

RIGHT TO KNOW ADVISORY COMMITTEE
AGENDA
(Revised)

REMOTE MEETING
Wednesday, October 13, 2021
1:00 p.m.

YouTube link: <https://youtu.be/xwCxPqVv6yg>
Audio on Legislature's audio website: <https://legislature.maine.gov/Audio/#438>

1. Introductions
2. Election of Chair
3. Review and discussion of the Fifteenth Annual Report of the Right to Know Advisory Committee (January 2021) and actions related to those recommendations
4. Remote participation – LD 32, Public Law 2021, chapter 290
Remote participation policy?
5. New public records exceptions enacted and pending in 2021
6. Review of existing public records exceptions:
 - a. Follow up on Titles 8, 9-A, 9-B, 10, 11 and 12
 - b. New: Titles 13, 13-B, 13-C, 14, 15, 16, 17, 17-A, 18-B, 18-C, 19-A, 20-A, 21-A
7. Brenda Kielty, Public Access Ombudsman – informal update
8. Katherine McBrien, Maine State Archivist
9. Standardized language report, pursuant to PL 2019, c. 667, Pt B, §8
10. Discussion of issues and topics for 2021
Subcommittees?
11. Confirm meetings schedule
Upcoming meetings:
 - Wednesday, November 10, 2021, 1-4 p.m. (format TBD)
 - Wednesday, December 1, 2021, 1-4 p.m. (format TBD)
 - Wednesday, December 15, 2021, 1-4 p.m. (format TBD)
12. Adjourn

Right to Know Advisory Committee

RECOMMENDATIONS FROM 15th ANNUAL REPORT:

- Enact legislation to cap copying fees**
LD 1345, An Act To Implement the Recommendations of the Right To Know Advisory Committee; Public Law 2021, chapter 313, §1
- Enact legislation to require planning boards, specific school district officials and additional municipal officials and their deputies to complete Freedom of Access Act training, and to clarify the application of existing training requirements**
LD 1345, An Act To Implement the Recommendations of the Right To Know Advisory Committee; Public Law 2021, chapter 313, §§5-7
- Enact legislation to improve the review of public records exceptions by including consideration of access to information that will assist in making informed decisions about health and safety**
LD 1345, An Act To Implement the Recommendations of the Right To Know Advisory Committee; Public Law 2021, c. 313, §§8-9
- Enact legislation to expand the membership of the Right to Know Advisory Committee to include a member with experience and expertise in data and personal privacy issues**
LD 1345, An Act To Implement the Recommendations of the Right To Know Advisory Committee; Public Law 2021, c. 313, §4
- Enact legislation to revise the membership of the Archives Advisory Board to include a public member and two members representing journalistic and news perspectives**
Not included in Judiciary Committee legislation (legislation in 129th was referred to the State and Local Government Committee)
- Support funding to accelerate access to broadband statewide and to invest in technology for local governments to facilitate public access to public proceedings conducted remotely**
No specific legislative proposal
- Amend certain provisions of law in Titles 8 through 12 relating to previously-enacted public records exceptions**
LD 1221, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Public Records Exceptions; Public Law 182
- Enact legislation to amend the fees that may be charged by a public body to cover the actual cost of searching for, retrieving and compiling a requested public record**
LD 1346, An Act To Implement the Recommendations of the Right To Know Advisory Committee Concerning Fees Charged for Responding to Public Records Requests; Public Law 2021, chapter 375

Right to Know Advisory Committee

TITLE 1 GENERAL PROVISIONS

CHAPTER 13 PUBLIC RECORDS AND PROCEEDINGS

SUBCHAPTER 1 FREEDOM OF ACCESS

§411. Right To Know Advisory Committee

1. Advisory committee established. The Right To Know Advisory Committee, referred to in this chapter as "the advisory committee," is established to serve as a resource for ensuring compliance with this chapter and upholding the integrity of the purposes underlying this chapter as it applies to all public entities in the conduct of the public's business.

2. Membership. The advisory committee consists of the following members:

- A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;
- B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;
- C. One representative of municipal interests, appointed by the Governor;
- D. One representative of county or regional interests, appointed by the President of the Senate;
- E. One representative of school interests, appointed by the Governor;
- F. One representative of law enforcement interests, appointed by the President of the Senate;
- G. One representative of the interests of State Government, appointed by the Governor;
- H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;
- I. One representative of newspaper and other press interests, appointed by the President of the Senate;
- J. One representative of newspaper publishers, appointed by the Speaker of the House;
- K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;
- L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House;
- M. The Attorney General or the Attorney General's designee;
- N. One member with broad experience in and understanding of issues and costs in multiple areas of information technology, including practical applications concerning creation, storage, retrieval and accessibility of electronic records; use of communication technologies to support meetings, including teleconferencing and Internet-based conferencing; databases for records management and reporting; and information technology system development and support, appointed by the Governor; and
- O. One representative having legal or professional expertise in the field of data and personal privacy, appointed by the Governor. *effective October 18, 2021***

Right to Know Advisory Committee

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

3. Terms of appointment. The terms of appointment are as follows.

- A. Except as provided in paragraph B, members are appointed for terms of 3 years.
- B. Members who are Legislators are appointed for the duration of the legislative terms of office in which they were appointed.
- C. Members may serve beyond their designated terms until their successors are appointed.

4. First meeting; chair. The Executive Director of the Legislative Council shall call the first meeting of the advisory committee as soon as funding permits. At the first meeting, the advisory committee shall select a chair from among its members and may select a new chair annually.

5. Meetings. The advisory committee may meet as often as necessary but not fewer than 4 times a year. A meeting may be called by the chair or by any 4 members.

6. Duties and powers. The advisory committee:

- A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws;
- B. Shall serve as the central source and coordinator of information about the freedom of access laws and the people's right to know. The advisory committee shall provide the basic information about the requirements of the law and the best practices for agencies and public officials. The advisory committee shall also provide general information about the freedom of access laws for a wider and deeper understanding of citizens' rights and their role in open government. The advisory committee shall coordinate the education efforts by providing information about the freedom of access laws and whom to contact for specific inquiries;
- C. Shall serve as a resource to support the establishment and maintenance of a central publicly accessible website that provides the text of the freedom of access laws and provides specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. The website must include the contact information for agencies, as well as whom to contact with complaints and concerns. The website must also include, or contain a link to, a list of statutory exceptions to the public records laws;
- D. Shall serve as a resource to support training and education about the freedom of access laws. Although each agency is responsible for training for the specific records and meetings pertaining to that agency's mission, the advisory committee shall provide core resources for the training, share best practices experiences and support the establishment and maintenance of online training as well as written question-and-answer summaries about specific topics. The advisory committee shall recommend a process for collecting the training completion records required under section 412, subsection 3 and for making that information publicly available;
- E. Shall serve as a resource for the review committee under subchapter 1-A in examining public records exceptions in both existing laws and in proposed legislation;
- F. Shall examine inconsistencies in statutory language and may recommend standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released;
- G. May make recommendations for changes in the 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 regional 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 and

Right to Know Advisory Committee

their underlying principles. The joint standing committee of the Legislature having jurisdiction over judiciary matters may report out legislation based on the advisory committee's recommendations;

H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered;

I. May conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records;

J. Shall review 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; and

K. May undertake other activities consistent with its listed responsibilities.

7. Outside funding for advisory committee activities. The advisory committee may seek outside funds to fund the cost of public hearings, conferences, workshops, other meetings, other activities of the advisory committee and educational and training materials. Contributions to support the work of the advisory committee may not be accepted from any party having a pecuniary or other vested interest in the outcome of the matters being studied. Any person, other than a state agency, desiring to make a financial or in-kind contribution shall certify to the Legislative Council that it has no pecuniary or other vested interest in the outcome of the advisory committee's activities. Such a certification must be made in the manner prescribed by the Legislative Council. All contributions are subject to approval by the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council along with an accounting record that includes the amount of funds, the date the funds were received, from whom the funds were received and the purpose of and any limitation on the use of those funds. The Executive Director of the Legislative Council shall administer any funds received by the advisory committee.

8. Compensation. Legislative members of the advisory committee are entitled to receive the legislative per diem, as defined in Title 3, section 2, and reimbursement for travel and other necessary expenses for their attendance at authorized meetings of the advisory committee. Public members not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses and, upon a demonstration of financial hardship, a per diem equal to the legislative per diem for their attendance at authorized meetings of the advisory committee.

9. Staffing. The Legislative Council shall provide staff support for the operation of the advisory committee, except that the Legislative Council staff support is not authorized when the Legislature is in regular or special session. In addition, the advisory committee may contract for administrative, professional and clerical services if funding permits.

10. Report. By January 15, 2007 and at least annually thereafter, the advisory committee shall report to the Governor, the Legislative Council, the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Chief Justice of the Supreme Judicial Court about the state of the freedom of access laws and the public's access to public proceedings and records.

STATE OF MAINE

—
IN THE YEAR OF OUR LORD
TWO THOUSAND TWENTY-ONE

—
H.P. 896 - L.D. 1221

**An Act To Implement the Recommendations of the Right To Know Advisory
Committee Concerning Public Records Exceptions**

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

Sec. 1. 10 MRSA §1107, first ¶, as amended by PL 1991, c. 137, §4, is further amended to read:

The Attorney General upon the Attorney General's own initiative or upon petition of 50 or more citizens of this State, shall investigate all seeming violations of sections 1102-A and 1105 to 1107, all contracts, combinations or conspiracies in restraint of trade or commerce, and all monopolies, and may require, by summons, the attendance and testimony of witnesses and the production of books and papers before the Attorney General relating to any such matter under investigation. The summons must be served in the same manner as summons for witnesses in criminal cases, and all provisions of law relating thereto apply to summonses issued under this section so far as they are applicable. All investigations or hearings thereunder or connected therewith to which witnesses are summoned or called upon to testify or to produce books, records or correspondence are ~~public or private at the choice of the person summoned~~ confidential and must be held in the county where the act to be investigated is alleged to have been committed, or if the investigation is on petition it must be held in the county in which the petitioners reside. Books, records or correspondence produced in response to a summons issued under this section may be disclosed by the Attorney General with the consent of the producing party and in court pleadings or other papers filed in court. The expense of such investigation must be paid from the appropriation provided by Title 5, section 203.

Sec. 2. 12 MRSA §550-B, sub-§6, as amended by PL 2013, c. 405, Pt. C, §7, is further amended to read:

6. Information use. Information collected by the Division of Geology, Natural Areas and Coastal Resources, Maine Geological Survey under this section is subject to Title 1, chapter 13, subchapter 1, ~~unless the well drilling company to whom the information belongs or pertains requests that it be designated as confidential and the bureau has determined it contains proprietary information. For the purposes of this subsection, "proprietary information" means information that is a trade secret or production,~~

~~commercial or financial information the disclosure of which would impair the competitive position of the person submitting the information and would make available information not otherwise publicly available.~~ The Division of Geology, Natural Areas and Coastal Resources, Maine Geological Survey shall make information collected under this chapter available to any federal, state or municipal entity or authorized agent of such entity.

STATE OF MAINE

—
IN THE YEAR OF OUR LORD
TWO THOUSAND TWENTY-ONE

—
H.P. 996 - L.D. 1345

**An Act To Implement the Recommendations of the Right To Know Advisory
Committee**

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.

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

Sec. 1. 1 MRSA §408-A, sub-§8, ¶A, as enacted by PL 2011, c. 662, §5, is amended to read:

A. The agency or official may charge a reasonable fee to cover the cost of copying. A reasonable fee to cover the cost of copying is no more than 10¢ per page for a standard 8 1/2 inches by 11 inches black and white copy of a record. A per-page copy fee may not be charged for records provided electronically.

Sec. 2. 1 MRSA §411, sub-§2, ¶M, as amended by PL 2015, c. 250, Pt. A, §1, is further amended to read:

M. The Attorney General or the Attorney General's designee; ~~and~~

Sec. 3. 1 MRSA §411, sub-§2, ¶N, as enacted by PL 2015, c. 250, Pt. A, §2, is amended to read:

N. One member with broad experience in and understanding of issues and costs in multiple areas of information technology, including practical applications concerning creation, storage, retrieval and accessibility of electronic records; use of communication technologies to support meetings, including teleconferencing and Internet-based conferencing; databases for records management and reporting; and information technology system development and support, appointed by the Governor; ~~and~~
and

Sec. 4. 1 MRSA §411, sub-§2, ¶O is enacted to read:

O. One representative having legal or professional expertise in the field of data and personal privacy, appointed by the Governor.

Sec. 5. 1 MRSA §412, sub-§1, as amended by PL 2019, c. 300, §1, is further amended to read:

1. Training required. A public access officer and an official subject to this section shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The official or public access officer shall complete the training not later than the 120th day after the date the official ~~takes the oath of office to assume~~ assumes the person's duties as an official or the person is designated as a public access officer pursuant to section 413, subsection 1.

Sec. 6. 1 MRSA §412, sub-§4, ¶F, as enacted by PL 2007, c. 576, §2, is amended to read:

F. Municipal officers; municipal clerks, treasurers, managers or administrators, assessors and code enforcement officers and deputies for those positions; and planning board members and budget committee members of municipal governments;

Sec. 7. 1 MRSA §412, sub-§4, ¶G, as amended by PL 2011, c. 662, §7, is further amended to read:

G. Officials Superintendents, assistant superintendents and school board members of school administrative units; and

Sec. 8. 1 MRSA §432, sub-§2, ¶G-1 is enacted to read:

G-1. Whether public access to the record ensures or would ensure that members of the public are able to make informed health and safety decisions;

Sec. 9. 1 MRSA §434, sub-§2, ¶G-1 is enacted to read:

G-1. Whether public access to the record ensures or would ensure that members of the public are able to make informed health and safety decisions;

STATE OF MAINE

—
IN THE YEAR OF OUR LORD
TWO THOUSAND TWENTY-ONE

—
H.P. 997 - L.D. 1346

**An Act To Implement the Recommendations of the Right To Know Advisory
Committee Concerning Fees Charged for Responding to Public Records
Requests**

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

Sec. 1. 1 MRSA §408-A, sub-§8, ¶B, as enacted by PL 2011, c. 662, §5, is amended to read:

B. The agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record ~~of not more than \$15 per hour after the first hour of staff time per request in accordance with this paragraph.~~ Compiling the public record includes reviewing and redacting confidential information.

(1) The agency or official may not charge a fee for the first 2 hours of staff time per request.

(2) After the first 2 hours of staff time, the agency or official may charge a fee of not more than \$25 per hour.

Sec. 2. 1 MRSA §408-A, sub-§12 is enacted to read:

12. Retention of fees or costs. An agency may retain any fees or costs charged under this section.

STATE OF MAINE

—
IN THE YEAR OF OUR LORD
TWO THOUSAND TWENTY-ONE

—
S.P. 40 - L.D. 32

An Act Regarding Remote Participation in Public Proceedings

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the state of emergency declared by the Governor pursuant to the Maine Revised Statutes, Title 37-B, section 742 in response to the public health emergency caused by the spread of the novel coronavirus disease referred to as COVID-19 may terminate sooner than 90 days after the adjournment of the First Special Session of the 130th Legislature; and

Whereas, the Maine Revised Statutes, Title 1, section 403-A governs remote participation in public proceedings of certain public bodies but is automatically repealed 30 days after the termination of the state of emergency declared by the Governor; and

Whereas, there is a need to have in place a law that governs remote participation in public proceedings of certain public bodies after the termination of the state of emergency declared by the Governor; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

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

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

§403-B. Remote participation in public proceedings

1. Remote participation. This section governs remote methods of participation in public proceedings of certain public bodies. For the purposes of this section, "remote methods" means telephonic or video technology allowing simultaneous reception of information and may include other means when such means are necessary to provide reasonable accommodation to a person with a disability. Public proceedings may not be conducted by text-only means such as e-mail, text messages or chat functions.

2. Requirements. A public body subject to this subchapter may allow members of the body to participate in a public proceeding using remote methods only under the following conditions:

A. After notice and hearing the body has adopted a written policy governing the conditions upon which members of the body and the public may participate in a public proceeding of that body by remote methods;

B. The policy adopted pursuant to paragraph A must provide that members of the body are expected to be physically present for public proceedings except when being physically present is not practicable. Circumstances in which physical presence for one or more members is not practicable may include:

(1) The existence of an emergency or urgent issue that requires the public body to meet by remote methods;

(2) Illness, other physical condition or temporary absence from the jurisdiction of the body that causes a member of the body to face significant difficulties traveling to and attending in person at the location in the notice under section 406;

(3) With respect to a public body with statewide membership, significant distance a member must travel to be physically present at the location in the notice under section 406; and

(4) The area of the public body's jurisdiction includes geographic characteristics that impede or slow travel, including but not limited to islands not connected by bridges;

C. The policy adopted pursuant to paragraph A must provide members of the public a meaningful opportunity to attend by remote methods when members of the body participate by remote methods, and reasonable accommodations may be provided when necessary to provide access to individuals with disabilities;

D. If the body allows or is required to provide an opportunity for public input during the proceeding, an effective means of communication between the members of the body and the public must be provided;

E. Notice of the proceeding must be provided in accordance with section 406. When the public may attend by remote methods pursuant to paragraphs C and D, the notice must include the means by which members of the public may access the proceeding using remote methods. The notice must also identify a location for members of the public to attend in person. The body may not determine that public attendance at a proceeding will be limited solely to remote methods except under the conditions in paragraph B, subparagraph (1);

F. A member of the body who participates in a public proceeding by remote methods is present for purposes of a quorum and voting;

G. All votes taken during a public proceeding using remote methods must be taken by roll call vote that can be seen and heard if using video technology, and heard if using only audio technology, by the other members of the public body and the public; and

H. The public body must make all documents and other materials considered by the public body available, electronically or otherwise, to the public who attend by remote methods to the same extent customarily available to members of the public who attend

the proceedings of the public body in person, as long as additional costs are not incurred by the public body.

3. Remote participation not permitted. This section does not authorize town meetings held pursuant to Title 30-A, section 2524 or regional school unit budget meetings held pursuant to Title 20-A, section 1482-A to be conducted using remote methods.

4. Application. This section does not apply to:

A. The Legislature; or

B. A public body to which specific statutory provisions for remote participation apply.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.

**FOA Reviews ~ Judiciary Committee ~ 130th Legislature
First Regular Session and First Special Session**

LD	COMMITTEE	SUBJECT	MEMO DATE	REVIEW DATE	REPORT DATE	RESULT	STATUTE	RESULT
5	HCIFS	Health care information or records provided to Emergency Medical Services' Board	February 19, 2021	March 3, 2021	March 9, 2021	Approved	32 MRSA §91-B, sub-§1, ¶¶E and F	Public Law 2021, c. 15
6	HCIFS	Documents filed by an insurer assuming reinsurance with the Superintendent of Insurance	February 19, 2021	March 3, 2021	March 9, 2021	Approved	24-A MRSA §731-B, sub-§1, ¶B-2, sub¶(e)	Public Law 2021, c. 16
8	ENR	Proprietary information submitted in a drug take-back stewardship plan	March 22, 2021	April 13, 2021	April 14, 2021	Approved	38 MRSA §1612, sub-§7	Public Law 2021, c. 94
51	HCIFS	Documents, materials and other information provided to Bureau of Insurance about insurer's information security program	February 19, 2021	March 3, 2021	March 9, 2021	Approved	24-A MRSA §2268, sub-§1	Public Law 2021, c. 24
121	HHS	Fingerprint-based criminal history background check for "high-risk" MaineCare providers	April 5, 2021	April 13, 2021	April 14, 2021	Approved	22 MRSA §5307, sub-§2, ¶f	Public Law 2021, c. 400
541	HCIFS	Confidential information report to Maine Health Data Organization related to cancer-incidence registry data and vital statistics	April 11, 2021	April 21, 2021	April 27, 2021	Approved	22 MRSA §8715-A, sub-§2	Public law 2021, c. 423

**FOA Reviews ~ Judiciary Committee ~ 130th Legislature
First Regular Session and First Special Session**

LD	COMMITTEE	SUBJECT	MEMO DATE	REVIEW DATE	REPORT DATE	RESULT	STATUTE	RESULT
673	HCIFS	Pharmacy Board records identifying an individual seeking access to Insulin Safety Net Program	June 2, 2021	June 4, 2021	June 7, 2021	Approved	32 MRSA §13725, sub-§8	Public Law 2021, c. 303
875	SLG	Privatization of agency services (multiple exceptions) 1: Agency cost estimate 2: Proposed collective bargaining agreement amendment 3: Employee-specific information in payroll records submitted by bidder 4. Employee organization bid 5: Documents and testimony provided to Attorney General in reviewing privatization process	March 12, 2020	Jul 28-29, 2020	July 29, 2020	Approved	1. 5 MRSA §1816-B, sub-§2, ¶C 2. 5 MRSA §1816-B, sub-§4 3. 5 MRSA §1816-B, sub-§5, ¶A, sub-¶(4) 4. 5 MRSA §1816-B, sub-§6, ¶C 5. 5 MRSA §1816-B, sub-§9, ¶A, sub-¶(2)	Public Law 2021, c. 332
(716) and 221	HHS	Records held by the coordinator of the Aging and Disability Mortality Review Panel	March 15, 2021	April 13, 2021	April 14, 2021	Approved	22 MRSA §264, sub-§8	Public Law 2021, c. 398, Part MMMM
1352	VLA	1: Criminal history background information for applicants of sports wagering licenses 2: Information obtained by DHHS or child support registry operator from a	June 3, 2021	June 4, 2021	June 7, 2021	Approved	1: 8 MRSA §1204, sub-§3, ¶G 2: 8 MRSA §1214, sub-§10 3. 8 MRSA §1215, sub-§3	Carried Over On Table

**FOA Reviews ~ Judiciary Committee ~ 130th Legislature
First Regular Session and First Special Session**

LD	COMMITTEE	SUBJECT	MEMO DATE	REVIEW DATE	REPORT DATE	RESULT	STATUTE	RESULT
		<i>licensee; information obtained by licensee from DHHS or child support registry operator 3. Abnormal wagering activity information reported to the Gambling Control Unit</i>						
1363	VLA	Phone number and email address provided by a voter requesting an absentee ballot	June 3, 2021	June 4, 2021	June 7, 2021	Approved	21-A MRSA §753-A, sub-§7	Public Law 2021, c. 273
1467	ENR	<i>Proprietary information provided concerning post-consumer recycled plastic content in plastic beverage containers</i>	<i>June 1, 2021</i>	<i>June 4, 2021</i>	<i>June 7, 2021</i>	<i>Approved</i>	<i>38 MRSA §1612, sub-§4, ¶D</i>	<i>Carried Over On Table</i>
1484	EUT	Maine Connectivity Authority – information about communications service providers if public access could compromise security of public utility systems or specific information is of a competitive or proprietary nature	June 1, 2021	June 4, 2021	June 7, 2021	Approved	35-A MRSA §9408, sub-§§1 and 2	Public Law 2021, c. 364
1541	ENR	Proprietary information provided concerning packaging materials	June 1, 2021	June 4, 2021	June 7, 2021	Approved	38 MRSA §2146, sub-§15	Public law 2021, c. 455

**FOA Reviews ~ Judiciary Committee ~ 130th Legislature
First Regular Session and First Special Session**

LD	COMMITTEE	SUBJECT	MEMO DATE	REVIEW DATE	REPORT DATE	RESULT	STATUTE	RESULT
1622	HCIFS	Individual account information of account holders under program by new Maine Retirement Savings Board	June 2, 2021	June 4, 2021	June 7, 2021	Approved	5 MRSA §176	Public Law 2021, c. 356
1708	EUT	<i>Pine Tree Power Company records that give the owner or user an opportunity to obtain a business or competitive advantage over another person or business; record that contains usage or other nonpublic information regarding a customer of a transmission or distribution utility in the State</i>	<i>June 2, 2021</i>	<i>June 4, 2021</i>	<i>June 7, 2021</i>	<i>Approved</i>	<i>Not law: 35-A MRSA §4008, sub-§1, ¶¶A and B</i>	<i>Vetoed</i>
1718	JUD	Proceedings and records of the Accidental Overdose Death Review Panel	May 24, 2021	May 26, 2021	June 1, 2021	Approved	5 MRSA §200-M, sub-§6	PL 2021, c. 292

G:\STUDIES\STUDIES 2021\RTKAC\Meeting materials\Materials for October 13 2021\FOA reviews by JUD in 2021.docx (10/8/2021 9:23:00 AM)

Public Records Exceptions For Review by RTKAC in 2021:

Exceptions Tabled in 2020 from Titles 8 to 12 and All Exceptions in Titles 13 to 21-A

REF. NO.	STATUTORY CITATION	DESCRIPTION
2020-3	8 MRSA §416-A, sub-§9	Title 8, section 416-A, subsection 9, relating to the Tri-State Lotto concerning personal records in connection with payment of prize
2020-4	8 MRSA §1006, sub-§1, ¶A	Title 8, section 1006, subsection 1, paragraph A, relating to information or records required by the Gambling Control Board for licensure: trade secrets and proprietary information
2020-5	8 MRSA §1006, sub-§1, ¶B	Title 8, section 1006, subsection 1, paragraph B, relating to information or records required by the Gambling Control Board for licensure: would be unwarranted invasion of privacy of key executive, gaming employee or another person
2020-6	8 MRSA §1006, sub-§1, ¶C	Title 8, section 1006, subsection 1, paragraph C, relating to information or records required by the Gambling Control Board for licensure: key executive or gaming employee compensation
2020-7	8 MRSA §1006, sub-§1, ¶D	Title 8, section 1006, subsection 1, paragraph D, relating to information or records required by the Gambling Control Board for licensure: financial, statistical and surveillance information related to the applicant
2020-8	8 MRSA §1006, sub-§1, ¶E	Title 8, section 1006, subsection 1, paragraph E, relating to information or records required by the Gambling Control Board for licensure: creditworthiness, credit rating or financial condition of person or project
2020-9	8 MRSA §1006, sub-§1, ¶F	Title 8, section 1006, subsection 1, paragraph F, relating to information or records required by the Gambling Control Board for licensure: information from other jurisdictions conditioned on remaining confidential
2020-10	8 MRSA §1006, sub-§1, ¶G	Title 8, section 1006, subsection 1, paragraph G, relating to information or records required by the Gambling Control Board for licensure: information designated confidential under federal law
2020-11	8 MRSA §1006, sub-§1, ¶H	Title 8, section 1006, subsection 1, paragraph H, relating to information or records required by the Gambling Control Board for licensure: specific personal information, including Social Security number, of any individual
2020-12	8 MRSA §1006, sub-§3	Title 8, section 1006, subsection 3, relating to records and information developed as part of suitability requirement to select operator of central site monitoring system, held by Gambling Control Board and Dept. of Public Safety
2020-13	8 MRSA §1006, sub-§4	Title 8, section 1006, subsection 4, relating to financial, statistical and surveillance information from the central site monitoring system held by the Gambling Control Board and the Dept. of Public Safety
2020-14	8 MRSA §1007, sub-§2	Title 8, section 1007, subsection 2, relating to information or records received by the Gambling Control Board or Department of Public Safety from another agency pursuant to agreement
2020-15	8 MRSA §1052	Title 8, section 1052, relating to reports, information or records compiled by the Gambling Control Board and Dept. of Public Safety concerning noncompliance with or violation of the chapter by an applicant, licensee, owner or key executive
2020-16	8 MRSA §1052, sub-§3	Title 8, section 1052, subsection 3, relating to all complaints and investigative records of the Gambling Control Board during the pendency of an investigation
2020-44	12 MRSA §6072, sub-§10	Title 12, section 6072, subsection 10, relating to aquaculture lease seeding and harvesting reports
2020-45	12 MRSA §6072-A, sub-§17-A	Title 12, section 6072-A, subsection 17-A, relating to aquaculture leasing research and development

Public Records Exceptions For Review by RTKAC in 2021:

Exceptions Tabled in 2020 from Titles 8 to 12 and All Exceptions in Titles 13 to 21-A

REF. NO.	STATUTORY CITATION	DESCRIPTION
2020-46	12 MRSA §6077, sub-§4	Title 12, section 6077, subsection 4, relating to the aquaculture monitoring program
2020-47	12 MRSA §6078-A, sub-§1	Title 12, section 6078-A, subsection 1, relating to the Aquaculture Monitoring, Research and Development Fund concerning harvest information from leaseholders
2020-48	12 MRSA §6082	Title 12, section 6082, relating to information obtained from another jurisdiction that is designated confidential by that jurisdiction and must remain confidential
2020-49	12 MRSA §6173, sub-§1	Title 12, section 6173, subsection 1, relating to marine resources statistics
2020-50	12 MRSA §6173-A, sub-§1	Title 12, section 6173-A, subsection 1, relating to information designated as proprietary information submitted under the Maine Working Waterfront Access Pilot Project
2020-51	12 MRSA §6173-B, sub-§1	Title 12, section 6173-B, subsection 1, relating to information designated as proprietary information for research, aquaculture, education, surveillance and inspection, shellfish sanitation and depuration
2020-52	12 MRSA §6310, sub-§3	Title 12, section 6310, subsection 3, relating to medical information pertaining to lobster and crab fishing license denials
2020-53	12 MRSA §6455, sub-§1-B <i>Repealed</i>	Title 12, section 6455, subsection 1-B, relating to market studies and promotional plans of the Lobster Promotion Council <i>Repealed effective October 1, 2021 per operation of subsection 9</i>
2020-54	12 MRSA §6749-S, sub-§1	Title 12, section 6749-S, subsection 1, relating to log book for sea urchin buyers and processors
2020-63	12 MRSA §8884, sub-§3	Title 12, section 8884, subsection 3, relating to landowner and wood processor reporting requirements concerning information about volume, species, product types, county of origin and personally identifying information of forest product suppliers <i>Tabled by Subcommittee as Agency indicated amendment proposed to provide for limited disclosure (130th); LD 35 submitted but withdrawn before consideration by Legislature</i>
1	13 MRSA §1957, sub-§8	Title 13, section 1957, subsection 8, relating to the members of associations of agricultural producers and purchasing information
2	14 MRSA §164-A, sub-3	Title 14, section 164-A, subsection 3, relating to identity or treatment of participants in the Maine Assistance Program for Lawyers
3	14 MRSA §1254-A, sub-§1	Title 14, section 1254-A, subsection 1, relating to juror questionnaire recipients and names drawn
4	14 MRSA §1254-A, sub-§7	Title 14, section 1254-A, subsection 7, relating to names of prospective jurors and contents of juror qualification forms
5	14 MRSA §1254-A, sub-8	Title 14, section 1254-A, subsection 8, relating to names of jury pool during the period of service of jurors and prospective jurors
6	14 MRSA §1254-B, sub-§2	Title 14, section 1254-B, subsection 2, relating to juror selection records and information
7	14 MRSA §6321-A, sub-§4	Title 14, section 6321-A, subsection 4, relating to financial information disclosed in the course of mediation under the foreclosure mediation program
8	15 MRSA §101-C, sub-§3	Title 15, section 101-C, subsection 3, relating to records necessary to conduct an evaluation concerning mental responsibility for criminal conduct

Public Records Exceptions For Review by RTKAC in 2021:

Exceptions Tabled in 2020 from Titles 8 to 12 and All Exceptions in Titles 13 to 21-A

REF. NO.	STATUTORY CITATION	DESCRIPTION
9	15 MRSA §393, sub-§4-A, ¶G	Title 15, section 393, subsection 4-A, paragraph G, relating to information concerning application to possess firearm by person who was involuntarily committed
10	15 MRSA §3009, sub-§2	Title 15, section 3009, subsection 2, relating to the reintegration of a juvenile into school
11	15 MRSA §3010, sub-§2	<i>Title 15, section 3010, subsection 2, relating to juvenile history record information</i>
12	15 MRSA §3307, sub-§1-A	<i>Title 15, section 3307, subsection 1-A, relating to the identity of a juvenile until the petition is open to public inspection</i>
13	15 MRSA §3308-A, sub-§1	<i>Title 15, section 3308-A, subsection 1, relating to juvenile case records</i>
14	15 MRSA §3308-A, sub-§3	<i>Title 15, section 3308-A, subsection 3, relating to orders of adjudication for certain juvenile crimes</i>
15	15 MRSA §3308-A, sub-§4	<i>Title 15, section 3308-A, subsection 4, relating to juvenile intelligence and investigative information, juvenile community corrections officers' records and other reports in juvenile care records</i>
16	15 MRSA §3318-A, sub-§5	<i>Title 15, section 3318-A, subsection 5, relating to juvenile case records pending a competency examination</i>
17	15 MRSA §3318-C, sub-§2	<i>Title 15, section 3318-C, subsection 2, relating to competency orders regarding a juvenile</i>
18	16 MRSA §703, sub-§2	Title 16, section 703, subsection 2, relating to confidential criminal history record information (Criminal History Record Information Act)
19	16 MRSA §804	Title 16, section 804, relating to reports or records that contain intelligence and investigative information (Intelligence and Investigative Record Information Act)
20	17-A MRSA §1176, sub-§1	Title 17-A, section 1176, subsection 1, relating to information that pertains to current address or location of crime victims
21	17-A MRSA §1176, sub-§5	Title 17-A, section 1176, subsection 5, relating to request by crime victim for notice of release of defendant
22	18-C MRSA §2-514	Title 18-C, section 2-514, relating to wills deposited with the Probate Court
23	18-C MRSA §5-205	Title 18-C, section 5-205, relating to confidential information received from the Department of Health and Human Services regarding the guardianship of a minor
24	18-C MRSA §5-207, sub-§3, ¶C	Title 18-C, subsection 5-207, subsection 3, paragraph C, relating to status reports to the Probate Court by guardian of a minor
25	18-C MRSA §5-308, sub-§3	Title 18-C, section 5-308, subsection 3, relating to reports of a visitor or professional evaluation regarding the guardianship of an adult
26	18-C MRSA §5-409, sub-§3	Title 18-C, section 5-409, subsection 3, relating to reports of a visitor or a professional evaluation regarding the conservatorship of an adult
27	18-C MRSA §5-423, sub-§4	Title 18-C, section 5-423, subsection 4, relating to the credit report included in the conservator's report
28	18-C MRSA §9-304, sub-§1, ¶B	Title 18-C, section 9-304, subsection 1, paragraph B, relating to background checks for adoptions ordered by the Probate Court
29	18-C MRSA §9-304, sub-§21, ¶A	Title 18-C, section 9-304, subsection 2, paragraph A, relating to background checks initiated by the Department of Health and Human Services
30	18-C MRSA §9-308, sub-§3	Title 18-C, section 9-308, subsection 3, relating to final adoption decrees
31	18-C MRSA §9-310	Title 18-C, section 9-310, relating to adoption records concerning adoptions decreed on or after August 8, 1953

Public Records Exceptions For Review by RTKAC in 2021:

Exceptions Tabled in 2020 from Titles 8 to 12 and All Exceptions in Titles 13 to 21-A

REF. NO.	STATUTORY CITATION	DESCRIPTION
32	19-A MRSA §651, sub-§2 <i>Repealed</i>	Title 19-A, section 651, subsection 2, relating to social security numbers on marriage applications
33	19-A MRSA §908	Title 19-A, section 908, relating to social security numbers on divorce records
34	19-A MRSA §1653, sub-§6	Title 19-A, section 1653, subsection 6, relating to addresses of children and victims in cases concerning parental rights and responsibilities involving domestic abuse
35	19-A MRSA §1753, sub-§5	Title 19-A, section 1753, subsection 5, relating to identifying information under the Uniform Child Custody Jurisdiction and Enforcement Act if health, safety or liberty jeopardized
36	19-A MRSA §1834, sub-§5	Title 19-A, section 1834, subsection 5, relating to Social Security numbers in parentage actions
37	19-A MRSA §2006, sub-§10	Title 19-A, section 2006, subsection 10, relating to social security numbers in child support actions
38	19-A MRSA §2111, sub-§5	Title 19-A, section 2111, subsection 5, relating to criminal background check information for DHHS employees and applicants with access to federal tax information
39	19-A MRSA §2152, sub-§11	Title 19-A, section 2152, subsection 11, relating to information collected in child support enforcement and medical support recoupment
40	19-A MRSA §2158, sub-§6	Title 19-A, section 2158, subsection 6, relating to records of child support obligors provided to wireless service provider
41	19-A MRSA §3012	Title 19-A, section 3012, relating to specific identifying information in child support enforcement
42	19-A MRSA §4008	Title 19-A, section 4008, relating to identifying information concerning protection from abuse actions if health, safety or liberty would be jeopardized
43	19-A MRSA §4013, sub-§4, ¶E	Title 19-A, section 4013, subsection 4, paragraph E, relating to the Domestic Abuse Homicide Review Panel
44	20-A MRSA §4008, sub-§2	Title 20-A, section 4008, subsection 2, relating to school counselor or social worker activities
45	20-A MRSA §5001-A, sub-§3	Title 20-A, section 5001-A, subsection 3, relating to homeschooling records
46	20-A MRSA §6001, sub-§3	Title 20-A, section 6001, subsection 3, relating to education records of students
47	20-A MRSA §6101, sub-§2	Title 20-A, section 6101, subsection 2, relating to school records concerning employees and applicants
48	20-A MRSA §6103, sub-§3	Title 20-A, section 6103, subsection 3, relating to school records concerning criminal history record checks of employees and applicants
49	20-A MRSA §6205	Title 20-A, section 6205, relating to standards and assessments of student performance
50	20-A MRSA §6357, sub-§1	Title 20-A, section 6357, subsection 1, relating to student immunization records
51	20-A MRSA §7451, sub-§2	Title 20-A, section 7451, subsection 2, relating to records of the Baxter Compensation Authority
52	20-A MRSA §10206, sub-§2	Title 20-A, section 10206, subsection 2, relating to records of the Energy Testing Laboratory of Maine
53	20-A MRSA §11418, sub-§1, sub-§2	Title 20-A, section 11418, subsections 1 and 2, relating to Maine Educational Loan Authority applicants and recipients
54	20-A MRSA §11444, sub-§1 <i>Repealed</i>	Title 20-A, section 11444, subsection 1, relating to the Student Financial Aid Supplemental Loan Program applicants and recipients

Public Records Exceptions For Review by RTKAC in 2021:

Exceptions Tabled in 2020 from Titles 8 to 12 and All Exceptions in Titles 13 to 21-A

REF. NO.	STATUTORY CITATION	DESCRIPTION
55	20-A MRSA §11494, sub-§1	Title 20-A, section 11494, subsection 1, relating to the Higher Education Loan Purchase Program borrowers
56	20-A MRSA §13004, sub-§2	Title 20-A, section 13004, subsection 2, relating to certification and registration of teachers
57	20-A MRSA §13004, sub-§2-A	Title 20-A, section 13004, subsection 2-A, relating to complaints, charges and accusations concerning certification and registration of educational personnel
58	20-A MRSA §13015, sub-§5	Title 20-A, section 13015, subsection 5, relating to teacher action plans
59	20-A MRSA §13034	Title 20-A, section 13034, relating to teacher qualifying exam scores
60	21-A MRSA §1, sub-§21	Title 21-A, section 1, subsection 21, relating to portion of incoming voting list relating to Address Confidentiality Program participants
61	21-A MRSA §22, sub-§2	Title 21-A, section 22, subsection 2, relating to ballots
62	21-A MRSA §22, sub-§3, ¶A	Title 21-A, section 22, subsection 3, paragraph A, relating to records pertaining to a voter certified as a participant in the Address Confidentiality Program
63	21-A MRSA §22, sub-§3, ¶B	Title 21-A, section 22, subsection 3, paragraph B, relating to residence and mailing address of voter when voter submits statement to registrar stating good reason to believe physical safety jeopardized
64	21-A MRSA §22, sub-§5, sub-§6	Title 21-A, section 22, subsections 5 and 6, relating to registered voter applications
65	21-A MRSA §122-A	Title 21-A, section 122-A, relating to voter registration records of voters who are participants in the Address Confidentiality Program
66	21-A MRSA §172	Title 21-A, section 172, relating to a voter registration file kept by the registrar when the voter is a participant in the Address Confidentiality Program
67	21-A MRSA §196-A	Title 21-A, section 196-A, relating to information contained electronically in the central voter registration system
68	21-A MRSA §624, sub-§1	Title 21-A, section 624, subsection 1, relating to that portion of voter list relating to Address Confidentiality Program participants
69	21-A MRSA §737-A, sub-§7	Title 21-A, section 737-A, subsection 7, relating to disputed ballots
70	21-A MRSA §753-B, sub-§6, ¶A	Title 21-A, section 753-B, subsection 6, paragraph A, relating to the portion of the absentee voter list relating to voters who are Address Confidentiality Program participants
71	21-A MRSA §764	Title 21-A, section 764, relating to applications and envelopes for absentee ballots
72	21-A MRSA §1003, sub-§3-A	Title 21-A, section 1003, subsection 3-A, relating to investigative working papers of the Commission on Governmental Ethics and Election Practices
73	21-A MRSA §1125, sub-§2-B <i>Repealed</i>	Title 21-A, section 1125, subsection 2-B, relating to records of individuals who made Clean Elections gubernatorial seed money contributions over the Internet
74	21-A MRSA §1125, sub-§3	Title 21-A, section 1125, subsection 3, relating to records of individuals who made Clean Elections qualifying contributions over the Internet



Maine State Legislature
OFFICE OF POLICY AND LEGAL ANALYSIS
13 State House Station, Augusta, Maine 04333-0013
Telephone: (207) 287-1670

October 8, 2021

TO: Members, Right To Know Advisory Committee

FROM: Anna T. Broome, Senior Legislative Analyst
Colleen McCarthy Reid, Senior Legislative Analyst
Margaret J. Reinsch, Senior Legislative Analyst
Office of Policy and Legal Analysis

Re: Report pursuant to Public Law 2019, Chapter 667, Part B, Section 8

INTRODUCTION

Public Law 2019, Chapter 667, Part B, section 8 directs the Office of Policy and Legal Analysis, in consultation with the Office of the Revisor of Statutes and the Right to Know Advisory Committee ("RTKAC"), to examine the statutes for inconsistencies in the wording of public records exceptions, and to recommend standardized language for use in drafting statutes to clearly delineate what information is confidential and the circumstances under which that information may appropriately be released.

"PUBLIC RECORDS"

The term "public records" is defined in the Freedom of Access Act ("FOAA"), 1 MRSA chapter 13, subchapter 1, as:

"[A]ny 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" for the 22 specific exceptions that are contained in the lettered paragraphs of subsection 3. 1 MRSA §402, sub-§3.

The very first exception to this broad definition is “Records that have been designated confidential by statute[.]” 1 MRSA §402, sub-§3, ¶A. Most public records exceptions located outside of the Freedom of Access Act are described as “not a public record,” are designated “confidential” or include a different reference to the FOAA to indicate that the records are not available to the public.

THE ROAD TO STANDARDIZED LANGUAGE

As required by law, the Right to Know Advisory Committee reviews existing public records exceptions in Maine statutes and makes recommendations to the Legislature whether to continue, amend or repeal those exceptions. In our work staffing the RTKAC and assisting the RTKAC when reviewing existing public records exceptions, we have identified inconsistencies and sometimes ambiguous language throughout the statutes. The Legislature has corrected the most problematic wording upon the recommendation of the RTKAC. Without having an established template, however, the RTKAC has been hesitant to seek changes for other more nuanced inconsistencies or to recommend strict compliance with standardized language. Later in this report, we recommend standardized language for use in drafting statutes.

As the Legislature recognized in Public Law 2019, chapter 667, there is great benefit to records custodians as well as the public for the laws to be crystal clear as to which records or information is subject to the public’s right to inspect and copy, and whether exceptions to that right exist. There are instances in the statutes where the law describes a record as being “not a public record” and others where the law describes a record as being “confidential.” Informally, some have suggested that the use of these alternate phrases in the statutes requires a different interpretation of their meaning:

- If the statute designates a record “confidential”: The public has no right of access, and it appears the record custodian is restricted as to who can receive, copy or inspect the record.
- If the statute says that a record is “not a public record”: The public has no right to access the record, but does the record custodian have discretion as to whether to share the record and with whom?

We have been unable to find legal authority – statutory or caselaw – to support the dichotomy represented by these informal interpretations. Many statutes over the years have been drafted to include both terms, i.e., that a record is confidential and not a public record. Such language provides implied support for the distinction, but there is no indication in any of these statutes that such wording is anything more than belt and suspenders to ensure the public is not given access to the specific record. That the difference in wording results in different interpretations appears unintentional when six of the 22 public records exceptions listed in Title 1, section 402, subsection 3, are reviewed in detail. Paragraphs H, L, M, Q, U and V¹ all spell out specific records that are not public records, and then explicitly authorize the sharing with or disclosure to certain individuals or entities for express purposes. If being “not a public record”

only extinguished the public’s right to access such records, and did not limit the custodian’s discretion to share the records, then the explicitly-authorized sharing or disclosure would not be necessary.

The current mix of language creates ambiguity about the intended meaning of laws governing public records exceptions, and we believe the Right to Know Advisory Committee can use this opportunity to establish consistent wording that provides clear instruction as to the treatment of otherwise public records. We are happy to help with a discussion about the intent and the wording of public records exceptions; we suggest that the following general considerations and questions be included in your analysis.

- The FOAA default: Every record in the hands of a governmental entity that is about governmental activity is a public record.
- The FOAA default: The public has a right to inspect and copy every public record.
- The Law Court has stated that exceptions to the FOAA must be strictly construed. (most recently in *Blue Sky West, LLC v. Maine Revenue Services*, 2019 ME 137)
- Question: Is a record custodian’s duty the same whether a statute provides that a record is “not a public record” or a statute designates a record as “confidential”?

SUGGESTED LANGUAGE

We offer the following examples of suggested language for different drafting situations that relate to the confidentiality of a record that would otherwise be public and any circumstances authorizing the disclosure (or not) of that confidential record. The Office of the Revisor of Statutes was consulted to ensure the examples we suggest conform with the style and grammar conventions applied by the Office of the Revisor of Statutes to help ensure consistency throughout the statutes.

Designating a record as confidential

To designate a record as confidential, there are multiple examples in the statutes where the phrase “confidential and may not be disclosed” is used.

Example from 5 MRSA §244-C, sub-§3 (first sentence only; highlighted language in yellow is redundant and not necessary):

Except as provided in this subsection, audit working papers are confidential and may not be disclosed to any person.

The added language in the above example describing that a record “may not be disclosed” may not be necessary. We suggest that the language of a statutory exception be drafted clearly and in a consistent manner. If a record is designated as “confidential,” it is not necessary to add language prohibiting disclosure as the intent of both phrases is the same.

Example from 18-C MRSA §9-310:

Notwithstanding any other provision of law and except as provided in Title 22, section 2768, all court records relating to an adoption decreed on or after August 8, 1953 are confidential.

Authorizing disclosure of a confidential record

When the Legislature intends to authorize the disclosure in certain circumstances of records generally designated as confidential, we recommend that drafters include language that clearly describes when, how and to whom the confidential information may be disclosed as outlined in the examples provided below.

- **Authorizing the disclosure of a confidential record to a certain person**

When the Legislature intends that it is permissible for a confidential record to be disclosed to a certain person, the following is an example contained in current law that may be used in these circumstances.

Example from 4 MRSA §1806, sub-§2, ¶F:

F. Any information obtained or gathered by the commission when performing an evaluation or investigation of an attorney is confidential, except that it may be disclosed to the attorney being evaluated or investigated.

- **Authorizing the disclosure of a confidential record with permission**

When the Legislature intends that a confidential record may be shared only with permission, the following is an example contained in current law that may be used in these circumstances.

Example from 1 MRSA §538, sub-§3 (first sentence only):

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.

- **Authorizing the disclosure of a confidential record for certain purposes**

When the Legislature designates records as confidential, there are often situations in which it is important to share or make the information available to a limited number of people and for a limited purpose. The governmental entity is required to collect the information in order to provide services or carry out the statute, and often that information must be shared in order to meet the requirements of the statute; the authorized disclosure is limited to the listed recipients.

Example from 17-A MRSA §2108 (highlighted language in blue suggests revision described below):

17-A MRSA §2108. Confidentiality of victim records

1. General rule of confidentiality. *Records that pertain to a victim's current address or location or that contain information from which a victim's current address or location could be determined ~~must be kept confidential~~ **are confidential**, subject to disclosure only as authorized in this section.*

2. Disclosure to law enforcement or victims' service agency. *Records that pertain to a victim's current address or location or that contain information from which a victim's current address or location could be determined may be disclosed only to:*

- A. A state agency if necessary to carry out the statutory duties of that agency;*
- B. A criminal justice agency if necessary to carry out the administration of criminal justice or the administration of juvenile justice;*
- C. A victims' service agency with a written agreement with a criminal justice agency to provide services as a victim advocate; or*
- D. A person or agency upon request of the victim.*

This example from Title 17-A about information related to crime victims identifies specific information that the Department of Corrections collects and authorizes the sharing of that information with particular agencies or individuals that meet the listed requirements, and only for the described purposes. The interest of the public, as well as the interest of any individual other than those identified in the section, in that information is outweighed by the privacy and safety needs of the victim.

Note, however, that the FOAA uses the terminology “designated confidential by statute” as an exception to being a “public record”; we recommend changing the highlighted text to: are confidential.

- **Authorizing the disclosure of a confidential record to third parties with conditions**

There are occasions when the Legislature intends that a confidential record may be disclosed to third parties with conditions. If the Legislature intends to allow the disclosure of confidential information to third parties only when certain circumstances exist or when the recipient agrees to specific action, the Legislature should be very clear in describing the third parties to whom confidential records or information may be disclosed and what conditions apply to that disclosure.

Example from former 24-A MRSA §216, sub-§5, ¶B.

The superintendent may disclose information that is confidential under this subsection to other jurisdictions if the recipient of the information agrees to maintain the same level of confidentiality provided under Maine law and has demonstrated that it has the legal authority to do so.

While the above example authorizes the disclosure of confidential information to third parties, the language broadly describes those third parties and the circumstances under which the information may be disclosed. We suggest that the language should be more specific in its description of the third parties to whom the confidential information may be disclosed and the conditions or purposes of the disclosure. We suggest the use of the following example as a recommended template for drafters.

Example from 22 MRSA §2425-A, sub-§12, ¶G (highlighted language in blue suggests revision for consistency; highlighted language in yellow is redundant and not necessary)

*G. Records maintained by the department pursuant to this chapter that identify applicants for a registry identification card, registered patients, registered caregivers and registered patients' medical providers are confidential and may ~~not~~ be disclosed, **except as provided in this subsection and only** as follows:*

- (1) To department employees who are responsible for carrying out this chapter;*
- (2) Pursuant to court order or subpoena issued by a court;*
- (3) With written permission of the registered patient or the patient's guardian, if the patient is under guardianship, or a parent, if the patient has not attained 18 years of age;*
- (4) As permitted or required for the disclosure of health care information pursuant to section 1711-C;*
- (5) To a law enforcement official for verification purposes. The records may not be disclosed further than necessary to achieve the limited goals of a specific investigation; and*
- (6) To a registered patient's treating medical provider and to a registered patient's registered caregiver for the purpose of carrying out this chapter.*

- **Authorizing the disclosure of aggregated or summarized data when individual records are confidential**

There are occasions when the Legislature intends records to be confidential but also intends to permit the data from those individual records to be aggregated or summarized and made available to the public.

Example from former 20-A MRSA §6455:

Body mass index data from students is confidential, except that a school nurse shall report the data collected to the Department of Health and Human Services in the aggregate only and may not identify an individual student.

Example from 8 MRSA §1006, sub-§7:

When financial and operating information, business records, business plans and marketing plans that are confidential under this section are submitted, the board and the applicant or licensee shall prepare a publicly available document that summarizes the confidential information in a manner that maximizes public access to that information.

While the above examples authorize the release of data, we note that the language could be clearer in stating the circumstances when confidential records may be disclosed in aggregate or summary form and to whom those records may be disclosed. We suggest that the language should more fully articulate the Legislature's intent and suggest the use of the following examples as recommended templates for drafters.

Example from 22 MRSA §7250, sub-§3:

3. Permissible disclosure of information. *The department may provide prescription monitoring information for public research, policy or education purposes as long as all information reasonably likely to reveal the patient or other person who is the subject of the information has been removed.*

Example from 22 MRSA §8733 (highlighted language in yellow is redundant and not necessary):

*Information provided to the organization as required by this subchapter by a manufacturer, wholesale drug distributor or pharmacy benefits manager is confidential **and not a public record under Title 1, chapter 13**, except that the organization may share information:*

1. Bureau of Insurance. *With the Department of Professional and Financial Regulation, Bureau of Insurance, to the extent necessary for the bureau to enforce the provisions of Title 24-A, as long as any information shared is kept confidential; and*

2. Aggregate. *In the aggregate, as long as it is not released in a manner that allows the identification of an individual drug or manufacturer, wholesale drug distributor or pharmacy benefits manager.*

- **Making a confidential record public upon the occurrence of certain events**

Consistent with the purposes of the Freedom of Access Act to ensure all the activities of government are open to the public, sometimes the best way to tailor confidentiality

provisions as narrowly as possible is to make sure the confidentiality applies only as long as necessary. Some records need to be kept confidential while an activity or process is ongoing in order to avoid undue influence, to prevent the skewing of results or to prohibit the premature release of information until the activity or process is complete.

Example from 4 MRSA §1806, sub-§2 ¶E:

A request for funds for expert or investigative assistance that is submitted by an indigent party or by an attorney on behalf of an indigent client is confidential. The decision of the executive director of the commission hired pursuant to section 1804, subsection 1, or the executive director's designee, to grant or deny such a request is not confidential after a case has been completed. A case is completed when the judgment is affirmed on appeal or the period for appeal has expired.

The following example provides that complaints and investigative records of the Maine Pilotage Commission (which ensures ships coming into port have a harbor pilot) are confidential until the investigation is concluded. It explicitly states when an investigation has been concluded so it is clear when the records are available to the public.

Example from 38 MRSA §100-A

§100-A. Confidentiality of complaints and investigative records

1. During investigation. *All complaints and investigative records of the commission are confidential during the pendency of an investigation. Those records become public records upon the conclusion of an investigation unless confidentiality is required by some other provision of law. For purposes of this section, an investigation is concluded when:*

- A. A notice of an adjudicatory hearing under Title 5, chapter 375, subchapter IV has been issued;*
- B. The complaint has been listed on a meeting agenda of the commission;*
- C. A consent agreement has been executed; or*
- D. A letter of dismissal has been issued or the investigation has otherwise been closed.*

The confidentiality protection can also be set to expire after the passage of a set period of time. The following example addresses property acquisition records held by the Department of Transportation and the Maine Turnpike Authority.

Example from 23 MRSA §63, sub-§3:

3. Records relating to negotiations and appraisals. *The records and correspondence relating to negotiations for and appraisals of property are public records beginning 9 months after the completion date of the project according to the*

record of the department or Maine Turnpike Authority, except that records of claims that have been appealed to the Superior Court are public records following the award of the court.

- **Prohibiting the disclosure of a confidential record through compulsion or judicial process**

There are occasions when the Legislature intends that a confidential record is not available to the public and is not subject to disclosure through compulsion or judicial process. If the Legislature intends to prohibit a record designated as confidential from being disclosed further as part of a legal or judicial proceeding, the Legislature should affirmatively state that the confidential record may not be disclosed in those circumstances.

Example from former 20-A MRSA §6455:

Information that is confidential under this subsection is not subject to discovery, subpoena or other means of legal compulsion for its release to any person or entity or admissible as evidence in any civil, criminal, judicial or administrative proceeding.

While the above example does indirectly reference information that is confidential and states that that information is not subject to discovery, subpoena or other means of compulsion for its release, we suggest that the language should affirmatively describe the information that is confidential and then articulate that disclosure required or ordered in a legal proceeding is not permitted. We suggest the use of the following examples as recommended templates for drafters.

Example from 22 MRSA §4008, sub-§3-A:

3-A. Confidentiality. *The proceedings and records of the child death and serious injury review panel created in accordance with section 4004, subsection 1, paragraph E are confidential and are not subject to subpoena, discovery or introduction into evidence in a civil or criminal action. The commissioner shall disclose conclusions of the review panel upon request, but may not disclose data that is otherwise classified as confidential.*

Example from 24-A MRSA §962, sub-§2 (highlighted language in yellow is redundant and not necessary):

Except as provided in this subsection, all protected valuation information is confidential, ~~must be kept confidential by the superintendent, is not a public record~~ and is not subject to subpoena or discovery or admissible in evidence in any private civil action. The superintendent may use the documents, materials or other information in the furtherance of any regulatory or legal action brought as a part of the superintendent's official duties, including sharing the information on a confidential basis under section 216, subsection 5.

Note, however, in the examples above, the language in one exception refers to the record being inadmissible as evidence in a civil or criminal action and one exception only refers to the record being inadmissible in a private civil action. We recommend that drafters consider the different types of legal proceedings and specifically state the proceedings to which the exception applies, e.g. civil, criminal or administrative proceedings.

Another consideration is whether a record would be within the scope of a privilege against discovery or use as evidence. The definition of “public record” in the Freedom of Access Act currently provides an exception in 1 MRSA section 402, subsection 3, paragraph B for 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.” While paragraph B provides a general exception for records within the scope of a privilege, we suggest that when the Legislature is establishing an exception that prohibits the disclosure of a confidential record pursuant to subpoena, discovery or other legal means that the Legislature also consider whether a privilege may also exist with regard to that record.

CONCLUSION

Based on our examination of existing public records exceptions, we have identified inconsistencies in and ambiguity about the intended meaning of these exceptions and have suggested standardized language and guidance for drafting public records exceptions. We believe the Right to Know Advisory Committee can use this opportunity to make recommendations for the use of standardized language in the statutes that provides clear instruction for records custodians and the public about which records are subject to the public’s right to inspect and copy, and whether exceptions to that right exist. We look forward to assisting you as you continue your discussion of this important topic.

¹ From 1 MRSA Section 402, subsection 3:

H. Medical records and reports of municipal ambulance and rescue units and other emergency medical service units, except that such records and reports must be available upon request to law enforcement officers investigating criminal conduct;

L. Records describing security plans, security procedures or risk assessments prepared specifically for the purpose of preventing or preparing for acts of terrorism, but only to the extent that release of information contained in the record could reasonably be expected to jeopardize the physical safety of government personnel or the public. Information contained in records 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. For purposes of this paragraph, “terrorism” means conduct that is designed to cause serious bodily injury or substantial risk of bodily injury to

multiple persons, substantial damage to multiple structures whether occupied or unoccupied or substantial physical damage sufficient to disrupt the normal functioning of a critical infrastructure;

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 government operations and technology continuity and to facilitate 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;

Q. 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 if there is a reasonable possibility that public release or inspection of the records would endanger the life or physical safety of any individual or disclose security plans and procedures not generally known by the general public. Information contained in records covered by this paragraph may be disclosed to state and county officials if necessary to carry out the duties of the officials or the Department of Corrections under conditions that protect the information from further disclosure;

U. Records provided by a railroad company describing hazardous materials transported by the railroad company in this State, the routes of hazardous materials shipments and the frequency of hazardous materials operations on those routes that are in the possession of a state or local emergency management entity or law enforcement agency, fire department or other first responder, except that records related to a discharge of hazardous materials transported by a railroad company that poses a threat to public health, safety and welfare are subject to public disclosure after that discharge. For the purposes of this paragraph, "hazardous material" has the same meaning as set forth in 49 Code of Federal Regulations, Section 105.5; and

V. 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, except that a participant's personal information, including health information, may be made available to first responders only as necessary to implement the program. For the purposes of this paragraph, "community well-being check program" means a voluntary program that involves daily, or regular, contact with a participant and, when contact cannot be established, sends first responders to the participant's residence to check on the participant's well-being.