

RIGHT TO KNOW ADVISORY COMMITTEE

Monday, September 18, 2023
1:00 p.m.

Location: State House, Room 228 (Hybrid Meeting)
Public access also available through the Maine Legislature's livestream:
<https://legislature.maine.gov/Audio/#228>

1. Introductions
2. Election of Chair
3. Review duties and remote participation policy
4. Review and discussion of the Seventeenth Annual Report of the Right to Know Advisory Committee (January 2023) and actions related to those recommendations
5. Review of new public records exceptions and other FOAA-related laws enacted in 2023
6. Review of recent Maine Supreme Judicial Court decision
Human Rights Defense Center v. Maine County Commissioners Association Self-Funded Risk Management Pool, 2023 ME 56
7. Discussion of issues and topics for 2023
 - a. Review of existing public records exceptions in Titles 22 and 22-A
 - b. Continue discussion of use of radio encryption by law enforcement (from previous RTKAC report)
 - c. Letter from Judiciary Committee requesting input
 - d. Other suggested issues and topics?
 - e. Formation of subcommittees?
8. Public Comment: focused on suggested issues for RTKAC to consider in 2023
9. Confirm meetings schedule
10. Adjourn

Right to Know Advisory Committee

1 MRSA §411

Membership List as of August 29, 2023

Name	Representation
Rep. Erin Sheehan	House member of Judiciary Committee, appointed by the Speaker of the House
Sen. Anne Carney	Senate member of Judiciary Committee, appointed by the President of the Senate
Amy Beveridge	Representing broadcasting interests, appointed by the President of the Senate
Jonathan Bolton	Attorney General's designee
Vacant <i>[following passing of James Campbell]</i>	Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House
Justin Chenette	Representing the public, appointed by the President of the Senate
Lynda Clancy	Representing newspaper and other press interests, appointed by the President of the Senate
Linda Cohen	Representing municipal interests, appointed by the Governor
Julie Finn	Representing the Judicial Branch, designated by the Chief Justice of the Supreme Judicial Court
Betsy Fitzgerald	Representing county or regional interests, appointed by the President of the Senate
Chief Michael Gahagan	Representing law enforcement interests, appointed by the President of the Senate
Vacant <i>[following passing of Mal Leary]</i>	Representing broadcasting interests, appointed by the Speaker of the House
Kevin Martin	Representing state government interests, appointed by the Governor
Judy Meyer	Representing newspaper publishers, appointed by the Speaker of the House
Kim Monaghan	Representing the public, appointed by the Speaker of the House
Eric Stout	A member with broad experience in and understanding of issues and costs in multiple areas of information technology, appointed by the Governor
Cheryl Saniuk-Heinig	A member with legal or professional expertise in the field of data and personal privacy, appointed by the Governor
Victoria Wallack	Representing school interests, appointed by the Governor

§411. Right To Know Advisory Committee

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

[PL 2005, c. 631, §1 (NEW).]

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

A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate; [PL 2005, c. 631, §1 (NEW).]

B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House; [PL 2005, c. 631, §1 (NEW).]

C. One representative of municipal interests, appointed by the Governor; [PL 2005, c. 631, §1 (NEW).]

D. One representative of county or regional interests, appointed by the President of the Senate; [PL 2005, c. 631, §1 (NEW).]

E. One representative of school interests, appointed by the Governor; [PL 2005, c. 631, §1 (NEW).]

F. One representative of law enforcement interests, appointed by the President of the Senate; [PL 2005, c. 631, §1 (NEW).]

G. One representative of the interests of State Government, appointed by the Governor; [PL 2005, c. 631, §1 (NEW).]

H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House; [PL 2005, c. 631, §1 (NEW).]

I. One representative of newspaper and other press interests, appointed by the President of the Senate; [PL 2005, c. 631, §1 (NEW).]

J. One representative of newspaper publishers, appointed by the Speaker of the House; [PL 2005, c. 631, §1 (NEW).]

K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House; [PL 2005, c. 631, §1 (NEW).]

L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House; [PL 2015, c. 250, Pt. A, §1 (AMD).]

M. The Attorney General or the Attorney General's designee; [PL 2021, c. 313, §2 (AMD).]

N. One member with broad experience in and understanding of issues and costs in multiple areas of information technology, including practical applications concerning creation, storage, retrieval and accessibility of electronic records; use of communication technologies to support meetings, including teleconferencing and Internet-based conferencing; databases for records management and reporting; and information technology system development and support, appointed by the Governor; and [PL 2021, c. 313, §3 (AMD).]

O. One representative having legal or professional expertise in the field of data and personal privacy, appointed by the Governor. [PL 2021, c. 313, §4 (NEW).]

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

[PL 2021, c. 313, §§2-4 (AMD).]

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

A. Except as provided in paragraph B, members are appointed for terms of 3 years. [PL 2005, c. 631, §1 (NEW).]

B. Members who are Legislators are appointed for the duration of the legislative terms of office in which they were appointed. [PL 2005, c. 631, §1 (NEW).]

C. Members may serve beyond their designated terms until their successors are appointed. [PL 2005, c. 631, §1 (NEW).]

[PL 2005, c. 631, §1 (NEW).]

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

[PL 2005, c. 631, §1 (NEW).]

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

[PL 2005, c. 631, §1 (NEW).]

6. Duties and powers. The advisory committee:

A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws; [PL 2005, c. 631, §1 (NEW).]

B. Shall serve as the central source and coordinator of information about the freedom of access laws and the people's right to know. The advisory committee shall provide the basic information about the requirements of the law and the best practices for agencies and public officials. The advisory committee shall also provide general information about the freedom of access laws for a wider and deeper understanding of citizens' rights and their role in open government. The advisory committee shall coordinate the education efforts by providing information about the freedom of access laws and whom to contact for specific inquiries; [RR 2005, c. 2, §1 (COR).]

C. Shall serve as a resource to support the establishment and maintenance of a central publicly accessible website that provides the text of the freedom of access laws and provides specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. The website must include the contact information for agencies, as well as whom to contact with complaints and concerns. The website must also include, or contain a link to, a list of statutory exceptions to the public records laws; [RR 2005, c. 2, §1 (COR).]

D. Shall serve as a resource to support training and education about the freedom of access laws. Although each agency is responsible for training for the specific records and meetings pertaining to that agency's mission, the advisory committee shall provide core resources for the training, share best practices experiences and support the establishment and maintenance of online training as well as written question-and-answer summaries about specific topics. The advisory committee shall recommend a process for collecting the training completion records required under section 412, subsection 3 and for making that information publicly available; [PL 2007, c. 576, §1 (AMD).]

E. Shall serve as a resource for the review committee under subchapter 1-A in examining public records exceptions in both existing laws and in proposed legislation; [PL 2005, c. 631, §1 (NEW).]

F. Shall examine inconsistencies in statutory language and may recommend standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released; [PL 2005, c. 631, §1 (NEW).]

G. May make recommendations for changes in the statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and regional governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws and their underlying principles. The joint standing committee of the Legislature having jurisdiction over judiciary matters may report out legislation based on the advisory committee's recommendations; [PL 2005, c. 631, §1 (NEW).]

H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered; [PL 2005, c. 631, §1 (NEW).]

I. May conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records; [PL 2005, c. 631, §1 (NEW).]

J. Shall review the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public; and [PL 2005, c. 631, §1 (NEW).]

K. May undertake other activities consistent with its listed responsibilities. [PL 2005, c. 631, §1 (NEW).]

[PL 2007, c. 576, §1 (AMD).]

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

[PL 2005, c. 631, §1 (NEW).]

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

[PL 2005, c. 631, §1 (NEW).]

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

[PL 2005, c. 631, §1 (NEW).]

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

[PL 2005, c. 631, §1 (NEW).]

SECTION HISTORY

RR 2005, c. 2, §1 (COR). PL 2005, c. 631, §1 (NEW). PL 2007, c. 576, §1 (AMD). PL 2015, c. 250, Pt. A, §§1, 2 (AMD). PL 2021, c. 313, §§2-4 (AMD).

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Right to Know Advisory Committee Policy on Remote Participation

In accordance with Title 1, Section 403-B of the Maine Revised Statutes, it is the policy of the Right to Know Advisory Committee (“the Advisory Committee”) to allow Advisory Committee members to participate remotely in Advisory Committee meetings, including subcommittee meetings, under certain circumstances and using certain methods of remote participation.

1. Notice of Advisory Committee Meetings

The Advisory Committee will notify the public of the date, time and location of each Advisory Committee meeting on the Advisory Committee’s webpage, <https://legislature.maine.gov/right-to-know-advisory-committee>, and on the Maine Legislature’s calendar, <https://legislature.maine.gov/Calendar>. If applicable, the notice will specify the means by which members of the public may access the meeting remotely. Members of the public may also sign up to receive notices of upcoming meetings through email by subscribing to the interested parties list for the Advisory Committee at <https://lists.legislature.maine.gov/sympa/>. Notice of meetings will generally be provided at least one week before each meeting unless the Advisory Committee is meeting due to an emergency or urgent issue.

2. Remote Participation by Advisory Committee Members

Advisory Committee members are expected to be physically present for Advisory Committee meetings except when it is not practicable for a member to attend a meeting in person. Except as permitted by this Policy, only those Advisory Committee members who are physically present at the physical location of an Advisory Committee meeting may participate in the meeting.

3. Circumstances and Conditions Under Which Remote Participation is Permissible

A. Existence of an emergency or urgent issue.

- (1) If, as determined by the Advisory Committee chair, an emergency or urgent issue arises that requires the Advisory Committee to immediately schedule a meeting to address the emergency or urgent issue, one or more Advisory Committee members may participate in the meeting from a remote location.
- (2) If, as determined by the Advisory Committee chair, an emergency or urgent issue arises that requires the entire Advisory Committee to meet remotely, the Advisory Committee chair may authorize the Advisory Committee to conduct a virtual meeting without a physical location. Advisory Committee members would participate in such a virtual meeting from remote locations, and the public would be permitted to attend remotely.

B. Circumstances in which physical presence of Advisory Committee member is not practicable. An Advisory Committee member may participate in an Advisory Committee meeting from a remote location under the following circumstances:

- (1) When the Advisory Committee member has an illness or other physical or mental condition that causes the member to face significant difficulties traveling to and attending the Advisory Committee meeting or that is contagious and would pose a substantial health risk to others if the Advisory Committee member attended in person, or when the Advisory Committee member does not satisfy health or safety screening requirements applicable to the noticed meeting location;
- (2) When there is a reasonable chance that the Advisory Committee member’s health or safety will be compromised by attending the Advisory Committee meeting in person;

- (3) When the Advisory Committee member will be absent from the State at the time of a meeting and face significant difficulties traveling to and attending the Advisory Committee meeting in person;
- (4) When the time or distance for an Advisory Committee member to travel one way to a meeting exceeds the lesser of 60 minutes or 60 miles;
- (5) When the Advisory Committee member's residence is on an island that is not connected to the mainland by a bridge;
- (6) When events or occurrences out of the control of the Advisory Committee member or the effects of such events or occurrences make travel by the Advisory Committee member to the physical location not practicable; or
- (7) When an emergency or urgent issue, as determined by the Advisory Committee chair, requires the Advisory Committee to meet remotely.

If an Advisory Committee member determines it is not practicable for them to participate in a meeting in person, the member shall notify the Advisory Committee staff as soon as possible. If the Advisory Committee chair determines that an emergency or urgent issue requires the Advisory Committee to meet remotely, the Chair shall notify Advisory Committee staff as soon as possible.

4. Form of Remote Participation

When one or more Advisory Committee members will be participating remotely or the Advisory Committee will be conducting a virtual meeting, the Advisory Committee will schedule a meeting using an internet-based virtual meeting platform (e.g., Zoom) that provides simultaneous audio and video reception for all participants. The Advisory Committee will provide access to the virtual meeting to Advisory Committee members and the public.

5. Responsibilities of Advisory Committee Members Who Participate Remotely

Any Advisory Committee member who participates remotely must:

- A. Have the technology, including Internet access, in their remote location sufficient to be seen and heard during the meeting and participate in the same capacity as those members physically present and be responsible for any costs associated with obtaining and maintaining the technology and equipment necessary to participate remotely.
- B. Maintain decorum to the same extent as those Advisory Committee members physically present. The Advisory Committee Chair, in consultation with the Advisory Committee Administrator and after an oral or written warning, may deny an Advisory Committee member the option to participate remotely pursuant to this Policy if the member has failed to comply with this subsection on more than one occasion.

6. Procedures Applicable When Advisory Committee Members Participate Remotely

- A. A member of the Advisory Committee who participates from a remote location in accordance with this Policy is present for purposes of a quorum and voting.
- B. If any Advisory Committee member is participating in an Advisory Committee meeting from a remote location, all votes taken by the Advisory Committee during the meeting must be taken by roll call vote that can be seen and heard by the other members of the Advisory Committee and the public.

C. If any Advisory Committee member is participating from a remote location, the Advisory Committee shall make all non-confidential documents and other materials, electronic or otherwise, considered by it during the meeting available to the public who attend by remote means to the same extent customarily available to members of the public who attend Advisory Committee meetings in person, so long as no additional costs are incurred by the Advisory Committee.

7. Accessibility to the Public

It is the policy of the Advisory Committee to make its meetings as accessible as possible to all members of the public. In addition to remote attendance as permitted under section 4, members of the public may appear at a location designated in the public notice to attend any Advisory Committee meeting. When an emergency or urgent issue requires the Advisory Committee to meet remotely and the Advisory Committee chair determines that allowing any in-person attendance is not practicable, remote attendance by the public must be permitted.

The Advisory Committee will provide reasonable accommodations as necessary to allow members of the public with disabilities to access its meetings. A member of the public seeking a particular accommodation for a disability should request this by contacting the Advisory Committee staff at (207) 287-1670.

This Policy was adopted by the Advisory Committee on **October 26, 2021** following a public hearing held on **October 26, 2021**.

**RIGHT TO KNOW ADVISORY COMMITTEE
RECOMMENDATIONS FROM 17th ANNUAL REPORT**

For September 18, 2023

- Enact legislation to clarify responsibility of responders to requests for public records related to time estimates (1 member opposed)**

LD 1208, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Time Estimates for Responding to Public Records Requests*, was enacted as Public Law 2023, ch. 155. (See attached.) The “actual cost for time spent” language RTKAC suggested for 1 M.R.S. §408-A(8)(B) was not adopted. As enacted, the law also adds language allowing agencies to charge for devices, like thumb drives, given to the requester when fulfilling the record request.

- Amend certain provisions of law in Titles 23, 24 and 24-A relating to previously-enacted public records exceptions**

LD 1207, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Public Records Exceptions*, was enacted as Public Law 2023, ch. 123. (See attached.)

- Enact legislation to revise the membership of the Archives Advisory Board to include a member representing journalists, newspapers, broadcasters and other news media interests**

LD 133 was enacted as Public Law 2023, ch. 24, *An Act to Include a Representative of Newspaper and Other Press Interests on the Archives Advisory Board and to Require the Member Representing a Historical Society to Have Expertise in Archival Records*. (See attached.) As enacted, the law requires that the existing board member representing a state or local historical society have expertise in archival records and that the new member proposed by RTKAC have expertise in journalism.

- For FOAA training purposes, recommend that the Public Access Ombudsman review the Freedom of Access website and FOAA training materials to include guidance on best practices for conducting remote meetings to optimize public participation**

Staff communicated this recommendation to the Public Access Ombudsman.

- Encourage the Maine Municipal Association, the Maine County Commissioners Association and the Maine School Management Association to develop guidance documents related to remote meetings**

Staff shared a copy of the 17th Annual Report with representatives of these organizations and directed their attention to this recommendation.

- Enact legislation to amend the law related to remote participation**

LD 1322, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Remote Participation*, was enacted as Public Law 2023, ch. 158. (See attached.)

In addition, LD 1425, *An Act to Strengthen Freedom of Access Protections by Allowing Remote Meetings to Be Recorded*, was also enacted as Public Law 2023, ch. 185. (See attached.) This law requires that members of the public be allowed to record a meeting with remote participation using the electronic platform used to conduct the meeting, as long as additional costs are not incurred and the recording does not interfere with the orderly conduct of the proceeding.

- Recommend that the Legislature direct funding to provide grants and technical assistance to all public bodies authorized to adopt remote participation policies, including counties, municipalities, school boards and regional or other political subdivisions**

No specific action taken by the Legislature during First Regular Session or First Special Session.

- Recommend a statutory change and the revision of the record retention schedules applicable to state, county, and municipal employee personnel records (1 member opposed; 1 member abstained)**

**RIGHT TO KNOW ADVISORY COMMITTEE
RECOMMENDATIONS FROM 17th ANNUAL REPORT**

For September 18, 2023

LD 1397, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees*, included the language recommended by RTKAC that would prevent a collective bargaining agreement or employment contract from overriding the records retention schedule established by the State Archivist and would require that records related to disciplinary actions be retained for a period of 20 years, with potentially shorter retention periods for less serious conduct and potentially longer retention periods for law enforcement disciplinary actions reflecting on the credibility of the officer. But, these provisions were each removed before the bill was enacted as Public Law 2023, chapter 159. (See attached.)

Enact legislation to amend state and county employee personnel records statutes to align with the municipal employee personnel record statute

The enacted version of LD 1397, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees*, Public Law 2023, chapter 159, implements this recommendation. (See attached.)

Enact legislation to ensure that responses to FOAA requests for “personnel records” include records that have been removed from the personnel file and are otherwise retained

LD 1397, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees*, included the language recommended by RTKAC to implement this recommendation. But, this language was removed before the bill was enacted as Public Law 2023, chapter 159. (See attached.)

Recommend that the State Archivist, the Maine Archives Advisory Board and legislative proposals use standardized language related to record retention in schedules developed for public bodies and consider the inclusion of definitions of terms such as “remove,” “purge” and “destroy” when they are used in record retention schedules

LD 1397, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees*, included the language recommended by RTKAC to implement this recommendation. Although this language was removed before the bill was enacted as Public Law 2023, chapter 159 (see attached), the State Archivist indicated a willingness to continue working on this issue.

Request information from municipal, county and state law enforcement agencies regarding the prevalence and frequency of use of encrypted radio channels

Staff requested that municipal, county and state law enforcement agencies participate in a survey regarding the prevalence and frequency of the use of encrypted radio channels. Several responses were received, each indicating that the responding law enforcement agencies were not using encryption. Anecdotal evidence suggests that encrypted radio channels have been used only in the Lewiston/Auburn area.

Recommend that the Judiciary Committee, in consultation with the Criminal Justice and Public Safety Committee, continue to discuss providing expanded access to participation in the legislative process by residents of correctional facilities, including the barriers that must be resolved to allow participation

No action taken by Judiciary Committee during First Regular Session or First Special Session.

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND TWENTY-THREE

S.P. 72 - L.D. 133

An Act to Include a Representative of Newspaper and Other Press Interests on the Archives Advisory Board and to Require the Member Representing a Historical Society to Have Expertise in Archival Records

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

Sec. 1. 5 MRSA §96, sub-§2, as enacted by PL 2019, c. 50, §12, is amended to read:

2. Members. The Archives Advisory Board consists of 9 10 voting members with expertise in the administrative, fiscal, legal and historical value of records. Voting members of the board must represent the spectrum of records in the State and are appointed by the Secretary of State as follows:

- A. Two public members representing the interests of public access to government records, recommended by a public interest group;
- B. Two members from municipal or county government with expertise in local government records, recommended by local or county government entities;
- C. One member with expertise in archival records representing a state or local historical society, recommended by a state or local historical society;
- D. One member with expertise in the legal requirements of records retention and public records law, recommended by the Attorney General;
- E. One member with expertise in the State's fiscal requirements of records retention, recommended by the Governor;
- F. One member from the executive branch with expertise in executive branch records, recommended by the Governor; ~~and~~
- G. One member from the Department of Administrative and Financial Services, Office of Information Technology with expertise in electronic records, electronic records management systems and emerging technology related to electronic records, recommended by the Governor; ~~and~~
- H. One member with expertise in journalism representing newspaper and other press interests, recommended by a statewide professional news organization.

The State Archivist serves as a nonvoting member.

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND TWENTY-THREE

H.P. 767 - L.D. 1207

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

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

Sec. 1. 24 MRSA §2302-A, sub-§3, as enacted by PL 1987, c. 168, §1, is amended to read:

3. Confidentiality. Any information provided pursuant to this section ~~shall~~ may not identify the names of patients. If patient names are identified in information provided pursuant to this section, the patient names are confidential.

Sec. 2. 24 MRSA §2510, sub-§1, as amended by PL 2011, c. 524, §§9 and 10, is further amended to read:

1. Confidentiality; exceptions. Any reports, information or records received and maintained by the board pursuant to this chapter, including any material received or developed by the board during an investigation ~~shall be~~ is confidential, except for information and data that is developed or maintained by the board from reports or records received and maintained pursuant to this chapter or by the board during an investigation and that does not identify or permit identification of any patient or physician; provided that the board may disclose any confidential information only:

- A. In a disciplinary hearing before the board or in any subsequent trial or appeal of a board action or order relating to such disciplinary hearing;
- B. To governmental licensing or disciplinary authorities of any jurisdiction or to any health care providers or health care entities located within or outside this State that are concerned with granting, limiting or denying a physician's privileges, but only if the board includes along with the transfer an indication as to whether or not the information has been substantiated by the board;
- C. As required by section 2509, subsection 5;
- D. Pursuant to an order of a court of competent jurisdiction;
- E. To qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any patient or physician is first deleted; or

F. To other state or federal agencies when the information contains evidence of possible violations of laws enforced by those agencies.

Sec. 3. 24 MRSA §2510, sub-§2, as enacted by PL 1977, c. 492, §3, is amended to read:

2. Confidentiality of orders in disciplinary proceedings. Orders of the board relating to disciplinary action against a physician, including orders or other actions of the board referring or scheduling matters for hearing, ~~shall not be~~ are not confidential.

Sec. 4. 24 MRSA §2604, as corrected by RR 2015, c. 1, §25, is amended to read:

§2604. Records of superintendent

For the purpose of evaluation of policy provisions, rate structures and the arbitration process and for recommendations of further legislation, the Superintendent of Insurance shall retain the information and maintain the files in the form and for such period as the superintendent determines necessary. The superintendent shall maintain the reports filed in accordance with this section, and all data or information derived therefrom that identifies or permits identification of the insured or insureds or the incident or occurrences for which a claim was made, as ~~strictly~~ confidential records. Data and information derived from reports filed in accordance with this section that do not identify or permit identification of the insured or insureds or the incident or occurrence for which a claim was made may be released by the superintendent or otherwise made available to the public. Reports made to the superintendent and records thereof kept by the superintendent are not subject to discovery and are not admissible in any trial, civil or criminal, other than proceedings brought before or by the board.

Sec. 5. 24-A MRSA §6907, sub-§1, as enacted by PL 2003, c. 469, Pt. A, §8, is amended to read:

1. Financial information. Any personally identifiable financial information, supporting data or tax return of any person obtained by Dirigo Health under this chapter is confidential ~~and not open to public inspection.~~

Sec. 6. 24-A MRSA §6907, sub-§2, as enacted by PL 2003, c. 469, Pt. A, §8, is amended to read:

2. Health information. Health information obtained by Dirigo Health under this chapter that is covered by the federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, 110 Stat. 1936 or information covered by chapter 24 or Title 22, section 1711-C is confidential ~~and not open to public inspection.~~

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND TWENTY-THREE

H.P. 768 - L.D. 1208

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

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

Sec. 1. 1 MRSA §408-A, sub-§3, as amended by PL 2015, c. 317, §1, is further amended to read:

3. Acknowledgment; clarification; time estimate; cost estimate. The agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within 5 working days of receiving the request and may request clarification concerning which public record or public records are being requested. Within a reasonable time of receiving the request, the agency or official shall provide a good faith, nonbinding estimate of the time frame within which the agency or official will comply with the request, ~~as well as~~ and a cost estimate as provided in subsection 9. The agency or official shall make a good faith effort to fully respond to the request within the estimated time frame. For purposes of this subsection, the date a request is received is the date a sufficient description of the public record is received by the agency or official at the office responsible for maintaining the public record. An agency or official that receives a request for a public record that is maintained by that agency but is not maintained by the office that received the request shall forward the request to the office of the agency or official that maintains the record, without willful delay, and shall notify the requester that the request has been forwarded and that the office to which the request has been forwarded will acknowledge receipt within 5 working days of receiving the request.

Sec. 2. 1 MRSA §408-A, sub-§8, ¶C, as enacted by PL 2011, c. 662, §5, is amended to read:

C. The agency or official may charge for the actual cost to convert a public record into a form susceptible of visual or aural comprehension or into a usable format and for the actual cost of a device used to store the public record if the storage device will be given to the requester by the agency or official.

Sec. 3. 1 MRSA §408-A, sub-§9, as enacted by PL 2011, c. 662, §5, is amended to read:

9. Estimate. The agency or official having custody or control of a public record subject to a request under this section shall provide to the requester an estimate of the time ~~necessary to complete~~ frame within which the agency or official will comply with the request and of the total cost as provided by subsection 8. If the estimate of the total cost is greater than ~~\$30~~ \$50, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than \$100, subsection 10 applies.

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND TWENTY-THREE

H.P. 837 - L.D. 1322

**An Act to Implement the Recommendations of the Right To Know Advisory
Committee Concerning Remote Participation**

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

Sec. 1. 1 MRSA §403-B, sub-§2, as amended by PL 2021, c. 611, §§1 and 2 and c. 666, §§1 to 3, is further amended to read:

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

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

(1) If a public body has not adopted a policy authorizing remote methods of participation under this section and if the chair of the body determines that an emergency or urgent issue exists that prevents the public body from meeting in person to adopt a policy, the chair may call a meeting of the body in which the members may participate by remote methods. Notice of the meeting must include information about how the public can participate in the meeting and the proposed policy or instructions on how to obtain a copy of the proposed policy in advance of the meeting. Once the meeting is convened, the members shall vote on whether to support the chair's determination that an emergency or urgent issue exists that prevents the public body from meeting in person.

(2) If 2/3 of the members vote in support of the chair's determination under subparagraph (1), after an opportunity for hearing, the members may vote on whether to adopt a policy authorizing remote methods of participation in public proceedings of the body under this section;

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

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

E. Notice of the proceeding must be provided in accordance with section 406. When the public may attend by remote methods pursuant to paragraphs C and D, the notice must include the means by which members of the public may access the proceeding using remote methods. The notice must also identify a location for members of the public to attend in person. The body may limit public attendance at a proceeding solely to remote methods if there is an emergency or urgent situation that requires the body to meet only by remote methods;

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

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

H. The public body must make all documents and other materials considered by the public body available, electronically or otherwise, to the public who attend by remote methods to the same extent customarily available to members of the public who attend the proceedings of the public body in person, as long as additional costs are not incurred by the public body. The public body must make the proposed policy regarding remote participation available in advance of the meeting if meeting remotely under paragraph A, subparagraphs (1) and (2).

~~The policy adopted pursuant to this subsection applies to a board or committee that is within the jurisdiction of the public body, unless the board or committee adopts its own policy under this subsection.~~

Sec. 2. 1 MRSA §403-B, sub-§2-A is enacted to read:

2-A. Blanket remote participation policies; exceptions. The applicability of a policy adopted by a public body under subsection 2 to other public bodies within the jurisdiction of the public body is governed by this subsection.

A. Except as provided in paragraphs B and C, a remote participation policy adopted by a public body pursuant to subsection 2 applies to a board, committee or subcommittee that is within the jurisdiction of the public body, unless the board, committee or subcommittee adopts its own policy under subsection 2.

B. A remote participation policy adopted pursuant to subsection 2 by the county commissioners of the county, the municipal officers of a municipality or the officers of any regional or other political subdivision applies to all public bodies subject to this subchapter that are within the jurisdiction of the county, municipality or regional or other political subdivision, respectively, unless the county commissioners, municipal officers or other officers of the regional or other political subdivision specifically authorize a public body under their jurisdiction to adopt its own remote participation policy.

C. Nothing in this subsection limits the right of a school board to choose to adopt or to choose not to adopt a remote participation policy under subsection 2.

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND TWENTY-THREE

H.P. 892 - L.D. 1397

**An Act to Implement the Recommendations of the Right To Know Advisory
Committee Concerning Records of Disciplinary Actions Against Public
Employees**

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

Sec. 1. 5 MRSA §7070, sub-§2, ¶E, as amended by PL 1997, c. 770, §1, is further amended to read:

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. 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 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;

Sec. 2. 30-A MRSA §503, sub-§1, ¶B, as amended by PL 2019, c. 451, §2, is further amended by amending subparagraph (5) to read:

(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

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND TWENTY-THREE

H.P. 921 - L.D. 1425

An Act to Strengthen Freedom of Access Protections by Allowing Remote Meetings to Be Recorded

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

Sec. 1. 1 MRSA §403-B, sub-§2, ¶G, as enacted by PL 2021, c. 290, §1, is amended to read:

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

Sec. 2. 1 MRSA §403-B, sub-§2, ¶H, as amended by PL 2021, c. 611, §2, is further amended to read:

H. The public body must make all documents and other materials considered by the public body available, electronically or otherwise, to the public who attend by remote methods to the same extent customarily available to members of the public who attend the proceedings of the public body in person, as long as additional costs are not incurred by the public body. The public body must make the proposed policy regarding remote participation available in advance of the meeting if meeting remotely under paragraph A, subparagraphs (1) and (2); ~~and~~

Sec. 3. 1 MRSA §403-B, sub-§2, ¶I is enacted to read:

I. When the public may attend a public proceeding by remote methods, the public body must allow members of the public to record the proceeding remotely using the same electronic platform that is used to conduct the proceeding remotely as long as the electronic platform allows participants other than the host to record the proceeding remotely, additional costs are not incurred by the public body and the recording of the proceeding does not interfere with the orderly conduct of the proceeding.

**New Public Records Exception Reviews ~ Judiciary Committee
131st Legislature, First Regular and First Special Sessions**

LD	Policy Committee	Subject	Statute	Review Date	Judiciary Committee Recommendation	Final Disposition
23	JUD	Personally identifying information in Department of Public Safety's electronic citation database and electronic warning database.	29-A M.R.S. § 2601(3-A)	4/12/23	Approved	P.L. 2023, ch. 55
636	HHS	Personally identifying information or health information created or obtained in connection with the DHHS licensing or quality assurance activities.	22 M.R.S. § 1717(15)	6/15/23	Approved; but recommended more narrow tailoring of the proposed exception	P.L. 2023, ch. 309 <i>(includes recommended narrowing of the exception)</i>
922	VLA	Candidate's place of residence contained within a primary petition or a nominating petition.	21-A M.R.S. § 336(3) & § 355(3)	6/15/23	Disapproved	P.L. 2023, ch. 389 <i>(with substantially rewritten public records exception)</i>
1453	HCIFS	National criminal history information from the FBI for applicants for multistate licenses under the Physical Therapy Licensure Compact.	32 M.R.S. § 3121(1)(F)	6/15/23	Approved	P.L. 2023, ch. 317
1492	CJPS	Identity of a person who submits a good faith complaint about the Maine Information and Analysis Center.	25 M.R.S. § 1802(4)(C) [in the bill but moved to § 1802(3)(C) in the amendment]	6/15/23	Approved	Carried over on the Special Appropriations Table

**New Public Records Exception Reviews ~ Judiciary Committee
131st Legislature, First Regular and First Special Sessions**

LD	Policy Committee	Subject	Statute	Review Date	Judiciary Committee Recommendation	Final Disposition
1603	JUD	Registry of the names, phone numbers and other contact information for attorneys who represent incarcerated persons, when registry is in the possession of MCILS, the Department of Corrections, jails or correctional facilities.	4 M.R.S. § 1804(3)(P); 34-A M.R.S. § 1208(A)(1); & 34-A M.R.S. § 1402(14)(A)(1).	5/30/23	Approved	P.L. 2023, ch. 394
1704	SLG	Preincarceration street address, race, age, gender and veteran status of incarcerated individuals provided by Department of Corrections to the Legislative Apportionment Commission.	21-A M.R.S. § 1208(3)	6/15/23	Approved	P.L. 2023, ch. 373
1880	VLA	Personal contact information including the home or business address, telephone number and e-mail address of applicants for an adult use cannabis establishment license and employees.	28-B M.R.S. § 114	6/20/23	Approved; but recommended not including business addresses as confidential	P.L. 2023, ch. 396 <i>(includes change recommended by Judiciary Committee)</i>
1909	ENR	Proprietary information submitted to the Department of Environmental Protection under the commingling cooperative requirements of the container redemption program laws.	38 M.R.S. § 3107(3-B)(H)	6/15/23	Approved	P.L. 2023, ch. 482

**New Public Records Exception Reviews ~ Judiciary Committee
131st Legislature, First Regular and First Special Sessions**

LD	Policy Committee	Subject	Statute	Review Date	Judiciary Committee Recommendation	Final Disposition
1964	LBHS	Medical or health information required to be submitted to the administrator under the paid family medical leave benefits program.	26 M.R.S. § 850-D(4)	6/15/23	Approved	Died on adjournment; however, the substance of LD 1964 (including the new public records exception) was incorporated in the biennial budget, P.L. 2023, ch. 412, Part AAA

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2023 WL 5355356

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Judicial Court of Maine.

HUMAN RIGHTS DEFENSE CENTER

v.

MAINE COUNTY COMMISSIONERS ASSOCIATION SELF-FUNDED RISK MANAGEMENT POOL

Docket: Ken-22-420

|

Argued: June 8, 2023

|

Decided: August 22, 2023

Synopsis

Background: Records requester filed complaint against county and Maine County Commissioners Association alleging violations of Freedom of Access Act (FOAA), arising from failure to comply with request for records relating to settlement of federal lawsuit as to treatment of prisoner at county jail. The Superior Court, Kennebec County, [Daniel Billings, J.](#), granted requester's motion to amend complaint to add Maine County Commissioners Association Self-Funded Risk Management Pool as party, granted requester's motion to dismiss as to county and Commissioners Association, denied Risk Pool's motion to dismiss as to relation back of complaint, and, following a bench trial, entered judgment in favor of requester, finding that Risk Pool wrongfully refused to release responsive documents and did so in bad faith, warranting award of attorney's fees, [2022 WL 18670269](#). Risk Pool appealed.

Holdings: The Supreme Judicial Court, [Horton, J.](#), held that:

[1] response from Risk Pool to letter from requester's counsel, and not response to requester's prior email, triggered 30-day period to file appeal in Superior Court alleging violation of FOAA;

[2] proposed amendment related back to original timely complaint;

[3] as matter of first impression, Risk Pool engaged in "bad faith," within meaning of FOAA, warranting award of attorney fees; and

[4] requester was "substantially prevailing party," within meaning of FOAA, as required to be entitled to award of attorney fees.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion for Attorney's Fees.

West Headnotes (21)

[1] **Records** 🔑 Scope, Standard, and Extent of Further Review

Supreme Judicial Court reviews trial court's factual findings for clear error and its interpretation of Freedom of Access Act (FOAA) de novo. 1 Me. Rev. Stat. § 400 et seq.

[2] **Records** 🔑 Time for judicial review of administrative decisions

Freedom of Access Act's (FOAA) 30-day period to appeal to Superior Court runs from date on which requesting party learns of agency's violation of FOAA in form of wrongful refusal, denial, or failure to comply with FOAA. 🚩 1 Me. Rev. Stat. § 409(1).

[3] **Records** 🔑 Time for judicial review of administrative decisions

Response from Maine County Commissioners Association Self-Funded Risk Management Pool stating that there were no other documents responsive to request for any documents showing payments made to settle federal lawsuit relating to treatment of prisoner at county jail in response to follow-up letter from requester's counsel, and not Risk Pool's response to requester's prior email clarifying that request was for documentation of "\$30,000 amount" of settlement that had been cited in newspaper article, was Risk Pool's final response that triggered 30-day period for requester to file appeal alleging violation of Freedom of Access Act (FOAA); Risk Pool's reply to email did not answer whether it had documentation that showed the \$30,000 amount, such that requester was fully justified in attempting to ensure, through counsel's letter, that Risk Pool understood what it was requesting, and counsel's letter indicated that requester did not interpret Risk Pool's prior response as its final response. 🚩 1 Me. Rev. Stat. § 409(1).

[4] **Records** 🔑 Judicial Proceedings Concerning Access or Disclosure


As a matter of Freedom of Access Act (FOAA) procedure, when an agency plainly is not interpreting a request to mean what the requester intends, further efforts to clarify both the scope of the request and the completeness of the response are to be encouraged before judicial remedies are invoked. 🚩 1 Me. Rev. Stat. § 409(1).

[5] **Records** 🔑 Time for judicial review of administrative decisions


Proposed amendment to complaint to add Maine County Commissioners Association Self-Funded Risk Management Pool as party related back to original timely complaint against county and Maine County Commissioners Association alleging violations of Freedom of Access Act (FOAA), arising from failure to comply with request for records relating to settlement of federal lawsuit regarding treatment of prisoner at county jail, for purposes of 30-day period to bring appeal for violation of FOAA; Risk Pool was aware of action almost as soon as it was brought and did not assert that delay resulted in any prejudice, Risk Pool did not proffer any reason other than mistake for requester's initial failure to include Risk Pool as defendant, and requester filed motion to amend a week after Association filed answer identifying Risk Pool as separate entity. 🚩 1 Me. Rev. Stat. § 409(1); Me. R. Civ. P. 15(a), 15(c)(2, 3).

[6] **Records** 🔑 Costs and Fees

Maine County Commissioners Association Self-Funded Risk Management Pool acted in "bad faith," within meaning of Freedom of Access Act (FOAA), in responding to records request, as would support award of attorney fees, in action by requester who originally sought "any documents" and "payment documentation" relating to settlement of federal lawsuit regarding treatment of prisoner at county jail; instead of facilitating requester's access to responsive material, Risk Pool mischaracterized the request as being different and narrower than it was, namely, as relating to settlement agreement, ignored requester's efforts to correct the mischaracterization, and deliberately withheld access

to payment-related documents in its possession that clearly were responsive to the request and should have been disclosed.  1 Me. Rev. Stat. § 409(4).

[7] **Records**  Costs and Fees

Records requester was “substantially prevailing plaintiff,” within meaning of Freedom of Access Act (FOAA), as required to be entitled to award of attorney fees, based on finding that Maine County Commissioners Association Self-Funded Risk Management Pool acted in bad faith in responding to requests regarding records relating to settlement of federal lawsuit about treatment of prisoner in county jail; requester demonstrated that litigation was necessary and had causative effect on disclosure of requested information, and without court intervention, which included bench trial, records requester would not have been able to obtain access to documents it requested.  1 Me. Rev. Stat. § 409(4).

[8] **Appeal and Error**  Attorney Fees

Supreme Judicial Court reviews trial court's award of attorney fees for abuse of discretion, mindful that trial court is in best position to observe unique nature and tenor of litigation as it relates to request for attorney fees.

[9] **Statutes**  Plain Language; Plain, Ordinary, or Common Meaning

Statutes  Relation to plain, literal, or clear meaning; ambiguity

In interpreting statute, Supreme Judicial Court looks to plain meaning of statute, interpreting its language to avoid absurd, illogical, or inconsistent results and attempting to give all of its words meaning.

[10] **Statutes**  Dictionaries

Plain meaning of language of statute may be determined by its dictionary definition.

[11] **Statutes**  Purpose and intent; determination thereof

Statutes  Plain, literal, or clear meaning; ambiguity


If statute is ambiguous, Supreme Judicial Court may look to legislative intent and legislative history.






[12] **Records**  General disclosure requirements; freedom of information

Central purpose of Freedom of Access Act (FOAA) is to ensure the public's right to hold the government accountable. 1 Me. Rev. Stat. § 400 et seq.

[13] **Records**  Right of Access in General

Records  Making and Use of Copies

Freedom of Access Act (FOAA) establishes a general right of the public to inspect and copy public records.  1 Me. Rev. Stat. § 408-A.

- [14] **Records** ➡ On judicial review of administrative decisions
Because a Freedom of Access Act (FOAA) appeal can include the taking of evidence, although the process is described statutorily as an “appeal,” the trial court actually conducts a trial de novo and does not act in an appellate capacity.
- [15] **Records** ➡ Presumptions, inferences, and burden of proof
On a Freedom of Access Act (FOAA) appeal to the Superior Court, the burden of proof to demonstrate just and proper cause is on the agency that denied inspection of the records.  1 Me. Rev. Stat. § 409(1).
- [16] **Costs, Fees, and Sanctions** ➡ Costs and fees
In general, attorney fees may not be awarded as a sanction in the absence of significant bad faith on the part of a litigant or his agents.
- [17] **Costs, Fees, and Sanctions** ➡ Meritless or Bad-Faith Litigation
“Bad faith” in litigation, as would support an award of attorney fees, can consist of dishonest conduct, but it can also include intentional acts or omissions that thwart the legal process and cause harm to other parties to the action.
- [18] **Courts** ➡ Construction of federal Constitution, statutes, and treaties
The Supreme Judicial Court looks to the federal Freedom of Information Act (FOIA) for guidance in interpreting the Maine Freedom of Information Act (FOAA).  5 U.S.C.A. § 552; 1 Me. Rev. Stat. § 400.
- [19] **Records** ➡ In general; necessity
Agency’s duty to apply Freedom of Access Act (FOAA) in manner that promotes FOAA’s purposes calls for agency to respond to FOAA request with purpose of facilitating requester’s timely access to requested records unless agency has good-faith basis for withholding or delaying access. 1 Me. Rev. Stat. §§ 401,  408-A.
- [20] **Records** ➡ Costs and Fees
Agency’s failure to respond to Freedom of Access Act (FOAA) request does not in itself establish bad faith, as would support an award of attorney fees.  1 Me. Rev. Stat. § 409(4).
- [21] **Records** ➡ Costs and Fees
Proof that an agency has acted in the opposite manner to facilitating access to its public records—by responding to a request dishonestly, for example, or by deliberately and affirmatively impeding or thwarting valid requests for access—may be sufficient to prove bad faith, as would support an award of attorney fees.  1 Me. Rev. Stat. § 409(4).

Attorneys and Law Firms

Jeffrey T. Edwards, Esq. (orally), Preti Flaherty Beliveau & Pachios LLP, Portland, for appellant Maine County Commissioners Association Self-Funded Risk Management Pool

Carol J. Garvan, Esq. (orally), Zachary L. Heiden, Esq., and Anahita D. Sotoohi, Esq., American Civil Liberties Union of Maine Foundation, Portland; and Loree Stark, Esq., Human Rights Defense Center, Boynton Beach, Florida, for appellee Human Rights Defense Center

Shelby Leighton, Esq., and Jaqueline Aranda Osorno, Esq., Public Justice, Washington, D.C., for amici curiae Maine Association of Criminal Defense Lawyers, Maine Freedom of Information Coalition, Maine Press Association, New England First Amendment Coalition, and Public Justice

Panel: STANFILL, C.J., and MEAD, HORTON, CONNORS, LAWRENCE, and DOUGLAS, JJ.

Opinion

HORTON, J.

*1 [¶1] The Maine County Commissioners Association Self-Funded Risk Management Pool (Risk Pool) appeals from a judgment of the Superior Court (Kennebec County, *Billings, J.*) awarding attorney fees to the Human Rights Defense Center (HRDC), based on the court's ruling after an evidentiary hearing that the Risk Pool had refused in bad faith to comply with HRDC's request for records pursuant to the Maine Freedom of Access Act (FOAA), 1 M.R.S. §§ 400-414 (2023).

[¶2] This case presents the first occasion for us to consider what constitutes “bad faith” for purposes of FOAA's fee-shifting provision.¹ 1 M.R.S. § 409(4). Because the Risk Pool never denied or explicitly refused to comply with HRDC's request, we must consider the circumstances under which a public entity's failure to comply with a FOAA request rises to the level of a bad-faith refusal to comply. *See id.* Here, the Risk Pool's failure to produce any of its records in response to HRDC's FOAA request, despite HRDC's repeated efforts to clarify what should already have been clear, can only be viewed as, in the court's words, “deceptive and abusive of the FOAA process.” We agree with the court that the Risk Pool's response constituted a bad-faith refusal and we affirm the judgment.

I. BACKGROUND

A. Factual Background

[¶3] “The following facts are drawn from the court's findings, which are supported by the record” *Dubois v. Dep't of Agric., Conservation and Forestry*, 2018 ME 68, ¶ 2, 185 A.3d 743.

[¶4] HRDC is a non-profit organization that collects information from law enforcement and corrections agencies and other public entities in furtherance of its mission to advocate for change in the criminal justice system. The Risk Pool is an unincorporated, public, self-funded pool that provides risk management services to Maine counties under a contract with the Maine County Commissioners Association. *See 30-A M.R.S. §§ 2251-2256 (2023)* (authorizing public, self-funded pools). Malcolm Ulmer, the Risk Pool's director of operations, maintains a claim file on each claim handled by the Risk Pool.

[¶5] At some point before June 18, 2021, HRDC became aware, through a *Portland Press Herald* article, of the settlement of a federal lawsuit against Kennebec County alleging maltreatment of a prisoner at the Kennebec County Jail. The article indicated that the action was settled by the County's payment of \$30,000 to the plaintiff. HRDC submitted a FOAA request to Kennebec County for documents showing payments related to the action and settlement. The County's attorney responded by sending HRDC copies of pleadings filed in the matter and a copy of a settlement agreement. However, the settlement agreement

indicated only that the settlement was in consideration of “One Dollar and Other Good and Valuable Consideration” and did not mention the \$30,000 payment cited in the article.

*2 ¶6 On June 18, 2021, HRDC submitted via email to the Risk Pool what it designated as a FOAA request for “any documents showing payments disbursed to Jonathan Afanador and/or attorney John Wall[] by Kennebec County, Nathan Willhoite, and/or the Maine County Commissioners Association Self-Funded Risk Management Pool from January 1, 2021 to present. This includes but is not limited to payment documentation related to the following case: Afanador v. Kennebec County Case No: 1:20-cv-00235-JDL.”

¶7 Ulmer, on behalf of the Risk Pool, responded via email the same day, stating that he understood that the County's attorney had already provided a copy of the settlement agreement to HRDC and noting that the settlement amount was \$30,000. HRDC replied promptly to point out that the settlement agreement did not indicate the dollar amount of the settlement and asked, “[d]o you have any documentation that shows the \$30,000 amount?” The Risk Pool responded with a message saying only, “See attached,” attaching the *Portland Press Herald* article stating that the case settled for \$30,000, and not any Risk Pool document from his claim file. On June 21, 2021, HRDC sent another follow-up email asking for “a copy of the actual agreement that shows \$30,000.” On the same day, the Risk Pool replied that the release that HRDC received from the attorney for Kennebec County was the “actual agreement” and that “I have already advised you that the settlement amount is \$30,000.”

¶8 On July 2, 2021, counsel for the American Civil Liberties Union of Maine (ACLU of Maine) sent a letter via email to the Risk Pool and the attorney for Kennebec County indicating that the ACLU of Maine was representing HRDC in connection with its FOAA request and stating that “Kennebec County's FOAA response thus far is not in compliance with the FOAA.” The letter pointed out that the settlement agreement produced by Kennebec County's attorney did not contain the dollar amount paid in settlement and that “[n]o documents were produced that show that \$30,000 was paid to Mr. Afanador, nor were any documents produced showing payment to any attorneys involved in the case.” The letter pointed out that “documents that are potentially responsive to the FOAA request include accounting records, a copy of a cover letter that was sent with payment, emails between individuals in county government and officials in the sheriff's office, or memoranda suggesting that officers not engage in whatever conduct led to the filing of the litigation in the first place.” The letter concluded by noting that HRDC would treat a failure to provide all responsive documents as a final denial or refusal pursuant to [1 M.R.S. § 409\(1\)](#). The Risk Pool responded by stating that “it is [its] understanding that the signed release provided to [HRDC] by [Kennebec County] is the only settlement release document.” The Risk Pool's reply did not indicate whether the Risk Pool possessed what HRDC had requested—“payment documentation.”

B. Procedural History

¶9 Pursuant to FOAA's appeal procedure, HRDC filed a complaint in the Superior Court on July 27, 2021, against Kennebec County and the Maine County Commissioners Association. *See* [1 M.R.S. § 409\(1\)](#). Kennebec County responded on September 7, 2021, by asserting that it had provided HRDC with all responsive documents in its possession. *See id.* (“The agency or official shall file a statement of position explaining the basis for denial”). The Maine County Commissioners Association filed its statement of position on September 27, 2021, asserting that HRDC should have named the Risk Pool as a party instead of the Maine County Commissioners Association. *See* [1 M.R.S. § 409\(1\)](#). HRDC filed a motion to amend its complaint on October 4, 2021, to add the Risk Pool as a party. HRDC's motion explained that it did not initially name the Risk Pool as a party because it believed that the Risk Pool was part of the Maine County Commissioners Association. On October 25, 2021, the court granted HRDC's motion to amend. The order did not address Kennebec County's or the Maine County Commissioners Association's statements of positions. On November 15, 2021, the Risk Pool filed an answer and affirmative defenses to HRDC's amended complaint, asserting that HRDC's appeal was untimely, that all responsive documents were produced, and that any documents withheld are privileged. On January 24, 2022, HRDC moved to dismiss its appeal as to Kennebec County and the Maine County Commissioners Association. The court granted the motion on February 1, 2022, leaving the Risk Pool as the only defendant. *See* [M.R. Civ. P. 41\(a\)\(2\)](#).

*3 ¶10 On March 1, 2022, the Risk Pool filed a motion to dismiss pursuant to [M.R. Civ. P. 12\(b\)\(6\)](#), asserting that HRDC had failed to meet the FOAA requirement that an appeal be filed within thirty calendar days of the agency's "refusal, denial, or failure" to comply with a FOAA request. ¶ 1 M.R.S. § 409(1). HRDC's memorandum in response to the Risk Pool's motion contended that its joinder of the Risk Pool related back to its timely initial complaint because HRDC would have named the Risk Pool initially but for a mistake, and the mistake caused no prejudice because the Risk Pool was aware of the action from its outset. *See* [M.R. Civ. P. 15\(c\)\(3\)](#) (relation back of the joinder of a party). HRDC included an affidavit of counsel explaining why HRDC had not initially joined the Risk Pool in its appeal. The court denied the motion to dismiss, agreeing with HRDC that "there was good reason for [HRDC's] confusion" about whether the Risk Pool was a distinct legal entity, and ruled that HRDC's joinder of the Risk Pool in its amended complaint related back to its initial complaint.

¶11 The court held a bench trial on September 29, 2022. The court heard testimony from the executive director of HRDC and Ulmer. During the trial, the Risk Pool acknowledged that it did in fact have "payment documentation" (the same term used in HRDC's FOAA request) for the settlement and had still not provided it to HRDC. When pressed on why documents showing the amount of payment had still not been provided, the Risk Pool claimed that HRDC had not requested them.

¶12 After the hearing, HRDC and the Risk Pool filed written closing arguments. By its decision, dated December 1, 2022, the court noted that Ulmer had testified "that he was in possession of a claim file and financial records that contained documentation that showed the Risk Pool had paid \$30,000 to settle [the] claim, but did not release those documents because he did not believe that HRDC had specifically requested them." The court found that the Risk Pool "is in possession of responsive documents and wrongfully refused to release them" and ordered that the Risk Pool disclose all responsive documents "showing that it paid \$30,000 to settle the case." The court granted HRDC's request for attorney fees based on what it found was the Risk Pool's bad-faith response to HRDC's request, because "the Risk Pool's behavior was so deceptive and abusive of the FOAA process." *See* ¶ 1 M.R.S. § 409(4). The court found that

[a]t every stage of the FOAA process, the Risk Pool and Mr. Ulmer adopted bizarre interpretations of HRDC's request to avoid disclosure, despite knowing from the beginning that they were in possession of responsive documents. This type of obfuscation and prevarication undermines the basic purpose of the FOAA, which is to enable the public to be informed about what their government is up to.


¶13 The Risk Pool filed a motion to alter or amend the final judgment on December 15, 2022. [M.R. Civ. P. 52\(b\)](#). On February 6, 2023, the court denied the Risk Pool's motion for amended findings of fact without comment. The Risk Pool timely appealed from the final judgment. [M.R. App. P. 2B\(c\)\(1\)](#); 14 M.R.S. § 1851 (2023).

II. DISCUSSION

[1] ¶14 "[W]e review the trial court's factual findings for clear error and its interpretation of FOAA de novo." *Fairfield v. Me. State Police*, 2023 ME 12, ¶ 9, 288 A.3d 1220. The Risk Pool raises two arguments on appeal. It contends that HRDC's appeal was untimely and that the court erred in awarding attorney fees to HRDC.

A. Timeliness of HRDC's Appeal


[2] ¶15 Under FOAA "[a]ny person aggrieved by a refusal or denial to inspect or copy a record or the failure to allow the inspection or copying of a record ... may appeal ... within 30 calendar days of the receipt of the written notice of refusal, denial,

or failure”  1 M.R.S. § 409(1). The thirty-day period runs from the date on which the requesting party learns of an agency's violation of FOAA in the form of a wrongful refusal, denial, or failure to comply with FOAA. See *Palmer v. Portland Sch. Comm.*, 652 A.2d 86, 89 (Me. 1995) (“A Freedom of Access claim must be filed within thirty days of discovering a possible violation.”).

*4 [¶16] The Risk Pool asserts that HRDC's appeal was untimely for two alternate reasons. First, the Risk Pool argues that the thirty-day period began to run on June 21, 2021, because “the undisputed evidence is that [Ulmer] had responded to the request as much as he was going to by June 21, 2021,” and HRDC's filing of its original complaint on July 27, 2021, was therefore untimely. Second, the Risk Pool argues that even if HRDC's initial complaint were deemed timely, it failed to name the Risk Pool as a defendant, and the court erred in deciding that the addition of the Risk Pool as a defendant in HRDC's amended complaint related back to the filing of the initial complaint. See *M.R. Civ. P. 15*. We disagree on both points.

[3] [¶17] The Risk Pool's contention that its June 21, 2021, response to HRDC's request triggered the appeal period because HRDC should have taken it as the Risk Pool's final response is unfounded. HRDC's initial June 18, 2021, request was for “any documents showing payments” made to settle the case, and its clarification sought “documentation that shows the \$30,000 amount.” The Risk Pool's June 21, 2021, reply did not indicate whether the Risk Pool possessed such documents. HRDC was fully justified in attempting to ensure, through its counsel's July 2, 2021, follow-up letter, that the Risk Pool understood what HRDC was requesting.

[4] [¶18] Moreover, as a matter of FOAA procedure, when an agency plainly is not interpreting a request to mean what the requester intends, further efforts to clarify both the scope of the request and the completeness of the response are to be encouraged before judicial remedies are invoked. To accept the Risk Pool's argument would likely spawn avoidable litigation by causing requesters to file appeals prematurely when further dialogue might resolve disagreements. Here, HRDC's counsel's July 2 letter pointing out that “Kennebec County's FOAA response *thus far* is not in compliance with the FOAA” shows that HRDC did not interpret Ulmer's June 21, 2021, message as a final response. (Emphasis added.) The Risk Pool's July 6, 2021, response to that letter stated that there were no other documents responsive to HRDC's request. It was that response that triggered the appeal deadline, and HRDC's complaint, filed on July 27, 2021, was therefore timely.

[5] [¶19] The Risk Pool's contention that HRDC's amended complaint adding the Risk Pool as a party should not relate back to the initial complaint is equally unpersuasive. *Maine Rule of Civil Procedure 15(a)* allows for changes of parties or the naming of parties. “An amended pleading relates back to the date of the original pleading where the claim asserted in the amended pleading ‘arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.’”  *Frame v. Millinocket Reg'l Hosp.*, 2013 ME 104, ¶ 13, 82 A.3d 137 (quoting *M.R. Civ. P. 15(c)(2)*). The “relation back” provision of *Rule 15(c)(3)* further provides:

An amendment of a pleading relates back to the date of the original pleading when ... (3) the amendment changes the party or the naming of the party against whom a claim is asserted if ... the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

[¶20] The Risk Pool does not deny that it was aware of the action almost as soon as it was brought and does not contend that the delay in its joinder resulted in any prejudice. Instead, the Risk Pool argues that HRDC's failure to name the Risk Pool was not a mistake and that HRDC unduly delayed moving to amend its complaint to add the Risk Pool as a defendant. However, the Risk Pool does not contend that HRDC knew, as of when it filed its initial complaint, that the Risk Pool was separate from Kennebec County and the Maine County Commissioners Association, and it does not proffer any reason other than a mistake for HRDC's

initial failure to include the Risk Pool as a defendant. As to delay, we have indicated that a party seeking leave to amend must act without unreasonable delay once the party becomes aware of grounds for a motion to amend. *See John W. Goodwin, Inc. v. Fox*, 642 A.2d 1339, 1341 (Me. 1994). Here, HRDC filed its motion to add the Risk Pool as a defendant a week after the Maine County Commissioners Association filed its answer identifying the Risk Pool as a separate entity. The court did not err in concluding that the joinder related back to HRDC's timely initial filing.

B. The Award of Attorney Fees Based on a Finding of Bad Faith


*5 [6] [7] [8] [¶21] On appeal, the Risk Pool argues that the court erred in awarding HRDC attorney fees based on the court's finding that the Risk Pool acted in bad faith in responding to HRDC's FOAA request.² *See* 1 M.R.S. § 409(4) (stating that in an appeal from an agency's refusal of a records request or failure to allow inspection or copying of a record, “the court may award reasonable attorney's fees and litigation expenses to the substantially prevailing plaintiff ... if the court determines that the refusal ... was committed in bad faith”). We review *de novo* the court's interpretation of the statute, and “we review the court's factual findings for clear error.” *Blue Sky W., LLC v. Me. Revenue Servs.*, 2019 ME 137, ¶ 24, 215 A.3d 812. “We review a court's award of attorney fees for an abuse of discretion, mindful that the trial court is in the best position to observe the unique nature and tenor of the litigation as it relates to a request for attorney fees.” *Wilmington Tr., N.A. v. Berry*, 2020 ME 95, ¶ 21, 237 A.3d 167 (quotation marks omitted).

[9] [10] [11] [¶22] In interpreting a statute, this Court “look[s] to the plain meaning of the statute, interpreting its language to avoid absurd, illogical, or inconsistent results and attempting to give all of its words meaning.” *Jackson Lumber & Millwork Co. v. Rockwell Homes, LLC*, 2022 ME 4, ¶ 10, 266 A.3d 288. The plain meaning of the language may be determined by its dictionary definition. *Id.* ¶ 13. If a statute is ambiguous, this Court may look to legislative intent and legislative history. *Id.* ¶ 10.

[12] [13] [14] [15] [¶23] We have not previously construed the FOAA attorney fee provision. Our starting point is in the purposes and framework of the statute. In enacting FOAA, the Legislature mandated that the statute “shall be liberally construed and applied to promote its underlying purposes.” 1 M.R.S. § 401. “FOAA's central purpose [is to ensure] the public's right to hold the government accountable.” *Blethen Me. Newspapers, Inc. v. State*, 2005 ME 56, ¶ 32, 871 A.2d 523. In furtherance of that purpose, FOAA “establishes a general right of the public to inspect and copy public records.” *Doyle v. Town of Falmouth*, 2014 ME 151, ¶ 8, 106 A.3d 1145; *see* 1 M.R.S. § 408-A. When an agency denies or refuses a request or fails to allow access to a requested record, an aggrieved party may “appeal” to the Superior Court. 1 M.R.S. § 409(1). Because a FOAA “appeal” can include the taking of evidence, “although the process is described statutorily as an appeal, the trial court actually conducts a trial *de novo* and does not act in an appellate capacity.” *Blue Sky W., LLC*, 2019 ME 137, ¶ 24, 215 A.3d 812 (quotation marks omitted). “On such a challenge, the burden of proof to demonstrate just and proper cause is on the agency that denied inspection of the records.” *Id.* “If a court, after a review, with taking of testimony and other evidence as determined necessary, determines such refusal, denial, or failure was not for just and proper cause, the court shall enter an order for disclosure.” 1 M.R.S. § 409(1).

*6 [16] [17] [18] [¶24] The Legislature did not include a definition of “bad faith” in the FOAA statute,³ and we have not been previously called on to define the term for purposes of FOAA. A legal dictionary defines the term as “[d]ishonesty of belief, purpose, or motive.” *Bad faith*, Black's Law Dictionary (11th ed. 2019). Our jurisprudence on attorney fee awards provides guidance on what can constitute bad faith. In general, “attorney fees may not be awarded as a sanction in the absence of significant bad faith on the part of a litigant or his agents,” *Linscott v. Foy*, 1998 ME 206, ¶ 17, 716 A.2d 1017. In *Linscott*, we upheld a fee award, noting that a litigant's “obstinate refusal to comply with a valid order” of court was “undertaken in bad faith” and was “abusive of the court and other parties.” *Id.* ¶ 18. In *Cimenian v. Lumb*, we upheld a fee award, observing that “bringing an action without ‘even the slightest merit,’ [and] testifying untruthfully about matters relevant to the issues being litigated is bad faith.” 2008 ME 107, ¶ 13, 951 A.2d 817; *cf. Aubuchon v. Blaisdell*, 2023 ME 5, ¶¶ 16-20, 288 A.3d 805 (awarding attorney fees as a sanction for a “frivolous and contumacious appeal”). These decisions convey that bad faith

in litigation can consist of dishonest conduct, but it can also include intentional acts or omissions that thwart the legal process and cause harm to other parties to the action.

[19] [20] [21] [¶25] A similar analysis applies to identifying bad faith in the context of FOAA. The legislative mandate for the FOAA to be “liberally construed and applied to promote its underlying purposes,” 1 M.R.S. § 401, applies as forcefully to responding agencies as it does to courts. An agency's duty to apply FOAA in a manner that promotes the Act's purposes calls for the agency to respond to a FOAA request with the purpose of facilitating the requester's timely access to the requested records unless the agency has a good-faith basis for withholding or delaying access. An agency's failure to respond does not in itself establish bad faith. See  *Campbell v. Town of Machias*, 661 A.2d 1133, 1135 (Me. 1995) (“[T]he failure to respond to a Maine Freedom of Access request within the time frame set forth in the statute does not constitute a waiver of the right to withhold the documents at issue. Such a failure to respond is deemed a denial of the request for the documents.”). On the other hand, proof that an agency has acted in the opposite manner to facilitating access to its public records—by responding to a request dishonestly, for example, or by deliberately and affirmatively impeding or thwarting valid requests for access—may be sufficient to prove bad faith.

[¶26] Here, HRDC's June 18, 2021, FOAA request was quite specific:

[A]ny documents showing payments disbursed to Jonathan Afanador and/or attorney John Wall[] by Kennebec County, Nathan Willhoite, and/or the Maine County Commissioners Association Self-Funded Risk Management Pool from January 1, 2021 to present. This includes but is not limited to payment documentation related to the following case: Afanador v. Kennebec County Case No: 1:20-cv-00235-JDL.

[¶27] At the hearing, the following exchange occurred between Ulmer on behalf of the Risk Pool and HRDC's counsel:

Q : You have a claim file for the Afanador matter?

A: That's correct.

Q: And the claim file has material related to the settlement of the Afanador matter?

*7 A: Yes.

Q: Including the amount that was paid to Mr. Afanador?

A: Yes.

Q: And you didn't turn over any of those documents in that claim file, did you?

A: Those documents were not requested in the context of this case.

[¶28] In a previous series of questions, Ulmer was asked whether the Risk Pool had ever provided HRDC with copies of cancelled checks, payment receipts, ledgers, or “any documents showing how much money was paid to Mr. Afanador,” and he answered each question by saying that such documents had never been requested. When HRDC asked, “You have documents like that in your possession, though, don't you?” Ulmer answered, “I have documents that would reflect the payment.”

[¶29] The Risk Pool appears to proffer two reasons for failing to provide the documents in its possession reflecting payment of the settlement, neither of which withstands even cursory examination. First, the Risk Pool claims that it thought HRDC wanted

a settlement agreement that showed the dollar amount of the settlement and that it did not produce anything because there is no such document. HRDC's FOAA request, however, was not for a settlement agreement; it sought "any documents showing payments." When the Risk Pool initially responded by mentioning the settlement agreement that HRDC had already obtained, HRDC reiterated its original request by asking, "Do you have any documentation that shows the \$30,000 amount?" The Risk Pool ignored this reiteration of HRDC's already clear request and then ignored a subsequent reiteration in the ACLU of Maine's July 2, 2021, letter, which asked for documents reflecting the settlement amount, such as "accounting records, a copy of a cover letter that was sent with payment, emails between individuals in county government and officials in the sheriff's office, or memoranda suggesting that officers not engage in whatever conduct led to the filing of the litigation in the first place." Instead of providing the "documents that would reflect the payment" that Ulmer testified were in his claim file, the Risk Pool's July 6, 2021, response to HRDC's letter mischaracterized HRDC's FOAA request as being for a release or agreement: "[I]t is my understanding that the signed release provided to [HRDC] by [Kennebec County] is the only settlement release document and I also advised [HRDC] of the settlement amount."

[¶30] The Risk Pool's second explanation for producing nothing in response to HRDC's request appears to be that HRDC did not request the payment documents in Ulmer's claim file in terms specific enough to suit the Risk Pool. Ulmer testified that his claim file included documents reflecting payment, yet he testified that cancelled checks, payment receipts, and "documents showing how much money was paid to Mr. Afanador" were never requested. HRDC obviously had no way to know whether the settlement amount was paid by check, wire transfer, credit or debit card, an online payment platform, or some other method of payment. HRDC's request for "any documents showing payments disbursed to Jonathan Afanador" and "any documentation" clearly covered documents in the various categories that the Risk Pool claims were not requested.

*8 [¶31] Instead of facilitating HRDC's access to the responsive material in the Risk Pool's possession, the Risk Pool did the very opposite, while pretending to facilitate: it mischaracterized HRDC's FOAA request as being different and narrower than it was, ignored HRDC's efforts to correct the mischaracterization, and deliberately withheld access to documents in its possession that clearly were responsive to the request and should have been disclosed. As we learned at oral argument, although the court ordered the Risk Pool to provide HRDC with the responsive documents, it still has not done so because it continues to maintain that they were not requested. We agree with the court that "the Risk Pool's behavior was so deceptive and abusive of the FOAA process" that an award of attorney fees based on bad faith is warranted.


The entry is:

Judgment affirmed.

All Citations

--- A.3d ----, 2023 WL 5355356, 2023 ME 56

Footnotes

- 1 Based on the novel-for-us issue presented, we granted a motion by the Maine Association of Criminal Defense Lawyers, Maine Freedom of Information Coalition, Maine Press Association, New England First Amendment Coalition, and Public Justice, for leave to file a joint amicus brief. Their joint brief supports an affirmance of the judgment.
- 2 To be awarded attorney fees under FOAA, HRDC must have also been a "substantially prevailing plaintiff."  1 M.R.S. § 409(4) (2023). The Risk Pool has not appealed the court's finding that it violated FOAA or the order requiring the Risk Pool to disclose all the responsive documents in its possession. See *Citizens for a Strong N.H., Inc. v. Internal Revenue Serv.*, No. 14-cv-487-LM, 2016 U.S. Dist. LEXIS 128118 at *8-10, 2016 WL 5108035, at *3 (D.N.H. Sept. 20,

2016). We conclude that HRDC is a substantially prevailing plaintiff, because HRDC demonstrated that the litigation was “necessary and had a causative effect on the disclosure of the requested information.” [Maynard v. Cent. Intel. Agency](#), 986 F.2d 547, 568 (1st Cir. 1993) (quotation marks omitted). Without court intervention, HRDC would not have been able to obtain access to the documents it requested. See [id.](#) at 568-69.

- 3 Likewise, the legislation that preceded the statute did not provide any definition for bad faith but noted that the Superior Court had discretion to award attorney fees. J. Standing Comm. on Judiciary, Legis. Doc. 679, 124th Leg., 1st Sess., at 21 (Me. 2009). Although we look to the federal Freedom of Information Act (FOIA) for guidance in interpreting the Maine FOAA, [Campbell v. Town of Machias](#), 661 A.2d 1133, 1136 (Me. 1995), the term “bad faith” does not appear in the federal statute. FOIA permits courts to award attorney fees against the Government if the requesting party “has substantially prevailed.” [5 U.S.C.A. § 552\(a\)\(4\)\(E\)\(i\) \(2023\)](#) (Westlaw through Pub. L. No. 118-10) (“The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.”).

**Public Records Exceptions For Review by RTKAC in 2023:
Exceptions in Title 22**

REF No.	STATUTORY CITATION	DESCRIPTION
1	22 MRSA §17, sub-§7	Title 22, section 17, subsection 7, relating to records of child support obligors
2	22 MRSA §42, sub-§5	Title 22, section 42, subsection 5, relating to DHHS records containing personally identifying medical information
3	22 MRSA §261, sub-§7	Title 22, section 261, subsection 7, relating to records created or maintained by the Maternal and Infant Death Review Panel
4	22 MRSA §264, sub-§8	Title 22, section 264, subsection 8, relating to records held by the coordinator of the Aging and Disability Mortality Review Panel
5	22 MRSA §664, sub-§1	Title 22, section 664, subsection 1, relating to State Nuclear Safety Program facility licensee books and records
6	22 MRSA §666, sub-§3	Title 22, section 666, subsection 3, relating to the State Nuclear Safety Program concerning the identity of a person providing information about unsafe activities, conduct or operation or license violation
7	22 MRSA §811, sub-§6	Title 22, section 811, subsection 6, relating to hearings regarding testing or admission concerning communicable diseases
8	22 MRSA §815, sub-§1	Title 22, section 815, subsection 1, relating to communicable disease information
9	22 MRSA §824	Title 22, section 824, relating to persons having or suspected of having communicable diseases
10	22 MRSA §832, sub-§3	Title 22, section 832, subsection 3, relating to hearings for consent to test for the source of exposure for a blood-borne pathogen
11	22 MRSA §1064	Title 22, section 1064, relating to immunization information system
*12	22 MRSA §1065, sub-§3	Title 22, section 1065, subsection 3, relating to manufacturer and distributor reports on distribution of influenza immunizing agents
13	22 MRSA §1233	Title 22, section 1233, relating to syphilis reports based on blood tests of pregnant women
14	22 MRSA §1317-C, sub-§ 3	Title 22, section 1317-C, subsection 3, relating to information regarding the screening of children for lead poisoning or the source of lead exposure
15	22 MRSA §1413	Title 22, section 1413, relating to information that directly or indirectly identifies individuals included in amyotrophic lateral sclerosis (ALS) registry
16	22 MRSA §1494	Title 22, section 1494, relating to occupational disease reporting
*17	22 MRSA §1555-D, sub-§ 1	Title 22, section 1555-D, subsection 1, relating to lists maintained by the Attorney General of known unlicensed tobacco retailers
18	22 MRSA §1596	Title 22, section 1596, relating to abortion and miscarriage reporting
19	22 MRSA §1597-A, sub-§6	Title 22, section 1597-A, subsection 6, relating to a petition for a court order consenting to an abortion for a minor
*20	22 MRSA §1696-D	Title 22, section 1696-D, relating to the identity of chemical substances in use or present at a specific location if the substance is a trade secret
*21	22 MRSA §1696-F	Title 22, section 1696-F, relating to the identity of a specific toxic or hazardous substance if the substance is a trade secret

*Statute Repealed since last review in 2015—no RTKAC action needed

^Recently enacted by 131st Legislature after review by JUD Committee

**Public Records Exceptions For Review by RTKAC in 2023:
Exceptions in Title 22**

REF No.	STATUTORY CITATION	DESCRIPTION
22	22 MRSA §1711-C, sub-§2	Title 22, section 1711-C, subsection 2, relating to hospital records concerning health care information pertaining to an individual
23	22 MRSA §1714-E, sub-§5	Title 22, section 1714-E, subsection 5, relating to department records regarding determination of credible allegation of MaineCare fraud
^23-A	22 MRSA §1717, sub-§15	<i>Title 22, section 1717, subsection 15, relating to personally identifying information or health information created or obtained in connection with DHHS licensing or quality assurance activities</i>
24	22 MRSA §1816, sub-§2	Title 22, section 1816, subsection 2, paragraph B, relating to survey findings of health care accrediting organization, including deficiencies and work plans, of hospitals reported to DHHS
25	22 MRSA §1828	Title 22, section 1828, relating to Medicaid and licensing of hospitals, nursing homes and other medical facilities and entities
*26	22 MRSA §1848, sub-§1	Title 22, section 1848, subsection 1, relating to documents and testimony given to Attorney General under Hospital and Health Care Provider Cooperation Act
27	22 MRSA §2140, sub-§17	Title 22, section 2140, subsection 17, relating to information collected by DHHS regarding compliance with Maine Death with Dignity Act
28	22 MRSA §2153-A, sub-§1	Title 22, section 2153-A, subsection 1, relating to information provided to the Department of Agriculture by the US Department of Agriculture, Food Safety and Inspection Service
29	22 MRSA §2153-A, sub-§2	Title 22, section 2153-A, subsection 2, relating to information provided to the Department of Agriculture by the US Food and Drug Administration
*30	22 MRSA §2425, sub-§8	Title 22, section 2425, subsection 8, paragraph A, relating to information submitted by qualifying and registered patients under the Maine Medical Use of Marijuana Act
*31	22 MRSA §2425, sub-§8	Title 22, section 2425, subsection 8, paragraph B, relating to information submitted by primary caregivers and physicians under the Maine Medical Use of Marijuana Act
*32	22 MRSA §2425, sub-§8	Title 22, section 2425, subsection 8, paragraph C, relating to list of holders of registry identification cards under the Maine Medical Use of Marijuana Act
*33	22 MRSA §2425, sub-§8	Title 22, section 2425, subsection 8, paragraph F, relating to information contained in dispensary information that identifies a registered patient, the patient's physician and the patient's registered primary caregiver under the Maine Medical Use of Marijuana Act
*34	22 MRSA §2425, sub-§8	Title 22, section 2425, subsection 8, paragraph G, relating to information that identifies applicants for registry identification card, registered patients, registered primary caregivers and registered patients' physicians under the Maine Medical Use of Marijuana Act
*35	22 MRSA §2425, sub-§8	Title 22, section 2425, subsection 8, paragraph J, relating hearing on revocation of a registry identification card under the Maine Medical Use of Marijuana Act unless card is revoked
36	22 MRSA §2425-A, sub-§12	Title 22, section 2425-A, subsection 12, relating to applications and supporting information submitted by patients, caregivers and providers under the Maine Medical Use of Marijuana Act

*Statute Repealed since last review in 2015—no RTKAC action needed

^Recently enacted by 131st Legislature after review by JUD Committee

**Public Records Exceptions For Review by RTKAC in 2023:
Exceptions in Title 22**

REF No.	STATUTORY CITATION	DESCRIPTION
*37	22 MRSA §2698-A, sub-§7	Title 22, section 2698-A, subsection 7, relating to prescription drug marketing costs submitted to the Department of Health and Human Services
*38	22 MRSA §2698-B, sub-§5	Title 22, section 2698-B, subsection 5, relating to prescription drug information provided by the manufacturer to the Department of Health and Human Services concerning price
39	22 MRSA §2706, sub-§4	Title 22, section 2706, relating to prohibition on release of vital records in violation of section; recipient must have “direct and legitimate interest” or meet other criteria
40	22 MRSA §2706-A, sub-§6	Title 22, section 2706-A, subsection 6, relating to adoption contact files
41	22 MRSA §2769, sub-§4	Title 22, section 2769, subsection 4, relating to adoption contact preference form and medical history form
42	22 MRSA §3022, sub-§8,12,13, 14	Title 22, section 3022, subsections 8, 12,13 and 14, relating to medical examiner information
43	22 MRSA §3034, sub-§2	Title 22, section 3034, subsection 2, relating to the Chief Medical Examiner missing persons files
44	22 MRSA §3109, sub-§2-A	Title 22, section 3109, subsection 2-A, relating to personal information of TANF participants surveyed by DHHS
45	22 MRSA §3174-X, sub-§6	Title 22, section 3174-X, relating to records of the Medicaid ombudsman program
46	22 MRSA §3188, sub-§4	Title 22, section 3188, subsection 4, relating to the Maine Managed Care Insurance Plan Demonstration for uninsured individuals
47	22 MRSA §3192, sub-§13	Title 22, section 3192, subsection 13, relating to Community Health Access Program medical data
48	22 MRSA §3292	Title 22, section 3292, relating to use of confidential information for personnel and licensure actions
49	22 MRSA §3293	Title 22, section 3293, relating to confidential information provided to state employees and Bureau of Human Resources
50	22 MRSA §3294	Title 22, section 3294, relating to confidential information provided to professional and occupational licensing boards
51	22 MRSA §3295	Title 22, section 3295, relating to confidential information provided in unemployment compensation proceedings related to state employment
52	22 MRSA §3474, sub-§1	Title 22, section 3474, subsection 1, relating to adult protective records
53	22 MRSA §3762, sub-§3	Title 22, section 3762, subsection 3, relating to TANF recipients
54	22 MRSA §4007, sub-§1-A	Title 22, section 4007, subsection 1-A, relating to a protected person’s current or intended address or location in the context of child protection proceeding
55	22 MRSA §4008, sub-§1	Title 22, section 4008, subsection 1, relating to child protective records
56	22 MRSA §4008, sub-§3-A	Title 22, section 4008, subsection 3-A, relating to records of child death and serious injury review panel
57	22 MRSA §4008, sub-§3-A	Title 22, section 4008, subsection 3-A, relating to records of child death and serious injury review panel
58	22 MRSA §4018, sub-§4	Title 22, section 4018, subsection 4, relating to information about a person delivering a child to a safe haven
59	22 MRSA §4019, sub-§9	Title 22, section 4019, subsection 9, relating to files, reports, records, communications and working papers used or developed by child advocacy centers

*Statute Repealed since last review in 2015—no RTKAC action needed

^Recently enacted by 131st Legislature after review by JUD Committee

**Public Records Exceptions For Review by RTKAC in 2023:
Exceptions in Title 22**

REF No.	STATUTORY CITATION	DESCRIPTION
60	22 MRSA §4021, sub-§3	Title 22, section 4021, subsection 3, relating to information about interviewing a child without prior notification in a child protection case
61	22 MRSA §4036, sub-§1-A	Title 22, section 4036, subsection 1-A, relating to child protective case documents in a proceeding awarding parental rights and responsibility
62	22 MRSA §4087-A, sub-§6	Title 22, section 4087-A, subsection 6, relating to information held by or records or case-specific reports maintained by the Child Welfare Ombudsman
63	22 MRSA §4306	Title 22, section 4306, relating to general assistance
64	22 MRSA §5307, sub-§2	Title 22, section 5307, subsection 2, relating to fingerprint-based criminal background check for “high-risk” MaineCare providers
65	22 MRSA §5328, sub-§1	Title 22, section 5328, subsection 1, relating to community action agencies records about applicants and providers of services
66	22 MRSA §5409, sub-§1 and 2	Title 22, section 5409, subsections 1 and 2, relating to records held by the Maine Health Insurance Marketplace
67	22 MRSA §7250, sub-§1	Title 22, section 7250, subsection 1, relating to the Controlled Substances Prescription Monitoring Program
68	22 MRSA §7703, sub-§2	Title 22, section 7703, subsection 2, relating to facilities for children and adults
69	22 MRSA §8110, sub-§5	Title 22, section 8110, subsection 5, relating to criminal history record information for employees of a children's residential care facility, an emergency children's shelter, a shelter for homeless children or any group home that provides care for children
70	22 MRSA §8302-C, sub-§1	Title 22, section 8302-C, subsection 1, relating to criminal history record information for child care providers and child care staff members
71	22 MRSA §8707	Title 22, section 8707, relating to records of the Maine Health Data Organization
72	22 MRSA §8714, sub-§1	Title 22, section 8714, subsection 1, relating to protected health information in data collected by MHDO
73	22 MRSA §8715-A, sub-§2	Title 22, section 8715-A, subsection 2, relating to cancer-incidence registry data and vital statistics data reported to MHDO
74	22 MRSA §8733	Title 22, section 8733, relating to information provided to MHDO by a prescription drug manufacturer, wholesale drug distributor or pharmacy benefits manager
75	22 MRSA §8754	Title 22, section 8754, relating to medical sentinel events and reporting
76	22 MRSA §8824, sub-§ 2	Title 22, section 8824, subsection 2, relating to the newborn hearing program
77	22 MRSA §8943	Title 22, section 8943, relating to the registry for birth defects
78	22 MRSA §9061	Title 22, section 9061, relating to criminal background check record or other personally identifiable information for direct access worker

**Statute Repealed since last review in 2015—no RTKAC action needed*

^Recently enacted by 131st Legislature after review by JUD Committee

RIGHT TO KNOW ADVISORY COMMITTEE

For September 18, 2023

Additional Update on Recommendation from 17th Annual Report Related to Use of Radio Encryption by Law Enforcement Agencies

1. As recommended by Advisory Committee, staff sent the attached letter to police departments listed on the Maine Chiefs of Police Association website and also reached out by email to the Executive Director of the Maine Chiefs of Police Association prior to their annual meeting in January 2023 to solicit responses to the survey.

2. Staff received responses from the following departments, each indicating that the responding law enforcement agencies were not using encryption:
 - Caribou
 - Isleboro
 - North Berwick
 - Ogunquit
 - Vassalboro

3. Telephone and email correspondence from the Executive Director of the Maine Chiefs of Police Association in February 2023 indicated that he was not aware of any county or municipal police department using radio encryption other than the Lewiston and Auburn police departments.

Representative Thom Harnett, Chair
Senator Anne Carney
Amy Beveridge
Jonathan Bolton
James Campbell
Hon. Justin Chenette
Lynda Clancy
Linda Cohen
Chief Michael Gahagan



Julie Finn
Betsy Fitzgerald
Mal Leary
Kevin Martin
Judy Meyer
Hon. Kimberly Monaghan
Cheryl Saniuk-Heinig
Eric Stout
Victoria Wallack

STATE OF MAINE

RIGHT TO KNOW ADVISORY COMMITTEE

TO: Chief Edward J. Tolan, Executive Director, Maine Chiefs of Police Association
Municipal, county and state law enforcement agencies in Maine

FROM: Representative Thom Harnett, Chair, Right to Know Advisory Committee TH

DATE: January 9, 2023

RE: Survey: Access to and use of encrypted radio channels by municipal, county and state law enforcement agencies

The Right to Know Advisory Committee considered the topic of encrypted radio communications by police and emergency service providers. This topic was previously discussed by the Advisory Committee in 2012. At that time, the Advisory Committee determined that radio encryption practices were not widespread in Maine, thereby reducing concerns, at that time, regarding the potential for law enforcement agencies to use encrypted radio channel transmissions to restrict public access to critical public safety information. The Advisory Committee did agree that if current practices regarding the availability and use of encrypted radio channels were to change significantly, it would be appropriate to revisit the topic. It came to the attention of the Advisory Committee during its first meeting in September that some departments or agencies are using encrypted radio channels for at least some of their radio transmissions, and in a few instances, for all of their radio transmissions. Therefore, the Advisory Committee established a Subcommittee to reexamine and discuss the issue. The Subcommittee identified a need for more data regarding the extent of access to and use of encrypted radio channels within the State by municipal, county and state law enforcement agencies.

Given the need for data, the Advisory Committee requests that the following information be collected for the period **January 2023 – June 2023** and reported back to the Advisory Committee by July 31, 2023:

1. Did your department/agency have the capability to use an encrypted radio channel?
2. If so, did your department/agency use an encrypted radio channel at any time?

3. When examining the use of encrypted radio channels within your department/agency, how often is an encrypted channel used: always, often, sometimes, rarely, never?
4. If an encrypted radio channel was used, or an encrypted radio transmission was sent, please describe the type of situation(s). (Ex. In all situations, only by certain individuals, only in tactical situations, only for certain types of information, etc.)
5. If an encrypted radio channel was used for tactical situations, how many tactical situations were there during this time period?
6. If an encrypted radio channel was used, do you rely on any criteria or policies regarding its use?

Thank you for providing this data. If you have any questions or concerns about our request, please do not hesitate to reach out to Advisory Committee staff, Rachel Olson or Colleen McCarthy Reid at (207) 287-1670.

SENATE

ANNE M. CARNEY, DISTRICT 29, CHAIR
DONNA BAILEY, DISTRICT 31
ERIC BRAKEY, DISTRICT 20

JANET STOCCO, LEGISLATIVE ANALYST
SAMUEL PRAWER, LEGISLATIVE ANALYST
SUSAN PINETTE, COMMITTEE CLERK



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STATE OF MAINE
ONE HUNDRED AND THIRTY-FIRST LEGISLATURE
COMMITTEE ON JUDICIARY

June 29, 2023

Dear Right to Know Advisory Committee,

As you may know, the Judiciary Committee considered several bills this year related to the processes by which members of the public may access public records under the state Freedom of Access Act (FOAA) and the state Intelligence and Investigative Record Information Act (IIRIA), including: LD 1203, *An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act*; LD 1649, *An Act to Support Local Governments in Responding to Freedom of Access Act Requests*; LD 1699, *An Act to Amend the Freedom of Access Act and Related Provisions*; and LD 1764, *An Act Regarding the Charge for Research Time by State Agencies for Freedom of Access Act Requests*.

These bills proposed several reforms to FOAA and IIRIA that readjust the balance these laws strike between ensuring transparency and accountability of governmental business through robust procedures for accessing public records and the sometimes overwhelming burdens that the increasing number of public records requests has placed on many governmental entities and public employees. A majority of the committee voted “ought not to pass” on these legislative documents and respectfully requests that the Right to Know Advisory Committee draw on the expertise of its members and, as necessary, gather additional input from relevant stakeholders to examine the following issues.

1. Whether to expand FOAA’s definition of “public records” to include the records of tax-exempt, nonprofit organizations that receive a certain threshold of their annual revenue from federal, state or municipal sources. *See* LD 1699, §1 (proposing to include the records of such organizations that receive at least 50% of their annual revenue from federal, state or municipal sources).
2. Whether the Public Access Ombudsman should be directed to design a form for public records requests under FOAA. And if so, whether all public agencies or officials, or a specific subset of public agencies or officials, may require that members of the public use the form when submitting public records requests. *See* LD 1649, §2 and §6 (proposing to authorize the Public Access Ombudsman to design a “simple, short” form “designed to provide only the basic information required to fulfill the request” and to authorize school districts, in their discretion, to require use of the form).

3. Whether and how to define the “reasonable time” after receipt of a public records request under FOAA within which an agency or official having custody of the record must provide a good faith, nonbinding estimate of the time frame within which it will comply with the request. Alternatively, or additionally, whether to establish a deadline for full compliance with a public records request and, if so: whether agencies or officials should have the ability to request an extension of the deadline; who should decide whether to grant an extension; and what criteria must be met for an extension to be granted. *Compare* LD 1203, §1 (proposing to amend 1 M.R.S. §408-A(3) to require that an estimate of the time to respond to a public records request be provided “no later than 30 days following receipt of the request”) *with* LD 1699, §5 (requiring an agency or official to “fully respond to a request” within 60 days of “the date a sufficient description of the public record is received . . . at the office responsible for maintaining the public record” and authorizing the Public Access Ombudsman to extend the deadline for “good cause”).
4. Whether and to what extent, under FOAA, an agency or official should be either authorized or directed to prioritize a public records request received from a Maine resident, a journalist or other specific preferred party over a request received from an out-of-state resident, a request for bulk data received from a for-profit, data-mining company, or other specific type of request or requester. If prioritization is appropriate, is it possible to craft the law in a way that will prevent someone with a low priority from soliciting the assistance of a proxy with a higher priority to submit a request on their behalf? *See* LD 1203, §2 (proposing a statutory priority for Maine residents and journalists).
5. Given the testimony we received regarding the burden on staff time and resources caused by public records requests, should the maximum hourly rate a public agency or official may charge for each hour of staff time beyond the first 2 hours spent “searching for, retrieving and compiling the requested public record” be increased? Similarly, should a public agency or official be authorized to charge for the first 2 hours of staff time if the requester previously made a public records request of the same public agency or official during the same calendar year? *Compare* LD 1649, §1 (proposing to increase the maximum hourly fee from \$25 to \$40 and to authorize charging for the first 2 hours of staff time in the circumstances described above) *with* LD 1764 (proposing to replace the maximum hourly fee in current law with a set hourly fee of \$25 for all staff time, including the first 2 hours, spent on a public records request). Alternatively, given the testimony we received regarding the sometimes exorbitant fees charged for public records requests that do not, on their face, appear to be overly burdensome, should the Legislature establish a maximum fee that may be charged either in response to a single public records request or for all requests submitted to a single public entity by the same person in a single calendar year? *See* LD 1699, §7 (proposing to establish a maximum single-request fee of \$500, except that there would be a maximum calendar-year-fee of \$100 for all public records requests submitted by the same person to a school administrative unit).
6. Whether, given the testimony we received regarding the recent increase in public records requests under FOAA that appear designed to harass specific public employees, especially school personnel, the following procedures, or different procedures, should be established:
 - a. If a public agency or official receives a series or a pattern of public records requests that it believes are frivolous or designed to intimidate or harass and not intended for the dissemination of information about government activity to the public, should the public agency or official have an opportunity to request that the Public Access Ombudsman relieve it from the requirement to comply with the request? *See* LD 1649, §2 (proposing to establish such a process for school districts). Would this new process provide meaningful assistance beyond that currently afforded

in 1 M.R.S. §408-A(4-A), which authorizes a body, agency or official to seek an order of protection in Superior Court from a request “that is unduly burdensome or oppressive”?

- b. Should a public employee who is the “subject” of a public records request be provided an opportunity to inspect the records before they are disclosed to the requester? Should this opportunity be provided only when a public employee is specifically named in the request or should it also be available whenever a public record that will be disclosed names a specific public employee? *See* LD 1649, §2 (proposing to provide such an opportunity to school employees).
7. Whether to amend IIRIA’s current requirement that a Maine criminal justice agency treat as confidential and not disseminate a record that contains intelligence and investigative record information—including, for example, a dashboard or body camera recording of a law enforcement encounter—if there is a reasonable possibility that public release or inspection of the record would constitute an unwarranted invasion of personal privacy. For example, should the individual whose personal privacy might be invaded have the authority to consent to the release of the record; if so, should that individual’s status as a potential victim or potential perpetrator affect their authority to consent to the record’s release; must each individual whose personal privacy might be invaded by the release of a record consent to its release; and who, if anyone, should have the authority to consent to release of a record if the individual whose privacy might be invaded by its release has died? *See* LD 1203, §3 (proposing amendments to 16 M.R.S. §804(3)).

Thank you in advance for your time and attention to these matters. We look forward to reviewing your recommendations on these important topics. Please do not hesitate to reach out to us if you have any questions.

Sincerely,


Anne M. Carney

Sen. Anne M. Carney
Senate Chair


Matt W. Moonen

Rep. Matthew W. Moonen
House Chair

cc: *(via email)*

Judiciary Committee Members (including Representative Andrews, Sponsor of LD 1699)
Representative David Boyer, Sponsor of LD 1203
Representative Maureen Terry, Sponsor of LD 1649
Senator Mark Lawrence, Sponsor of LD 1764

RIGHT TO KNOW ADVISORY COMMITTEE

2023 Proposed Meeting Dates

- **Monday, October 2, 2023, 1:00 pm**
- **Monday, October 23, 2023, 1:00 pm**
- **Monday, November 6, 2023, 1:00 pm**
- **Monday, December 4, 2023 at 1:00 pm**