



# 129th MAINE LEGISLATURE

## SECOND REGULAR SESSION-2020

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Legislative Document

No. 2103

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H.P. 1498

House of Representatives, February 11, 2020

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

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Reported by Representative BAILEY of Saco for the Joint Standing Committee on Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph G.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

A handwritten signature in cursive script that reads "Robert B. Hunt".

ROBERT B. HUNT  
Clerk

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

2 **PART A**

3 **Sec. A-1. 1 MRSA §402, sub-§3, ¶C-1**, as enacted by PL 2011, c. 264, §1, is  
4 amended to read:

5 C-1. Information contained in a communication between a constituent and an elected  
6 official if the information:

7 (1) Is of a personal nature, consisting of:

8 (a) An individual's medical information of any kind, including information  
9 pertaining to diagnosis or treatment of mental or emotional disorders;

10 (b) Credit or financial information;

11 (c) Information pertaining to the personal history, general character or  
12 conduct of the constituent or any member of the constituent's immediate  
13 family; or

14 (d) Complaints, charges of misconduct, replies to complaints or charges of  
15 misconduct or memoranda or other materials pertaining to disciplinary  
16 action; or

17 ~~(e) An individual's social security number; or~~

18 (2) Would be confidential if it were in the possession of another public agency or  
19 official;

20 **Sec. A-2. 1 MRSA §402, sub-§3, ¶K**, as amended by PL 2003, c. 392, §1, is  
21 further amended to read:

22 K. Personally identifying information concerning minors that is obtained or  
23 maintained by a municipality in providing recreational or nonmandatory educational  
24 programs or services, ~~if the municipality has enacted an ordinance that specifies the~~  
25 ~~circumstances in which the information will be withheld from disclosure.~~ This  
26 paragraph does not apply to records governed by Title 20-A, section 6001 and does  
27 not supersede Title 20-A, section 6001-A;

28 **Sec. A-3. 1 MRSA §402, sub-§3, ¶M**, as amended by PL 2011, c. 662, §2, is  
29 further amended to read:

30 M. Records or information describing the architecture, design, access authentication,  
31 encryption or security of information technology infrastructure, systems and  
32 software, including records or information maintained to ensure government  
33 operations and technology continuity and to facilitate disaster recovery. Records or  
34 information covered by this paragraph may be disclosed to the Legislature or, in the  
35 case of a political or administrative subdivision, to municipal officials or board  
36 members under conditions that protect the information from further disclosure;

37 **Sec. A-4. 3 MRSA §997, sub-§1**, as enacted by PL 2001, c. 702, §2, is amended  
38 to read:

1           **1. Review and response.** Prior to the presentation of a program evaluation under  
2 this chapter to the committee by the office, the director of the evaluated state agency or  
3 other entity must have an opportunity to review a draft of the program evaluation report.  
4 Within 15 calendar days of receipt of the draft report, the director of the evaluated state  
5 agency or other entity may provide to the office comments on the draft report. If  
6 provided to the office by the comment deadline, the comments must be included in the  
7 final report when it is presented to the committee. Failure by the director of an evaluated  
8 agency or other entity to submit its comments on the draft report by the comment  
9 deadline may not delay the submission of a report to the committee or its release to the  
10 public.

11 All documents, writings, drafts, electronic communications and information transmitted  
12 pursuant to this subsection are confidential and may not be released to the public ~~prior to~~  
13 ~~the time the office issues its program evaluation report pursuant to subsection 3.~~ A  
14 person violating the provisions of this subsection regarding confidentiality is guilty of a  
15 Class E crime.

16           **Sec. A-5. 3 MRSA §997, sub-§3,** as enacted by PL 2001, c. 702, §2, is amended  
17 to read:

18           **3. Confidentiality.** ~~The director shall issue program evaluation reports, favorable or~~  
19 ~~unfavorable, of any state agency or other entity, and these reports are public records,~~  
20 ~~except that, prior to the release of a program evaluation report pursuant to subsection 2 or~~  
21 ~~the point at which a program evaluation is no longer being actively pursued, all papers,~~  
22 ~~physical and electronic records and correspondence and other supporting materials~~  
23 ~~comprising the working Working papers in the possession of the director or other entity~~  
24 ~~charged with the preparation of a program evaluation report an entity with which the~~  
25 ~~director has contracted for the conduct of program evaluations pursuant to section 995,~~  
26 ~~subsection 2 are confidential and exempt from disclosure pursuant to Title 1, chapter 13,  
27 ~~including disclosure to the Legislative Council or an agent or representative of the~~  
28 ~~Legislative Council. All other records or materials in the possession of the director or~~  
29 ~~other entity charged with the preparation of a program evaluation report under this~~  
30 ~~chapter an entity with which the director has contracted for the conduct of program~~  
31 ~~evaluations pursuant to section 995, subsection 2 that would otherwise be confidential or~~  
32 ~~exempt from disclosure are exempt from disclosure pursuant to the provisions of Title 1,~~  
33 ~~chapter 13. Prior to the release of a program evaluation report pursuant to subsection 2 or~~  
34 ~~the point at which a program evaluation is no longer being actively pursued, all papers,~~  
35 ~~physical and electronic records and correspondence and other supporting materials~~  
36 ~~comprising the working papers in the possession of the director or other entity charged~~  
37 ~~with the preparation of a program evaluation report are confidential and may not be~~  
38 ~~released or disclosed by the director to the Legislative Council or an agent or~~  
39 ~~representative of the Legislative Council. This subsection may not be construed to~~  
40 ~~prohibit or prevent public access to the records of a state agency or other entity in the~~  
41 ~~possession of the director that would otherwise be subject to disclosure pursuant to the~~  
42 ~~provisions of Title 1, chapter 13. The director shall refer requests for access to those~~  
43 ~~records directly to the state agency or other entity that is the official custodian of the~~  
44 ~~requested records, which shall respond to the request for public records.~~~~

1           **Sec. A-6. 3 MRSA §997, sub-§5**, as enacted by PL 2001, c. 702, §2, is amended  
2 to read:

3           **5. Confidentiality of working papers Disclosure to agency or entity subject to**  
4 **program evaluation.** Except as provided in this subsection, working papers are  
5 confidential pursuant to subsection 3 and may not be disclosed to any person. Prior to the  
6 release of the final program evaluation report, the director has sole discretion to disclose  
7 working papers to the state agency or other entity subject to the program evaluation when  
8 disclosure will not prejudice the program evaluation. After release of the final program  
9 evaluation report, working papers may be released as necessary to the state agency or  
10 other entity that was subject to the program evaluation under this chapter.

11           **Sec. A-7. 5 MRSA §4572, sub-§2, ¶C**, as enacted by PL 1995, c. 393, §13, is  
12 amended by amending subparagraph (2) to read:

13           (2) ~~Information obtained regarding the~~ Any medical condition or and disability  
14 information and history of the applicant is collected and maintained on separate  
15 forms and in separate medical files and is treated as a confidential medical  
16 record, except that:

17           (a) Supervisors and managers may be informed regarding necessary  
18 restrictions on the work or duties of the employee and necessary  
19 accommodations;

20           (b) First aid and safety personnel may be informed, when appropriate, if the  
21 disability might require emergency treatment; and

22           (c) Government officials investigating compliance with this Act are provided  
23 relevant information on request; and

24           **Sec. A-8. 5 MRSA §4572, sub-§2, ¶E**, as enacted by PL 1995, c. 393, §13, is  
25 amended to read:

26           E. A covered entity may conduct voluntary medical examinations, including  
27 voluntary medical ~~histories~~ and disability information and history, that are part of an  
28 employee health or wellness program available to employees at that work site. A  
29 covered entity may make inquiries into the ability of an employee to perform job-  
30 related functions. Information obtained under this paragraph regarding the medical  
31 ~~condition or~~ and disability information and history of an employee is subject to the  
32 requirements of paragraph C, subparagraphs (2) and (3).

33           **Sec. A-9. 5 MRSA §4573, sub-§2**, as amended by PL 1995, c. 393, §16, is  
34 further amended to read:

35           **2. Records.** After employment or admission to membership, to make a record of  
36 such features of an individual as are needed in good faith for the purpose of identifying  
37 ~~them~~ the individual, provided the record is intended and used in good faith solely for  
38 identification, and not for the purpose of discrimination in violation of this Act. Records  
39 ~~of features~~ regarding physical or mental disability that are collected must be collected and  
40 maintained on separate forms and in separate files and be treated as confidential records;

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**PART B**

**Sec. B-1. 1 MRSA §402, sub-§3, ¶E**, as repealed and replaced by PL 1989, c. 878, Pt. A, §2 and amended by PL 2003, c. 20, Pt. OO, §2 and affected by §4, is further amended to read:

E. Records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Community College System and the University of Maine System when the subject matter is confidential or otherwise protected from disclosure by statute, other law, legal precedent or privilege recognized by the courts of this State. The provisions of this paragraph do not apply to the boards of trustees and the committees and subcommittees of those boards, which are referred to in subsection 2, paragraph B;

**Sec. B-2. 1 MRSA §402, sub-§3, ¶J**, as amended by PL 2001, c. 675, §1, is further amended to read:

J. Working papers, including records, drafts and interoffice and intraoffice memoranda, used or maintained by any advisory organization covered by subsection 2, paragraph F, or any member or staff of that organization during the existence of the advisory organization. Working papers are public records if distributed ~~by a member~~ in a public meeting of the advisory organization;

**Sec. B-3. 1 MRSA §402, sub-§3, ¶O**, as corrected by RR 2009, c. 1, §1, is amended by amending subparagraph (1) to read:

(1) "Personal contact information" means ~~home~~ personal address, ~~home~~ telephone number, ~~home~~ facsimile number, ~~home~~ e-mail address ~~and personal~~, cellular telephone number ~~and personal~~, pager number and username, password and uniform resource locator for a personal social media account as defined in Title 26, section 615, subsection 4; and

**Sec. B-4. 1 MRSA §402, sub-§3, ¶U**, as amended by PL 2017, c. 118, §2, is further amended to read:

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

**Sec. B-5. 5 MRSA §244-E, sub-§3**, as enacted by PL 2009, c. 567, §1, is amended to read:

1           **3. Coordination with Office of Program Evaluation and Government**  
2 **Accountability and Attorney General; disclosure to state agencies.** The State Auditor  
3 may disclose information that is confidential under this section to the Director of the  
4 Office of Program Evaluation and Government Accountability and the Attorney General  
5 to ensure appropriate agency referral or coordination between agencies to respond  
6 appropriately to all complaints made under this section. The State Auditor may disclose  
7 information that is confidential under this section related to a complaint alleging fraud,  
8 waste, inefficiency or abuse to a department or agency that is the subject of a complaint  
9 to ensure that the department or agency can respond appropriately to the complaint. The  
10 department or agency shall maintain as confidential any information related to a  
11 complaint furnished by the State Auditor.

12           **Sec. B-6. 7 MRSA §2992-A, sub-§1, ¶C,** as amended by PL 2007, c. 597, §9  
13 and PL 2011, c. 657, Pt. W, §6, is further amended by amending subparagraph (2) to  
14 read:

15           (2) All meetings and records of the board are subject to the provisions of Title 1,  
16 chapter 13, subchapter 1, except that, by majority vote of those members present  
17 recorded in a public session, records and meetings of the board may be closed to  
18 the public when public disclosure of the subject matter of the records or meetings  
19 would adversely affect the competitive position of the milk industry of the State  
20 ~~or segments of that industry.~~ The Commissioner of Agriculture, Conservation  
21 and Forestry and those members of the Legislature appointed to serve on the joint  
22 standing committee of the Legislature having jurisdiction over agricultural,  
23 conservation and forestry matters have access to all material designated  
24 confidential by the board;

25           **Sec. B-7. 7 MRSA §2998-B, sub-§1, ¶C,** as amended by PL 2007, c. 597, §10  
26 and PL 2011, c. 657, Pt. W, §6, is further amended by amending subparagraph (2) to  
27 read:

28           (2) All meetings and records of the council are subject to the provisions of Title  
29 1, chapter 13, subchapter 1, except that, by majority vote of those members  
30 present recorded in a public session, records and meetings of the council may be  
31 closed to the public when public disclosure of the subject matter of the records or  
32 meetings would adversely affect the competitive position of the milk industry of  
33 the State ~~or segments of that industry.~~ The Commissioner of Agriculture,  
34 Conservation and Forestry and those members of the Legislature appointed to  
35 serve on the joint standing committee of the Legislature having jurisdiction over  
36 agricultural, conservation and forestry matters have access to all material  
37 designated confidential by the council;

38           **Sec. B-8. Public records exceptions and confidential records; drafting**  
39 **templates.** The Office of Policy and Legal Analysis, in consultation with the Office of  
40 the Revisor of Statutes and the Right To Know Advisory Committee, shall examine  
41 inconsistencies in statutory language related to the designation as confidential or not  
42 subject to public disclosure of information and records received or prepared for use in  
43 connection with the transaction of public or governmental business or containing  
44 information relating to the transaction of public or governmental business and shall

1 recommend standardized language for use in drafting statutes to clearly delineate what  
2 information is confidential and the circumstances under which that information may  
3 appropriately be released. On or before September 1, 2021, the Office of Policy and  
4 Legal Analysis shall submit a report with its recommendations to the Right To Know  
5 Advisory Committee.

6 **SUMMARY**

7 This bill implements the recommendations of the Right To Know Advisory  
8 Committee concerning public records exceptions as included in Appendix C of the  
9 Fourteenth Annual Report of the Right To Know Advisory Committee.

10 Part A implements statutory changes initially recommended by the Right To Know  
11 Advisory Committee in 2019 pursuant to its responsibility to review existing public  
12 records exceptions and included in L.D. 1511, "An Act To Implement the  
13 Recommendations of the Right To Know Advisory Committee Concerning Public  
14 Records Exceptions."

15 Part A eliminates specific protection under the Freedom of Access Act for social  
16 security numbers in the context of constituent communications because social security  
17 numbers are designated as not public records for all contexts.

18 Current law provides that personally identifying information concerning minors that  
19 is obtained or maintained by a municipality in providing recreational or nonmandatory  
20 educational programs or services is not a public record as long as the municipality has  
21 adopted an ordinance that protects the information from disclosure. Part A removes the  
22 requirement that a municipality adopt such an ordinance in order to protect the  
23 information concerning minors.

24 Current law provides a public records exception for records or information describing  
25 the architecture, design, access authentication, encryption or security of information  
26 technology infrastructure, systems and software. Part A amends the provision to  
27 specifically include records or information maintained to ensure government operations  
28 and technology continuity and to facilitate disaster recovery.

29 Part A amends the statutes governing the confidentiality of the working papers of the  
30 Office of Program Evaluation and Government Accountability to clarify that the working  
31 papers, whether in the possession of the office or an entity with which the office director  
32 has contracted, remain confidential even after the report is released to the public. It  
33 removes duplicative language that is already captured in the definition of working papers.

34 Part A amends the Maine Human Rights Act to update and clarify the language  
35 describing medical history and information about disabilities, as well as to update a  
36 reference to employee health and wellness programs.

37 Part B implements recommendations identified by the Right To Know Advisory  
38 Committee in 2019.

1 Four sections of Part B amend specific exceptions to the definition of public records  
2 in the Freedom of Access Act.

3 1. Part B amends the existing public records exceptions to clarify that records,  
4 working papers and interoffice and intraoffice memoranda used by or prepared for faculty  
5 and administrative committees of the Maine Maritime Academy, the Maine Community  
6 College System and the University of Maine System are confidential when the subject  
7 matter is confidential or otherwise protected from disclosure by statute, other law, legal  
8 precedent or privilege recognized by the courts of this State.

9 2. Part B amends the public records exceptions to clarify that working papers  
10 become public records once distributed in a public meeting of an advisory organization  
11 and not when distributed by an individual member of an advisory organization.

12 3. Part B amends the public records exceptions to provide that personal contact  
13 information concerning public employees protected as confidential includes a person's  
14 username, password and uniform resource locator for a personal social media account.

15 4. Part B amends the public records exceptions to make records related to a  
16 discharge of hazardous materials transported by a railroad company that poses a threat to  
17 public health, safety and welfare subject to public disclosure after that discharge.

18 Part B amends the public records exceptions under the laws governing the Office of  
19 the State Auditor to permit the State Auditor to share confidential information related to a  
20 complaint alleging fraud, waste, inefficiency or abuse with a department or agency that is  
21 the subject of a complaint to ensure that the department or agency can respond  
22 appropriately to the complaint. The department or agency is required to maintain the  
23 confidentiality of any information related to a complaint furnished by the State Auditor.

24 Part B amends the public records exceptions in the laws governing the Maine Dairy  
25 Promotion Board and the Maine Dairy and Nutrition Council to remove references to a  
26 particular segment or segments of the milk industry.

27 Part B directs the Office of Policy and Legal Analysis, in consultation with the Office  
28 of the Revisor of Statutes and the Right To Know Advisory Committee, to examine  
29 inconsistencies in statutory language related to the designation of information and records  
30 as confidential or not subject to public disclosure and to recommend standardized  
31 language for use in drafting statutes to clearly delineate what information is confidential  
32 and the circumstances under which that information may appropriately be released. The  
33 Office of Policy and Legal Analysis is required to submit a report with its  
34 recommendations to the Right To Know Advisory Committee on or before September 1,  
35 2021.