RIGHT TO KNOW ADVISORY COMMITTEE

Access to Disciplinary Records of Public Employees Subcommittee

Via Zoom
Thursday, October 20, 2022
9:00-10:30 a.m.

Public Access: https://legislature.maine.gov/Audio/#438

AGENDA

1. Introductions

2. Subcommittee Discussion

3. Next Steps and Future Meetings

    - Thursday, November 3, 2022, 9am-10:30am (remote)
    - Thursday, November 17, 2022, 9am-10:30am (hybrid)

4. Adjourn

§7070. Personnel records

Every appointment, transfer, promotion, demotion, dismissal, vacancy, change of salary rate, leave of absence, absence from duty and other temporary or permanent change in status of employees in both the classified service and the unclassified service of the Executive and Legislative Departments shall be reported to the director at such time, in such form and together with such supportive or pertinent information as he shall by rule prescribe. [PL 1985, c. 785, Pt. B, §38 (NEW).]

The director shall maintain a perpetual roster of all officers and employees in the classified and unclassified services, showing for each person such data that the director considers pertinent. [PL 2007, c. 466, Pt. A, §21 (AMD).]

Records of the Bureau of Human Resources shall be public records and open to inspection of the public during regular office hours at reasonable times and in accordance with the procedure as the director may provide. [PL 1985, c. 785, Pt. B, §38 (NEW).]

The following records shall be confidential and not open to public inspection, and shall not be "public records," as defined in Title 1, section 402, subsection 3: [PL 1985, c. 785, Pt. B, §38 (NEW).]

1. Papers relating to applications, examinations or evaluations of applicants. Except as provided in this subsection, applications, resumes, letters and notes of reference, working papers, research materials, records, examinations and any other documents or records and the information they contain, solicited or prepared either by the applicant or the State for use in the examination or evaluation of applicants for positions as state employees.

A. Notwithstanding any confidentiality provision other than this subsection, applications, resumes and letters and notes of reference, other than those letters and notes of reference expressly submitted in confidence, pertaining to the applicant hired are public records after the applicant is hired, except that personal contact information is not a public record as provided in Title 1, section 402, subsection 3, paragraph O. [PL 2007, c. 597, §5 (AMD).]

B. Telephone numbers are not public records if they are designated as "unlisted" or "unpublished" in an application, resume or letter or note of reference. [PL 1989, c. 402, §1 (NEW).]

C. This subsection does not preclude union representatives from access to personnel records, consistent with subsection 4, which may be necessary for the bargaining agent to carry out its collective bargaining responsibilities. Any records available to union representatives which are otherwise covered by this subsection shall remain confidential and are not open to public inspection; [PL 1989, c. 402, §1 (NEW).]

[PL 2007, c. 597, §5 (AMD).]

2. Personal information. Records containing the following, except they may be examined by the employee to whom they relate when the examination is permitted or required by law:

A. Medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders; [PL 1985, c. 785, Pt. B, §38 (NEW).]

B. Performance evaluations and personal references submitted in confidence; [PL 1985, c. 785, Pt. B, §38 (NEW).]

C. Information pertaining to the credit worthiness of a named employee; [PL 1985, c. 785, Pt. B, §38 (NEW).]

D. Information pertaining to the personal history, general character or conduct of members of the employee's immediate family; [PL 1997, c. 124, §2 (AMD).]

D-1. Personal information, including that which pertains to the employee's:

(1) Age;

(2) Ancestry, ethnicity, genetic information, national origin, race or skin color;

(3) Marital status;

(4) Mental or physical disabilities;

(5) Personal contact information, as described in Title 1, section 402, subsection 3, paragraph O;

(6) Personal employment choices pertaining to elected payroll deductions, deferred compensation, savings plans, pension plans, health insurance and life insurance;

(7) Religion;

(8) Sex, gender identity or sexual orientation as defined in section 4553, subsection 9-C; or

(9) Social security number.

Such personal information may be disclosed publicly in aggregate form, unless there is a reasonable possibility that the information would be able to be used, directly or indirectly, to identify any specific employee.

When there is a work requirement for public access to personal information under this paragraph that is not otherwise protected by law, that information may be made public. The Director of the Bureau of Human Resources, upon the request of the employing agency, shall make the determination that the release of certain personal information not otherwise protected by law is allowed; and [PL 2019, c. 451, §1 (RPR).]

E. Except as provided in section 7070-A, complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public.

For purposes of this paragraph, "final written decision" means:

(1) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(2) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days; [PL 1997, c. 770, §1 (AMD).]

This subsection does not preclude union representatives from having access to personnel records, consistent with subsection 4, that may be necessary for the bargaining agent to carry out its collective bargaining responsibilities. Any records available to union representatives that are otherwise covered by this subsection remain confidential and are not open for public inspection;
[PL 2019, c. 451, §1 (AMD).]

3. Other information. Other information to which access by the general public is prohibited by law.

[PL 1985, c. 785, Pt. B, §38 (NEW).]

4. Disclosure of certain information for grievance and other proceedings. The Director of Human Resources may release specific information designated confidential by this section to be used in negotiations, mediation, fact-finding, arbitration, grievance proceedings and other proceedings in which the State is a party. For the purpose of this subsection, "other proceedings" means unemployment compensation proceedings, workers' compensation proceedings, human rights proceedings and labor relations proceedings.

Confidential information provided under this subsection shall be governed by the following.

A. The information to be released shall be information only as necessary and directly related to the proceeding as determined by the Director of Human Resources. [PL 1987, c. 673, §1 (NEW).]

B. [PL 2007, c. 240, Pt. HH, §12 (RP).]

C. The proceeding for which the confidential information is provided shall be private and not open to the public; or, if the proceeding is open to the public, the confidential information shall not be disclosed except exclusively in the presence of the fact finder, the parties and counsel of record, and the employee who is the subject of the proceeding and provisions are made to ensure that there is no public access to the confidential information. [PL 1987, c. 673, §1 (NEW).]

The State may use this confidential information in proceedings and provide copies to the employee organization that is a party to the proceedings, provided the information is directly related to those proceedings as defined by the applicable collective bargaining agreement. Confidential personnel records in the possession of the Bureau of Human Resources may not be open to public inspection and may not be "public records," as defined in Title 1, section 402, subsection 3.
[PL 2007, c. 240, Pt. HH, §12 (AMD).]

5. Constitutional obligations of a prosecutor. Notwithstanding this section or any other provision of law, this section does not preclude the disclosure of confidential personnel records and the information contained in those records to the Attorney General, a deputy attorney general, an assistant attorney general, a district attorney, a deputy district attorney, an assistant district attorney or the equivalent departments or offices in a federal jurisdiction that are related to the determination of and compliance with the constitutional obligations of the State or the United States to provide discovery to a defendant in a criminal matter. A person or entity participating in good faith disclosure under this subsection or participating in a related proceeding is immune from criminal and civil liability for the act of disclosure or for participating in the proceeding.
[PL 2013, c. 201, §1 (NEW).]

SECTION HISTORY

PL 1985, c. 785, §B38 (NEW). PL 1987, c. 673, §1 (AMD). PL 1989, c. 402, §1 (AMD). PL 1991, c. 229, §1 (AMD). PL 1991, c. 729, §1 (AMD). PL 1997, c. 124, §2 (AMD). PL 1997, c. 770, §1 (AMD). PL 2007, c. 240, Pt. HH, §12 (AMD). PL 2007, c. 466, Pt. A, §21 (AMD). PL 2007, c. 597, §§5, 6 (AMD). PL 2013, c. 201, §1 (AMD). PL 2019, c. 451, §1 (AMD).

§503. Personnel records

1. Confidential records. The following records are confidential and not open to public inspection. They are not "public records" as defined in Title 1, section 402, subsection 3. These records include:

A. Except as provided in this paragraph, applications, resumes, letters and notes of reference, working papers, research materials, records, examinations and any other documents or records and the information they contain, solicited or prepared either by the applicant or the county for use in the examination or evaluation of applicants for positions as county employees.

(1) Notwithstanding any confidentiality provision other than this paragraph, applications, resumes and letters and notes of reference, other than those letters and notes of reference expressly submitted in confidence, pertaining to the applicant hired are public records after the applicant is hired.

(2) Telephone numbers are not public records if they are designated as "unlisted" or "unpublished" in an application, resume or letter or note of reference.

(3) This paragraph does not preclude union representatives from access to personnel records which may be necessary for the bargaining agent to carry out its collective bargaining responsibilities. Any records available to union representatives which are otherwise covered by this subsection shall remain confidential and are not open to public inspection; [PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD); PL 1989, c. 402, §2 (RPR).]

B. County records containing the following:

(1) Medical information of any kind, including information pertaining to the diagnosis or treatment of mental or emotional disorders;

(2) Performance evaluations and personal references submitted in confidence;

(3) Information pertaining to the creditworthiness of a named employee;

(4) Information pertaining to the personal history, general character or conduct of members of an employee's immediate family;

(5) Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public.

For purposes of this subparagraph, "final written decision" means:

(a) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(b) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days; and

(6) Personal information, including that which pertains to the employee's:

(a) Age;

(b) Ancestry, ethnicity, genetic information, national origin, race or skin color;

(c) Marital status;

(d) Mental or physical disabilities;

(e) Personal contact information, as described in Title 1, section 402, subsection 3, paragraph O;

(f) Personal employment choices pertaining to elected payroll deductions, deferred compensation, savings plans, pension plans, health insurance and life insurance;

(g) Religion;

(h) Sex, gender identity or sexual orientation as defined in Title 5, section 4553, subsection 9-C; or

(i) Social security number.

Such personal information may be disclosed publicly in aggregate form, unless there is a reasonable possibility that the information would be able to be used, directly or indirectly, to identify any specific employee; and [PL 2019, c. 451, §2 (AMD).]

C. Other information to which access by the general public is prohibited by law. [PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

[PL 2019, c. 451, §2 (AMD).]

1-A. Investigations of deadly force or physical force by law enforcement officer. The name of a law enforcement officer is not confidential under subsection 1, paragraph B, subparagraph (5) in cases involving:

A. The use of deadly force by a law enforcement officer; or [PL 1991, c. 729, §6 (NEW).]

B. The use of physical force by a law enforcement officer resulting in death or serious bodily injury. [PL 1991, c. 729, §6 (NEW).]

In cases specified in paragraphs A and B, regardless of whether disciplinary action is taken, the findings of any investigation into the officer's conduct are no longer confidential when the investigation is completed and a decision on whether to bring criminal charges has been made, except that if criminal charges are brought, the findings of the investigation remain confidential until the conclusion of the criminal case.

[PL 1991, c. 729, §6 (NEW).]

2. Employee right to review. On written request from an employee or former employee, a county official with custody of the records shall provide that employee, former employee or the employee's authorized representative with an opportunity to review the employee's personnel file, if the county official has a personnel file for that employee. These reviews shall take place during normal office hours at the location where the personnel files are maintained.

A. For the purposes of this subsection, a personnel file includes, but is not limited to, any formal or informal employee evaluations and reports relating to the employee's character, credit, work habits, compensation and benefits of which the county official has possession. [PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

B. The records described in subsection 1, paragraph B, may also be examined by the employee to whom they relate, as provided in this subsection. [PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987,

c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

[PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

3. Constitutional obligations of a prosecutor. Notwithstanding this section or any other provision of law, this section does not preclude the disclosure of confidential personnel records and the information contained in those records to the Attorney General, a deputy attorney general, an assistant attorney general, a district attorney, a deputy district attorney, an assistant district attorney or the equivalent departments or offices in a federal jurisdiction that are related to the determination of and compliance with the constitutional obligations of the State or the United States to provide discovery to a defendant in a criminal matter. A person or entity participating in good faith disclosure under this subsection or participating in a related proceeding is immune from criminal and civil liability for the act of disclosure or for participating in the proceeding.

[PL 2013, c. 201, §2 (NEW).]

SECTION HISTORY

PL 1987, c. 737, §§A2,C106 (NEW). PL 1989, c. 6 (AMD). PL 1989, c. 9, §2 (AMD). PL 1989, c. 104, §§C8,10 (AMD). PL 1989, c. 402, §2 (AMD). PL 1991, c. 229, §2 (AMD). PL 1991, c. 729, §6 (AMD). PL 1997, c. 770, §2 (AMD). PL 2013, c. 201, §2 (AMD). PL 2019, c. 451, §2 (AMD).

§2702. Personnel records

1. Confidential records. The following records are confidential and not open to public inspection. They are not "public records" as defined in Title 1, section 402, subsection 3. These records include:

A. Except as provided in this paragraph, applications, resumes, letters and notes of reference, working papers, research materials, records, examinations and any other documents or records and the information they contain, solicited or prepared either by the applicant or the municipality for use in the examination or evaluation of applicants for positions as municipal employees.

(1) Notwithstanding any confidentiality provision other than this paragraph, applications, resumes and letters and notes of reference, other than those letters and notes of reference expressly submitted in confidence, pertaining to the applicant hired are public records after the applicant is hired.

(2) Telephone numbers are not public records if they are designated as "unlisted" or "unpublished" in an application, resume or letter or note of reference.

(3) This paragraph does not preclude union representatives from access to personnel records that may be necessary for the bargaining agent to carry out its collective bargaining responsibilities. Any records available to union representatives that are otherwise covered by this subsection must remain confidential and are not open to public inspection; [PL 2019, c. 451, §3 (AMD).]

B. Municipal records pertaining to an identifiable employee and containing the following:

(1) Medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders;

(2) Performance evaluations and personal references submitted in confidence;

(3) Information pertaining to the creditworthiness of a named employee;

(4) Information pertaining to the personal history, general character or conduct of members of an employee's immediate family;

(5) Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public.

For purposes of this subparagraph, "final written decision" means:

(a) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(b) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written

decision of the neutral arbitrator is not issued and released before the expiration of the 120 days; and

(6) Personal information, including that which pertains to the employee's:

(a) Age;

(b) Ancestry, ethnicity, genetic information, national origin, race or skin color;

(c) Marital status;

(d) Mental or physical disabilities;

(e) Personal contact information, as described in Title 1, section 402, subsection 3, paragraph O;

(f) Personal employment choices pertaining to elected payroll deductions, deferred compensation, savings plans, pension plans, health insurance and life insurance;

(g) Religion;

(h) Sex, gender identity or sexual orientation as defined in Title 5, section 4553, subsection 9-C; or

(i) Social security number.

Such personal information may be disclosed publicly in aggregate form, unless there is a reasonable possibility that the information would be able to be used, directly or indirectly, to identify any specific employee; and [PL 2019, c. 451, §3 (AMD).]

C. Other information to which access by the general public is prohibited by law. [PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

[PL 2019, c. 451, §3 (AMD).]

1-A. Investigations of deadly force or physical force by law enforcement officer. The name of a law enforcement officer is not confidential under subsection 1, paragraph B, subparagraph (5) in cases involving:

A. The use of deadly force by a law enforcement officer; or [PL 1991, c. 729, §7 (NEW).]

B. The use of physical force by a law enforcement officer resulting in death or serious bodily injury. [PL 1991, c. 729, §7 (NEW).]

In cases specified in paragraphs A and B, regardless of whether disciplinary action is taken, the findings of any investigation into the officer's conduct are no longer confidential when the investigation is completed and a decision on whether to bring criminal charges has been made, except that if criminal charges are brought, the findings of the investigation remain confidential until the conclusion of the criminal case.

[PL 1991, c. 729, §7 (NEW).]

2. Employee right to review. On written request from an employee or former employee, the municipal official with custody of the records shall provide the employee, former employee or the employee's authorized representative with an opportunity to review the employee's personnel file, if the municipal official has a personnel file for that employee. These reviews shall take place during normal office hours at the location where the personnel files are maintained. For the purposes of this subsection, a personnel file includes, but is not limited to, any formal or informal employee evaluations and reports relating to the employee's character, credit, work habits, compensation and benefits which the municipal official may possess. The records described in subsection 1, paragraph B, may also be examined by the employee to whom they relate, as provided in this subsection.

[PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

3. Constitutional obligations of a prosecutor. Notwithstanding this section or any other provision of law, this section does not preclude the disclosure of confidential personnel records and the information contained in those records to the Attorney General, a deputy attorney general, an assistant attorney general, a district attorney, a deputy district attorney, an assistant district attorney or the equivalent departments or offices in a federal jurisdiction that are related to the determination of and compliance with the constitutional obligations of the State or the United States to provide discovery to a defendant in a criminal matter. A person or entity participating in good faith disclosure under this subsection or participating in a related proceeding is immune from criminal and civil liability for the act of disclosure or for participating in the proceeding.
[PL 2013, c. 201, §3 (NEW).]

SECTION HISTORY

PL 1987, c. 737, §§A2,C106 (NEW). PL 1989, c. 6 (AMD). PL 1989, c. 9, §2 (AMD). PL 1989, c. 104, §§C8,10 (AMD). PL 1989, c. 402, §3 (AMD). PL 1991, c. 229, §3 (AMD). PL 1991, c. 729, §7 (AMD). PL 1997, c. 770, §3 (AMD). PL 2013, c. 201, §3 (AMD). PL 2019, c. 451, §3 (AMD).

STATE OF MAINE
PENOBSCOT, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-2021-00042

BANGOR PUBLISHING COMPANY,
Plaintiff,

v.

STATE OF MAINE,
Defendant.

MTM ACQUISITION, INC. D/B/A PORTLAND PRESS HERALD/MAINE SUNDAY TELEGRAM,

Plaintiff,

v.

STATE OF MAINE,

Defendant

ORDER

Before the Court is Plaintiffs' FOAA Appeal and Plaintiffs' Motion to Access the Affidavit of Christopher Parr. The parties have fully briefed the issues and a hearing was held via Zoom video conferencing software.

I. Background information

The following facts are taken from the Joint Statement of Facts. ("JSF.") The Bangor Daily News is a daily newspaper published by Bangor Publishing Company. (JSF ¶ 1.) The Portland Press Herald is a daily newspaper published by MTM Acquisitions. (JSF ¶ 2.) On May 29, 2020, a reporter for the Bangor Daily News submitted a request to the Maine Department of Public Safety pursuant to the Maine Freedom of Access Act ("FOAA") for "all final written disciplinary decisions or dispositional findings regarding personnel investigations into current and former

Maine State Police employees since Jan. 1, 2015" and "all settlement agreements reached between the Maine State Police and its employees since Jan. 1, 2015." (JSF ¶ 5.) On December 29, 2020, in response to the request, the State produced 53 pages of documents, 12 of which included some redaction. (JSF ¶ 6.) On January 7, 2021, the State issued a second response, the only difference being two pages contained fewer redactions. (JSF ¶ 7.) On January 23, 2021, a staff attorney for Maine State Police ("MSP") explained the redacted portions of the records contained information that was exempt from disclosure pursuant to 5 M.R.S § 7070 and declined to provide justification on a redaction by redaction basis. In its view, providing the specific statutory section would in effect disclose the information it sought to protect. (JSF ¶¶ 8-9.) On January 28, 2021, Bangor Publishing Company filed a complaint against the State of Maine appealing the State's response to the May 29, 2020 request. (JSF ¶ 10.)

Between February 2020 and February 2021, a staff writer for the Portland Press Herald submitted three FOAA requests to the State Police for employee discipline documents. (JSF ¶¶ 12, 14, 17.) The third request was made on February 2, 2021 and was described as a "unifying request" which sought "1) records of final discipline for sworn employees or former employees of the Maine State Police dated between Jan. 1, 2015 and ending July, 2020; 2) any settlement documents between employees or former employees, sated between Jan. 1, 2015 and July, 2020; and 3) a privilege log or so-called Vaughn index, for any redacted or withheld records responsive to items 1 and 2, identifying the specific exception relied upon as a basis for redacting or not disclosing any records." (JSF ¶ 17.) The request was ultimately narrowed to relevant documents between January 1, 2015 to May 29, 2020. (JSF ¶ 19.) The State produced responsive documents on three occasions. (JSF ¶¶13-16.)

On February 11, 2021 MSP responded to the February 2, 2021 request with 85 pages of records concerning 18 State Police personnel. (JSF ¶¶ 20-21.) 14 of the 85 pages contained redactions. (JSF ¶ 22.) On March 3, 2021 the State produced signed copies of documents that were previously produced as unsigned versions. (JSF ¶ 23.) While the State responded and produced documents on more than two occasions, the February 11, 2021 and March 3, 2021 productions consist of all of the documents produced in response to the February 2, 2020 "unifying request" and all of the documents at issue in this case. (JSF ¶ 24.)

Several documents produced refer to other final disciplinary records, which were not produced. (JSF ¶¶ 28-42.) For example, a Settlement Agreement dated April 4, 2016, pertaining to Trooper Coflesky refers to a "final disciplinary letter" and states "in addition to the final discipline a LAST CHANCE letter will also be signed" but the productions did not include a "final discipline letter" nor a "LAST CHANCE letter" related to Trooper Coflesky. (JSF ¶¶ 32-33.) The State represents no "last chance letter" appeared in the electronic system and therefore it believes no such letter was ever created. (JSF ¶ 45.) The State provided similar explanations for other documents that similarly appeared to be missing from the productions. (JSF ¶¶ 44-46.) On February 23, 2021, MTM filed a complaint against the State of Maine challenging its response to the February 2, 2021 FOAA request. (JSF ¶ 27.)

The State represents it did not withhold any public records that were responsive to the FOAA request at issue in this appeal. (JSF ¶ 46.) To locate responsive documents, the State conducted a search of Maine State Police personnel records, which are maintained by the Department of Administrative and Financial Services, Security and Employment Human Resources Service Center ("HR"). (JSF ¶¶ 25-26.) Staff from the MSP Office of Professional Standards ("OPS") utilized a list of employees for the time period requested to search its electronic

database, where all case files created during a personnel investigation are listed. (JSF ¶ 26.) OPS staff searched the database by employee name to determine which sworn employees should have active discipline in their personnel files. [1] (JSF ¶ 26.) The names of those employees were then given to HR staff who manually searched paper personnel files for final disciplinary records, including settlement agreements. (JSF ¶ 26.) For "civilian" employees, HR used a listed of employees to manually search paper files and MSP's staff attorney checked with the Office of Employee Relations regarding pending grievances to determine whether disciplines for certain employees were final. (JSF ¶ 26.)

During the relevant time period, the State of Maine had agreements in effect with several unions including the Maine State Law Enforcement Association, Maine State Troopers Association, and Maine State Employers Association SEIU 1989. (JSF ¶¶ 48-59.) The agreements include provisions allowing for the removal of some disciplinary documents from an employee's personnel file after a given period of time. (*Id.*)

Concerning the Plaintiffs' motion, the parties stipulated to the submission of unredacted records to the Court for *in camera* review. The State submitted the documents with an affidavit of a Maine State Police staff attorney, Christopher Parr, which provided a specific statutory justification on a redaction-by-redaction basis.[2] The State argues that providing Plaintiffs with redaction-by-redaction justification could, in effect, disclose the information the redactions are intended to protect. The Court has reviewed the Parr Affidavit and is mindful of the argument that disclosing such an affidavit could risk revealing the information that redactions are intended to

[1] Meaning discipline records that had not been removed from an employee's file pursuant to the collective bargaining agreement. (JSF ¶ 26.)

[2] Nine pages of redactions were submitted for *in camera* review. Of the original fourteen pages that contained redactions, three contained redactions of only an employee number. Two pages of redactions were subsequently removed two and reproduced by the State. (State Opp. at 11 n. 2).

protect and finds that argument is valid with regard to the medical redactions. Concerning the other redactions described in the Parr Affidavit, it is less likely that release of the specific redaction information would in effect disclose the information the redactions are intended to protect, but for reasons to be described herein, the redactions are deemed inappropriate and are stricken anyway. Requiring that the specific redactions be provided to the plaintiffs during the *in camera* inspection has the effect of rejecting the State's position without hearing and could result in the dissemination of confidential information prior to the Court's ruling on that ultimate issue. The Motion is Denied.

II. Analysis

The Freedom of Access Act, 1 M.R.S. §§ 400-414, provides public records are to be available for public inspection and copying, unless otherwise provided by statute. 1 M.R.S. § 408-A. "Public record" means in relevant part any written matter "that is in the possession or custody of an agency or public official of this State or any of its political subdivisions . . . and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business." 1 M.R.S. § 402(3). That definition is subject to several exceptions including documents "which have been designated confidential by statute." 1 M.R.S. § 402(3)(A). With regard to personnel records, confidential documents include "complaints, charges, accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action." 5 M.R.S. § 7070(2)(E). However, "[i]f disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. . . For purposes of this paragraph, 'final written decision' means:

> 1) the final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or
> 2) if the final written decision is appealed to arbitration, the final written decision of a neutral arbitrator."

Id.

FOAA is to be "liberally construed and applied to promote its underlying purpose." *Guy Gannett Pub. Co. v. University of Maine*, 555 A.2d 470, 471 (Me. 1989) (quoting 1 M.R.S. § 401). Any exception must be strictly construed. *Id.* The exception found in "section 7070(2)(E) is narrowly drawn" and it "does not protect all information pertaining to misconduct." *Id.* at 472. While complaints and mere allegations are clearly protected, details of actions that led to the imposition of discipline are not and are "specifically deemed no longer confidential by section 7070(2)(E)." *Anctil v. Dep't. of Corr.*, 2017 ME 233, ¶ 10, 175 A.3d 660. The agency from which the information is sought has the burden to "establish just and proper cause for the denial of a FOAA request." *Doyle v. Town of Falmouth*, 2014 ME 151, ¶ 8, 106 A.3d 1145 (quoting *MaineToday Media, Inc. v. State*, 2013 ME 100, ¶ 9, 82 A.3d 104.)

Before evaluating the legitimacy of each redaction, the threshold question for the Court is whether the settlement agreements constitute "final disciplinary documents." The State's productions of documents consist of a variety of document types including "Record of Employee Discipline forms", final disciplinary decision letters, memos, and settlement agreements between the applicable union and the State Police. In some cases, a settlement agreement was produced in addition to another document such as a letter, form, or memo. In others, the only document produced as a result of disciplinary action is a settlement agreement and, in others, no settlement agreement was produced. The State contends the settlement agreements should only be treated as a final written decision in cases where there is no other documentation of final disciplinary action. Plaintiffs argue the settlement agreements are part of the final written decision and therefore are no longer confidential pursuant to 5 M.R.S. §7070(2)(E) regardless of whether another disciplinary document was produced.

In several instances, records related to disciplinary actions include both a settlement agreement and some other final disciplinary document.[3] All of the settlement agreements reference and effectively incorporate the other discipline documents and discipline imposed by MSP in the corresponding action. For example, in the case of Cpl. Pelletier, the State produced both a settlement agreement and a letter of final discipline. The settlement agreement states, "The Bureau of State Police and the Maine State Troopers Association hereby enter into the following agreement as it pertains to Cpl. Kyle Pelletier and the final outcome of IA2019-009. . . both parties agree to the following stipulations in addition to the final discipline imposed in IA2019-009." This language is used in all of the settlement agreements produced related to other employees. In addition to the terms of the agreement between the applicable union and employee and MSP, the settlement agreements include the underlying violation, some description of the incident that led to the imposition of discipline, and the discipline ultimately imposed. Nothing in the agreements constitutes a complaint, charge, accusation of misconduct, reply thereto or information that may result in disciplinary action. In each case final disciplinary action was actually imposed and confirmed in the agreements. For these reasons, the Court finds the settlement agreements in this case constitute "final written decisions." As such, the agreements are no longer confidential. To hold otherwise in this case would allow the State Police to easily circumvent the public records disclosure laws and effectively shield disciplinary documents from public inspection.

A. Redactions

The fact that a document is no longer deemed confidential does not mean that it cannot be properly redacted to protect confidential information contained therein. The Law Court has instructed "[w]hen a public record contain[s] information that is not subject to disclosure under

[3] See for example the cases of Pelletier, Fowlie, and Murray.

FOAA, the information may be redacted to prevent disclosure." *Doyle v. Town of Falmouth*, 2014 ME 151, ¶ 9, 106 A.3d 1145. Plaintiffs challenge the redactions and argue the State has interpreted several exceptions to FOAA too broadly. The State explained generally that all redactions are justified pursuant one of three provisions under 5 M.R.S. § 7070.

i. 5 M.R.S. §7070(2)(E)

The State redacted portions of six settlement agreements pursuant to § 7070(2)(E). In doing so, it attempted to couch the following categories of information within that narrowly drawn statutory section: 1. information contained in the agreements between the employee and their union and the State Police that were entered into in addition to the final written decision related to disciplinary action, 2. proposed but not ultimately imposed discipline, 3. alleged conduct that did not result in discipline,[4] and 4. information potentially related to *Garrity* protections. The Court reviewed each redaction in combination with the Parr affidavit.

Portions of the Pelletier, Fowlie, and Murray agreements, were redacted on the basis of containing "additional details from investigation about the allegation or accusation of misconduct not included in the separate disciplinary decision." The Court notes the settlement agreements do contain additional details of misconduct from the investigation that were not included in other final disciplinary documents. However, in the cases of Pelletier and Fowlie, when compared to the accompanying disciplinary letter, the additional detail contained in each agreement describes the exact conduct each officer was ultimately disciplined for. Similarly, in the case of Murray, two sentences were redacted, one of which contained additional detail regarding the misconduct Murray was ultimately disciplined for.[5] The other was nearly identical to the description of the

[4] The Parr Affidavit does not identify any redactions on the basis of alleged conduct that did not result in discipline.

[5] This additional sentence stated, "Following this incident, you also failed to notify your chain of command" and appears to be related to the discipline imposed.

allegation contained in the discipline letter. None of the information redacted from these agreements constitutes charges, allegations, complaints or information regarding misconduct that may result in discipline or replies thereto. The Court finds the narrow exception in 5 M.R.S. § 7070(2)(E) does not protect additional information related to misconduct which the employee was ultimately disciplined for. Therefore, this information was not redacted for just and proper cause and must be disclosed. The Court hereby orders the State to remove redactions made to paragraph 4 of the Fowlie agreement, paragraph 4 of the Pelletier agreement, and paragraph 3 of the Murray agreement and produce copies of the same to Plaintiffs.

The State also redacted paragraphs 5 and 7 of the Gay settlement agreement pursuant to §7070(2)(E) on the basis that it contained information concerning "discipline that was proposed but not ultimately imposed." Narrowly construing the plain language of the exception, as the Court must, "proposed but ultimately not imposed discipline" is not an allegation, charge, accusation or reply thereto, and final discipline was ultimately imposed. The redaction pertains to the type of final discipline imposed and is public. The plain language of the statute does not create an exception for this type of information and therefore it was not redacted for just and proper cause. *See Anctil v. Dep't. of Corr.*, 2017 ME 233, ¶ 11, 175 A.3d 660. Accordingly, the State must produce an unredacted copy of the Gay settlement agreement.

Finally, paragraph 6 of the Coflesky agreement and paragraph 5 of the Murray agreement were redacted as replies "to allegation or accusation of misconduct in which there is a potential for criminal charges." The Court is not aware of, and the State has not provided any authority in the realm of public disclosure law which implicates the protection provided in *Garrity v. N.J*, 385 U.S. 493 (1967). With that said, because the redacted information is directly related to the conduct for which the troopers were disciplined, the redactions were not made for just and proper cause.

Therefore, the State must remove the redactions applied to paragraph 6 in the Coflesky agreement, paragraph 5 of the Murray agreement and produce those documents to the plaintiffs.

ii. Medical and personal information

Confidential information appropriate for redaction also includes "medical information of any kind" and "personal information" such as an employee's "mental or physical disability." 5 M.R.S. § 7070 (2)(A), (D-1)(4). The State redacted paragraph 5 of the Coflesky agreement, paragraph 4 of the Murray agreement, and paragraph 4 of the Fisk agreement on the basis of protecting confidential medical or personal information. In doing so, the State argues the definition includes medical treatment such as counseling, therapy, and evaluations, general treatment, or evaluation of a perceived or potential medical condition or disability or to detect or diagnose a medical condition or disability as well as to treat a particular diagnosed condition. Plaintiffs argue this interpretation is too broad and as an exception, it must be narrowly construed.

Pursuant to 5 M.R.S. § 7070(2)(A) "[m]edical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders" is confidential. 5 M.R.S. § 7070(2)(A). The "statutory section protecting medical information 'of any kind' is broadly drawn." *Guy Gannet Pub. Co. v. University of Maine*, 555 A.2d 470, 471 (Me. 1989). In applying this exception, the Law Court has explained

> even with the rule of strict construction that we must apply to exceptions to the Freedom of Access Act, we conclude that, when a document objectively viewed describes expressly or by clear implication aspects of an employee's medical condition or medical treatment, it contains medical information within the meaning of the statutory exception.

Id. Accepting as accurate the State's expansive definition as encompassing not only an employee's medical condition, but also medical treatment, including counseling, therapy, and evaluations, the Court is satisfied the redacted information constitutes "[m]edical information of any kind,

including information pertaining to diagnosis or treatment of mental or emotional disorders" and describes expressly or by clear implication aspects of the employee's medical condition or treatment and as such is confidential pursuant to 5 M.R.S. §7070(2)(A) and (2)(D-1). The redactions made to paragraph 5 of the Coflesky agreement, paragraph 4 of the Murray agreement and paragraph 4 of the Fiske agreement were made for just and proper cause and shall remain.

The last redaction is found in paragraph 3 of the Harriman agreement. The redaction was imposed pursuant to 5 M.R.S. § 7070(2)(b) on the basis that it contains information related to a work plan or performance issue of another employee. Though there does not appear to be a dispute over this redaction, the Court finds it is justified and may remain in place.

B. The State's search for documents was inadequate.

Plaintiffs contend finally the search was insufficient to retrieve all responsive documents for two reasons. First, as previously mentioned, several settlement agreements produced by the State refer to other seemingly responsive disciplinary documents, which were not produced. (JFS ¶¶ 28-47.) Second, the search was insufficient because it was limited to "active" disciplinary records and therefore was incapable of identifying or retrieving records related to "inactive" discipline during the relevant time period. Because the collective bargaining agreements covering employee disciplinary records allow employees to request that certain documents be "removed from their personnel filed" as soon as one year after discipline, Plaintiffs argue, it is possible records generated between January 1, 2015 and May 29, 2019 were removed and therefore beyond the scope of the State's search.

The State has outlined the steps it took in responding to the FOAA requests and contends it conducted a thorough search for responsive documents. The State further contends any documents referenced in a settlement agreement that were not produced, must have never existed.

The State further explained while the collective bargaining agreements in the record provide for "removal" of disciplinary records from the employee's file, it is possible the documents were actually destroyed.

It is not clear to the Court at this time whether any of these documents ever existed, still exist somewhere, or have been destroyed. The State is hereby ordered to perform a supplemental search for the "missing documents" which shall include records of final discipline and settlement agreements for the period described in Plaintiffs' FOAA request. To the extent possible, the State must search the personnel files of the specific employees whose records included reference to other final disciplinary documents which were not produced, those being Christopher Gay, David Muniec, David Coflesky, Andre Paradis, Christopher Rogers, Christopher Harriman, and Tom Fiske.

Additionally, The State must search the personnel records of employees who were disciplined during the relevant time period, including inactive disciplinary actions, and documents related to final disciplinary action that may have been removed from the employee file pursuant to a bargaining agreement. To the extent the State is able to locate these additional documents, it must turn them over in a manner consistent with this Order. If the State is unable to locate the documents after reasonably diligent efforts and has good reason to believe they no longer exist, or never existed, the State is ordered to provide the Court and Plaintiffs an account of the efforts made to locate the missing documents and what those efforts revealed as to the status of the missing documents.

5/26/22
Dated

William Anderson, Justice
Maine Superior Court

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-21-0216

KAITLYN THURLOW, SOUTH PORTLAND POLICE PATROL UNIT, and SOUTH PORTLAND POLICE COMMAND & SUPERVISORY UNIT

Plaintiffs

v.

CITY OF SOUTH PORTLAND

Defendant

v.

COREY HAMILTON and MARCUS WRAIGHT

Parties-in-Interest

ORDER

Before the Court are the parties' cross motions for summary judgment. Defendant City of South Portland's ("South Portland" or "City") Motion for Summary Judgment is GRANTED. Plaintiffs Kaitlyn Thurlow, South Portland Police Patrol Unit and South Portland Police Command and Supervisory Unit's (collectively "plaintiffs"), Motion for Summary Judgment is DENIED.

FACTUAL BACKGROUND

This Case addresses the potential release of multiple letters of reprimand issued by the South Portland Police command structure to various officers. Plaintiff Kaitlyn Thurlow's initial complaint was filed with the intention of preventing the City from producing two letters of reprimand in response to a Freedom of Access Act ("FOAA") by Party in Interest Corey Hamilton. The case has since evolved to seek declarations on behalf of multiple South Portland officers, preventing the release of written reprimands to another FOAA petitioner — Marcus Wraight, Party in Interest, and local criminal defense attorney

I. Officer Thurlow

Plaintiff Kaitlyn Thurlow ("Thurlow") was employed as a patrol officer with the City of South Portland until June 22nd, 2021. (Defendant's Statement of Material Facts ("Def.'s S.M.F.") ¶ 1.) At all times Thurlow was employed by the City, she was subject to the terms and conditions of the collective bargaining agreement between the City and the South Portland Police Patrol Association ("Patrol CBA"). (Def.'s S.M.F. ¶¶ 2, 3.) The Patrol CBA stated, *inter alia*, that "no written reprimand shall remain in an employee's personnel folder in excess of one year." (Def.'s S.M.F. ¶ 4.) It also provided that it is an employee's responsibility to request, in writing, removal of a written reprimand from their file after one year. (Def.'s S.M.F. ¶ 4.)

On February 8th, 2020, Thurlow was issued a first written reprimand, and was issued a second, unrelated reprimand on May 14th, 2020. (Def.'s S.M.F. ¶ 6.) Thurlow's second reprimand was signed by Chief Timothy Sheehan and stated that the reprimand would be removed from Thurlow's personnel file on November 14th, 2020, so long as Thurlow was not reprimanded again. (Def.'s S.M.F. ¶ 8.) Thurlow's second written reprimand was removed from her personnel folder on November 14th. (Def.'s S.M.F. ¶¶ 9, 10.)

On or around February 19th, 2021, Thurlow requested, in writing, that the City's Police Chief remove the February 8th, 2020, reprimand from her folder. (Def.'s S.M.F. ¶ 11.) The City complied and removed the written letter. (Def.'s S.M.F. ¶ 12.)

II. Other Officers

The Patrol CBA that governed Thurlow's employment with the City also governed the employment of other patrol officers. (Def.'s S.M.F. ¶ 14.) In addition to the Patrol CBA, the City also has a CBA with command and supervisory officers ("Command CBA"). (Def.'s S.M.F. ¶ 16.) The Command CBA similarly states that all "letters of reprimand shall be removed from an employee's personnel file one year from the date of issue." (Def.'s S.M.F. ¶ 18.) Under the Command CBA it is also the responsibility of the employee to request, in writing, that the written reprimand be removed from their file. (Def.'s S.M.F. ¶ 18.) From 2010 through 2020, eighteen written reprimands were issued to a total of fifteen South Portland Police Officers. (Def.'s S.M.F. ¶ 21.)

III. FOAA Requests

On April 16th, 2021, Marcus Wraight ("Wraight") a Maine criminal defense attorney submitted a request for public records under Maine's FOAA ("Wraight FOAA Request"). (Def.'s S.M.F. ¶ 22.) The Wraight FOAA request sought, *inter alia*, "letters of reprimand or other admonition" from the time period of 2010 through 2020. (Def.'s S.M.F. ¶ 23.) On June 14th, 2021, the City notified the Patrol and Command units of its intent to comply with Wraight's FOAA request and both objected to the release of the subject documents, through counsel. (Def.'s S.M.F. ¶¶ 24, 25.)

On April 30th, 2021, Corey Hamilton submitted a FOAA request to the City, seeking "all complaints, internal investigations and disciplinary reports involving South Portland Police

Officer Kaitlyn Thurlow, including the final written decision related to such complaints" ("Hamilton's FOAA Request"). (Def.'s S.M.F. ¶ 28.) After reviewing Hamilton's FOAA request, the City determined it would comply and notified Thurlow. (Def.'s S.M.F. ¶ 29.) Thurlow objected to the release of her two written reprimands, through counsel. (Def.'s S.M.F. ¶ 30.)

The City's decision to comply with both the Wraight and Hamilton FOAA Requests centers on their disciplinary process. Whenever an investigation results in a written disciplinary action, the City places a copy of the written action in three different locations. (Def.'s S.M.F. ¶ 34.) One copy is provided to the disciplined officer, another is placed in the officer's personnel file, and a third is placed in the department's internal affairs file. (Def.'s S.M.F. ¶ 34.)

If, in compliance with either the Patrol or the Command CBA, the officer subject to discipline requests removal of the letter from their personnel file, the chief or another administrative designee, may remove the reprimand letter from their personnel file and give it back to the officer. (Def.'s S.M.F. ¶ 36.) The City's practice is to remove the letter only from the officer's personnel file, not their internal affairs file. (Def.'s S.M.F. ¶ 36.) Continuing to store letters of reprimand in the officer's internal affairs file has long been the practice of the City's law enforcement leadership, and, in the city's opinion, subjects them to State laws regarding public disclosure. (Def.'s S.M.F. ¶ 40.)

IV. Procedural Posture

On June 1st, 2021, Thurlow filed a two count complaint seeking to prevent dissemination of her two letters of reprimand pursuant to Hamilton's FOAA request. On June 16th, 2021, Thurlow amended her complaint to account for Wraight's FOAA request and sought a temporary

restraining order preventing release of other written reprimands concerning other South Portland officers. That temporary order was granted on June 16th, 2021.

On October 29th, 2021, the City moved for Summary Judgment, and on November 19th, Thurlow filed her opposition and cross motion. Both parties filed their replies in December of 2021. The parties' cross motions, fully briefed, await this Court's decision.

STANDARD OF REVIEW

When there are cross-motions for summary judgment, the rules for consideration of summary judgment are applied separately to each motion. *F.R. Carroll, Inc. v. TD Bank, N.A.*, 2010 ME 115, ¶ 8, 8 A.3d 646. The record on each summary judgment issue must be considered most favorably to the party objecting to the grant of summary judgment on that issue. *Blue Star Corp. v. CKF Properties LLC*, 2009 ME 101, ¶ 23, 980 A.2d 1270. A party is entitled to summary judgment when review of the parties' statements of material facts and the record to which the statements refer, demonstrates that there is no genuine issue as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821; M.R. Civ. P. 56(c). A contested fact is "material" if it could potentially affect the outcome of the case. *Dyer*, 2008 ME 106 ¶ 14, 951 A.2d 821. A "genuine issue" of material fact exists if the claimed fact would require a factfinder to choose between competing versions of the truth. *Id.* (quotations omitted). Summary judgment may also be used to isolate and decide a dispositive question of law. *Magno v. Freeport*, 486 A.2d 137, 141 (Me. 1985).

DISCUSSION

In their cross motions, the parties argue primarily over Count II of the complaint.[1] The City argues, as a matter of law, that it may release the letters of reprimand to both Wraight and Hamilton because removal of the reprimand is only required from an officer's personnel folder or file, not an internal affairs file. The Plaintiffs argue that the City's interpretations of both the Command CBA and the Patrol CBA are incorrect and ask the Court to find, as a matter of law, that a letter seeking removal of a written reprimand from a personnel file mandates destruction of the reprimand from all other officer associated files.[2]

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[1] This Court agrees with the City that because the Court issued a TRO on June 18th, 2021, Thurlow's first count seeking a preliminary injunction is moot. *See Ten Citizens of the Town of Biddeford v. Town of Biddeford*, 2003 ME 59, ¶ 5, 822 A.2d 1196 ("[A] determination of mootness [is made] by examining the record to determine "whether there remain sufficient practical effects flowing from the resolution of the litigation to justify the application of limited judicial resources."). None of the exceptions to the mootness doctrine apply. *See Clark v. Hancock County Comm'rs*, 2014 ME 33 ¶ 13, 87 A.3d 712 (recognizing three exceptions to the Mootness doctrine: (1) sufficient collateral consequences will result from the determination of the questions presented so as to justify relief; (2) the appeal contains questions of great public concern that, in the interest of providing future guidance to the bar and public, the court may address; or (3) the issues are capable of repetition but evade review because of their fleeting or determinate nature).

[2] At the outset, the Court notes its reservations about the procedural vehicle used by the Plaintiffs to bring their claim. While characterized as a declaratory judgment action regarding rights under two CBAs, this action is perhaps better characterized as an appeal of the City's decision to grant two FOAA requests.

An appeal of a municipality's decision to grant a FOAA request has never been squarely addressed by the Law Court. An appeal of an agency's affirmative FOAA decision, however, has. *See Blue Sky West, LLC v. Me. Revenue Servs.*, 2019 ME 137, ¶ 19, 215 A.3d 812.

In *Blue Sky West*, the Law Court acknowledged that the FOAA statute provides a process for seeking judicial review of a *denial* of a FOAA request but provides no explicit procedure for judicial review of a decision to *grant* one. *Id.* Thus, the Law Court determined that judicial review of an agency's decision to grant a FOAA request is governed by 5 M.R.S. § 11001(1) (2022) and M.R. Civ. P. 80C. *Id.*

The Law Court has stated, time and again, that Rule 80C's "municipal analogue" is Rule 80B. *See Dubois v. Town of Arundel*, 2019 ME 21, ¶ 5, 202 A.3d 524. Thus, it is conceivable that the Administrative Procedures Act and Rule 80B would offer an appropriate review process for the operative decisions here: South Portland's decision to grant Hamilton and Wraight's FOAA requests. While the fight here is primarily over whether the City should have removed the letters of reprimand from all personnel associated files, such an assignment of error could have likely been raised in an 80B action. *See* 5 M.R.S. § 11007(4)(C)(1) (2022) ("The Court may . . . reverse or modify the decision if the administrative findings, inferences, conclusions, or decisions are . . . in violation of statutory provisions").

Although 5 M.R.S. § 11001 has strict timelines for filing, the dates in this case, presented by the summary judgment record, also suggest that an 80B action could have been timely brought. Thurlow received notice of the City's decision on May 18th, 2021, and she brought her complaint on June 1st, 2021, well within the thirty day statutory period. *See* 5 M.R.S. § 11002(3) (2022). The other officers received notice on June 14th, 2021, and the First Amended Complaint was filed two days later — also meeting the thirty day standard.

This is not to say Rule 80B procedure is the only, exclusive mechanism for review of the City's decisions. It is to say, however, that, on an area of law never addressed by the Law Court — the decision of a municipality to

I. FOAA Applicability

The first question posed by the parties' filings is whether the objects of Wraight and Hamilton's FOAA requests — the eighteen written reprimands — are discoverable under FOAA.

"The purpose of FOAA is to open public proceedings and require that public actions and records be available to the public." *Town of Burlington v. Hosp. Admin. Dist. No. 1*, 2001 ME 59, ¶ 13, 769 A.2d 857; *see also Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 43, 770 A.2d 574. To promote such objectives, FOAA must be liberally construed. 1 M.R.S. § 401 (2022); *Town of Burlington*, 2001 ME 59, ¶ 13, 769 A.2d at 861.

FOAA provides that every person has the right to inspect and copy any public record. 1 M.R.S.A. § 408-A (2022). FOAA defines "public record" as: Any written [or] printed . . . matter . . . that is in the possession or custody of an agency or public official of this State or any of its political subdivisions . . . and has been received or prepared for use in connection with the transaction of public or governmental business . . . . *Id.* § 402(3) (2022).

While it provides liberal access to public records, FOAA also contains some statutory exceptions to the definition of the term "public record." One of those exceptions is "records that have been designated confidential by statute." 1 M.R.S. § 402(3)(A) (2022). "Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action" are generally not public

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grant a FOAA request — the administrative procedures act and M.R. Civ. P. 80B may offer an appropriate procedure for judicial review.

records. 30-A M.R.S. § 2702(B)(5) (2022). However, the final written disciplinary decision relating to that action is no longer confidential if it imposes or upholds discipline. *Id.*

Here, the written reprimands issued by the South Portland Police Department and reviewed *in camera* by the Court are final, written, disciplinary decisions which describe "conduct or other facts on the basis of which [a] disciplinary action [was] imposed and the conclusions of the acting authority as to the reasons" for the discipline. *Id.* Accordingly, each letter meets the statutory exemption to the "public record" definition found at 1 M.R.S. § 402(3)(A) (2022). None are confidential under the statute.

II. Applicability of Record Retention Exception

Having concluded that the reprimands are part of the public record, the next question is whether, legally, the City may remove them from the public record under any circumstances. As the City points out, the ability of a state agency or a municipality to destroy public records — especially when it comes to the disciplinary records of municipal employees — is heavily regulated. *See* 5 M.R.S. § 95-B(7) (2022).

The legislature has given authority to the State Archivist to promulgate rules and regulations which effectuate the purposes of the "Archives and Records Management Law" — preserving records "to ensure compliance with requests for public records under the Freedom of Access Act." 5 M.R.S. § 91 (2022). In accordance with that authority, the State Archives has promulgated a "Local Government Record Retention Schedule" which can be found online on

the Maine Secretary of State's website under the "State Archives" tab.[3] The schedule controlling personnel records is schedule 4, and the series regarding disciplinary records is series 4.2. Me. State Archives Rec. Retention. Sched. 4, § 4.2.

Series 4.2, titled "Employee Disciplinary Records," requires retention of disciplinary records for "60 years after separation unless collective bargaining contract requires that disciplinary documents be destroyed earlier than the contract shall be followed." Me. State Archives Rec. Retention. Sched. 4, § 4.2 (Retention).

Here, both the Patrol and Command CBAs contain language which provides for "removal" of disciplinary records from personnel files if a written request is made by an officer within one year after written discipline is issued. The City maintains that this language differs from the term "destroy" used in the retention schedule and therefore does not implicate the exception — resulting in the unlawful discard of public records if they comply with an Officer's request. The Court disagrees.

Although the terms may be slightly different in plain meaning, their usage carries the same practical effect. Removal of a written reprimand and destruction of disciplinary documents achieve the same desired result. Thus, the language of both the Patrol and Command CBAs implicates the exception to the retention of disciplinary records set forth in series 4.2. The City

[3] The prevailing authority in Maine for legal citations, the Uniform Maine Citations, provides no citation for reference to the Maine State Archives Record Retention Schedules. Any future cite within this Order to the personnel records retention schedule will be written as "Me. State Archives Rec. Retention Sched. 4, § 4.2."

may, pursuant to the Patrol CBA and the Command CBA, lawfully remove a written disciplinary document from an officer's personnel file or folder.[4]

III. Scope of Removal

The heart of this issue lies in the interpretation of the Patrol and Command CBAs' language regarding removal of reprimands. The City claims, as a matter of law, that if an officer makes a written request for removal of the reprimand from their personnel file, such removal is limited to the personnel file kept within the Police Department and reviewed only when making personnel related decisions such as promotions or terminations. The City says that the CBAs do not require them to remove the reprimands from other, non personnel related files.

The Plaintiffs contend, in their cross motion, that the written request for removal made pursuant to the applicable CBA language requires removal of reprimand letters from all officer associated files stored within City offices — personnel and internal affairs files alike.

Both parties offer ample support for their respective positions. The City cites to analogous cases from other jurisdictions for the proposition that removal of disciplinary records from a personnel file did not require their elimination from all of the city's records. *See Uniformed Fire Officer's Ass'n et. al. v. De Blasio*, 846 F. Appx 25, 30 (2nd Cir. 2021) (holding

[4] The City challenges the lawfulness of the CBAs and cites to cases from other jurisdictions which suggest that, when CBAs provide for destruction of public records, they are against public policy. *See City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7*, 181 N.E. 3d. (Ill. 2020); *Keller v. City of Columbus*, 797 N.E. 2d. 964 (Ohio 2003); *Lieberman v. State Bd. of Labor Relations*, 579 A.2d 505 (Conn. 1990). Because the Court rules in favor of the City, granting their summary judgment motion, the Court does not address this policy based argument.

removal of [disciplinary] records from a personnel file, as called for by the CBAs, does not require eliminating them from all of the City's records).

The Plaintiffs cite to a Maine case which holds that a personnel file "includes, but is not limited to, any formal or informal employee evaluations and reports relating to the employee's character, credit, work habits . . . that the employer has in the employer's possession." *Harding v. Wal-Mart Stores Inc.*, 2001 ME 13, ¶ 10, 765 A.2d 73 (quoting 26 M.R.S. § 631 (Supp. 2000)).

After careful consideration of both parties' arguments, the Court concludes, as a matter of law, that the City's interpretation of its obligations under FOAA, and the Patrol/Command CBAs is correct. The City is not required to remove written discipline from all of its officer associated files.

As mentioned *supra* 7-8, the written reprimands are public records and thus are subject to disclosure in response to FOAA requests brought pursuant to 1 M.R.S. § 408-A (2022). Thus, the City must disclose them to Wraight and Hamilton unless some statutory exception prevents their disclosure. The Plaintiffs argue an exception exists in the State Archivist's promulgated retention schedules which allow for CBAs to implement a destruction process for disciplinary records prior to the end of the sixty year retention period.

The Court agrees with the Plaintiffs that the retention schedules offer parties to a CBA the opportunity to craft an exception to retention which calls for the destruction of all disciplinary records, wherever they are located. However, the court disagrees that the exception at issue here has this effect.

The CBAs provide for the "removal" of a "written reprimand" from an employee's "personnel folder" one year after its issue, if the "employee notifie[s] the Chief of Police in writing." The use of this specific language in the CBAs, although somewhat ambiguous, is suggestive that the intent behind it was to prevent aging written disciplines from playing a role in later, employment related decisions. Not, as the Plaintiffs would have the Court read it, to prevent their possible disclosure to the public.[5]

In this case, the CBA language — which is lawfully part of each CBA pursuant to the State Archivist's promulgated retention schedules — does not require removal of a written reprimand from all officer associated files at city hall. It merely requires removal, upon written request, of reprimands from personnel folders or files which are stored at the Police Department for reference when making employment related decisions.

This conclusion is reinforced by the legislature's instruction that courts are to construe and apply FOAA's provisions "liberally." 1 M.R.S. § 401 (2022). "A corollary to such liberal construction of [FOAA] is necessarily a strict construction of any exceptions to the required public disclosure." *Citizens Communs. Co. v. Dep't of the AG*, 2007 ME 114, 931 A.2d 503 (quoting *Moffett v. City of Portland*, 400 A.2d 340, 348 (Me. 1979)).

The exception to retention — and subsequent disclosure — of public records, promulgated by the State Archivist in series 4.2 of schedule 4, allows CBA provisions to

[5] This intent is supported by former South Portland Police Chief Edward Googins' interpretation of the CBA language. (Googins Aff. ¶¶ 8, 12.)

mandate the destruction of disciplinary records. The CBA provisions here call for removal of disciplinary records from a personnel file — not total, complete destruction. Thus, while the CBAs terms implicate the Archivist's exception, they provide for less than all of what the exception offers.

The Plaintiff's cite to *Harding* for support that an internal affairs file is included within the term "personnel folder" or "file" is unpersuasive. While *Harding* did hold that the term "personnel file" was an expansive one which included records "relating to the employee's character . . . [or] work habits," *Harding*, 2001 ME 13, ¶ 13, 765 A.2d 73, such a holding was only in the context of 26 M.R.S. § 631 (Supp. 2000), a statute which governs "an employee's right to review personnel file." Buried in that statute is the following phrase conveniently omitted by the Plaintiffs in their filings: "For the purpose of this section." *Id.* Thus, the legislature intended its expansive definition of the term "personnel file" to apply only in the Section 631 context — this broad definition has little bearing on the decision here.

Accordingly, the Court holds that continued storage of the reprimand in an officer's internal affairs file is appropriate. Such storage, although possible to prevent with certain CBA terms, is not prevented here.

CONCLUSION

Summary judgment is granted in favor of the City of South Portland. The Temporary Restraining Order granted by this Court on June 18th, 2021, which prevented release of the written reprimands responsive to Wraight's FOAA Request is dissolved. The City may disclose

the reprimands in accordance with their decisions to grant Wraight and Hamilton's FOAA requests.

Entry Is:

Defendant's Motion for Summary Judgment is GRANTED.

Plaintiff's Cross Motion for Summary Judgment is DENIED.

The clerk is directed to incorporate this order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: 6/24/22

John O'Neil Jr
Justice, Maine Superior Court

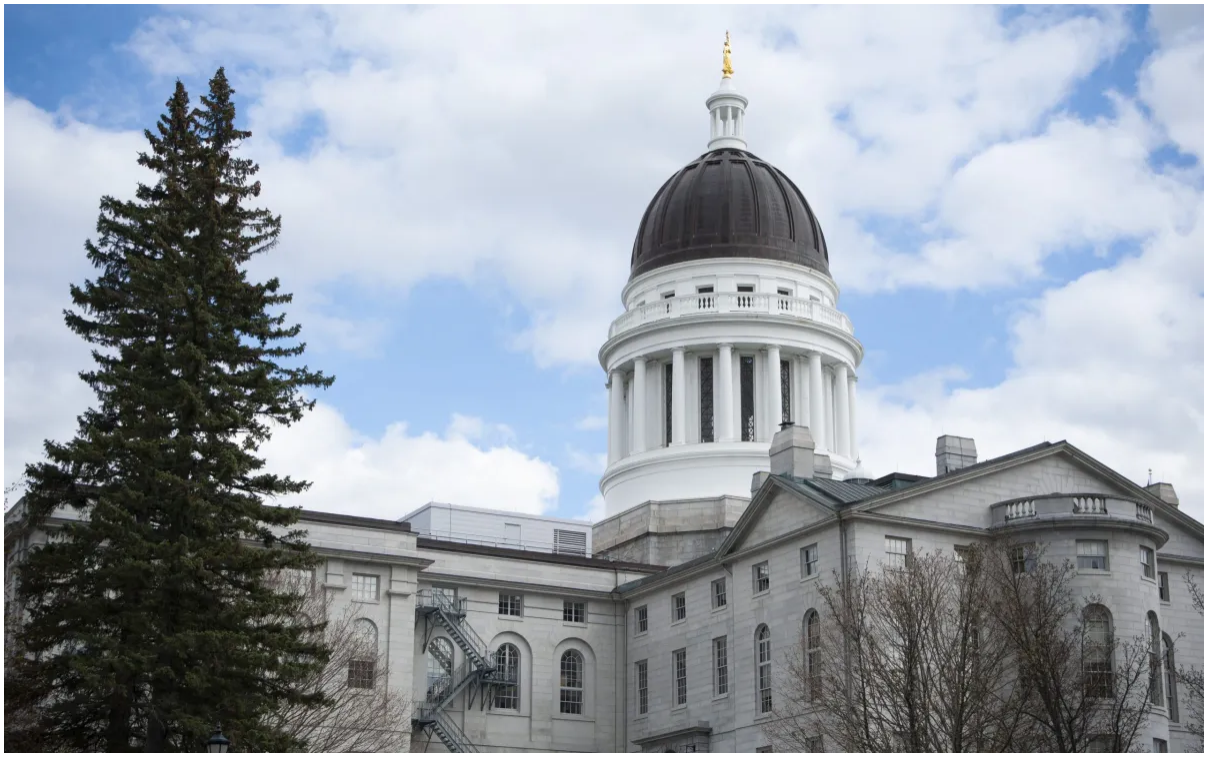
Entered on the Docket: 6/25/22

BDN BANGOR DAILY NEWS

Maine Legislature should strengthen Freedom of Access law

by **The BDN Editorial Board**

July 5, 2022 Updated July 6, 2022



The Maine State House in Augusta is pictured on May 6, 2020. Credit: Natalie Williams / BDN

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The Maine Freedom of Access Act (FOAA) has been in place for years. Having such a law is not enough, however. It needs to mean something.

Exceptions and loopholes, particularly related to public records, have provided too many off ramps for public officials and organizations to shield information from the people who fund them.

Even the Bangor Daily News' recent court victory (along with the Portland

of which eventually proved to be written so vaguely that they obscured the actual misconduct.

It should go without saying that final disciplinary documents should include information about the actual reason for the discipline.

Encouragingly, some current members of the Maine Legislature's Judiciary Committee have indicated a willingness to take this issue up in the future. While the makeup of the Legislature will change after the upcoming election in November, these remarks offer good insight into how lawmakers could approach freedom of access issues moving forward.

"I do think it's important for a final written decision imposing disciplinary action to contain information about the reason for discipline," Democratic Sen. Anne Carney, a co-chair of the Judiciary Committee, told the BDN recently. "I think requiring information about conduct that is the basis of discipline is an important issue for the Right to Know Advisory Committee and Legislature to address."

Rep. Thom Harnett, a Democrat from Gardiner, is the other judiciary co-chair. Both he and Carney are members of Maine's Right to Know Advisory Committee. Harnett chairs the advisory committee and expects it to discuss discipline records when it meets before the new Legislature convenes in January.

"I think the law we have right now is good, but it's been abused," Harnett told the BDN. "The final disciplinary document, which is not a confidential document, has to explain the conduct and the discipline. If they're not, I think they're being written in a way that deliberately contravenes the purpose of the Freedom of Access Act."

We'd again argue that the law should be strengthened to limit what

The accountability of public institutions and officials is not a Democratic or Republican issue. At least it shouldn't be. This is an issue of good governance, and it is one the next Legislature should take up no matter which party is in charge.

"My opinion is I trust the judgment of the superior officer if he does not want to disclose what the misconduct is and keeps it within the department," Republican Rep. James Thorne of Carmel told the BDN. "If they're not violating the law, then they shouldn't have to. I'm leaving it up to their judgment to say, 'The fact that I disciplined them for misconduct is good enough.'"

We have to respectfully disagree with Thorne here. It is not good enough if the public doesn't know why these public employees are being disciplined. And not unlike with police body cameras, this is an instance where increased transparency can actually help police departments and other law enforcement agencies.

When individual officers are disciplined but information is withheld from the public, it reflects poorly on the entire organization rather than the individual. Leadership clearly documenting officer misconduct and how it is dealt with, conversely, demonstrates what actions are not tolerated. Sunlight, as former U.S. Supreme Court Justice Louis Brandeis said, is the best disinfectant.

Lawmakers can and should take steps, like making sure final disciplinary documents actually contain information about why a public employee is being disciplined, to strengthen the Maine public's existing right to know. That right needs to mean something.

BDN BANGOR DAILY NEWS

Judge rules against former South Portland cop who sued to destroy disciline records

by **Callie Ferguson**
July 18, 2022

A judge has ruled against a former South Portland police officer who sued her department last year to block the release of records about her past misconduct in a case that has wider implications for the department.

Kaitlyn Thurlow, who now works for the Gorham Police Department, went to court in May 2021 to stop city officials from releasing her discipline records to another officer and a local lawyer who independently asked for them under Maine's Freedom of Access Act. Police discipline records are public under state law.

The case took on wider importance because it asked a judge to interpret whether a provision in the patrol officer's union contract requires city officials to destroy disciplinary records after certain periods of time. The practice has drawn scrutiny in a state where police departments handle discipline matters with little transparency and consistency, as revealed by recent Bangor Daily News investigations.

Then, in an unexpected twist this winter, a Maine group that advocates for government transparency published copies of Thurlow's discipline records online as part of a larger database of police records, preempting the court's decision and thwarting Thurlow's efforts to keep her disciplinary history a secret. The records show the department reprimanded her for repeatedly crashing her cruiser and sending inappropriate text messages to other police dog handlers.

Five months later, Cumberland County Superior Court Justice John O'Neil Jr. sided against the officer in a finding that acknowledged the integrity of Maine's Right to Know laws. In a June 24 decision, he ordered the city to release Thurlow's records, as well as other officer disciplinary records that lawyer Marcus Wraight asked for but were held up while the case was pending.

READ MORE

A Maine cop sued her former department to shield her misconduct

by Callie Ferguson January 12, 2022

The case hinged on an interpretation of the word “remove.” The South Portland patrol officer’s union agreement requires the city to “remove” discipline records from an officer’s personnel file after certain periods of time, though the department still maintains copies in an internal affairs folder, according to court records.

The city believed those copies were still subject to disclosure and intended to hand over Thurlow’s written reprimands in response to records requests by Wraight and former Animal Patrol Officer Corey Hamilton.

After learning of the request, Thurlow asked the court to intervene, arguing the city should have destroyed all copies of her records after a year, per the contract.

The judge disagreed.

“The use of this specific language in the [union contract], although somewhat ambiguous, is suggestive that the intent behind it was to prevent aging written disciplines from playing a role in later, employment related decisions,” O’Neil wrote in a June 24 order. “Not, as the Plaintiffs would have the Court read it, to prevent their possible disclosure to the public.”

He arrived at that conclusion in part because the Legislature requires courts “to construe and apply FOAA’s provisions ‘liberally,’” he wrote.

Thurlow has already notified the court that she intends to appeal the decision to the Maine Supreme Judicial Court, known as the Law Court. She also asked the court to halt its order to release her records until her appeal is heard. Wraight said on Monday that he had not yet received any records.

Thurlow’s attorney, Jonathan Goodman, and South Portland officials did not immediately respond to requests for comment.

130th Legislature
Senate of Maine
Senate District 29

Senator Anne Carney
3 State House Station
Augusta, ME 04333-0003
Office: (207) 287-1515
Anne.Carney@legislature.maine.gov

Judiciary Committee, Chair

March 31, 2022

Rep. Thomas Harnett, Chair
Right to Know Advisory Committee
13 State House Station
Room 215 Cross Office Building
Augusta, ME 04333-0013

Dear Chairman Harnett and Members of the Right to Know Advisory Committee,

I am writing you to request that the Right to Know Advisory Committee review a concern raised by a constituent, Marcus Wraight, Esq., that current practice allows for police disciplinary records to be removed from a personnel file and destroyed pursuant to the terms of a collective bargaining agreement. Public records exceptions are found at 5 M.R.S. §7070(2)(E)(1) (state); 30-A M.R.S. §503(1)(B)(5) (counties); 30-A M.R.S. §2702(1)(B)(5) (municipalities) but do not mention destruction of records within the scope of those exceptions.

I hope that we can review the statutory language to further understand and explore possible legislative solutions.

Sincerely,

Anne Carney
State Senator, District 29
Anne.Carney@legislature.maine.gov

CC Marcus Wraight, Esq.

Encl: Letter dated ___3/31/2022___

AGREEMENT

between

STATE OF MAINE

and

MAINE SERVICE EMPLOYEES ASSOCIATION SEIU LOCAL 1989

PROFESSIONAL AND TECHNICAL SERVICES BARGAINING UNIT

2021-2023

who are unavailable, including employees who are on vacation, sick leave or other approved leaves of absence, and employees for whom the requirement of overtime work would cause undue hardship, shall be excused from a required overtime assignment. Employees so excused shall not lose their eligibility for overtime work within the then current rotation.

4. Work in progress, when appropriate, shall be completed by the employee performing the work at the time the determination is made that overtime is required except that an employee for whom the requirement of overtime work would cause undue hardship shall be excused from the overtime assignment.

ARTICLE 46. PASSES AND TELEPHONES - FERRY SERVICE

1. Ferry Service employees will be issued passes authorizing free passage on Ferry Service vessels for the employee, their spouse or significant other, their dependent children and their vehicles for runs to or from the island or residency of the employees. Free passage for a vehicle shall be on the same priority as that afforded paying passengers.

2. Ferry Service employees shall be permitted reasonable use of terminal telephones for necessary calls to home.

ARTICLE 47. PERMANENT STATUS

No employee's probationary period shall be extended without the employee being informed in writing prior to the expiration of such period. Unless notified in writing otherwise prior to expiration of the employee's probationary period or extension thereof, the employee shall be granted permanent status immediately following such probationary period.

ARTICLE 48. PERSONAL SERVICES

No employee shall be required to perform services of a personal nature.

ARTICLE 49. PERSONNEL FILES

1. An employee, upon written request to or after prior arrangement with the State Bureau of Human Resources, or the appropriate official at the employee's work location or in the employee's agency, shall be permitted to review their personnel files. Such review shall take place during normal office hours and shall be conducted under the supervision of the appropriate records custodian or agency representative. An employee may review their personnel files at reasonable times during the employee's regular work hours if such review does not require travel out of the normal work area. An employee shall be allowed to place in such file a response of reasonable length to anything contained therein which the employee deems to be adverse.

2. An employee's personnel file shall include, but not be limited to, all memoranda and documents relating to such employee which contain commendations, employee performance appraisals or ratings and records of training programs completed.

3. In addition to the employee's right to view their file as set forth above, the employee shall have the right to receive copies of materials included in the employee's file as set forth below:

a. an employee may request, in writing, a copy of the employee's entire personnel file no more than once in any twelve month period, at no cost to the employee;

b. an employee may request, in writing, a copy of all the material added to the personnel file after the copy of the entire file was provided;

c. an employee may request a copy of specifically identified documents in the employee's personnel files;

d. if a document, other than routine processing documents, is added to the personnel file for an action of which the employee is not reasonably aware, the employee will either be notified or receive a copy of the document; and

e. requested documents may be provided in paper copy or electronically at the discretion of management.

4. Upon request of an employee, records of warnings, reprimands, and preventable accident reports shall be removed from personnel files after three (3) years from the date of the occurrence provided that the employee has had no further disciplinary action since that date. Upon request of an employee, records of suspensions and disciplinary demotions shall be removed from personnel files after five (5) years from the date of the occurrence provided that the employee has had no further disciplinary action since that date. However, records of disciplinary suspensions resulting from patient/client abuse, neglect or mistreatment shall not be removed from personnel files under the provisions of this paragraph.

Records of warnings and reprimands shall be deemed to be removed from the personnel files after three (3) years from the date of the occurrence provided that the employee has had no further discipline since that date.

Records of preventable accident reports shall be deemed to be removed from the personnel files after three (3) years from the date of the occurrence.

ARTICLE 50. PRISON RAPE ELIMINATION ACT (PREA)

Notwithstanding any other provisions of this Agreement, it is understood by the parties that the State is obligated to comply with the federal Prison Rape Elimination Act (PREA).

ARTICLE 51. PROPERTY DAMAGE

The State shall continue to reimburse employees for personal property of reasonable value damaged, destroyed or stolen while in the performance of their duties in accordance with established procedures.

ARTICLE 52. RECLASSIFICATIONS

1. Definitions. For the purposes of this Agreement the following terms are defined as follows:

(a) Classification and Reclassification. Classification and reclassification are the assignment or reassignment, respectively, of a position or group of positions to an occupational classification which is appropriate for compensation and employment purposes.

(b) Allocation and Reallocation. Allocation and reallocation are the assignment

AGREEMENT

Between

THE STATE OF MAINE

and

THE MAINE STATE TROOPERS ASSOCIATION

STATE POLICE UNIT
2021 - 2023

unacceptable conduct and will not be condoned or tolerated by MSTA or the State.

The State and the MSTA agree that any disputes arising out of the provisions of this article may be processed through the grievance procedure contained in the Grievance and Arbitration Procedure article subject to the State's right to have any such grievance considered at the appropriate level or steps by the State. This provision shall not preclude other legal remedies provided by law.

ARTICLE 29
PAID LEAVE

All employees eligible for overtime shall accrue and use leave credits on the basis of an eight (8) hour day.

ARTICLE 30
PARENTAL LEAVE

Paid Parental leave for childbearing and adoption shall be granted to an employee with pay for hours regularly scheduled to work during a period of time not to exceed twenty-eight (28) calendar days, taken continuously, beginning no later than eight (8) weeks directly following the birth or adoption of the child(ren). Employees shall be allowed to retain insurance benefits during such leave.

Employees are encouraged to consult with their agency Human Resources Office to determine if they are eligible for benefits available under the Federal Family and Medical Leave Act (FMLA), and time available under FMLA would run concurrent with both paid and unpaid parental leave.

ARTICLE 31
PERSONNEL FILES

Upon request of an employee, corrective memos shall be removed from his/her personnel file after one

(1) year from the date of the corrective memo if the employee has received no further discipline. Upon request of an employee, reprimands shall be removed from his/her personnel file after three (3) years from the date of the reprimand if the employee has received no further discipline. Upon request of an employee, suspensions shall be removed from his/her personnel file after five (5) years from the date of the suspension if the employee has received no further discipline. Upon written request of an employee sixty (60) days prior to his/her retirement date, corrective memos**,** reprimands and suspensions shall be removed from his/her personnel file if the employee has received no further discipline within the past three (3) years, notwithstanding the time frames stated above. However, if the employee then decides not to retire, the removed record of discipline will be returned to his/her personnel file.

The Chief of the State Police or his/her designee shall comply with the law and reporting requirements of the Maine Criminal Justice Academy in reporting acts of misconduct by employees. Only a synopsis of the alleged misconduct shall be provided to the Academy Board, not the complete investigation file, unless the Department is required to do otherwise under the law.

ARTICLE 32
POLICE PROFESSIONAL LIABILITY INSURANCE

The State agrees to continue the present level of Police Professional Liability Insurance for members of this unit during the term of this Agreement.

ARTICLE 33
PRINTING OF AGREEMENT

The State and MSTA will share the responsibility for printing copies of the Agreement.

AGREEMENT

between

STATE OF MAINE

and

MAINE STATE
LAW ENFORCEMENT ASSOCIATION

LAW ENFORCEMENT
BARGAINING UNIT

2021-2023

the appropriate work group in continuing rotation on the basis of seniority. Each employee shall be selected in turn according to his/her place on the seniority list by rotation provided, however, the employee whose turn it is to work possesses the qualifications, training and ability to perform the specific work required.

2. An employee requesting to be skipped when it becomes his/her turn to work overtime shall not be rescheduled for overtime work until his/her name is reached again in orderly sequence and an appropriate notation shall be made on the overtime roster.

3. In the event no employee accepts required overtime work, the State shall assign employees within the work location involved from the appropriate work group to perform the overtime work by continuing rotation in inverse order of seniority. Employees who are unavailable, including employees who are on vacation, sick leave or other approved leaves of absence, and employees for whom the requirement of overtime work would cause undue hardship, shall be excused from a required overtime assignment. Employees so excused shall not lose their eligibility for overtime work within the then current rotation.

4. Work in progress, when appropriate, shall be completed by the employee performing the work at the time the determination is made that overtime is required except that an employee for whom the requirement of overtime work would cause undue hardship shall be excused from the overtime assignment.

5. If an employee is skipped or denied an opportunity to work overtime in violation of this Article, he/she shall be offered overtime work the next time overtime work is available.

ARTICLE 44. PERMANENT STATUS

No employee's probationary period shall be extended without the employee being informed in writing prior to the expiration of such period. Unless notified in writing otherwise prior to expiration of his/her probationary period or extension thereof, the employee shall be granted permanent status immediately following such probationary period.

ARTICLE 45. PERSONAL SERVICES

No employee shall be required to perform services of a personal nature.

ARTICLE 46. PERSONNEL FILES

1. An employee, upon written request to or after prior arrangement with the State Bureau of Human Resources, or the appropriate official at his/her work location or in his/her agency, shall be permitted to review his/her personnel files. Such review shall take place during normal office hours and shall be conducted under the supervision of the appropriate records custodian or agency representative. An employee may review his/her personnel files at reasonable times during his/her regular work hours if such review does not require travel out of the normal work area. An employee shall be allowed to place in such file a response of reasonable length to anything contained therein which the employee deems to be adverse.

2. An employee's personnel file shall include, but not be limited to, all memoranda and documents relating to such employee which contain commendations, employee performance appraisals or ratings and records of training programs completed.

3. Upon request an employee shall be provided a copy of any or all materials in his/her personnel files provided that such copies shall be provided at the employee's expense. Copies of material added to the employee's personal file after the effective date of this Agreement shall be furnished at the State's expense and sent to each employee simultaneously with it being placed in his/her personnel file.

4. Upon request of an employee, records of reprimands and preventable accident reports shall be removed from personnel files after three (3) years from the date of the occurrence provided that the employee has had no further disciplinary action since that date. Upon request of an employee, records of suspensions and disciplinary demotions shall be removed from personnel files after five (5) years from the date of the occurrence provided that the employee has had no further disciplinary action since that date. However, records of disciplinary suspensions resulting from patient/client abuse, neglect or mistreatment shall not be removed from personnel files under the provisions of this paragraph 4.

ARTICLE 47. PROPERTY DAMAGE

The State shall continue to reimburse employees for personal property of reasonable value damaged, destroyed or stolen while in the performance of their duties in accordance with established procedures.

ARTICLE 48. RECLASSIFICATIONS

1. Definitions. For the purposes of this Agreement the following terms are defined as follows:

(a) Classification and Reclassification. Classification and reclassification are the assignment or reassignment, respectively, of a position or group of positions to an occupational classification which is appropriate for compensation and employment purposes.

(b) Allocation and Reallocation. Allocation and reallocation are the assignment or reassignment, respectively, of a classification to the appropriate grade in the compensation plan.

2. MSLEA may appeal to binding arbitration a determination of the Director of Human Resources on the classification, reclassification, allocation or reallocation of a position or classification. Such appeal shall be made within twenty-one (21) calendar days of the Director of Human Resources' determination. Arbitration cases will be heard chronologically, by date of appeal, unless the parties mutually agree otherwise. The parties agree to utilize the services of an arbitration panel. Subsequent selection of panel members, if necessary, shall be agreed to within sixty (60) days of the termination of an arbitrator. Arbitrators shall be experienced in job evaluation disputes. If the parties cannot agree on the selection of arbitrator(s), they shall seek the assistance of the American Arbitration Association or Labor Relations Connection (LRC). The parties shall share equally the costs