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TO: Members, Right To Know Advisory Committee

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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 V[1] 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.

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[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;
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> 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.