Published opinions. Published court or administrative opinions not impounded or otherwise declared confidential;

5. Records of public proceedings. Records of public administrative or legislative proceedings;

6. Records of traffic crimes. Records of traffic crimes maintained by the Secretary of State or by a state department of transportation or motor vehicles or the equivalent thereof for the purposes of regulating the issuance, suspension, revocation or renewal of a driver's, pilot's or other operator's license; and

7. Pardons, other than full and free pardons, commutations, reprieves and amnesties. Petitions for and warrants of pardons, commutations, reprieves and amnesties other than warrants of full and free pardons and their respective petitions.

§709. Right to access and review

1. Inspection. If a Maine criminal justice agency maintains criminal history record information about a person, the person or the person's attorney may inspect the criminal history record information. A criminal justice agency may prescribe reasonable hours and locations at which the right may be exercised and any additional restrictions, including satisfactory verification of identity by fingerprint comparison, as are reasonably necessary to ensure the security and confidentiality of the criminal history record information and to verify the identity of the person seeking to inspect that information. The criminal justice agency shall supply the person or the person's attorney with a copy of the criminal history record information pertaining to the person on request and payment of a reasonable fee.

2. Review. A person or the person's attorney may request amendment or correction of criminal history record information concerning the person by addressing, either in person or in writing, the request to the criminal justice agency in which the information is maintained. The request must indicate the particular record involved, the nature of the amendment or correction sought and the justification for the amendment or correction.

On receipt of a request, the criminal justice agency shall take necessary steps to determine whether the questioned criminal history record information is accurate and complete. If investigation reveals that the questioned criminal history record information is inaccurate or incomplete, the criminal justice agency shall immediately correct the error or deficiency.

Not later than 15 days, excluding Saturdays, Sundays and legal public holidays, after the receipt of a request, the criminal justice agency shall notify the requesting person in writing either that the criminal justice agency has corrected the error or deficiency or that it refuses to make the requested amendment or correction. The notice of refusal must include the reasons for the refusal, the procedure established by the criminal justice agency for requesting a review by the head of the criminal justice agency of that refusal and the name and business address of that official.

3. Administrative appeal. If there is a request for review, the head of the criminal justice agency shall, not later than 30 days from the date of the request, excluding Saturdays, Sundays and legal public holidays, complete the review and either make the requested amendment or correction or refuse to do so. If the head of the criminal justice agency refuses to make the requested amendment or correction, the head of the criminal justice agency shall permit the requesting person to file with the criminal justice agency a concise statement

setting forth the reasons for the disagreement with the refusal. The head of the criminal justice agency shall also notify the person of the provisions for judicial review of the reviewing official's determination under subsection 4.

Disputed criminal history record information disseminated by the criminal justice agency with which the requesting person has filed a statement of disagreement must clearly reflect notice of the dispute after the filing of such a statement. A copy of the statement must be included, along with, if the criminal justice agency determines it appropriate, a copy of a concise statement of the criminal justice agency's reasons for not making the amendment or correction requested.

4. Judicial review. If an administrative appeal brought pursuant to subsection 3 is denied by the head of the criminal justice agency, that decision is final agency action subject to appeal to the Superior Court in accordance with Title 5, chapter 375, subchapter 7 and the Maine Rules of Civil Procedure, Rule 80C.

5. Notification. When a criminal justice agency has amended or corrected a person's criminal history record information in response to a written request as provided in subsection 2 or a court order, the criminal justice agency shall, within 30 days thereof, advise all prior recipients who have received that information within the year prior to the amendment or correction that the amendment or correction has been made. The criminal justice agency shall also notify the person who is the subject of the amended or corrected criminal history record information of compliance with this subsection and the prior recipients notified.

6. Right of access and review of court records. This section does not apply to the right of access and review by a person or the person's attorney of criminal history record information about that person retained at or by the District Court, Superior Court or Supreme Judicial Court. Access and review of court records retained by the District Court, Superior Court or Supreme Judicial Court are as provided by rule or administrative order of the Supreme Judicial Court.

§710. Application to prior Maine criminal history record information

The provisions of this chapter apply to criminal history record information in existence before July 29, 1976, including that which has been previously expunged under any other provision of Maine law, as well as to criminal history record information in existence on July 29, 1976 and thereafter.

CHAPTER 9
INTELLIGENCE AND INVESTIGATIVE RECORD INFORMATION ACT

§801. Short title

This chapter may be known and cited as "the Intelligence and Investigative Record Information Act."

§802. Application

This chapter applies to a record that is or contains intelligence and investigative record information and that is collected by or prepared at the direction of or kept in the custody of any Maine criminal justice agency.

§803. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Administration of civil justice. "Administration of civil justice" means activities relating to the anticipation, prevention, detection, monitoring or investigation of known, suspected or possible civil violations and prospective and pending civil actions. It includes the collection, storage and dissemination of intelligence and investigative record information relating to the administration of civil justice. "Administration of civil justice" does not include known, suspected or possible traffic infractions.

2. Administration of criminal justice. "Administration of criminal justice" means activities relating to the anticipation, prevention, detection, monitoring or investigation of known, suspected or possible crimes. It includes the collection, storage and dissemination of intelligence and investigative record information relating to the administration of criminal justice.

3. Administration of juvenile justice. "Administration of juvenile justice" means activities relating to the anticipation, prevention, detection, monitoring or investigation of known, suspected or possible juvenile crimes. "Administration of juvenile justice" includes the collection, storage and dissemination of intelligence and investigative information relating to the administration of juvenile justice.

4. Criminal justice agency. "Criminal justice agency" means a federal, state or State of Maine government agency or any subunit of a government agency at any governmental level that performs the administration of criminal justice pursuant to a statute or executive order. "Criminal justice agency" includes the Department of the Attorney General, district attorneys' offices and the equivalent departments or offices in any federal or state jurisdiction. "Criminal justice agency" also includes any equivalent agency at any level of Canadian government and the government of any federally recognized Indian tribe.

5. Dissemination. "Dissemination" means the transmission of information by any means, including but not limited to orally, in writing or electronically, by or to anyone outside the criminal justice agency that maintains the information.

6. Executive order. "Executive order" means an order of the President of the United States or the chief executive of a state that has the force of law and that is published in a manner permitting regular public access.

7. Intelligence and investigative record information. "Intelligence and investigative record information" means information of record collected by or prepared by or at the direction of a criminal justice agency or kept in the custody of a criminal justice agency while performing the administration of criminal justice or, exclusively for the Department of the Attorney General and district attorneys' offices, the administration of civil justice. "Intelligence and investigative record information" includes information of record concerning investigative techniques and procedures and security plans and procedures prepared or collected by a criminal justice agency or other agency. "Intelligence and investigative record information" does not include criminal history record information as defined in section 703, subsection 3 and does not include information of record collected or kept while performing the administration of juvenile justice.

8. State. "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the

United States Virgin Islands, Guam and American Samoa. "State" also includes the federal government of Canada and any provincial government of Canada and the government of any federally recognized Indian tribe.

9. Statute. "Statute" means an Act of Congress or an act of a state legislature or a provision of the Constitution of the United States or the constitution of a state.

§804. Limitation on dissemination of intelligence and investigative record information

Except as provided in sections 805 and 806, a record that is or contains intelligence and investigative record information is confidential and may not be disseminated by a Maine criminal justice agency to any person or public or private entity if there is a reasonable possibility that public release or inspection of the record would:

1. Interfere with criminal law enforcement proceedings. Interfere with law enforcement proceedings relating to crimes;

2. Result in dissemination of prejudicial information. 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;

3. Constitute an invasion of privacy. Constitute an unwarranted invasion of personal privacy;

4. Disclose confidential source. Disclose the identity of a confidential source;

5. Disclose confidential information. Disclose confidential information furnished only by a confidential source;

6. Disclose trade secrets or other confidential commercial or financial information. Disclose trade secrets or other confidential commercial or financial information designated as such by the owner or source of the information, by the Department of the Attorney General or by a district attorney's office;

7. Disclose investigative techniques or security plans. Disclose investigative techniques and procedures or security plans and procedures not known by the general public;

8. Endanger law enforcement or others. Endanger the life or physical safety of any individual, including law enforcement personnel;

9. Disclose statutorily designated confidential information. Disclose information designated confidential by statute;

10. Interfere with civil proceedings. Interfere with proceedings relating to civil violations, civil enforcement proceedings and other civil proceedings conducted by the Department of the Attorney General or by a district attorney's office;

11. Disclose arbitration or mediation information. Disclose conduct of 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; or

12. Identify source of consumer or antitrust complaints. Identify the source of a complaint made to the Department of the Attorney General regarding a violation of consumer or antitrust laws.

§805. Exceptions

This chapter does not preclude dissemination of intelligence and investigative record

information that is confidential under section 804 by a Maine criminal justice agency to:

1. Another criminal justice agency. Another criminal justice agency;

2. A person or entity for purposes of intelligence gathering or ongoing investigation. A person or public or private entity as part of the criminal justice agency's administration of criminal justice or the administration of civil justice by the Department of the Attorney General or a district attorney's office;

3. An accused person or that person's agent or attorney. A person accused of a crime or that person's agent or attorney for trial and sentencing purposes if authorized by:

A. The responsible prosecutorial office or prosecutor; or

B. A court rule, court order or court decision of this State or of the United States.

As used in this subsection, "agent" means a licensed professional investigator, an expert witness or a parent, foster parent or guardian if the accused person has not attained 18 years of age;

4. Court. A federal court, the District Court, Superior Court or Supreme Judicial Court or an equivalent court in another state;

5. An authorized person or entity. A person or public or private entity expressly authorized to receive the intelligence and investigative record information by statute, executive order, court rule, court decision or court order. "Express authorization" means language in the statute, executive order, court rule, court decision or court order that specifically speaks of intelligence and investigative record information or specifically refers to a type of intelligence or investigative record; or

6. Secretary of State. The Secretary of State for use in the determination and issuance of a driver's license suspension.

§806. Exceptions subject to reasonable limitations

Subject to reasonable limitations imposed by a Maine criminal justice agency to protect against the harms described in section 804, this chapter does not preclude dissemination of intelligence and investigative record information confidential under section 804 by a Maine criminal justice agency to:

1. A government agency responsible for investigating child or adult abuse, neglect or exploitation or regulating facilities and programs providing care to children or adults. A government agency or subunit of a government agency in this State or another state that pursuant to statute is responsible for investigating abuse, neglect or exploitation of children or incapacitated or dependent adults or for licensing or regulating the programs or facilities that provide care to children or incapacitated or dependent adults if the intelligence and investigative record information concerns the investigation of suspected abuse, neglect or exploitation;

2. A crime victim or that victim's agent or attorney. A crime victim or that victim's agent or attorney. As used in this subsection, "agent" means a licensed professional investigator, an insurer or an immediate family member, foster parent or guardian if due to death, age or physical or mental disease, disorder or defect the victim cannot realistically act on the victim's own behalf; or

3. A counselor or advocate.

4. A counselor or advocate. A sexual assault counselor, as defined in section 53-A,

subsection 1, paragraph B, or an advocate, as defined in section 53-B, subsection 1, paragraph A. A person to whom intelligence and investigative record information is disclosed pursuant to this subsection:

A. May use the information only for planning for the safety of the victim of a sexual assault or domestic or family violence incident to which the information relates;

B. May not further disseminate the information;

C. Shall ensure that physical copies of the information are securely stored and remain confidential;

D. Shall destroy all physical copies of the information within 30 days after their receipt;

E. Shall permit criminal justice agencies providing such information to perform reasonable and appropriate audits to ensure that all physical copies of information obtained pursuant to this subsection are maintained in accordance with this subsection; and

F. Shall indemnify and hold harmless criminal justice agencies providing information pursuant to this subsection with respect to any litigation that may result from the provision of the information to the person.

§807. Confirming existence or nonexistence of confidential intelligence and investigative record information

A Maine criminal justice agency may not confirm the existence or nonexistence of intelligence and investigative record information confidential under section 804 to any person or public or private entity that is not eligible to receive the information itself.

§808. No right to access or review

A person who is the subject of intelligence and investigative record information maintained by a criminal justice agency has no right to inspect or review that information for accuracy or completeness.

§809. Unlawful dissemination of confidential intelligence and investigative record information

1. Offense. A person is guilty of unlawful dissemination of confidential intelligence and investigative record information if the person intentionally disseminates intelligence and investigative record information confidential under section 804 knowing it to be in violation of any of the provisions of this chapter.

2. Classification. Unlawful dissemination of confidential intelligence and investigative record information is a Class E crime.

3B-2

Reinsch, Margaret

From: Mackenzie Andersen <mackenziana@gmail.com>
Sent: Tuesday, September 11, 2018 9:08 AM
To: Reinsch, Margaret
Subject: Improvements needed to serve public benefit in Freedom of Access Law.

Dear Ms Reinsch,

Thank you for sending notice of the Right To Know committee meeting. I would like to submit this testimony of my own experience of how Freedom Of Access currently works and how the law can help to improve it.

I have observed that the Maine Legislative Library is excellent in providing information in the most usable form which is digital, searchable, and it is possible to copy specific information relevant to one's project. It is also sent in digital format free of charge.

The Maine Department of Corporations provides much information which can be downloaded for a reasonable $3.00 fee.

However, when I request information from other government agencies from the town to the state, I usually receive it in a form in which is impossible to search with database tools, either because it is not in digital form or because it is in a PDF which has blocked searching and copying functions. I believe this is an intentional choice as is reflected in the response I received in 2014 from the Maine Ombudsman, Brenda Kielty.

> 1.Information made available on an agency website but not in a searchable database format may not provide the research and investigative tool needed by the public. The Freedom of Access Act does not require that public information be posted online in any particular format, just that public records be made available. While there is a strong argument for increasing the accessibility and usefulness of information, there is no current requirement that the technology in place achieve that objective.
>
> > 2.The collection of data and reports generated from that data may be public records but the agency is not required under the law to create a new record or report in response to a FOAA request. If the dataset you request does not exist, the agency may choose to produce it for any number of reasons but not because they are legally required to take such an action. I appreciate your comments on this topic and I will continue to bring attention to the need for accessible, useful public data.
>
> Brenda Kielty

Transparency is best served by a searchable online database but if that is not an option the public should be granted the right to request the information in digital form, which is searchable with functioning copying capability. It seems that the government will only allow the public to request information in the most usable form if there is a law mandating the government to do so- and so there should be.

To take this even further. Since the seventies, we have a public-private government in Maine in which much of its activity is concealed from public transparency by privacy laws specific to the private sector. The public-private government can use its public identity to access public funds for its own use and use the private side of

the partnership to conceal information from the public. Given that the public-private government is deeply entrenched, the rules of privacy and transparency could be rewritten to better serve public transparency.

Sincerely

Mackenzie Andersen

Preserving the American Political Philosophy

On 9/10/2018 3:01 PM, Reinsch, Margaret wrote:

> The Right to Know Advisory Committee will hold its first meeting of 2018 on Thursday, September 13th at 4:00 p.m. (we're trying to accommodate the House and Senate Sessions that day) in Room 438 of the State House.
>
> We apologize for the short notice. The meeting is open to the public and the audio will be streamed live over the Internet: http://legislature.maine.gov/Audio/#438
>
> The plan is to post the agenda tomorrow: https://www.maine.gov/legis/opla/righttoknow.htm
>
> Please let me know if you have any questions.
>
> Thanks
>
> Peggy
>
> Margaret J. Reinsch, Esq., Legislative Analyst
>
> Joint Standing Committee on Judiciary
>
> Maine State Legislature
>
> Office of Policy and Legal Analysis
>
> Room 215, Cross State Office Building
>
> 13 State House Station
>
> Augusta, Maine 04333
>
> (207) 287-1670 (office number)
>
> (207) 287-1673 (direct and voice mail)
>
> (207) 287-1275 (fax)
>
> margaret.reinsch@legislature.maine.gov
>
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> ========== About This E-Mail List ==========
> ---
>
> Archives of this list: http:// https://lists.legislature.maine.gov/sympa/arc/right.to.know-ip

3B-1

STATE OF MAINE
ONE HUNDRED AND TWENTY-EIGHTH LEGISLATURE
COMMITTEE ON JUDICIARY

January 16, 2018

Senator Lisa Keim, Chair
Right to Know Advisory Committee
Committee Members

Re: Criminal History Record Information Database – Bulk Information Requests

Dear Right to Know Advisory Committee Members:

During the Second Regular Session of the 128th Legislature, the Judiciary Committee heard and worked LD 1658, An Act To Make Criminal History Record Information Maintained in a Database Confidential. The bill as originally drafted designated as confidential criminal history record information contained in a database maintained by the Department of Public Safety's State Bureau of Identification (SBI), except to the extent necessary to disclose criminal history record information to persons who are authorized by law to receive the information and who submit a request for that information.

Matthew Ruel, Director of the SBI, explained at the public hearing that LD 1658's purpose was to protect the state criminal history repository maintained by SBI from bulk data requests, which the SBI anticipates may be made in the future by private companies that wish to create on-line searchable criminal history databases for commercial purposes. These types of requests have been made in other states in the past; similarly, bulk requests for data from the Sex Offender Registry have been made in Maine. Bulk requests will not only create administrative burdens for the SBI—requiring the Bureau to segregate confidential criminal history information from the public data contained in its database—but more importantly will create a risk that inaccurate, incomplete and potentially confidential criminal history information will be publicly available on commercial websites. Although the information requested through a bulk data request may be complete and non-confidential on the date that the information is disseminated by the SBI in response to a bulk request, over time the information will become out-of-date and inaccurate. Moreover, criminal history information that is public on one day may, over time, become confidential; for example, pursuant to 16 M.R.S. §703(2)(F), information that a criminal charge has been filed becomes confidential once a year has elapsed since the day of the filing.

Matthew Ruel nevertheless agreed that both the title and the content of LD 1658 were misleading, and he proffered a proposed amendment to the bill in an attempt to clarify that while the *databases* maintained by the SBI would be protected under the bill, any public criminal

history information *contained within* those databases "may be disseminated . . . in response to a request for an individual's criminal history record information . . . in accordance with Title 25, section 1541, subsection 6." In addition, the proposed amendment would re-title the bill: "An Act To Prohibit the Dissemination of Criminal History Record Information Databases Maintained by or for the State Bureau of Identification."

Judith Meyer, of the Maine Freedom of Information Coalition, strongly opposed LD 1658 at the public hearing because it would make otherwise public criminal history information confidential solely because the information is stored electronically in database form. She explained:

> Criminal history record information includes, among other things, summonses, arrests, bail, criminal charges, indictments, dispositions of criminal cases and information on post-trial appeals. That information is undeniably public. What the Department of Public Safety is asking is to classify these non-confidential records as confidential by virtue of their being stored in a database, which is in sharp contrast with the spirit of the Freedom of Access Act. In fact, FOAA was amended in 2011 specifically to note that public records stored electronically must be as accessible as records drafted on paper "*or in the medium in which the record is stored, at the requester's option,*" whether records are requested singly or by entire database. (Emphasis by Ms. Meyer.)

Limiting bulk requests, she explained, would limit the ability of members of the public, the legislature, the media and others from conducting research involving criminal history record information. She noted, by example, that a legislator might not be permitted to access compiled criminal history information from the SBI database in an attempt to study the crime rate or recidivism rates in his or her legislative district under either LD 1658 or the proposed amendment presented to the bill. Ms. Meyer further noted that neither the Right to Know Advisory Committee nor the Criminal Law Advisory Commission has been asked to review the SBI's concerns regarding bulk data requests for public criminal history record information.

The Judiciary Committee ended up voting Ought Not to Pass on LD 1658, with the understanding that we would ask the Right to Know Advisory Committee to collaborate with the Criminal Law Advisory Commission to examine the issues raised by the bill and make recommendations back to the Judiciary Committee in January next year.

The Judiciary Committee will be happy to share all files and correspondence on this bill. Please feel free to contact us or our committee analyst if you have any questions.

Thank you.

Sincerely,

Senator Lisa Keim
Senator Chair

Representative Matthew W. Moonen
House Chair

Attachments: LD 1658 (original bill)
Department of Public Safety proposed amendment to LD 1658

cc: Matthew Ruel, Director, State Bureau of Identification
Members, Maine Criminal Law Advisory Commission

128th MAINE LEGISLATURE

SECOND REGULAR SESSION-2018

Legislative Document **No. 1658**

H.P. 1143 House of Representatives, November 29, 2017

An Act To Make Criminal History Record Information Maintained in a Database Confidential

Submitted by the Department of Public Safety pursuant to Joint Rule 203.

Received by the Clerk of the House on November 27, 2017. Referred to the Committee on Judiciary pursuant to Joint Rule 308.2 and ordered printed pursuant to Joint Rule 401.

Robert B. Hunt

ROBERT B. HUNT
Clerk

Presented by Representative COREY of Windham.
Cosponsored by Senator DIAMOND of Cumberland and
Representatives: GERRISH of Lebanon, HICKMAN of Winthrop, LONGSTAFF of Waterville, MAREAN of Hollis, NADEAU of Winslow, RECKITT of South Portland, WARREN of Hallowell, Senator: CYRWAY of Kennebec.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 16 MRSA §711 is enacted to read:

§711. Criminal history record information in database confidential

Notwithstanding any other provision of law to the contrary, criminal history record information contained in a database maintained or caused to be maintained by the Department of Public Safety, State Bureau of Identification is confidential and not a public record for the purposes of Title 1, chapter 13 and may not be disseminated in whole or part, except to the extent necessary to generate and disclose an individual's criminal history record information to persons requesting and authorized by law to receive an individual's criminal history record information from the State Bureau of Identification.

SUMMARY

This bill makes criminal history record information contained in a database maintained or caused to be maintained by the Department of Public Safety, State Bureau of Identification confidential.

STATE OF MAINE
DEPARTMENT OF PUBLIC SAFETY
MAINE STATE POLICE

PAUL R. LEPAGE
GOVERNOR

JOHN E. MORRIS
COMMISSIONER

COL. ROBERT A. WILLIAMS
CHIEF

LT. COL. JOHN E. COTE
DEPUTY CHIEF

TESTIMONY OF MATTHEW RUEL
DIRECTOR, STATE BUREAU OF IDENTIFICATION

In Support of
An Act To Make Criminal History Record Information Maintained in a Database Confidential

Senator and Representative, Members of the Committee:

My name is Matt Ruel, and I am the Director of the State Bureau of Identification at the Maine Department of Public Safety. I present this testimony on behalf of the Administration in support of LD 1658.

The purpose of this bill is simply to protect the state criminal history repository from bulk data requests, or having to provide access to repository data in ways that are not already defined in state statute. Our intent is not to change or prohibit public access that is already provided by state statute. Yearly, we receive roughly half a million public requests for individual criminal history and that process will continue unchanged.

I am looking to ensure that the record remains as accurate, timely, and complete as possible and as the only agency responsible for receiving all segments of the criminal history no other entity can meet that requirement. Supporting this LD will protect consumers and the subjects with criminal history by making it difficult for privately maintained criminal history websites from maintaining and disseminating information that could become inaccurate, or that shouldn't be disseminated because of state statute.

For these reasons, the Administration is in support of LD 1658, and asks the Committee to report the bill out as "Ought to Pass."

Thank you. I would be happy to try to answer any questions you might have and be available for the work session.

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DEPARTMENT OF PUBLIC SAFETY
MAINE STATE POLICE

COL. ROBERT A. WILLIAMS
CHIEF

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DEPUTY CHIEF

1659

LD 1568, *An Act To Make Criminal History Record Information Maintained in a Database Confidential*

*** AGENCY AMENDMENT ***

Sec. 1. Amend the bill title by striking the current title and replacing it with the following title:

'An Act to Prohibit the Dissemination of Criminal History Record Information Databases Maintained by or for the State Bureau of Identification'

Sec. 2. Amend Section 1 of the bill by striking the current text of the proposed bill and replacing it with the following text:.

'§711. Dissemination of Criminal History Record Information Databases Prohibited

'Databases that contain criminal history record information and are maintained by or for the Bureau of State Police, State Bureau of Identification are not public records, either in whole or in part, for the purposes of Title 1, chapter 13.

'Public criminal history record information may be disseminated by the State Bureau of Identification in response to a request for an individual's criminal history record that includes the individual's name and date of birth, in accordance with Title 25, Section 1541, subsection 6.'

AMENDMENT SUMMARY

The amendment replaces the bill. The amendment –

1. Replaces the bill title to better reflect the intent of the original bill and the proposed bill amendment;

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2. Clarifies that the bill prohibits the public dissemination, in whole or part, of criminal history databases maintained by or for the Bureau of State Police, State Bureau of Identification; and

3. Provides a cross-reference to the statutory provision that currently authorizes dissemination of public criminal history record information based on name and date of birth requests.

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Are School Surveillance Videos Public Records?
General Overview

Right to Know Advisory Committee
November 19, 2018

Under Maine law, 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 MRSA § 402(3). No exceptions to that definition directly apply to school surveillance videos.

Under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), a student's education records cannot be disclosed without prior written consent of the student's parent. Education records are defined as all records, regardless of medium, that are maintained by a school and contain information directly related to a student, with certain limited exceptions.

The US Department of Education has developed some guidance on whether photos and videos are education records protected by FERPA, which requires a determination of whether the photo or video is (1) maintained by a school and (2) directly related to a student.

A photo or video is maintained by the school when the school is the custodian of the photo or video. A photo of a student that is taken by a parent, for example, is not protected by FERPA unless the school obtains a copy and maintains that photo in a particular student's records.

The US DOE further advises that whether a photo or video is directly related to a student is often context-specific, but factors that may help determine if a photo or video is directly related to a student are:

> a. Whether the school uses the photo or video for disciplinary action involving the student;
>
> b. Whether the photo or video contains a depiction of an activity that resulted in the school's use of the photo or video for disciplinary action, shows the student in violation of a law or shows the student getting injured, attacked, ill or having a health emergency;
>
> c. Whether the person taking the photo or video intends to make a specific student the subject of the photo or video; and
>
> d. Whether the photo or video otherwise contains personally identifiable information.

A photo or video is probably not directly related to a student if the student's image is incidental or captured as part of the background, or if the student is shown participating in school activities that are open to the public and the image does not focus on a particular student.

In *Easton Area School District v. Miller*, 191 A.3d 75 (Pa. Commw. Ct. 2018), a surveillance video recorded on a school bus that captured a teacher disciplining a student was not an education record under FERPA because the video was directly relevant to the teacher's performance but was not directly relevant to the students captured in the video. Although the video was maintained by the school, it was subject to public disclosure because it did not meet the FERPA requirement that it also be directly related to any of the students in the video.

Similarly, the surveillance video in *Rome City School Dist. v. Grifasi*, 806 N.Y.S.2d 381 (Sup. Ct. 2005), which recorded a fight among several students and included other students in the vicinity, was not an education record eligible for FERPA protection when it was "recorded to maintain the physical security and safety of the school building and which [did] not pertain to the educational performance of the students captured" on the tape, even when it identified the students and was maintained by the school. The court observed that, like the video in *Easton Area School District v. Miller*, this video was not directly related to the students depicted in any educational sense.

In contrast, in *Bryner v. Canyons School Dist.*, 351 P.3d 852 (Utah Ct. App. 2015), a surveillance video recorded in an elementary school that showed an altercation among students was not subject to public disclosure when the video clearly identified the students involved in the altercation and the video was maintained by the school. Because the students were identifiable in the video the video was directly related to those students. Although the video was a protected education record for each of the students in it, each student's parents were only permitted to view it with the other students' identifying features blurred or otherwise redacted. The court did not cite the *Grifasi* case to distinguish it, but did observe that "Congress made no content-based judgments with regard to its 'education records' definition."

RIGHT TO KNOW ADVISORY COMMITTEE

Monday, December 3, 2018
1:00 p.m.
State House Room 438

Meeting Agenda

1. Introductions
2. Report of Public Records Exceptions Subcommittee
    A. Proposed recommendations of the Subcommittee
    B. Advisory Committee action
3. Review draft Thirteenth Annual Report of the Right to Know Advisory Committee
    A. Government employee training
        - Recommended legislation
    B. Proposed remote participation study
    C. Public records exceptions in Titles 1 through 7-A
        - Recommended legislation
    D. Remedies
        - Recommended legislation
    E. Electronic databases
    F. School surveillance
    G. Proposed joint select committee on government transparency and data privacy
4. Adjourn

Thirteenth Annual Report
of the
Right to Know Advisory Committee

December 2018

Staff:
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Rep. Christopher W. Babbidge
Amy Beveridge
Elaine Clark
James Campbell
Suzanne Goucher
Stephanie Grinnell
Richard LaHaye
Mary-Anne LaMarre
Judy Meyer
Paul Nicklas
Christopher Parr
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EXECUTIVE SUMMARY

This is the thirteenth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council 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 members are appointed by the Governor, the Chief Justice of the Supreme Judicial Court, the Attorney General, the President of the Senate and the Speaker of the House of Representatives.

As in previous annual reports, this report includes a brief summary of the legislative actions taken in response to the Advisory Committee's January 2018 recommendations and a summary of relevant Maine court decisions from 2018 on the freedom of access laws. This report also summarizes several topics discussed by the Advisory Committee that did not result in a recommendation or further action.

For its thirteenth annual report, the Advisory Committee makes the following unanimous recommendations:

- ❑ **Enact legislation to require municipal officials to complete Freedom of Access Act training when appointed to offices for which training is required if elected to those offices;**
- ❑ **Amend certain provisions of law in Titles 1 through 7-A relating to previously-enacted public records exceptions;**
- ❑ **Establish a legislative study on remote participation;**
- ❑
- ❑

In 2019, the Right to Know Advisory Committee will continue to discuss the unresolved issues identified in this report, including its discussion of the establishment of a joint select committee of the Legislature on government transparency and data privacy policy issues and the public availability of information contained in electronic databases. The Advisory Committee will also continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access. The FOAA Remedies Subcommittee will meet with the expectation to make recommendations concerning alternatives to enforcement of the FOAA through the court process to the Advisory Committee. The Advisory Committee looks forward to another year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

I. INTRODUCTION

This is the twelfth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council 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 Advisory Committee's authorizing legislation, located at Title 1, section 411, is included in **Appendix A**.

More information on the Advisory Committee, including meeting agendas, meeting materials and summaries of meetings and its previous annual reports can be found on the Advisory Committee's webpage at http://legislature.maine.gov/legis/opla/righttoknow.htm. The Office of Policy and Legal Analysis provides staffing to the Advisory Committee.

The Right to Know Advisory Committee has 17 members. The chair of the Advisory Committee is elected annually by the members. Current Advisory Committee members are:

Senator Lisa Keim Chair	*Senate member of Judiciary Committee, appointed by the President of the Senate*
Representative Christopher Babbidge	*House member of Judiciary Committee, appointed by the Speaker of the House*
James Campbell	*Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House*
Suzanne Goucher	*Representing broadcasting interests, appointed by the Speaker of the House*
Stephanie Grinnell	*Representing newspaper and other press interests, appointed by the President of the Senate*
Amy Beveridge	*Representing broadcasting interests, appointed by the President of the Senate*
Richard LaHaye	*Representing law enforcement interests, appointed by the President of the Senate*
Mary-Anne LaMarre	*Representing school interests, appointed by the Governor*
Elaine Clark	*Representing the Judicial Branch, designated by the Chief Justice of the Supreme Judicial Court*
Judy Meyer	*Representing newspaper publishers, appointed by the Speaker of the House*
Paul Nicklas	*Representing municipal interests, appointed by the*

	Governor
Christopher Parr	*Representing state government interests, appointed by the Governor*
Linda Pistner	*Attorney General's designee*
Luke Rossignol	*Representing the public, appointed by the President of the Senate*
William Shorey	*Representing county or regional interests, appointed by the President of the Senate*
Eric Stout	*A member with broad experience in and understanding of issues and costs in multiple areas of information technology, appointed by the Governor*
Vacant	*Representing the public, appointed by the Speaker of the House*

The complete membership list of the Advisory Committee, including contact information, is included in **Appendix B**.

By law, the Advisory Committee must meet at least four times per year. During 2018, the Advisory Committee met four times: on September 13, October 2, November 19 and December 3. Each meeting was open to the public and was also accessible through the audio link on the Legislature's webpage.

II. COMMITTEE DUTIES

The Right to Know Advisory Committee was created to serve as a resource and advisor about Maine's freedom of access laws. The Advisory Committee's specific duties include:

- Providing guidance in ensuring access to public records and public proceedings;
- Serving as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know;
- Supporting the provision of information about public access to records and proceedings via the Internet;
- Serving as a resource to support training and education about Maine's freedom of access laws;

- Reporting annually to the Governor, the Legislative Council, the Joint Standing Committee on Judiciary and the Chief Justice of the Supreme Judicial Court about the state of Maine's freedom of access laws and the public's access to public proceedings and records;

- Participating in the review and evaluation of public records exceptions, both existing and those proposed in new legislation;

- Examining inconsistencies in statutory language and proposing clarifying standard language; and

- Reviewing the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public.

In carrying out these duties, the Advisory Committee may conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss and consider solutions to problems concerning access to public proceedings and records.

The Advisory Committee may make recommendations for changes in statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws. The Advisory Committee is pleased to work with the Public Access Ombudsman, Brenda Kielty. Ms. Kielty is a valuable resource to the public and public officials and agencies.

III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES

Dubois v. Office of the Attorney General, 2018 ME 67: The Maine Supreme Judicial Court upheld the Superior Court decision finding that drafts of a letter sent by the Maine Department of Agriculture, Conservation and Forestry to Dubois Livestock, Inc. were not subject to disclosure pursuant to the Freedom of Access Act because they were created in anticipation of litigation. Rule 26(b)(3) of the Maine Rules of Civil Procedure protects from discovery records created in anticipation of litigation because they contain attorneys' mental impressions, conclusions, opinions or legal theories concerning the prospective litigation. The Freedom of Access Act, Title 1, §402, sub-§3, ¶B provides an exception from the definition of public records for records that would be within the scope of a privilege against discovery.

In the same case, the Supreme Judicial Court reversed the Superior Court's decision to provide access to a series of emails that involved planning for a strategy meeting. The Law Court found these also fell within the work product privilege.

In a companion case, *Dubois v. Department of Agriculture. Conservation and Forestry,* 2018 ME 68, the Supreme Judicial Court upheld the privilege exception (Title 1, section 402,

subsection 3, paragraph B) for those portions of records containing the names of people who had complained to the DACF about odors from the Dubois composting facility. The "informant identity privilege" of Rule 509(a)(1) of the Maine Rules of Evidence provides that a State agency has a privilege to refuse to disclose the identity of an informant.

IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEES

Public Records Exception Subcommittee

(To be completed after meetings on December 3rd)

Remedies Subcommittee, formerly Penalties and Enforcement Subcommittee

The Right to Know Advisory Committee in 2017 created a Penalties and Enforcement Subcommittee, subsequently known as the Remedies Subcommittee, to the review the penalty and enforcement provisions in the Freedom of Access Act. The Advisory Committee named Judy Meyer chair of the Subcommittee; Representative Babbidge, Eric Stout, Chris Parr, Linda Pistner and Luke Rossignol were named as members of the subcommittee.

The Remedies Subcommittee met twice during the legislative session and was staffed by Adam Bohanan, the Maine School of Law extern for the Public Access Ombudsman. The Subcommittee looked at the existing penalties and the enforcement process included in the Freedom of Access Act in Title 1, sections 409 and 410. The Subcommittee reviewed extensive materials on penalties, attorney's fees and processes in other states. The Subcommittee recommended that the full Advisory Committee consider adopting changes, including:

- Increasing the fine, which is currently $500, maybe as a tiered schedule;
- Requiring the individual public actor to be responsible for paying the fine, rather than the employing governmental agency;
- Directing that the fine go to the person aggrieved, not the General Fund:
- Removing the "bad faith" standard for attorney's fees, and requiring the court to award reasonable attorney's fees and litigation expenses to the party who substantially prevails;
- Providing an alternative dispute resolution (ADR) option before filing a court action to enforce the law; and
- Aligning the language concerning the protection of public access to public records and public proceedings.

The Advisory Committee agreed to look at changing the penalties; it focused on increasing the amount of the fine for subsequent violations. Current law provides for a fine of up to $500 to be paid by the state government agency or the local government entity when an officer or employee willfully violates the Freedom of Access Act. The Advisory Committee considered maintaining the $500 fine for the first willful violation, but establishing a fine of up to $1,000 for the second

willful violation within a four-year period and a fine of up to $2,000 for a third or subsequent willful violation within the four-year period.

Public Access Ombudsman Brenda Kielty reminded the Advisory Committee that the FOAA is remedial, not punitive, and that her role is generally to help figure out what the process is for individual situations and help the parties sort out what the law requires. Putting more emphasis on the penalty will push the statute to being focused more on punishment.

Members expressed interest in developing an alternative dispute option as a remedy before filing an action in court, noting that different entities have an appeals or fair hearing process in effect now. Court litigation is long and complicated and can be prohibitively expensive. The parties may want an opportunity to be heard by another group or person, rather than the formal court-based ADR. Ms. Kielty pointed out that when the Legislature created the Public Access Ombudsman position, it intentionally put resources toward preventing and facilitating the resolution of disputes by focusing on communication and education, rather than on enforcement and punitive measures. Ms. Kielty works with agencies to determine what can and should be released, which is prior to a denial; it becomes much more difficult for the ombudsman once a denial of a public record request has occurred. Establishing a hearing step would formalize what is now an informal process undertaken by the ombudsman, but would seem to require the ombudsman to exercise more powers than actually exist in that position. Once there is a violation and the court clock is ticking, it is not a good spot for the Ombudsman; the Ombudsman cannot stop the clock. Plus, the ADR process should not slow down the resolution of the request. Sometimes agencies do not know how to efficiently extract information, resulting in an expensive estimate, which is a constructive denial.

Recognizing that there was no consensus, the Advisory Committee agreed to extending the life of the Subcommittee and changing its direction to focus more on examining whether an administrative appeal process or other alternative dispute resolution method would be feasible to implement before the requestor files an action in court.

The Subcommittee did not meet before the final meeting of the Advisory Committee, but will convene as soon as possible in 2019.

V. COMMITTEE PROCESS

The Right to Know Advisory Committee did not schedule meetings until the final day of the Second Special Session of the 128th Legislature, leaving very little time to meet and make recommendations before the new 129th Legislature convened on December 5, 2018. The Advisory Committee was able to squeeze in four meetings and the Public Records Exceptions Subcommittee met XX times, rescheduling the final meeting due to weather. The Advisory Committee engaged in robust discussions about several topics, and the members agreed to add a few of the areas to the agenda for 2019 because of the lack of time to thoroughly research and vet the issues involved.

FOAA training for public officials

Under current law, 1 MRSA §412 requires officials elected to certain public offices to complete training on the Freedom of Access Act. The law requires public access officers and the following elected officials to be trained: the Governor; the Attorney General, Secretary of State, Treasurer of State and State Auditor; members of the Legislature elected after November 1, 2008; commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments; municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments; officials of school administrative units; and officials of a regional or other political subdivision who, as part of the duties of their offices, exercise executive or legislative powers.

Brenda Kielty, the Public Access Ombudsman, noted in her 2017 update to the Advisory Committee that section 412's application to only elected officials in the listed positions may create some disparity among trained officials simply because some officials are elected to those positions while others are appointed. By unanimous vote, the Advisory Committee recommended in its Twelfth Annual Report that section 412 be amended to require that officials appointed to the same elected positions listed also be required to complete the training.

The Joint Standing Committee on Judiciary directed that a bill be printed to carry out the recommendations: LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Freedom of Access Training for Public Officials. Because the bill was interpreted as requiring a local unit of government to expand or modify that unit's activity so as to necessitate additional expenditures from that unit's local revenues, the bill was identified as imposing a local government mandate under the Constitution of Maine, Article IX, Section 21. To avoid having to provide funding for what was determined to be an "insignificant" cost, a majority of the Judiciary Committee included a mandate preamble in the Committee Amendment to exempt the bill from the funding requirement. Legislation that includes a mandate preamble requires a two-thirds vote of the elected members of the House and Senate. Although a majority of the House voted in favor of the bill as amended, the affirmative votes did not reach the two-thirds threshold and the bill was not enacted. (Ten members of the Judiciary Committee voted Ought to Pass as Amended while three members voted Ought Not to Pass; the Senate enacted the bill with a two-thirds majority; the House failed to enact with the required two-thirds vote, with 80 voting in favor and 68 against.)

The Right to Know Advisory Committee continues to unanimously support the requirement that the specified municipal officials receive FOAA training, regardless of whether they are elected or appointed, and therefore once again recommends the enactment of legislation to implement that requirement.

Remote participation

The question of whether it is legal or appropriate for a member of a public body to participate and vote in proceedings of that public body when not physically in attendance has been explored in depth by the Advisory Committee over the past several years. The Attorney General's Office advises state agencies that remote participation is not permitted under current law unless specifically authorized (there are several examples in the law that specifically authorize

participation in public proceedings by telephone or other electronic communication). However, it has been widely acknowledged that because FOAA is silent with regard to remote participation generally, there is ambiguity because there has been no litigation or court decision to provide other legal guidance.

In its Twelfth Annual Report, the Advisory Committee recommended legislation to prohibit remote participation in public proceedings by a member of a public body unless the body has established a policy for remote participation that meets certain requirements. Although the Judiciary Committee directed that the Advisory Committee's recommendations be printed as a bill (LD 1832, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation), a majority of the Judiciary Committee ended up opposing the legislation, and separate proposed legislation focused on remote participation similarly failed passage in the Legislature (LD 70, An Act To Allow Municipal Governing Boards of 3 Members To Perform Official Duties via Technology; and LD 1831, An Act Concerning Remote Participation in Public Proceedings).

The Advisory Committee discussed the failure of the Legislature over the course of several years to grasp the significance of the absence of statutory directives on remote participation, that transparency and accountability are potentially put in jeopardy by the unfettered participation in meetings by members who are not physically in attendance. The Advisory Committee concluded that the best way to ensure the shaping of a statutory framework for remote participation is to develop a process that includes more legislators. Before legislation can move forward, the Advisory Committee believes that a broad cross-section of legislators needs to understand the dangers of the status quo, and be part of the crafting of an appropriate structure that supports governmental transparency and public participation.

With that in mind, the Advisory Committee recommends that the Legislature create a legislative study commission on remote participation. The study commission will have the benefit of years of the Advisory Committee's research, deliberations and legislative options on remote participation, as well as all the detailed input of agencies and interested parties. The Advisory Committee suggests that a good starting place for the study is the legislation introduced in 2018, LD 1832.

Public records exceptions review

(To be completed after meetings on December 3rd)

Remedies

The Advisory Committee discussed the recommendations of the Penalties and Enforcement Subcommittee. There was significant interest in revising the penalties section of the FOAA to provide for tiered schedule of fines to increase the sanction for willfully violating the law repeatedly. Among the variables to consider are whether the individual officer or employee should be personally liable for the fine, what is the appropriate time period in which to sanction repeated willful violations and should be the agency or entity be subject to the tiered fine schedule only if it is the same officer or employee who is violating the law.

(To be completed after meetings on December 3rd)

The Advisory Committee agreed to continue the work of the Penalties and Enforcement Subcommittee to focus on exploring one or more processes to provide an alternative or at least an intervening step before a person files an action in court against a public entity to enforce the FOAA. The newly-names Remedies Subcommittee is chaired by Judy Meyer, with initial volunteers of Representative Babbidge, Amy Beveridge, Chris Parr, Luke Rossignol and Eric Stout, although participation may change when the subcommittee convenes in 2019.

Electronic databases

Public access to government databases was raised as a topic for the Advisory Committee by two different sources. The Joint Standing Committee on Judiciary requested the Advisory Committee to consider the issues and underlying concerns raised by LD 1658, An Act To Make Criminal History Record Information Maintained in a Database Confidential, introduced by the State Bureau of Identification (SBI) in the Second Regular Session of the 128th Legislature. Also during 2018, the Advisory Committee received an email from a member of the public requesting assistance in making available the public information that is contained in databases maintained by governmental entities.

LD 1658 was introduced partly in anticipation of requests, already received by similar agencies in other states, for all the content of the criminal history database. Current law directs the SBI to provide public criminal history record information about a specific person upon receiving a request identifying that person's name and date of birth and for a small fee. The bill would have prohibited the bulk transfer of the public data in the database. Supporters of the bill were concerned that certain information in the database loses its public nature and becomes confidential after the passage of time. A one-time transfer of data that is then sold or posted online will not be accurate, and could harm those whose information is then permanently released. The Judiciary Committee did not pass the bill, but requested that the Advisory Committee review the concerns and make recommendations back to the Judiciary Committee.

Approaching from the opposite direction, an email asked the Advisory Committee to address the difficulty that members of the public face when requesting information that is maintained in a government database that also contains personally-identifying information or other confidential information, such as proprietary information or programming directions. Because the Freedom of Access Act does not require a public entity to create a new record in response to a public records request (1 MRSA §408-A, subsection 6), and many public entities have difficulty extracting the public information in the database, requests for such information are often denied.

The Freedom of Access Act requires agencies to consider, in the purchase of and contracting for computer software and other information technology resources, the extent to which the software or technology will maximize public access to public records, and maximize the exportability of public records while protecting confidential information that may be part of public records. (1 MRSA §413) Some states have adopted statutory language to specifically provide for the extraction of public information.

The Advisory Committee discussed the difficulties in responding to public records requests seeking the public elements of government databases. John Pelletier, Chair of the Criminal Law Advisory Commission (CLAC), shared CLAC's discussion about the concerns leading to the introduction of LD 1658. CLAC reached no consensus and thus is making no recommendations to the Judiciary Committee; the members understand the dangers of releasing information whose accuracy will wane over time, as well as the fact that very little information cannot be discovered through diligent searching on the Internet.

Members of the Advisory Committee were uncomfortable with making records that are public individually not public when they are in bulk. Concerns were raised that it is not appropriate to make money off the taxpayer's investment in building the databases, and that care should be taken to ensure that data is accurate and not stale. Part of the stewardship of a government agency is to ensure the accuracy and validity of records; the rights of the individual must be balanced with the rights of the public and the First Amendment. The Advisory Committee did not make specific recommendations concerning databases due to time constraints, although there was interest in making progress on the issue. The Advisory Committee recognized the tension between protecting personally-identifiable information while still retaining statistically useful data. The Advisory Committee agreed to further investigation in 2019.

School surveillance records

Ms. LaMarre brought a recently decided case from Pennsylvania regarding public access to school surveillance videos to the Advisory Committee's attention. In that case, a school surveillance video was determined to be a public record because it was not protected by the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"). The Advisory Committee discussed its concerns with allowing video of schoolchildren to become public, as well as the countervailing public interest in ensuring the accountability of school staff and the safety of children by allowing at least some access to those videos.

The Advisory Committee considered the protections afforded by FERPA, which provides that "educational records" are not accessible by the public; whether a record – or surveillance video – is considered an "educational record," however, depends upon whether the record is (1) maintained by a school and (2) directly related to a student. The cases that have interpreted FERPA in the context of surveillance videos have produced unpredictable results and minimal guidance. There is not currently a Maine law that would affect the availability of school surveillance videos to the public.

The Advisory Committee further discussed the safety and privacy issues associated with school surveillance videos, including its value to members of the public with bad motives toward the children depicted and its personal nature, as well as the potential value to the public in ensuring that schools do not overreach in their surveillance or keep damaging footage from public scrutiny. Mr. Campbell expressed his desire to regulate video and other, non-video, types of information collected by schools about children that could be disseminated in innumerable ways.

Ultimately the Advisory Committee felt that the issue required more consideration than its time would allow, but advises that this is an important topic for consideration and is available to assist the Judiciary Committee in whatever capacity necessary during the 129th Legislature.

Joint select committee on government transparency and data privacy policy issues

The Advisory Committee discussed the proposal, offered by Mr. Parr, to suggest to the Legislative Council that a joint select committee on government transparency and data privacy policy issues be created. Creating such a committee, which perhaps might work at times with the Advisory Committee, would ensure that more legislators are able to directly work on, more thoroughly discuss and more fully appreciate the very often complex public policy issues about which the Advisory Committee frequently deliberates in its work. One idea is that the joint select committee could investigate privacy concerns while the Right to Know Advisory Committee focuses more on access to government information. There was a concern that such a joint select committee would look like an end-run around the Judiciary Committee, but a benefit would be that it could work during the legislative session. The Advisory Committee members agreed that the idea was worthy of further discussion and agreed to add it to the Advisory Committee's 2019 agenda.

VI. ACTIONS RELATED TO COMMITTEE RECOMMENDATIONS CONTAINED IN ELEVENTH ANNUAL REPORT

The Right to Know Advisory Committee made the following recommendations in its Twelfth Annual Report. The legislative actions taken in 2018 as a result of those recommendations are summarized below.

Recommendation:	**Action:**
Enact legislation to prohibit remote participation in public proceedings by a member of a public body unless the body establishes a policy for remote participation that meets certain requirements	The Joint Standing Committee on Judiciary directed that two bills be printed, one to carry out the recommendation of the Right to Know Advisory Committee (LD 1832, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation) and the other (LD 1831, An Act Concerning Remote Participation in Public Proceedings) to prohibit remote participating and phase out authorization of remote participation by the seven specific bodies that are currently statutorily authorized to conduct proceedings with one or more members participating from a remote location. LD 1832 was reported out of committee with a majority Ought Not To Pass report, and a minority report of Ought To Pass As Amended. The amendment included the prohibition on executive sessions being conducted with remote participation, giving public bodies of three or fewer members more flexibility and requiring the approval of a remote participation policy by the constituents of

	a public body before remote participation could be used. The Senate and House of Representatives accepted the Ought Not To Pass report. LD 1831 was reported out of committee with a majority Ought Not To Pass report, and a minority report of Ought To Pass. The Senate and the House of Representatives accepted the Ought Not To Pass report.
Recommendation: Enact legislation to amend 1 MRSA §412 to require municipal officials to complete Freedom of Access Act training when appointed to offices for which training is required if elected to those offices	**Action:** The Judiciary Committee directed that a bill be printed to carry out the recommendations of the Right to Know Advisory Committee. LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Freedom of Access Training for Public Officials, was reported out with a majority Ought To Pass As Amended report, the amendment adding a Mandate Preamble to exempt the requirement that the State fund a local government mandate, identified for this bill as "insignificant costs" on a statewide basis. The minority report was Ought Not To Pass. Although the Senate voted to accept the majority report by at least a two-thirds vote, required for bills containing a mandate preamble, the majority report was note approved by the required two-thirds in the House of Representatives and LD 1821 was not enacted.
Recommendation: Establish a subcommittee to review the penalty and enforcement provisions in the Freedom of Access Act	**Action:** The Right to Know Advisory Committee established a Penalties and Enforcement Subcommittee, chaired by Judy Meyer and including Representative Chris Babbidge, Chris Parr, Linda Pistner, Luke Rossignol and Eric Stout. The Subcommittee was staffed by Adam Bohannon, the Maine Law School extern working with Public Access Ombudsman Brenda Kielty. The Subcommittee met twice and presented recommendations to the Right to Know Advisory Committee at the September 13, 2018 meeting.

VII. RECOMMENDATIONS

The Advisory Committee makes the following recommendations.

- ❑ Enact legislation to require municipal officials to complete Freedom of Access Act training when appointed to offices for which training is required if elected to those offices

The Advisory Committee continues to support requiring municipal officials receive FOAA training regardless of whether they are appointed or elected. Current law applies to only elected

officials, which creates disparity from town to town and within municipal governments. The distinction does not make much sense with regard to who is responsible for responding to public records requests and requests for access to public proceedings. Although 1821 failed passage in the 128th Legislature, the Advisory Committee believes that a training requirement is important and is worth pursuing.

See recommended legislation in **Appendix ??**.

❑ Amend . . . .

See recommended legislation in **Appendix ??**

❑ Adoption of . . . . . .

VIII. FUTURE PLANS

In 2019, the Right to Know Advisory Committee will continue to discuss the unresolved issues identified in this report, including its discussion of the establishment of a joint select committee of the Legislature on government transparency and data privacy policy issues and the public availability of information contained in electronic databases. The Advisory Committee will also continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access. The FOAA Remedies Subcommittee will meet with the expectation to make recommendations concerning alternatives to enforcement of the FOAA through the court process to the Advisory Committee. The Advisory Committee looks forward to another year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

CURRENT LAW

§410. Violations

For every willful violation of this subchapter, the state government agency or local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture of not more than $500 may be adjudged.

§410. Violations

1. Civil violation. An officer or employee of a state government agency or local government entity who willfully violates this subchapter commits a civil violation.

2. Penalties. A state government agency or local government entity whose officer or employee commits a civil violation described in subsection 1 is subject to:

A. A fine of not more than $500;

B. A fine of not more than $1,000 for a civil violation described in subsection 1 that was committed not more than 4 years after a previous adjudication of a civil violation described in subsection 1 by the same officer or employee of the state government agency or local government agency; or

C. A fine of note more than $2,000 for a civil violation described in subsection 1 that was committed not more than 4 years after 2 or more previous adjudications of a civil violation described in subsection 1 by the same officer or employee of the state government agency or local government agency.

Questions:

1. Who is liable for the fine – agency/entity or officer/employee?
2. Do tiered penalties apply only if is the same officer/employee who willfully violates the law each time?
3. Time limit to include subsequent violations?

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Be it enacted by the People of the State of Maine as follows:

Sec. 1. 1 MRSA §412 is amended to read:

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

1. Training required. A public access officer and an ~~elected~~ 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 ~~elected~~ official takes the oath of office to assume the person's duties as an ~~elected~~ official or the person is designated as a public access officer pursuant to section 413, subsection 1.

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;

B. Procedures and requirements regarding complying with a request for a public record under this chapter; and

C. Penalties and other consequences for failure to comply with this chapter.

An ~~elected~~ 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.

3. Certification of completion. Upon completion of the training course required under subsection 1, the ~~elected~~ 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 ~~elected~~ 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.

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

A. The Governor;

B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;

C. Members of the Legislature elected after November 1, 2008;

D.

E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;

F. Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments;

G. Officials of school administrative units; and

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 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.

SUMMARY

Current law requires public officials elected to certain positions to complete a training on the requirements of the Freedom of Access Act. This bill implements the recommendation of the Right to Know Advisory Committee that officials appointed to those same positions also be required to complete the training.

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
1	*1*	*402*	*3, ¶ A*	*Title 1, section 402, subsection 3, paragraph A: Records that have been designated confidential by statute*			No change
2	*1*	*402*	*3, ¶ B*	*Title 1, section 402, subsection 3, paragraph B; Records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding*			No change
3	*1*	*402*	*3, ¶ C*	*Title 1, section 402, subsection 3, paragraph C: Legislative papers and reports until signed and publicly distributed in accordance with legislative rules, and records, working papers, drafts and interoffice and intraoffice memoranda used or maintained by any Legislator, legislative agency or legislative employee to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees during the legislative session or sessions in which the papers or reports are prepared or considered or to which the paper or report is carried over*	Legislative offices		No change

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
4	*1*	*402*	*3, ¶ C-1*	*Title 1, section 402, subsection 3, paragraph C-1: Information contained in a communication between a constituent and an elected official if the information is of a personal nature as specified in the paragraph, is an individual's social security number, or would be confidential if it were in the possession of a public agency or official*	Legislative offices		Remove SSNs because paragraph N excepts all SSNs
5	*1*	*402*	*3, ¶ D*	*Title 1, section 402, subsection 3, paragraph D: Material prepared for and used specifically and exclusively in preparation for negotiations, including the development of bargaining proposals to be made and the analysis of proposals received, by a public employer in collective bargaining with its employees and their designated representatives*	DAFS Bureau of Human Resources	No change	No change
6	*1*	*402*	*3, ¶ E*	*Title 1, section 402, subsection 3, paragraph E, relating to records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Community College System and the University of Maine System*	Maine Maritime Academy; Maine Community College System; University of Maine System	No change	Follow up: could exception be more narrowly tailored?

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
7	*1*	*402*	*3, ¶ F*	*Title 1, section 402, subsection 3, paragraph F, relating to records that would be confidential if they were in the possession or custody of an agency or public official of the State or any of its political or administrative subdivisions and are in the possession of an association, the membership of which is composed exclusively of one or more political or administrative subdivisions of the State; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of any of these entities*	Maine Municipal Association		No change
8	*1*	*402*	*3, ¶ G*	*Title 1, section 402, subsection 3, paragraph G, relating to materials related to the development of positions on legislation or materials that are related to insurance or insurance-like protection or services which are in the possession of an association, the membership of which is composed exclusively of one or more political or administrative subdivisions of the State; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of any of these entities*	Maine Municipal Association		No change
9	*1*	*402*	*3, ¶ H*	*Title 1, section 402, subsection 3, paragraph H, relating to medical records and reports of municipal ambulance and rescue units and other emergency medical service units*	Maine Municipal Association		No change

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
10	*1*	*402*	*3, ¶ I*	*Title 1, section 402, subsection 3, paragraph I, relating to juvenile records and reports of municipal fire departments regarding the investigation and family background of a juvenile fire setter*	Maine Municipal Association		No change
11	*1*	*402*	*3, ¶J*	*Title 1, section 402, subsection 3, paragraph J, relating to working papers, including records, drafts and interoffice and intraoffice memoranda, used or maintained by any advisory organization covered by subsection 2, paragraph F, or any member or staff of that organization during the existence of the advisory organization*			Follow up: Too broad? What are these boards/commissions? Conflict of interest considerations?
12	*1*	*402*	*3, ¶K*	*Title 1, section 402, subsection 3, paragraph K, relating to personally identifying information concerning minors that is obtained or maintained by a municipality in providing recreational or nonmandatory educational programs or services, if the municipality has enacted an ordinance that specifies the circumstances in which the information will be withheld from disclosure*	Maine Municipal Association		Strike municipal ordinance language
13	*1*	*402*	*3, ¶ L*	*Title 1, section 402, subsection 3, paragraph L, relating to records describing security plans, security procedures or risk assessments prepared specifically for the purpose of preventing or preparing for acts of terrorism*	Department of Defense, Veterans and Emergency Management	No change	No change

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
14	*1*	*402*	*3, ¶ M*	*Title 1, section 402, subsection 3, paragraph M, relating to architecture, design, access authentication, encryption and security of information technology infrastructure and systems*	DAFS Office of Information Technology	Add business continuity and disaster recovery documentation	Add business continuity and disaster recovery documentation
15	*1*	*402*	*3, ¶ N*	*Title 1, section 402, subsection 3, paragraph N, relating to social security numbers in possession of the Department of Inland Fisheries and Wildlife*			No change
16	*1*	*402*	*3, ¶ O*	*Title 1, section 402, subsection 3, paragraph O relating to personal contact information concerning public employees other than elected officials*	DAFS Bureau of Human Resources	Expand to include social media accounts	No change Note concern re: social media
17	*1*	*402*	*3, ¶ P*	*Title 1, section 402, subsection 3, paragraph P relating to geographic information regarding recreational trails that are located on private land*	Department of Inland Fisheries and Wildlife	No change	No change
18	*1*	*402*	*3, ¶ Q*	*Title 1, section 402, subsection 3, paragraph Q relating to security plans, staffing plans, security procedures, architectural drawings or risk assessments prepared for emergency events that are prepared for or by or kept in the custody of the Department of Corrections or a county jail*	Department of Corrections	No change	No change
19	*1*	*402*	*3, ¶ R*	*Repealed by PL 2017, ch. 163*	N/A	N/A	N/A

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
20	*1*	*402*	*3, ¶ S*	*Title 1, section 402, subsection 3, paragraph S relating to e-mail addresses obtained by a political subdivision of the State for the sole purpose of disseminating noninteractive notifications, updates and cancellations that are issued from the political subdivision or its elected officers to an individual or individuals that request or regularly accept these noninteractive communications*	Maine Municipal Association		No change
21				*[Duplicate]*	N/A	N/A	N/A
22	*1*	*402*	*3, ¶ T*	*Title 1, section 402, subsection 3, paragraph T relating to records describing research for the development of processing techniques for fisheries, aquaculture and seafood processing or the design and operation of a depuration plant in the possession of the Department of Marine Resources*	Department of Marine Resources	No change	No change
23	*1*	*402*	*3, ¶ U*	*Title 1, section 402, subsection 3, paragraph U relating to records provided by a railroad company describing hazardous materials transported by the railroad company in this State*	Department of Public Safety; Department of Defense, Veterans and Emergency Management	No change	No change
23-A	*1*	*402*	*3, ¶ V*	*Title 1, section 402, subsection 3, paragraph V relating to participant application materials and other personal information obtained or maintained by a municipality or other public entity in administering a community well-being check program*	Town of Hancock (doesn't collect this data)		

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
23-B	*1*	*402*	*3-A, ¶A*	*Title 1, section 402, subsection 3-A, paragraph A relating to prisoner furloughs to the extent they pertain to a prisoner's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, address of furlough and dates of furlough*	Dept. of Corrections	No change	
23-C	*1*	*402*	*3-A, ¶B*	*Title 1, section 402, subsection 3-A, paragraph B relating to out-of-state adult probationer or parolee supervision to the extent they pertain to a probationer's or parolee's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, address of residence and dates of supervision*	Dept. of Corrections	No change	
23-D	*1*	*402*	*3-A, ¶C*	*Title 1, section 402, subsection 3-A, paragraph C relating to a prisoner's, adult probationer's or parolee's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, and current address or location, unless the Commissioner of Corrections determines that it would be detrimental to the welfare of a client to disclose the information*	Dept. of Corrections	No change	
24	*1*	*538*	*3*	*Title 1, section 538, subsection 3, relating to InforME subscriber information*	InforME; DAFS Office of Information Technology		
25	*1*	*1013*	*2*	*[Not a public records exception]*	N/A	N/A	N/A
26	*1*	*1013*	*4, ¶A*	*Title 1, section 1013, subsection 4, relating to investigative records relating to complaints that the Commission on Governmental Ethics and Election Practices has voted to pursue*	Maine Commission on Governmental Ethics and Election Practices	No change	No change

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
27	*1*	*1013*	*3-A*	*Title 1, section 1013, subsection 3-A, relating to a complaint alleging a violation of legislative ethics*	Maine Commission on Governmental Ethics and Election Practices	No change	No change, pending inquiry to full Advisory Committee re: whether complaints should be confidential if not pursued
28	*3*	*156*		*Title 3, section 156, relating to prehearing conference materials for legislative confirmations of gubernatorial appointments*	Legislature		No change
29	*3*	*159*		*Title 3, section 159, relating to prehearing conference materials for legislative confirmations of gubernatorial appointments*	Legislature		No change
30	*3*	*997*	*1*	*Title 3, section 997, subsection 1, relating to program evaluation reports transmitted by OPEGA to the GOC prior to the report's formal presentation*	OPEGA	Changes proposed by OPEGA	Strike "prior to" language in hanging paragraph
31	*3*	*997*	*3*	*Title 3, section 997, subsection 3, relating to papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of OPEGA or other entity charged with the preparation of a program evaluation report*	OPEGA	Changes proposed by OPEGA	Clarify that working papers are confidential per yellow OPLA draft; follow up re: including language

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
32	*3*	*997*	*4*	*Title 3, section 997, subsection 4, relating to documentary or other information obtained by OPEGA during the course of a program evaluation is privileged or confidential in the possession of the state agency or other entity providing the information*	OPEGA	Changes proposed by OPEGA	No change
33	*3*	*997*	*5*	*Title 3, section 997, subsection 5, relating to working papers of OPEGA*	OPEGA	Changes proposed by OPEGA	Amend headnote to "Disclosure to evaluated agency"
34	*3*	*997*	*6*	*Title 3, section 997, subsection 6, relating to data supplied by an individual are needed to initiate, continue or complete a program evaluation*	OPEGA	Changes proposed by OPEGA	No change
35	*4*	*17*	*3*	*Title 4, section 17, subsection 3, relating to State Court Administrator complaints and investigative files*	Judicial Branch		
36	*4*	*1701*	*7*	*Repealed by PL 2017, ch. 242*	N/A	N/A	N/A

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
37	*4*	*1806*	*2*	*Title 4, section 1806, subsection 2, relating to records in the possession of the Maine Commission on Indigent Legal Services, including: individual client information; information subject to the lawyer-client privilege; personal contact information of a commission-rostered attorney; personal contact information of a member of the commission or a commission staff member; a request for funds for expert or investigative assistance that is submitted by an indigent party; any information obtained or gathered by the commission when performing an evaluation or investigation of an attorney*	MCILS	No change	No change
38	*5*	*95*	*11*	*Title 5, section 95, subsection 11, relating to state records maintained by the state archivist that contain information related to the identity of an archives patron relative to the patron's use of materials at the archives are confidential*	Secretary of State, State Archivist	No change	No change
39	*5*	*191*	*4, ¶K*	*Error – Not a public records exception*	N/A	N/A	N/A

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
40	*5*	*211*	*4*	*Title 5, section 211, subsection 4 relating to nondisclosure of information produced in connection with an investigation under the Attorney General's Unfair Trade Practices authority*	Attorney General	Not necessary, but could be amended to allow AG's Office to share documents with other state and federal agencies that pursue civil unfair and deceptive trade practices	No change; include note re: AG's proposed action
41	*5*	*791*		*Title 5, section 791, relating to certain records and correspondence utilized by state agencies in the certification of minority business enterprises, women's business enterprises and disadvantaged business enterprises*	DAFS Bureau of Human resources; DAFS Bureau of General Services		No change
42	*5*	*957*	*5*	*Title 5, section 957, subsection 5, relating to State Employee Assistance Program client records*	DAFS Bureau of Human Resources	No change	No change
43	*5*	*1541*	*10-B*	*Title 5, section 1541, subsection 10-B, relating to internal audit working papers of the State Auditor*	DAFS Office of State Auditor	No change	No change
44	*5*	*1545*		*Title 5, section 1545, relating to outstanding unpaid checks issued by the State*	Treasurer of State; DAFS Office of State Controller	No change	No change
45	*5*	*1743*	*5, ¶A*	*Title 5, section 1743, subsection 5, paragraph A, relating to public improvements construction contracts concerning evaluations of proposals*	DAFS Bureau of General Services	No change	No change

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
46	*5*	*1747*	*3*	*Title 5, section 1747, subsection 3, relating to public improvement contracts concerning prebid qualifications*	DAFS Bureau of General Services	No change	No change
47	*5*	*1976*	*1*	*Title 5, section 1976, subsection 1, relating to the State Government computer system*	DAFS Office of Information Technology	No change	No change
48	*5*	*4572*	*2*	*Title 5, section 4572, subsection 2, relating to medical information or history of an applicant in an employment discrimination complaint*	Maine Human Rights Commission	- Amend "medical condition or history" to "medical and disability information and history" for job applicants - Add employee "wellness" programs - Apply exception for inquiries about performing job-related functions to applicants as well as employees	
49	*5*	*4573*	*2*	*Title 5, section 4573, subsection 2, relating to records of mental or physical disability*	Maine Human Rights Commission	Clarify "features of" language as indicated in response	

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
50	*5*	*4612*	*1, ¶B*	*Title 5, section 4612, subsection 1, paragraph B related to information possessed by the Maine Human Rights Commission relating to an investigation*	Maine Human Rights Commission	No change	
50-A	*5*	*4612*	*1, ¶A*	*Title 5, section 4612, subsection 1, paragraph A related to evidence of conduct or statements made in compromise settlement negotiations, offers of settlement and any final agreement*	Maine Human Rights Commission	No change	
50-B	*5*	*4612*	*3*	*Title 5, section 4612, subsection 3, relating to anything said or done as part of an endeavor to eliminate discrimination in response to a complaint*	Maine Human Rights Commission	No change	
51	*5*	*4612*	*5*	*Title 5, section 4612, subsection 5, relating to data reflecting the identity of a party to a complaint*	Maine Human Rights Commission	No change	
52	*5*	*7070*	*1*	*Title 5, section 7070, subsection 1, relating to state employee applicants*	DAFS Bureaus of Human Resources and Employee Relations	No change	No change
53	*5*	*7070*	*2*	*Title 5, section 7070, subsection 2, relating to state employees' personal information*	DAFS Bureau of Human Resources and Employee Relations	Expand to include social media accounts	No change
54	*5*	*7070*	*4*	*Title 5, section 7070, subsection 4, relating to state employees' personal information*	DAFS Bureau of Human Resources and Employee Relations	No change	No change
55	*5*	*15322*	*3*	*Title 5, section 15322, subsection 3, relating to certain records of technology centers*	DECD, Maine Technology Centers	No change	No change
56	*5*	*17057*	*1*	*Title 5, section 17057, subsection 1, relating to medical information held by MePERS*	Maine Public Employees Retirement System	No change	

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
57	*5*	*17057*	*2*	*Title 5, section 17057, subsection 2, relating to private financial and personal information of members, beneficiaries or participants in any of the programs of MePERS*	Maine Public Employees Retirement System	No change	
58	*5*	*17057*	*3*	*Title 5, section 17057, subsection 3, relating to home contact information of Maine State Retirement System members, benefit recipients and staff*	Maine Public Employees Retirement System	No change	
59	*5*	*17057*	*4*	*Title 5, section 17057, subsection 4, relating to certain investment activity information*	Maine Public Employees Retirement System	No change	
60	*5*	*17057*	*5*	*Title 5, section 17057, subsection 5, relating to home contact information of Maine State Retirement System members, benefit recipients and staff*	Maine Public Employees Retirement System	No change	
61	*5*	*19203*		*Title 5, section 19203, relating to the disclosure of the results of an HIV test.*	DHHS	No change	No change
62	*5*	*19507*		*Title 5, section 19507, relating to the disclosure of information, materials and records of the DHHS Office of Advocacy*	DHHS	No change	
63	*5*	*20047*	*1*	*Title 5, section 20047, subsection 1, relating to Department of Health and Human Services, Office of Substance Abuse records concerning patients*	DHHS	No change	No change
64	*5*	*13119-A*		*Title 5, section 13119-A, relating to economic and community development activities of the Department of Economic and Community Development and municipalities*	DECD	No change	No change

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
65	*5*	*13120-M*	*2*	*Title 5, section 13120-M, subsection 2, relating to Maine Rural Development Authority activities*	DECD, Maine Rural Development Authority	No change	No change
66	*5*	*15302-A*	*2*	*Title 5, section 15302-A, subsection 2, relating to Maine Technology Institute activities*	Maine Technology Institute	Consult with industry before any changes are made	No change
67	*5*	*19203-D*	*1*	*Title 5, section 19203-D, subsection 1, relating to the disclosure of medical records containing information regarding a person's HIV status.*	DHHS	No change	No change
68	*5*	*19203-D*	*2*	*Title 5, section 19203-D, subsection 2, relating to the disclosure of medical records containing information regarding a person's HIV status.*	DHHS	No change	No change
69	*5*	*200-H*		*Title 5, section 200-H, relating to the Office of the Attorney General, Maine Elder Death Analysis Review Team*	Attorney General, Maine Elder Death Analysis Review Team	No change	
70	*5*	*244-C*	*2*	*Title 5, section 244-C, subsection 2, relating to the Department of Audit activities and working papers*	Office of the State Auditor	No change	
71	*5*	*244-C*	*3*	*Title 5, section 244-C, subsection 3, relating to the Department of Audit activities and working papers*	Office of the State Auditor	No change	
72	*5*	*244-E*	*1*	*Title 5, section 244-E, subsection 1, relating to the identity of a person making a complaint alleging fraud, waste, inefficiency or abuse*	Office of the State Auditor	No change	

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
73	*5*	*244-E*	*2*	*Title 5, section 244-E, subsection 2, relating to the contents of a complaint alleging fraud, waste, inefficiency or abuse*	Office of the State Auditor	Amend to allow Auditor to forward complaints to other agencies that are expected to follow up on the complaint	
74	*5*	*3305-B*	*1*	*Repealed by PL 2011, ch. 655*	N/A	N/A	
75	*5*	*3360-D*	*4*	*Title 5, section 3360-D, subsection 4, relating to the Victims' Compensation Fund concerning applications and awards*	Attorney General, Victims' Compensation Board	No change	
76	*5*	*90-B*	*7*	*Title 7, section 90-B, subsection 7, relating to a State Address Confidentiality Program participant's application, supporting materials and the program's state e-mail account*	Secretary of State, Address Confidentiality Program	No change	
77	*7*	*20*	*1*	*Title 7, section 20, subsection 1, relating to information reported to the Department of Agriculture, Food and Rural Resources*	Department of Agriculture	No change	
78	*7*	*607*	*5-A*	*Title 7, section 607, subsection 5-A, relating to pesticide data determined confidential by the US EPA administrator*	Department of Agriculture	No change	
79	*7*	*1052*	*2*	*Title 7, section 1052, subsection 2, relating to growers of genetically engineered plants and seeds*	Department of Agriculture	No change	
80	*7*	*1052*	*2*	*[Duplicate of 79]*	N/A	N/A	
81	*7*	*1052*	*2-A*	*Title 7, section 1052, subsection 2-A, relating to planting density of genetically modified crops*	Department of Agriculture	No change	

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
82	*7*	*2226*	*1*	*Title 7, section 2226, subsection 1, relating to ginseng license applications, licensees and locations of ginseng plantings*	Department of Agriculture	No change	
83	*7*	*2231*	*3*	*Repealed by PL 2015, ch. 202*	N/A	N/A	
84	*7*	*3909*	*6*	*Title 7, section 3909, subsection 6, relating to the names of and other identifying information about persons providing information pertaining to criminal or civil cruelty to animals to the department*	Department of Agriculture	No change	
85	*7*	*4204*	*10*	*Title 7, section 4204, subsection 10, relating to nutrient management plans*	Department of Agriculture	No change	
86	*7*	*4205*	*2*	*Title 7, section 4205, subsection 2, relating to livestock operation permits and nutrient management plans*	Department of Agriculture	No change	
87	*7*	*2103-A*	*4*	*Title 7, section 2103-A, subsection 4, relating to patented and nonreleased potato varieties*	Department of Agriculture	No change	
88	*7*	*2992-A*	*1*	*Title 7, subsection 2992-A, subsection 1, paragraph C, subparagraph (2), relating to records and meetings of Maine Dairy Promotion Board which may be closed to public when disclosure would adversely affect competitive position of milk industry*	Maine Dairy Promotion Board	No change	
89	*7*	*2998-B*	*1*	*Title 7, section 2998-B, subsection 1, paragraph C, subparagraph (2), relating to records and meetings of Maine Dairy and Nutrition Council which may be closed to public when disclosure would adversely affect competitive position of milk industry*	Maine Dairy and Nutrition Council	No change	
90	*7*	*306-A*	*3*	*Title 7, section 306-A, subsection 3, relating to agricultural development grant program, market research or development activities*	Department of Agriculture	No change	

Existing Public Records Exceptions
For Review by Legislative Subcommittee
Titles 1 through 7

REF. NO.	TITLE	SECTION	SUB-§, ¶	DESCRIPTION	RESPONDING DEPARTMENT/AGENCY	PROPOSED ACTION	SUBCOMMITTEE ACTION
91	*7*	*306-A*	*3*	*[Duplicate of 90]*	N/A	N/A	N/A
92	*7*	*951-A*		*Title 7, section 951-A, relating to minimum standards for planting potatoes*	Department of Agriculture, Food and Rural Resources	No change	

Right to Know Advisory Committee
December 3, 2018

Proposed Legislation Based Upon Pubic Records Exceptions Review
Titles 1 – 7-A

REF #4

Sec. X. 1 MRSA §402, sub-§3, ¶C-1 is amended as follows:

C-1. Information contained in a communication between a constituent and an elected official if the information:

(1) Is of a personal nature, consisting of:

(a) An individual's medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders;

(b) Credit or financial information;

(c) Information pertaining to the personal history, general character or conduct of the constituent or any member of the constituent's immediate family; or

(d) Complaints, charges of misconduct, replies to complaints or charges of misconduct or memoranda or other materials pertaining to disciplinary action; or

~~(e) An individual's social security number; or~~

(2) Would be confidential if it were in the possession of another public agency or official;

REF #12

Sec. X. 1 MRSA §402, sub-§3, ¶K is amended to read:

K. Personally identifying information concerning minors that is obtained or maintained by a municipality in providing recreational or nonmandatory educational programs or services~~, if the municipality has enacted an ordinance that specifies the circumstances in which the information will be withheld from disclosure~~. This paragraph does not apply to records governed by Title 20-A, section 6001 and does not supersede Title 20-A, section 6001-A;

REF #14

Sec. X. 1 MRSA §402, sub-§3, ¶M is amended to read:

M. Records or information describing the architecture, design, access authentication, encryption or security of information technology infrastructure, systems and software, including records or information maintained to ensure business continuity and enable disaster recovery. Records or information covered by this paragraph may be disclosed to the Legislature or, in the case of a political or administrative subdivision, to municipal officials or board members under conditions that protect the information from further disclosure;

REF ## 30-34

Sec. X. 3 MRSA §997 is amended to read:

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

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

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

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

3. Confidentiality. ~~The director shall issue program evaluation reports, favorable or unfavorable, of any state agency or other entity, and these reports are public records, except that, prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working~~ Working papers in the possession of the director, ~~or other~~ another entity charged with the preparation of a program evaluation report or a private individual or entity with which the director has contracted for the conduct of program evaluations pursuant to section 995, subsection 2 are confidential and exempt from disclosure pursuant to Title 1, chapter 13, including to the Legislative Council or an agent or representative of the Legislative Council. All other records or materials in the possession of the director, ~~or other~~ another entity charged with the preparation of a program evaluation report under this chapter, or a private individual or entity with which the director has contracted for the conduct of program evaluations pursuant to section 995, subsection 2 that would otherwise be confidential or exempt from disclosure are exempt from disclosure pursuant to the provisions of Title 1, chapter 13. ~~Prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and may not be released or disclosed by the director to the Legislative Council or an agent or representative of the Legislative Council.~~ This subsection may not be construed to prohibit or prevent public access to the records of a state agency or other entity in the possession of the director that would otherwise be subject to disclosure pursuant to the provisions of Title 1, chapter 13. The director shall refer requests for access to those records directly to the state agency or other entity that is the official custodian of the requested records, which shall respond to the request for public records.

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

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

B. Documentary or other information obtained by the office during the course of a program evaluation under this chapter is privileged or confidential to the same extent under law that that information would be privileged or confidential in the possession of the state agency or other entity providing the information. Any privilege or statutory

provision, including penalties, concerning the confidentiality or obligation not to disclose information in the possession of a state agency or other entity or its officers or employees applies equally to the office. Privileged or confidential information obtained by the office during the course of a program evaluation may be disclosed only as provided by law and with the agreement of the state agency or other entity subject to the program evaluation that provided the information.

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

5. Disclosure to evaluated agency. Except as provided in this subsection, working papers are confidential and may not be disclosed to any person. Prior to the release of the final program evaluation report, the director has sole discretion to disclose working papers to the state agency or other entity subject to the program evaluation when disclosure will not prejudice the program evaluation. After release of the final program evaluation report, working papers may be released as necessary to the state agency or other entity that was subject to the program evaluation under this chapter.

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

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

REF #48 (not reviewed)

Sec. X. 5 MRSA §4572, sub-§2, ¶C, sub-¶(2) is amended to read:

(2) Information obtained regarding the medical ~~condition or~~ and disability information and history of the applicant is collected and maintained on separate

forms and in separate medical files and is treated as a confidential medical record, except that:

Sec. X. 5 MRSA §4572, sub-2, ¶E is amended to read:

E. A covered entity may conduct voluntary medical examinations, including voluntary medical and disability information and history ~~histories~~, that are part of an employee health or wellness program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions. Information obtained under this paragraph regarding the medical condition or history of an employee is subject to the requirements of paragraph C, subparagraphs (2) and (3).

REF #49 (not reviewed)

Sec. X. 5 MRSA §4573, sub-§2 is amended to read:

2. Records. After employment or admission to membership, to make a record of such features of an individual as are needed in good faith for the purpose of identifying them, provided the record is intended and used in good faith solely for identification, and not for the purpose of discrimination in violation of this Act. Records ~~of features~~ regarding physical or mental disability that are collected must be collected and maintained on separate forms and in separate files and be treated as confidential records;

REF #73 (not reviewed)

Sec. X. 5 MRSA §244-E, sub-§2 is amended to read:

[Pending recommendation]

REF #6

Nale, Craig

From: James Thelen <james.thelen@maine.edu>
Sent: Friday, November 30, 2018 11:28 AM
To: Nale, Craig
Cc: rhonda.varney@mma.edu; Amy Homans
Subject: Re: Right to Know Advisory Committee - follow up to 2017 questionnaire

Thanks for the check-in, Craig.

The language we'd collectively propose for the advisory committee's consideration is underscored below.

E. Records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Community College System and the University of Maine System when the subject matter is confidential or otherwise protected from disclosure by statute, other law or legal precedent, or evidentiary privilege.

On Fri, Nov 30, 2018 at 11:21 AM Nale, Craig <Craig.Nale@legislature.maine.gov> wrote:

> Hi all,
>
> I just wanted to check in again before the Right to Know Advisory Committee meets again on Monday, December 3. If you have anything else for their consideration please forward it to me before Monday.
>
> Thanks again,
>
> Craig
>
> **From:** James Thelen [mailto:james.thelen@maine.edu]
> **Sent:** Thursday, November 15, 2018 4:32 PM
> **To:** Nale, Craig
> **Cc:** rhonda.varney@mma.edu; Amy Homans
> **Subject:** Re: Right to Know Advisory Committee - follow up to 2017 questionnaire
>
> Hi Craig, you asked for a response by today. We do intend to respond and are working on some narrowing language to propose to you. We may not be able to get back to you until at least later tomorrow sometime, however.

STATUTE: 1 MRSA §402, sub-§3-A, ¶A

AGENCY: Dept. of Corrections

CONTACT PERSON: Joseph Fitzpatrick

Dear Freedom of Access Act Contact Person:

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 1 through 7-A before 2019; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

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

    a. **ANSWER:** The records coming within this provision are: "Records relating to prisoner furloughs to the extent they pertain to a prisoner's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, address of furlough and dates of furlough". These records are made public by this provision. Because this is not a public records exception, it is not cited as a reason for denying a request for production of records.

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

    a. **ANSWER:** The department does not oppose this provision as there have been no issues to date.

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

    a. **ANSWER:** This provision is clear.

4. Does your agency recommend changes to this exception?

    a. **ANSWER:** No

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

    a. **ANSWER:** The department does not have this information.

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

    a. ANSWER: There is nothing further.

STATUTE: 1 MRSA §402, sub-§3-A, ¶B

AGENCY: Dept. of Corrections

CONTACT PERSON: Joseph Fitzpatrick

Dear Freedom of Access Act Contact Person:

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 1 through 7-A before 2019; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

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

    a. **ANSWER:** The records coming within this provision are: "Records relating to out-of-state adult probationer or parolee supervision to the extent they pertain to a probationer's or parolee's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, address of residence and dates of supervision". These records are made public by this provision. Because this is not a public records exception, it is not cited as a reason for denying a request for production of records.

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

    a. **ANSWER:** The department does not oppose this provision as there have been no issues to date.

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

    a. **ANSWER:** This provision is clear.

4. Does your agency recommend changes to this exception?

    a. **ANSWER:** No

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

    a. **ANSWER:** The department does not have this information.

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

    a. ANSWER: There is nothing further.

STATUTE: 1 MRSA §402, sub-§3-A, ¶C

AGENCY: Dept. of Corrections

CONTACT PERSON: Joseph Fitzpatrick

Dear Freedom of Access Act Contact Person:

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 1 through 7-A before 2019; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

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

    a. **ANSWER:** The records coming within this provision are: "Records to the extent they pertain to a prisoner's, adult probationer's or parolee's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, and current address or location, unless the Commissioner of Corrections determines that it would be detrimental to the welfare of a client to disclose the information". These records are made public by this provision, with one exception. The exception is cited once in a while.

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

    a. **ANSWER:** The department does not oppose the public records part of this provision as there have been no issues to date. The exception provides sufficient protection for those cases in which it would be detrimental to disclose the information. The exception is necessary for those cases in which the location of a prisoner or address of a probationer/parolee needs to be kept confidential for that person's safety.

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

    a. **ANSWER:** This provision is clear.

4. Does your agency recommend changes to this exception?

    a. **ANSWER:** No

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

    a. **ANSWER:** The department does not have this information.

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

    a. ANSWER: There is nothing further.