

# Special Reviews of Public Records Exceptions and Restrictions on Access to Public Records

## Background

In the Freedom of Access Act (FOAA), set forth in [Title 1, chapter 13, subchapter 1](#) of the Maine Revised Statutes, the Maine Legislature has declared as a matter of public policy that records in the possession or custody of an agency or public official of the State or its political subdivisions should as a general rule be open to public inspection and copying. Although the Legislature retains authority to adopt a law specifically declaring that a particular type of record is confidential or exempt from some or all of FOAA's public access requirements, [Title 1, chapter 13, subchapter 1-A](#) of the Maine Revised Statutes (another of Maine's Freedom of Access laws) establishes specific processes for the enactment of and for periodic review of such exceptions.

## Committee procedure when a bill proposes a new public records exception

If, after holding a public hearing, a majority of a committee supports legislation proposing a new public records exception or affecting the accessibility of a public record, it must request that the Judiciary Committee conduct a supplemental review of the proposal under [1 M.R.S.A. §434](#). Legislation contains a "new public records exception" if it declares a particular type of otherwise-public record either "confidential" or "not a public record" for purposes of FOAA. To initiate the review process, the committee with jurisdiction over the legislation generally drafts a memo to the Judiciary Committee outlining the proposed public records exception or accessibility restriction and explaining why the committee believes the proposal should be adopted.

## Review of proposed new public records exceptions by the Judiciary Committee

The Judiciary Committee evaluates legislation proposing new public records exceptions using the following criteria, which are set forth in [1 M.R.S.A. §434](#), subsections 2 and 2-A:

- Whether a record protected by the proposed exception needs to be collected and maintained;
- The value to the agency or official or to the public in maintaining a record protected by the proposed exception;
- Whether federal law requires a record covered by the proposed exception to be confidential;
- Whether the proposed exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records;
- Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records;
- Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records;
- Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records;
- Whether the proposed exception is as narrowly tailored as possible;
- Any other criteria that assist the review committee in determining the value of the proposed exception as compared to the public's interest in the record protected by the proposed exception; and
- Whether there is a publicly accountable entity that has authority to review the agency or official that collects, maintains or uses the record subject to the exception in order to ensure that information collection, maintenance and use are consistent with the purpose of the exception and that public access to public records is not hindered.

If the legislative proposal affects the accessibility of a public record, instead of or in addition to containing a new public records exception, [1 M.R.S.A. §434](#), subsection 2-B provides that the Judiciary Committee may consider during its review any factors that affect the accessibility of public records, including but not limited to fees, request procedures and timeliness of responses.

After completing this review, the Judiciary Committee must report its findings and recommendation whether the proposed public records exception or access limitation should be enacted to the committee with jurisdiction over the legislation.

Subsection 1 of [1 M.R.S.A. §434](#) provides that a proposed public records exception or accessibility restriction may not be enacted into law unless the Judiciary Committee has completed this review.

### **Periodic Review of Public Records Exceptions**

In addition to requiring review of newly proposed public records exceptions, Maine's Freedom of Access laws provide for periodic review of existing public records exceptions by the Right to Know Advisory Committee (Advisory Committee) and the Judiciary Committee. The Advisory Committee is comprised of 17 members, including 2 members of the Judiciary Committee, representatives of state and local government interests and advocates for increased public access to public records, including representatives of the media.

Maine's Freedom of Access laws establish a schedule for the Advisory Committee to review public record exceptions codified in specific titles of the Maine Revised Statutes each biennium. As a first step, the Advisory Committee generally contacts the state and local bodies that administer each of the public records exceptions scheduled for review for information, comments and suggestions. Subsequently, after considering the specific statutory criteria set forth in [1 M.R.S.A. §432](#), subsection 2, which mirror the criteria for the evaluation of new public records exceptions described above, the Advisory Committee must report to the Judiciary Committee its recommendation whether each exception scheduled for review should be repealed, modified or remain unchanged. The Judiciary Committee has authority to report out legislation related to these recommendations, and must notify the committees of the Legislature having jurisdiction over the subject-matter of each affected public records exception prior to the public hearing and work sessions on the legislation. The Judiciary Committee shall allow members of those committees to participate in the work sessions involving public records exceptions within their jurisdiction.