

STATUTE: [4 MRSA §1806](#)

AGENCY: Maine Commission on Indigent Legal Services

CONTACT PERSON: Justin W. Andrus, Executive Director

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 13 through 21-A before the end of 2021; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

4 MRSA §1806 sets out a series of exceptions to the presumption that certain records in the possession of the Maine Commission on Indigent Legal Services, ("the Commission,") are subject to public disclosure. §1806(2)(E) sets out a specific exception to disclosure for requests for funds for expert or investigative assistance, except that the decision of the Executive Director or designee is not confidential after a case has been completed.

The exception to disclosure set out at §1806(2)(E) is not often applied. I estimate that we receive at most 1 or 2 requests in any given year, to which documents protected by the subject provisions might be responsive. In most years, we receive no relevant requests. To my present knowledge, there have been no denials related to administrative or other litigation.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

Continuation of this exception is essential to the adequate provision of constitutionally required legal services to indigent clients. Disclosure of information related to the identity of experts or investigators would have a tendency to permit people outside the privileged client-attorney relationship to gain insight into otherwise privileged defense strategies.

The risks of disclosure are not mitigated by limiting the disclosure to the amount of money for which authorization is requested. The mere fact that money has, or has not, been requested provides inappropriate insight into defense strategy. At its most basic, access to this information might serve to increase a prosecutor's attention to a case in a manner that might tend to prejudice a defendant.

It bears note that the funds that are authorized may, or may not, represent the cost actually incurred. For example, a client might have two successive attorneys, each of whom requested \$1,000 for investigator fees. In many instances the first attorney is out of the case before the investigator completes its work. In that event, the total fees incurred would be less than the total of the authorizations. For that reason, early insight into authorizations does not necessarily constitute insight into the ultimate expenditure.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

I am not aware of any problems that have occurred in the application of this exception. It is clear to the Commission that the records described are intended to be confidential under the FOA statutes. The language of the exception is sufficiently clear.

4. Does your agency recommend changes to this exception?

No.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

The stakeholders here are the indigent clients. It is my role through the Commission to speak for that interest.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

N/A