RIGHT TO KNOW ADVISORY COMMITTEE

Monday, October 23, 2023
1:00 p.m.

Location: State House, Room 438 (Hybrid Meeting)
Public access also available through the Maine Legislature's livestream:
https://legislature.maine.gov/Audio/#438

1. Introductions

2. Committee/subcommittee topics – items from last meeting
    a. Use of radio encryption by law enforcement

    b. Participation in the legislative process by residents of correctional facilities

3. Disciplinary records of public employees
    a. Overview of LD 1397 from last session

    b. Interested party perspectives

    c. Public comment: focused on topic of disciplinary records of public employees

4. Adjourn
    - Next meeting: Monday, November 6, 2023, 1:00 pm (AFA Committee Room, State House Room 228)

Right to Know Advisory Committee

Subcommittees and Topic Lists

Subcommittee Name	**Public Records Exceptions Subcommittee**	**Public Records Process Subcommittee**	**Law Enforcement Records Subcommittee**	Additional items for consideration by full RTKAC
Subcommittee Issues to Consider	• Review of existing public records exceptions of Titles 22 and 22-A in accordance with 1 MRS §433(2-A) • Request for a new public records exception for "proprietary information" included in grant applications and grant recipient reports under the Emergency Medical Services Stabilization and Sustainability Program in 32 MRS §98 (effective Oct. 25)	• Standard form for FOAA requests • Allow prioritization of requests based on type of requestor • Give Ombudsman authority to waive agency response requirement under certain circumstances • Provide notice to individual who is the subject of inquiry • Repeat requestors and incomplete/delayed responses • Define "burdensome" request • Require body to cite reason for going into executive session	• Amend the Intelligence and Investigative Record Information Act exception (16 MRS §804(3)) to allow and define the circumstances under which the person whose personal privacy might be invaded may consent to the release of the record • Release of information by law enforcement without FOAA request	• Disciplinary records of public employees Topics identified as possibly not ripe for discussion this year, but RTKAC will review at the next meeting: • Use of radio encryption by law enforcement – *RTKAC wants to afford J. Meyer a chance to provide input* • Participation in the legislative process by residents of correctional facilities – *Chair Sheehan will update RTKAC on JUD and CJPS chairs' thoughts*
Members & Staff	Kim Monaghan, Chair AAG Jonathan Bolton Lynda Clancy Cheryl Saniuk-Heinig *Staff: Colleen McCarthy Reid & Anne Davison*	Victoria Wallack, Chair Julie Finn Judy Meyer Kevin Martin Eric Stout Representative Sheehan *Staff: Lindsay Laxon & Colleen McCarthy Reid*	Senator Carney, Chair Amy Beveridge AAG Jonathan Bolton Julie Finn Betsy Fitzgerald Chief Gahagan Cheryl Saniuk-Heinig Judy Meyer *Staff: Janet Stocco & Anne Davison*	

Right to Know Advisory Committee
September 18, 2023 (Hybrid: Zoom and Room 228)
Meeting Summary

Convened 1:07 p.m. in person and remote on Zoom; public access on Legislature's website at: https://legislature.maine.gov/audio/#228?event=89520&startDate=2023-09-18T13:00:00-04:00

Present in Room 228:
Rep. Erin Sheehan
Sen. Anne Carney
Jon Bolton
Lynda Clancy
Julie Finn
Betsy Fitzgerald
Chief Michael Gahagan
Cheryl Saniuk-Heinig
Eric Stout
Victoria Wallack

Remote:
Amy Beveridge
Kevin Martin
Judy Meyer
Kim Monaghan

Absent:
Justin Chenette
Linda Cohen

Staff:
Colleen McCarthy Reid
Janet Stocco
Lindsay Laxon

Welcome and introductions
Rep. Erin Sheehan convened the meeting and all members introduced themselves and identified the interests they were appointed to represent on the Advisory Committee.

Election of chair
Staff explained that the Advisory Committee needed to elect a new chair, as the former Advisory Committee chair, Rep. Thom Harnett, is no longer a member of the Legislature. Rep. Erin Sheehan has been appointed to the Advisory Committee as the House member of the Judiciary Committee. Sen. Anne Carney nominated Rep. Erin Sheehan serve as chair (motion seconded by Cheryl Saniuk-Heinig). Rep. Sheehan was unanimously elected chair of the Advisory Committee.

Review of duties
Staff reviewed the Advisory Committee's statutory duties and the annual written report due date.

Remote participation policy
Staff reviewed the Advisory Committee's Remote Participation Policy adopted October 26, 2021 and advised that the Advisory Committee could choose to make changes to the policy.

Review and discussion of the Seventeenth Annual Report of the Right to Know Advisory Committee and actions related to those recommendations
Staff reviewed the recommendations of the Advisory Committee that are contained in the 17th Annual Report from January 2023. The recommendations and subsequent actions (in italics) are outlined below.

- Enact legislation to clarify responsibility of responders to requests for public records related to time estimates

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. 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.

- 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. 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.
  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. 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

  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.

- 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.

- 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.

- 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, 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.

Review and discussion of legislation including public records exceptions evaluated by Judiciary Committee pursuant to 1 MRSA §434

Staff directed the Advisory Committee to a list of proposed public records exceptions referred from policy committees to the Judiciary Committee for review in the First Regular and First Special Sessions. As required by the Freedom of Access Act (FOAA) at 1 MRSA §434, when a majority of a joint standing policy committee of the Legislature supports proposed legislation that contains a new public records exception, the legislation is referred to the Judiciary Committee for review according to the criteria laid out in statute. The Judiciary Committee reviewed ten bills considered in the First Regular and First Special Sessions containing public records exceptions.

The Judiciary Committee approved all but one of the proposed exceptions it reviewed; eight bills were enacted into law, one bill was carried over on the Special Appropriations Table and one bill died on adjournment, although the substance of the bill was incorporated into the biennial budget.

Review of recent Maine Supreme Judicial Court Decision

Staff directed Advisory Committee members to *Human Rights Defense Center v. Maine County Commissioners Association Self-Funded Risk Management Pool, 2023 ME 56* which was provided in the meeting materials.

Discussion of issues and topics for 2023

- **Review of existing public records exceptions**

Staff summarized the Advisory Committee's role in reviewing all existing exceptions in Titles 22 to 25 during the 131st Legislature. Last year, a subcommittee of the Advisory Committee reviewed all existing exceptions in Titles 23, 24, 24-A and 25, leaving the exceptions in Titles 22 and 22-A for consideration this year. A chart of the exceptions subject to review this year (78, which includes 1 exception enacted in the 131st Legislature and 12 repealed exceptions) was included in the materials distributed to members in advance of the meeting and was posted to the Advisory Committee's webpage.

Staff has begun preparing for the review. Consistent with past practice, FOAA contact persons for each agency or governmental entity have been asked to submit input, through a questionnaire, on each of the exceptions that their agency/entity administers. Responses to those questionnaires have been received from most agencies; the remaining questionnaires are expected to be submitted soon.

As in past years, staff noted that the review of the exceptions may be initially completed through a subcommittee. Staff confirmed that 53 responses have been received from agencies regarding the exceptions to be reviewed this year. Kim Monaghan agreed to serve as chair of this subcommittee and Jon Bolton, Cheryl Saniuk-Heinig and Lynda Clancy agreed to serve as members of the subcommittee.

- **Continue discussion of use of radio encryption by law enforcement**

Staff explained that in accordance with one of the recommendations of the Advisory Committee in the 17th Annual Report, staff sent a letter to police departments and contacted the Executive Director of the Maine Chiefs of Police Association to obtain information regarding the use of radio encryption by law enforcement in the State. Staff received responses from five departments indicating that the responding law enforcement agencies were not using encryption and the Executive Director of the Maine Chiefs of Police Association indicated that he was not aware of any county or municipal police department using radio encryption other than the Lewiston and Auburn police departments.

- **Letter from Judiciary Committee requesting input**

Staff reviewed the Judiciary Committee's June 29, 2023 letter to the Advisory Committee in which the Judiciary Committee asked the Advisory Committee to examine issues related to public records that were raised in several bills considered in the First Regular and First Special sessions.

- **Other suggested issues and topics**

Rep. Sheehan asked the Advisory Committee members for suggestions for topics for discussion or ideas for subcommittees and advised that this item would be on the agenda for the Advisory Committee's next meeting.

Kevin Martin suggested continuing the discussion of alleged problem requestors and bad faith responses about which the Advisory Committee had received comment last year. He noted that this would likely

require input from multiple parties including schools, municipal and county interests, state contacts for FOAA and possibly law enforcement.

Lynda Clancy asked whether the Advisory Committee would continue the consideration of the issues raised in LD 1397 related to the effect of collective bargaining agreements on the retention of disciplinary records. Sen. Carney noted that the Judiciary Committee received feedback at the public hearing that supervisors may use discipline for retaliation and requiring retention of these records could exacerbate the problem. She noted that additional information on this aspect of the bill and additional public participation would be valuable.

The Advisory Committee members discussed a few topics raised in the letter from the Judiciary Committee. Several members noted legal and implementation challenges related to the first topic referred from the Judiciary Committee and, as the discussion continued, members noted that several topics were similar and might be able to be addressed by a subcommittee. Sen. Carney noted that some of the bills related to areas of the law that have been recently changed and additional time may be necessary to evaluate the current law's effectiveness. The members expressed interest in including all topics from the Judiciary Committee's letter as items for possible subcommittee consideration.

Amy Beveridge commented that the Advisory Committee may wish to consider the release of information before a FOAA request is needed, particularly in the case of law enforcement records for violent crimes.

Representative Sheehan added that she has received inquiries related to the use of executive sessions and a public body's failure to identify the reason for going into executive session.

Staff agreed to compile the topics discussed by Advisory Committee members and create possible subcommittee groupings for the members' consideration at the next meeting.

Public comment

The Advisory Committee received public comment from one member of the public.

Future meeting dates

The Advisory Committee confirmed the proposed meeting schedule.

- Monday, October 2, 2023 @ 1:00 p.m., location State House, Room 228
- Monday, October 23, 2023 @ 1:00 p.m., location State House, Room 228
- Monday, November 6, 2023 @ 1:00 p.m., location State House, Room 228
- Monday, December 4, 2023 @ 1:00 p.m., location State House, Room 228

Eric Stout noted that the time before full Advisory Committee meetings has been used in the past for subcommittee meetings.

Judy Meyer asked about the Advisory Committee membership list. Staff explained that the Advisory Committee has two vacancies that are appointed by the Speaker of the House. The Speaker's Office is working on those appointments, but staff will follow up as well.

The meeting was adjourned at 2:59 p.m.

Right to Know Advisory Committee
October 2, 2023 (Hybrid: Zoom and Room 228)
Meeting Summary

Convened 1:07 p.m. in person and remote on Zoom; public access on Legislature's website at: https://legislature.maine.gov/audio/#228?event=89520&startDate=2023-09-18T13:00:00-04:00

Present in Room 228:
Rep. Erin Sheehan
Sen. Anne Carney
Lynda Clancy
Julie Finn
Betsy Fitzgerald
Kevin Martin
Eric Stout
Victoria Wallack

Remote:
Amy Beveridge
Jon Bolton
Justin Chenette
Chief Michael Gahagan
Kim Monaghan
Cheryl Saniuk-Heinig

Absent:
Linda Cohen
Judy Meyer

Staff:
Colleen McCarthy Reid
Janet Stocco

Welcome and introductions
Rep. Erin Sheehan convened the meeting and all members introduced themselves and identified the interests they were appointed to represent on the Advisory Committee.

Update from Brenda Kielty, Public Access Ombudsman
Brenda Kielty, an Assistant Attorney General, who serves as the Public Access Ombudsman provided an overview of her role, which she has served in since 2012, and recent FOAA-related activities and inquiries. Ms. Kielty also described some of the current and emerging issues she's focused on. Ms. Kielty noted the changes in technology since FOAA was enacted, particularly with digital records. FOAA was written based on requests for paper records, not for access to digital records. Ms. Kielty discussed the lack of clarity in the FOAA about the extent to which the public has access to database information and that there may be ways to make improvements to FOAA to make the law clearer for both requestors and public bodies responding to requests for digital records. Ms. Kielty also noted that, over the past year, she has received fewer inquiries about remote meetings and remote participation as public bodies have now implemented the remote participation in public meetings law (1 MRSA §403-B) and adapted to the use of new technology. Finally, Ms. Kielty stated that she continues to see lots of public records requests related to school districts and school board meetings.

Ms. Kielty asked for clarification related to a recommendation in the 2022 Advisory Committee report about guidance for public participation in remote meetings. Ms. Kielty stated that she is not in a position to provide authoritative guidance or technical advice on best practices for conducting Zoom meetings or using other technology platforms. Mr. Stout agreed that it may be difficult to provide definitive technical advice for different platforms, but that the recommendation was made to provide information to assist public bodies, particularly small local bodies, with providing remote access to the public. Justin Chenette concurred that the Advisory Committee recognized that some public bodies have had difficulties with remote meetings, e.g. Zoom bombing, and cautioned that there may be fewer opportunities for remote public access without additional guidance. Mr. Chenette suggested that the Advisory Committee may need more collaboration and discussion with Ms. Kielty and others before providing guidance on the

website. Ms. Kielty noted that the Ombudsman's website does have a Frequently Asked Questions section and that links to other resources could be added, cautioning that she lacked expertise to evaluate IT guidance.

Ms. Kielty also responded to a few questions from Advisory Committee members.

Lynda Clancy asked whether Ms. Kielty needed more staff or resources. Ms. Kielty explained that only her position is funded and that she has no designated staff support. As long as her statutory responsibility continues without change, Ms. Kielty believes that current resources are adequate. However, she cautioned that additional resources would be needed if the Legislature enacts legislation that would increase or expand the role of the Ombudsman related to responses to requests for public records.

Kevin Martin asked if Ms. Kielty had any opinion on the recent legislative proposals that would change her role, such as LD 1649 and LD 1699. Ms. Kielty responded that she was not involved in the development of the legislation, but that any additional duties for her position might require an increase in staff.

Eric Stout inquired if Ms. Kielty had any recommendations for changes in her role that would provide an alternative remedy to the courts when disputes arise. Ms. Kielty stated that she would be open to such a discussion, but that significant changes would be needed to the law as the Ombudsman does not have any adjudicatory authority or subpoena powers now.

Victoria Wallack asked whether Ms. Kielty had any suggestions or advice for school boards and school districts to ensure that public records requests are reasonable. Ms. Wallack explained that there is limited staff and resources to respond to the large volume of requests that are being made. Ms. Kielty reminded everyone that FOAA has a provision allowing a public body to appeal to the court if it believes a request is not reasonable, but that the underlying policy of FOAA is to make access to public records easy and that the current law does not compel a requestor to identify themselves or to explain why they are making a request. Ms. Wallack responded that she was interested in discussing how to define a "burdensome" request and was not interested in categorizing requestors. Mr. Stout suggested that the discussion of what is a "burdensome" request could be referred to the Public Records Process Subcommittee.

Public comment

The Advisory Committee did not receive any public comment.

Discussion of subcommittees and topics for committee review

The Advisory Committee reviewed the draft chart prepared by staff that outlines the possible subcommittees and topics for committee discussion after the September 18th meeting. The Advisory Committee also considered whether to add additional topics, including a request from the Speaker's Office for a possible public records exception for information related to grant applications under the Emergency Medical Services Stabilization and Sustainability Program, enacted as part of biennial budget law, Public Law 2023, chapter 412, Part GGGGG.

The Advisory Committee agreed to form 3 subcommittees and to ask the subcommittees to consider the following topics/issues as outlined below. The members agreed to refer the consideration of a possible public records exception information related to grant applications under the Emergency Medical Services Stabilization and Sustainability Program to the Public Records Exceptions Subcommittee. The members also agreed to amend the scope of the Public Records Process Subcommittee to add the topic of a definition of a "burdensome request" and to remove the topics related to fees and the reasonableness of a request because the Advisory Committee has recently recommended changes that were adopted by the Legislature.

Public Records Exceptions Subcommittee	Public Records Process Subcommittee	Law Enforcement Records Subcommittee
• Review of existing public records exceptions of Titles 22 and 22-A in accordance with 1 MRS §433(2-A)Request for a new public records exception for "proprietary information" included in grant applications and grant recipient reports under the Emergency Medical Services Stabilization and Sustainability Program in 32 MRS §98 (effective Oct. 25)	• Standard form for FOAA requests • Allow prioritization of certain requests based on requestor • Give Ombudsman authority to waive agency response requirement under certain circumstances • Provide notice to individual who is the subject of inquiry • Repeat requestors and incomplete/delayed responses • Define "burdensome" request • Require body to cite reason for going into executive session	• Amend the Intelligence and Investigative Record Information Act exception (16 MRS §804(3)) to allow and define the circumstances under which the person whose personal privacy might be invaded may consent to the release of the record • Release of information by law enforcement without FOAA request
Kim Monaghan, Chair AAG Jonathan Bolton Lynda Clancy Cheryl Saniuk-Heinig *Staff: Colleen McCarthy Reid & Anne Davison*	Victoria Wallack, Chair Julie Finn Judy Meyer Kevin Martin Eric Stout Representative Sheehan *Staff: Lindsay Laxon & Colleen McCarthy Reid*	Senator Carney, Chair Amy Beveridge AAG Jonathan Bolton Julie Finn Betsy Fitzgerald Chief Gahagan Cheryl Saniuk-Heinig Judy Meyer *Staff: Janet Stocco & Anne Davison*

Discussion of additional topics

Inclusion of records of certain tax-exempt, nonprofit organizations in public record definition. The Advisory Committee agreed that this was not an issue that they were interested in discussing further at this time. Jonathan Bolton noted that the legal issues associated with this topic are formidable, such as the First Amendment rights of nonprofit entities, and that the Advisory Committee may need significant time to explore these issues. Sen. Carney concurred that she did not think this was an issue that the Advisory Committee should address at this time.

Disciplinary records of public employees. The Advisory Committee agreed that the full committee would consider the issues raised in LD 1397 related to the effect of collective bargaining agreements on the retention of disciplinary records of public employees. This topic will be added to the agenda for the October 23rd meeting. Staff will provide an overview of the bill and the issues discussed by the Judiciary Committee. Staff will also invite comment from stakeholders, including representatives of public employees, law enforcement and the Archives Advisory Board.

Use of radio encryption by law enforcement. Chief Gahagan recommended that the Advisory Committee did not need to take further action at this time based on the information received by surveying law enforcement agencies as there appears to be no statewide use of radio encryption. He suggested that the Advisory Committee monitor the issue moving forward. In deference to Judy Meyer, who chaired the subcommittee on this issue, the Advisory Committee deferred a decision until Ms. Meyer could be present for the discussion.

Grants and technical assistance to all public bodies authorized to adopt remote participation policies. Justin Chenette, who chaired the subcommittee last year, suggested that the Advisory Committee should focus on its recommendation to provide guidance and information about remote participation through the Ombudsman's website before pursuing a recommendation for more funding from the Legislature. The Advisory Committee members agreed.

Participation in the legislative process by residents of correctional facilities. The Judiciary Committee did not take any action to develop a working group to continue discussion of this issue (as recommended by the Advisory Committee in its recent annual report). Chair Sheehan proposed that she will confer with former chair Thom Harnett and the chairs of the JUD and CJPS Committees for their input and report back at the next meeting with a recommendation for moving forward.

Next meeting

The next meeting is scheduled for **Monday, October 23, 2023 @ 1:00 p.m.** Staff noted that the location of the meeting has been changed to the Judiciary Committee room, State House Room 438.

The remaining Advisory Committee meetings are scheduled on:

- Monday, November 6, 2023 @ 1:00 p.m., location State House, Room 228
- Monday, December 4, 2023 @ 1:00 p.m., location State House, Room 228

Staff noted that they would be in touch with subcommittee chairs about scheduling subcommittee meetings. Rep. Sheehan encouraged the subcommittees to consider using the time before the full Advisory Committee meeting on October 23rd as a potential first subcommittee date. Rep. Sheehan also noted that it is anticipated that subcommittees should be prepared to make a final report, along with any recommendations, to the full Advisory Committee no later than the December 4th meeting.

The meeting was adjourned at 2:38 p.m.

131st MAINE LEGISLATURE

FIRST REGULAR SESSION-2023

Legislative Document **No. 1397**

H.P. 892 House of Representatives, March 28, 2023

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

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

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

ROBERT B. HUNT
Clerk

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

Sec. 1. 5 MRSA §95-B, sub-§7, as amended by PL 2019, c. 50, §10, is further amended to read:

7. Disposition of records. ~~Records~~ Notwithstanding any collective bargaining agreement or other employment contract entered into on or after January 1, 2024 that provides for the removal, destruction or purging of records, records may not be destroyed or otherwise disposed of by any local government official, except as provided by the records retention schedule established by the State Archivist pursuant to section 95-C, subsection 2, paragraph A, subparagraph (3). Records that have been determined to possess archival value must be preserved by the municipality.

Sec. 2. 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. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the Bureau of Human Resources shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

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. 3. 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. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the county shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

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

Sec. 4. 30-A MRSA §2702, sub-§1, ¶B, as amended by PL 2019, c. 451, §3, 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. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the municipality shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

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

Sec. 5. Revision of record retention schedules. The State Archivist shall revise the record retention schedules applicable to state and local government personnel records as follows.

1. Except as provided in subsections 2 and 3 and notwithstanding any collective bargaining agreement or other employment contract entered into on or after January 1, 2024 to the contrary, final written decisions relating to disciplinary action must be maintained for a period of 20 years.

2. For final written decisions relating to less serious conduct or disciplinary action as described in the schedules, the schedules may provide for a shorter retention period of no less than 5 years.

3. For final written decisions relating to law enforcement employee disciplinary actions that could be used to impeach the credibility of the law enforcement officer if the law enforcement officer is a witness in a criminal case, the schedules may provide for a retention period of more than 20 years.

4. The schedules must use consistent terminology related to records that are not retained and provide definitions for terms used in the schedule such as "remove," "purge" and "destroy."

SUMMARY

This bill implements the recommendations of the Right To Know Advisory Committee related to records of disciplinary actions against public employees.

The bill provides that, notwithstanding any collective bargaining agreement or other employment contract entered into on or after January 1, 2024 to the contrary, local government records may not be disposed of except in accordance with record retention schedules established by the State Archivist.

The bill amends the statutes governing state, municipal and county employee personnel records to require that, in response to Freedom of Access Act requests for final written decisions, the responding public body provide the records in its possession or custody regardless of the specific file location in which the final written decision is located. The bill also requires the final written decisions applicable to state and county employees to state the conduct or other facts on the basis of which the disciplinary action is being imposed and the conclusions of the state or county employer as to the reasons for that action. Similar language is already included in the statute governing municipal employee personnel records.

The bill directs the State Archivist to revise the record retention schedules applicable to state and local government personnel records to require that final written decisions relating to disciplinary action be maintained for a period of 20 years or a lesser period depending on the severity of the conduct or disciplinary action. The State Archivist may increase the retention period beyond 20 years for final written decisions relating to law enforcement employee disciplinary actions that could be used to impeach the credibility of

the law enforcement officer if the law enforcement officer is a witness in a criminal case. It also requires that the schedules use consistent terminology and define terms related to the disposition of records.

MAINE PRESS ASSOCIATION
On the record since 1864

Testimony of Maine Press Association

Honorable Anne Carney, Senate Chair
Honorable Matt Moonen, House Chair

Joint Committee on Judiciary

April 7, 2023

RE: LD 1397, An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees

Dear Senator Carney, Representative Moonen, and Members of the Joint Committee on Judiciary,
The Maine Press Association supports this legislation.

Comprising 43 print newspapers and digital news sites across the state, the MPA advocates for the interests of open and transparent government, and access to public records in order to better inform the citizenry.

Last fall, the Maine Right to Know Advisory Committee deliberated at length to improve and standardize the retention schedules of personnel disciplinary records of municipal, county and state employees, and to ensure that Freedom of Access Act requests for records result in the production of all relevant documents, including any that have been removed from a personnel file but retained elsewhere.

The additional effort to streamline the use of specific language pertaining to record retentions; e.g., standardizing the definitions of “remove”, “purge” and “destroy” in the oversight of record retention and archival storage, will strengthen the framework.

For the sake of parity across local and state government, the statutes that govern retention of, and access to, the disciplinary records of public employees — from town offices to public works, sheriffs' offices to state agencies — must be consistent and readily apparent, without the potential for obfuscation.

We appreciate the work involved in amending state statute for improved access to public records, and including a stipulation that final written disciplinary decisions likewise be standardized across state, county and municipal personnel records. This is important premise on which all Maine citizens can rely.

Thank you for your time and consideration,

Maine Press Association Legislative Committee:
Lynda Clancy, Editorial Director, Penobscot Bay Pilot
Joe Charpentier, Lewiston Sun Journal
David Dahl, Editor, Maine Monitor
Jodi Jalbert, Publisher, Sun Media Group
Dan MacLeod, Managing Editor, Bangor Daily News
Judith Meyer, Executive Editor, Sun Journal, Kennebec Journal, Morning Sentinel
Marian McCue, Editor, Portland Phoenix
Courtney Spencer, VP of Advertising, Portland Press Herald
Maia Zewert, Editor, Lincoln County News

MAINE ASSOCIATION OF POLICE

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"In Valor There Is Hope"

Maine Law Enforcement Coalition

Maine Law Enforcement Association – Maine Association of Police – Maine State Troopers Association – Maine Lodge-Fraternal Order of Police

Judiciary Committee Hearing Testimony
By Paul Gaspar, Maine Law Enforcement Coalition
LD 1397 - "An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees"

April 10th, 2021

Senator Carney, Representative Moonen and members of the Joint Standing Committee on Judiciary. My name is Paul Gaspar and I am a resident of South Portland. I am the executive director of the Maine Association of Police and I am glad to provide this testimony on behalf of our 850 members as well as a member representative to the Maine Law Enforcement Coalition. The Coalition, and its member organizations, represents about 3,000 state, county, and municipal law enforcement officers and public safety dispatchers throughout Maine.

On behalf of the Coalition, its partner organizations and combined memberships throughout the state of Maine, I am here today to speak in opposition to LD 1397, **"An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees"**

On behalf of my fellow representatives of the Maine Law Enforcement Coalition (MLEC) and our respective memberships, I express our deep concerns over this legislation as well as the exponentially chilling effect that it will have on a public safety sector that is already in crisis in its efforts to protect the people of Maine.

Maine's law enforcement ranks are depleted to what can only be characterized as critical. In the wake of uninformed and unsubstantiated efforts to increase oversight through a national narrative of derision of law enforcement, we have seen vacancies numbering in some quarters as much as 300 vacant Maine law enforcement positions throughout our state.

In valuing our already high commitment to only hiring the most qualified candidates who possess the highest values and integrity, these efforts have only served to act as a deterrent to people committing to a Maine calling that is constantly being judged as equal to the narrative on officers and states with no connection or comparative value to Maine.

Although we agree that transparency is an utmost need, we believe both the transparency and the high expectations of the people we serve be the same and consistent across the spectrum of ALL public trust positions, and not just those who are the daily representatives of all public trust positions, the public employee.

Although we have no doubt that the advisory committee charged with bringing this recommended legislation worked diligently to do so. However, we are also disappointed and concerned that this committee, although large in nature, did not reserve a single solitary seat to a representative of any group that represents the actual individuals who would be affected by it. I have attached the list of representatives to this testimony and would say this complete oversight in the committee's make up to be a clear indicator of the efforts to hold Maine law enforcement and other public employees accountable based on narratives, political benefit and inherent disregard for the very people this legislation would affect.

LD1397 attempts to bring a scale of conformity and consistency across municipal, county and state employees, however completely ignores the fact that every other statute dealing with labor laws, pensions, accountability and contracts are all addressed in their very own statute for each division of government.

Some of our concerns include very different recognitions, descriptions and results to what is, or isn't, serious, minor, or de minimis levels of discipline. Many of these are subjects to bargaining and defined in collective bargaining agreements set between the municipal, county and state divisions of government under their own specific labor statute, rights of appeal and local controls.

In short, LD 1397 is punitive to individual employees as it advocates for what is a permanent stain within their permanent record without any consistency of definition for their actions. This defeats what is widely known as the true purpose of disciplinary action; to provide accountability and an expectant route for the employee to improve and expand their level of accountability and service. If the individual is unable to provide this expectation, there is already a recognized process known as progressive discipline which ultimately provides for what CAN be agreed is the most serious of discipline: termination.

Due to the fact that this legislation does not proportionately provide accountability for all public trust and governmental sector positions, and was devised by a committee that omitted representatives of affected parties such as labor, the MLEC cannot support this one-sided effort.

LD 1397 unsuccessfully and intrusively, spans the breadth and scope of three separate and distinct divisions of government and their specific statutes, stunting their ability to negotiate collective bargaining agreements under them. Because we believe that this is extemporaneous with much legislative and partisan vitriol from the 121st legislature, the legislation before us is and will be perceived as based in a flawed effort to effect change based on political and anecdotal, rather than a factual experience in Maine.

Passage of this bill into law will assuredly accomplish not only paralyzing the effort to recruit hire and retain future law enforcement officers, but also push many of those currently serving the people of Maine to flee the profession for fear of their past and remediated behavior being used as a means to also provide identifying information which will not only jeopardize their safety, but that of their families, their homes and their communities.

We hope that you will consider all of these things and vote ought not to pass. We do not advocate for never pursuing accountability, but to include ALL stakeholders in the spirit of cooperation to strive for fair and consistent accountability for all public trust representatives and one borne out of mutual respect and the public's expectation in the interest of the public trust.

Thank you for your efforts. I'm happy to answer any questions for the committee.

Sincerely,

Paul D. Gaspar
Executive Director
Maine Association of Police
Maine Law Enforcement Coalition.

Right to Know Advisory Committee

1 MRSA §411

Membership List
as of October 27, 2022

Name	Representation
Rep. Thom Harnett, Chair	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
James Campbell	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
Mal Leary	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

Maine Education Association
Grace Leavitt President | Jesse Hargrove Vice President | Beth French Treasurer
Rebecca Cole NEA Director | Rachelle Bristol Executive Director

Testimony

In Opposition

LD 1397: An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees

Ben Grant - General Council, Maine Education Association

Before the Judiciary Committee

April 10, 2023

My name is Ben Grant (he/him) and I am proud to serve as General Counsel for the Maine Education Association (MEA). The MEA represents 24,000 educators in the state of Maine, including teachers and other professionals in nearly every public school in the state and faculty and other professional staff in the University of Maine and Community College Systems.

I am here to convey MEA's opposition to LD 1397. We understand that the sponsor is open to ideas about how to make this bill more palatable to all impacted parties, and we are prepared to remain engaged in the process. In light of the notion that there is more work to do, I will use my time to highlight our concerns about the bill as drafted.

First, I want to make clear that the MEA recognizes the policy underlying the current proposal – namely that of protecting employees, future employers, and the public in general <u>from</u> bad actors. There are classes of offenses that should be discoverable.

However, this bill's approach is too broad, and, in our view, susceptible to manipulation <u>by</u> bad actors. This Committee should seek to achieve an appropriate balance between the public's right to know and a citizen's right to privacy. To be specific, this bill forces into the public domain all levels of discipline in an employee's record – no matter how minor. Many disciplinary matters that fall short of suspension or termination involve actions or behaviors that are often corrected right away. Something like this should not live on in perpetuity. Further, the letters that describe these kinds of discipline often contain long-winded and one-sided statements of facts that are left uncontested or unedited. We are significantly concerned about how these kinds of minor matters could be twisted or manipulated by someone in the future with an axe to grind.

We need to continue to allow parties to bargain away the existence of at least lower-level discipline – both in contract bargaining and in dispute resolution. The MEA is eager to remain engaged in this process so that appropriate lines are drawn to protect the privacy of employees who should not have minor acts follow them throughout their careers.

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Testimony of the Maine Municipal Association

Neither for Nor Against

LD 1397 - *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees*

April 10, 2023

Sen. Carney, Rep. Moonen and members of the Judiciary Committee, my name is Rebecca Lambert, and I am providing testimony neither for nor against LD 1397 on behalf of the Maine Municipal Association's (MMA) elected 70-member Legislative Policy Committee (LPC). For reference, the LPC provides direction to the advocacy team at MMA and establishes the position on bills of municipal interest.

The LPC will be discussing LD 1397 at their next meeting scheduled for tomorrow, April 11 and have yet to take a position. MMA will plan to submit additional testimony based on the outcome of that discussion in advance of the work session. Thank you for your time and for considering the municipal perspective on this issue.

- CORRECTED COPY -

Department of the Secretary of State

Shenna Bellows
Secretary of State

Kate McBrien
Maine State Archivist

JOINT STANDING COMMITTEE ON JUDICIARY
Testimony of Kate McBrien, Maine State Archivist
Department of the Secretary of State
April 10, 2023

Testifying Neither For, Nor Against

L.D. 1397, "An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees"

Senator Carney, Representative Moonen, and Members of the Joint Standing Committee on Judiciary, my name is Kate McBrien and I am the Maine State Archivist. I am speaking today Neither For, Nor Against L.D. 1397 as the keeper of the records of this state and as the office who sets records retention schedules.

Title 5, Chapter 6, §95-C, states:

> *The "State Archivist shall, upon consent of the Secretary of State, establish and administer for all state agencies an active, continuing program for the economical and efficient management of agency records and for the proper disposition of government records. The State Archivist shall, with due regard for the functions of the agencies concerned:*
>
> *Establish records retention schedules, in consultation with the heads of agencies and their records officers appointed pursuant to paragraph B. The records retention schedules must define the period of time for which each agency must retain records based on the following 4 criteria:*
> *(a) Administrative use;*
> *(b) Legal requirements;*
> *(c) Fiscal and audit requirements; and*
> *(d) Historical and research value.*

I perform this duty with the help of knowledgeable staff and an Archives Advisory Board, which consists of experts from various state departments and areas of expertise, as well as two members of the public. Through L.D. 133, this legislative body just recently voted to add a member of the press to that Advisory Board, adding another base of knowledge for guidance on appropriate retention schedules for state and local government records.

The question of how long disciplinary records for state employees was considered in the last session of the Right to Know Advisory Committee. Currently, the State's General Schedules state that employee personnel records include disciplinary records, among other documents. The general retention schedule states that personnel records be kept for 10 years after an employee leaves their employment with the state, but that agencies should retain disciplinary records for up to 5 years. But it also states that "If collective bargaining contract requires that disciplinary documents be

destroyed earlier than described above, the contract shall be followed." The collective bargaining agreement currently states that disciplinary records will be kept no longer than 3 years. This bill proposes to keep these records for 20 years.

With guidance from the Bureau of Human Resources, the Attorney General's office, and our Archives Advisory Board, the state general schedules were updated in March 2022 with the current language about the collective bargaining agreement. Under current law, contractual obligations had to be followed. This bill would overturn existing statutory language and increase the retention period of disciplinary records to 20 years.

The Maine State Archives is always willing to reconsider a retention period for specific records, as we believe it is vital that we get this right. The proper and appropriate retention of records is the key to a transparent democracy.

This concludes my testimony. I am happy to answer any questions the committee may have. Thank you.

Testimony of Jeff McCabe
Maine Service Employees Association, SEIU Local 1989

Before the Joint Standing Committee on Judiciary,
State House Room 438 and electronically

In Opposition to LD 1397, An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees, Reported by Representative Moonen of Portland

April 10, 2023

Senator Carney, Representative Moonen, members of the Committee on Judiciary, I'm Jeff McCabe, Director of Politics and Legislation for the Maine Service Employees Association, Local 1989 of the Service Employees International Union. The Maine Service Employees Association represents over 13,000 public sector and private sector workers.

Throughout all departments of Maine State Government, the State is experiencing a real struggle to recruit and retain employees. State workers feel buried by workloads and cannot keep up. One in six positions in Maine State Government is currently vacant, further exacerbating the workloads of everyone doing the public's work. Often legislation with the best intention can create further uncertainty for public sector workers. We understand the interest in bringing this bill forward but because of the significant potential consequences to public-sector employees, we come today to speak against this bill. In the event this Committee chooses to proceed with this bill, we hope we can work with the committee to get us to a place of supporting this bill in an amended version. We understand efforts to protect the public and fellow employees that this bill may address. Below we're providing a list of concerns and questions.

Concerns and Examples

We are incredibly concerned about the ways in which this bill could create, intentionally or not, a quasi-permanent disciplinary record for the employees to whom it applies. Currently, our various collective bargaining agreements contain provisions for the removal of discipline from personnel files after certain periods of time, depending on the level of discipline and whether subsequent discipline has been imposed. Discipline in an employee's personnel file, in many cases, can and is used to justify subsequent and more severe discipline for similar conduct. A reasonable removal period allows an employee to improve their behavior in the hopes of an eventual "clean slate" for disciplinary purposes. As drafted, this bill would impose substantially longer "active discipline" periods on employees, potentially leading to more severe discipline being issued simply because the prior discipline could not be removed from the personnel file. Similarly, this longer period of retention of the discipline, even outside of the personnel file, could cause an employee unnecessary burden or embarrassment, including for lower-level forms of discipline for things such as tardiness, minor work performance issues, or intraoffice dynamics, even though the employee's behavior, job, or duties could have changed significantly since the time the discipline was issued. Additionally, keeping disciplines for such a lengthy period of time could lead to more severe impacts on employees, such as denials of promotions or other job opportunities.

This bill will also have significant impacts on labor relations between the various public employers and labor organizations representing public employees. The meaning of "final written decision" and the ways

in which the proposed retention periods would apply do not necessarily comport with the reality of how discipline is handled, at least within our Executive Branch contracts. We file grievances when a discipline is issued that we assert violates the applicable contract, including disciplines that lack basis in fact. The goal of such a grievance, in most cases, is to have the discipline rescinded and removed, as if it had not been issued. The bill and underlying statute define a "final written decision," in two ways – as either an ungrieved discipline or an arbitrator's written decision if grieved. Currently, a grieved discipline is not considered to be a final written decision, but an ungrieved discipline is. However, given the ways in which our grievance processes operate, many disciplines that fall into a third, and perhaps even fourth, category - ones that are actively being grieved but have not yet made it to the arbitration stage of the grievance process and, relatedly, those that were grieved but resolve, by mutual agreement of the parties, prior to arbitration. As to the latter category, a grievance settlement will often include a reduction of the time that the discipline remains in the employee's personnel file. This bill would remove this incentive towards settlement and ensure that we will be forced to take many more cases to arbitration, particularly in those disciplines that make professionally damaging allegations but lack factual basis or proof. In those situations, among others, an arbitrator's decision would be the only means by which to entirely overturn and eliminate an issued discipline and for the disciplined employee to be vindicated. Put plainly, this bill will dramatically increase both the adversarial relationship between workers and the employers and increase the overall costs of the dispute resolution process borne by each party, including the various public employers impacted by this bill, will rise substantially.

State workers enforce laws and rules that are not necessarily welcomed by the individuals against whom enforcement is made. Unfortunately, we have examples of employees across the public sector subjected to harassment by members of the public. Some examples involve workers in child protective services at Maine DHHS as well as workers in the Maine Department of Corrections, the Judicial Department and the Department of Agriculture, Conservation, and Forestry. The list of workers subjected to harassment by members of the public goes on. Although the intent of the bill may be to provide transparency about state operations, the unintended consequence is that open records and extended retention periods can, and often do, provide an opportunity for the public, especially those who may have had negative, albeit professional, interactions with State workers to unreasonably and unnecessarily embarrass or harass state workers about past discipline which, as it currently stands, would have been removed from their personnel file and state records within a reasonable period of time. As with their counterparts in the private sector, State employees should be able to, within reason, be able to improve their behavior and most beyond their prior discipline, without it following them indefinitely.

Clarifying Questions to be answered for work session

What would prevent medical information, phone, numbers and addresses of employees from becoming public?

> Specifically, can this bill be amended to include language that would allow "final written decisions" to be redacted to avoid the disclosure of confidential or personal information, such as that information protected under 5 MRSA 7070 (A)-(D-1) and the corresponding sections of the municipal and county statutes?

If this bill is intended to retain records of serious misconduct, can serious misconduct be defined?

If not in a personnel file, where would employers be required to retain these records?

Thank you and I would be glad to answer any questions.

Sen. Carney, Rep. Moonen, members of the Joint Standing Committee on Judiciary, my name is Judith Meyer. I am the editor of the Sun Journal in Lewiston, the Kennebec Journal and the Morning Sentinel, and I have served on the Right to Know Advisory Committee for the past 20 years.

I am here today on behalf of both the Maine Freedom of Information Coalition and the New England First Amendment Coalition, on whose boards I serve, to enthusiastically urge this committee to pass LD 1397, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees.

* * *

In 2020, both the Portland Press Herald and the Bangor Daily News filed Freedom of Access Act requests with the Department of Public Safety for access to certain State Police disciplinary records.

The newspapers found that "under a union contract, some public records of discipline are destroyed. Troopers have been arrested but lack a public discipline history. And DPS has revoked the licenses of troopers who resigned from the State Police with no public record documenting why." *(PPH/BDN report attached)*

That report prompted the Maine Freedom of Information Coalition to wonder how other police agencies manage disciplinary records and how they would respond to similar FOAA requests. So, in January 2021 the MFOIC filed FOAA requests for access to disciplinary records with 135 law enforcement agencies in Maine and documented the response. The results revealed widespread discrepancies in the public's ability to access documents that members of the public are legally entitled to view, widespread redaction of those records and, in 30 cases, no response at all. (*MFOIC press release and Sun Journal report on audit attached*)

In response to that audit and the PPH/BDN reporting, New England First Amendment Coalition Executive Director Justin Silverman wrote an opinion piece for the Sun Journal in which he highlighted the excessively redacted misconduct records produced by the State Police and the need for transparency within that department (*attached*). Referring to the PH report, he wrote: "Public awareness of whether law enforcement agencies are engaged in effective oversight and discipline of officers serves as a vital check on public corruption and misconduct."

The PH and BDN filed suit against the Department of Public Safety and, in May last year, a judge ordered State Police to produce the requested records. (*PH report attached*)

It took a lawsuit to wrest these public records away from this state agency. During the two years of newspaper reporting along with the MFOIC audit, we learned that not only are some police

agencies reluctant to provide public records, they actively remove disciplinary records from personnel files within a few short years, sometimes at an officer's request.

This is not the norm for other state agencies, or for county and municipal agencies where there is greater retention of disciplinary records and their availability to the public is more accessible.

A police officer who is disciplined should not have any greater privilege of confidentiality than a school teacher, a county administrator, or any other public employee. Given the inherent power of law enforcement and the greater consequences of its abuse, even more transparency is needed relative to other public servants.

As Maria Haberfeld, an expert on police training and discipline at the John Jay College of Criminal Justice in New York, told the PH, transparency into misconduct isn't solely for the public's benefit to "see what kind of misconduct is tolerated by the given police organization and why," there is matching public interest in knowing whether "there is an equal distribution of the discipline" within and across agencies.

Through this bill, the Legislature requires much needed public access to the disciplinary records of all public employees. It prevents those records from being destroyed or deemed confidential based on collective bargaining agreements. The bill also requires agencies to provide enough written detail in disciplinary records for the public to understand the underlying behavior and ensures that all disciplinary records are retained for a reasonable period of time to be determined by the State Archivist, not individual agencies that might otherwise favor secrecy.

These are sound measures to preserve transparency and protect public trust.

* * *

To review MFOIC's audit results, including disciplinary records provided by Maine's police departments, go to: http://www.tinyurl.com/mfoicaudit

The password for access is Mainenews1!; click "my drive" on left to access documents.

* * *

The **Maine Freedom of Information Coalition** is a broad coalition of public access advocates who strive to educate Maine citizens and legislators about the rights and responsibilities of citizens in accessing information so they may participate more fully in our democracy. MFOIC supports open access to government information, supports those who exercise their rights to access government information under Maine's Freedom of Access Act, and periodically conducts audits of government agency practices in making government information available according to the spirit and letter of FOAA.

The New England First Amendment Coalition is the region's leading advocate for First Amendment freedoms and the public's right to know about government. The coalition is a non-partisan non-profit organization that believes in the power of transparency in a democratic society. Its members include lawyers, journalists, historians, academics, and other private citizens. Learn more about NEFAC at nefac.org.

Inside the Maine State Police, officer misdeeds are kept secret

pressherald.com/2021/04/18/inside-the-maine-state-police-officer-misdeeds-are-kept-secret/

By Callie Ferguson, Matt Byrne and Erin Rhoda April 18, 2021

This is the first of three stories jointly investigated and written by the Portland Press Herald/Maine Sunday Telegram and Bangor Daily News about how the Maine State Police conceals officer wrongdoing. The project is funded by the Pulitzer Center.

For the final month of 2019, Maine State Police Sgt. Elisha Fowlie wasn't allowed to work.

Starting Nov. 29, 2019, Fowlie began serving a 30-day suspension for violating two of the agency's policies that summer, leaving the state police troop that patrols midcoast Maine short a supervisor as the year drew to a close.

What did Fowlie do to warrant the punishment? It's a secret.

In discipline records that provide one of the only public windows into officer malfeasance, the state police includes so few details about its troopers' misbehavior that the public cannot know what the officers did wrong by reading them. The practice defies the intent of the state

law that makes discipline records public, according to those who helped craft the statute 30 years ago.

Related

Read the Maine State Police discipline records

The lack of information in the records illustrates one way Maine's largest police force exhibits a pattern of secrecy that blocks it from public scrutiny.

In addition to keeping records with minimal information, they are incomplete. Under a union contract, some public records of discipline are destroyed. Troopers have been arrested but lack a public discipline history. And the state agency that oversees Maine law enforcement has revoked the licenses of troopers who resigned from the state police with no public record documenting why, according to a joint investigation by the state's two largest newspapers, the Portland Press Herald/Maine Sunday Telegram and the Bangor Daily News.

The lack of transparency means lawmakers, officers and the public can't fully assess how the agency holds its officers accountable, making it more challenging for police overseers to make policy changes and maintain the public's faith in law enforcement, lawmakers and experts said.

State laws address access to discipline records differently, but Maine is one of about 15 states where officer discipline records are public documents. More states are considering similar laws amid a national examination of law enforcement and demands that officers be held publicly accountable for misconduct. New York and California each made discipline records public in the last two years.

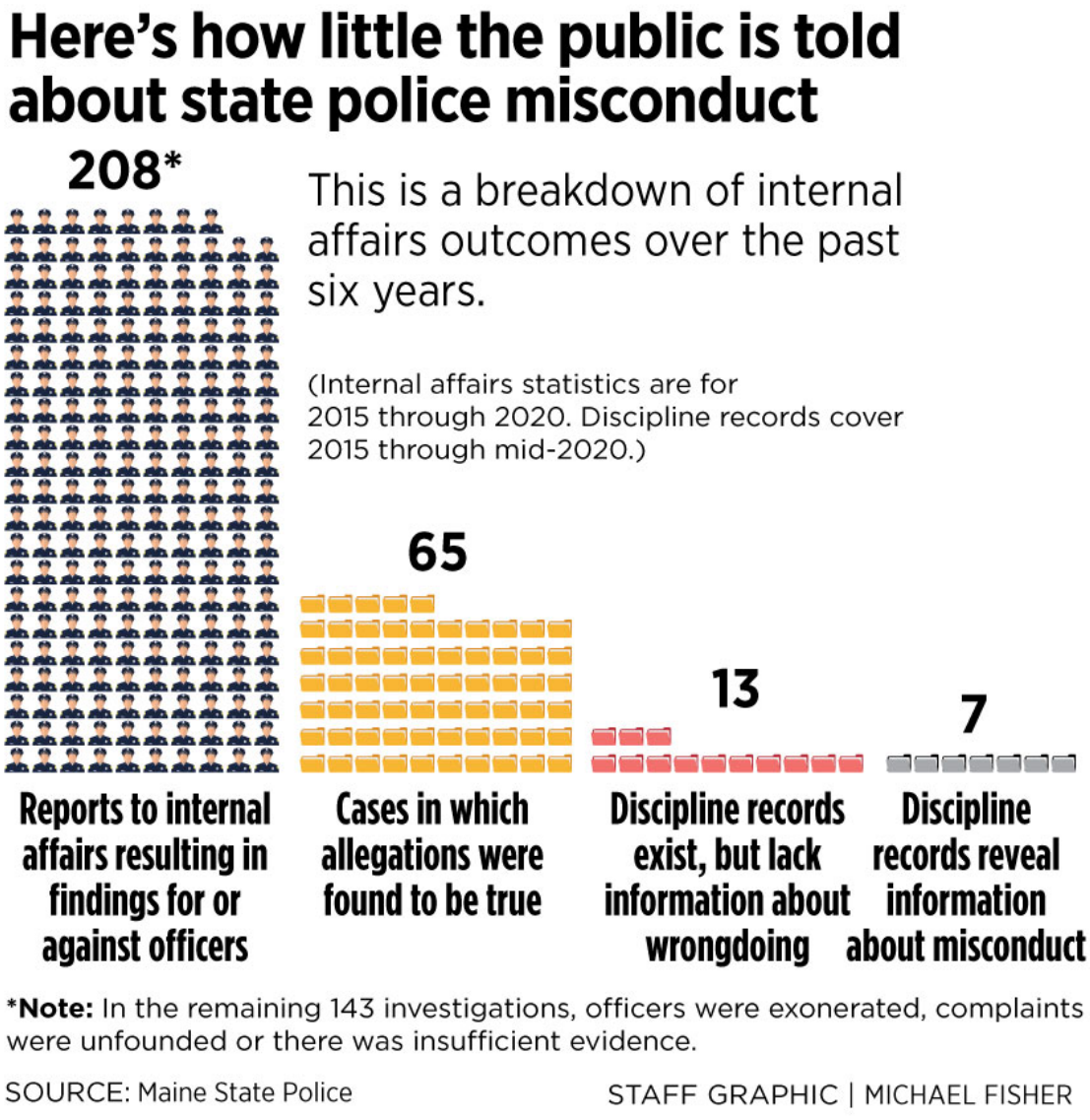
However, the Maine State Police's practices show how law enforcement agencies can skirt transparency even in a state that makes the records public.

"I wish that they would be coming out and saying, 'Yes, there are issues that need to be fixed, and we care so much about our profession that we're going to lead the charge on fixing them because we know that trust is our currency,'" said Rep. Charlotte Warren, D-Hallowell. As House chairwoman of the Legislature's public safety committee, she is largely responsible for oversight of police. "There's trust to be rebuilt for sure."

Transparency into misconduct is important so officers and the public can see whether discipline is fairly applied, said Maria Haberfeld, an expert on police training and discipline at the John Jay College of Criminal Justice in New York.

"The public has all the right to see what kind of misconduct is tolerated by the given police organization and why, and whether or not there is an equal distribution of the discipline," she said.

The newspapers obtained more than five years of state police discipline records. Of the 19 officers punished for misbehavior from 2015 through half of 2020 for whom there are public records, it was not possible to discern with any certainty what 12 of them got in trouble for. One of those officers was disciplined twice, and records were vague in both cases.



So the newspapers investigated the misconduct that the records kept hidden, discovering how one trooper failed to report when his former fiancee committed a hit and run. Another kept secret that he saw a fellow officer punch a handcuffed man in the face.

Of the 12 officers whose records were vague, the newspapers' investigation revealed details of misconduct for seven of them. For the remaining five officers – who received among the harshest punishments – it was not possible for the newspapers to confirm what happened. All disciplined officers declined interviews or did not respond to requests for comment.

The disciplined officers represent only a portion of the 65 internal affairs cases where allegations against officers were found to be true over the last six years. Whether the remaining officers had their discipline destroyed, or were not disciplined at all, is not known. There are about 300 sworn officers on the force.

Bare of description, records for Fowlie, the sergeant, say he was suspended for 30 days because of “the July/August 2019 incidents,” during which he violated the “code of conduct and chain of command policy.” He currently works in the state police unit that protects the governor.

It’s not clear what part of the pages-long policies he violated, let alone what he did. That’s partly because the state police also blacked out part of the public record that appears to detail Fowlie’s misconduct.

In addition to having vague references to misconduct, the state police redacted what appear to be more descriptive accounts of misbehavior in several cases.

Related

Newspapers join forces in lawsuit, investigation

The agency declined requests to lift the redactions, saying the information is confidential and exempt from the state’s open records law. Its staff attorney, Christopher Parr, also declined to cite the statutory reason for each redaction, saying to do so would reveal confidential information.

The newspapers jointly sued the state police to lift the redactions under the Maine Freedom of Access Act. The lawsuit is ongoing.

Col. John Cote, the chief of the state police, said his agency is following requirements set out by Maine law.

“We ensure the records honor the law and protect privacy as established under personnel law,” he wrote in an emailed response to questions. “I believe it is important for the public to have an awareness of the agency’s complaint and discipline process for officers and have information about the corrective actions of the agency if warranted.”

Putting aside legal questions about the redactions, whether public agencies should generally include more information about misconduct in discipline records is a policy question for lawmakers, Parr said.

“Based on the language of the statute, such a record seemingly only must identify the employee who is subject to disciplinary action and, presumably, must state what the discipline imposed is,” Parr said.

‘That almost makes no sense’

Thirty years ago, Maine lawmakers debated how much the public deserved to know about state employees accused of wrongdoing. Sen. Beverly Bustin, D-Augusta, sponsored a bill to ensure complaints and internal investigations of misconduct would stay confidential. It was backed mainly by unions who sought to prevent the publication of unfounded accusations.

Pictured are some of the Maine State Police officers who were disciplined over the last five years or who did not have discipline records but whose misconduct was documented elsewhere. Top left: Former Trooper Justin Cooley, Cpl. Tom Fiske, Trooper Christoper Rogers, and Sgt. Elisha Fowlie. Bottom left: Cpl. Scott Quintero, Cpl. Michael Lane, Trooper Tyler Maloon and Trooper Andre Paradis. *Photos courtesy of the Maine State Police and Portland Press Herald. Graphic by Coralie Cross, Bangor Daily News*

But a key provision of the proposal allowed the public to know about confirmed misconduct. If an agency disciplined an employee, the records of that discipline would be public. Lawmakers never weighed in on how detailed the records should be, but no one appears to have intended for the law to hide substantiated malfeasance.

“I don’t think any one of us ever envisioned that something that was ultimately deemed public after the fact would be incomplete to the extent that you couldn’t figure out what the person had done,” Richard Trahey, a former lobbyist for the then-Maine State Employees Association who helped craft the law 30 years ago, said in an interview. “That almost makes no sense.”

The Legislature's Judiciary Committee passed the bill believing it struck a balance between privacy and transparency. Today, the state police routinely defy the spirit of that compromise.

For example, the state police punished Cpl. Scott Quintero after a July 4, 2020, "incident" where he "communicated with a female subject while on duty in an inappropriate manner," according to a discipline agreement reached between the state police and the Maine State Troopers Association.

Quintero's punishment was relatively severe: a demotion from sergeant to corporal, in addition to no longer being able to teach leadership at the training academy or apply for a promotion for five years. If he committed "similar or other significant misconduct" again, he would be fired.

But there is no description of whom Quintero "communicated" with, such as whether it was a state police employee, a defendant in a case or another civilian. There is no record of how his communication was inappropriate, no description of why his actions were considered major misconduct, and no mention of what "communication" means, such as whether it was electronic or verbal.

In another instance, the state police demoted Christopher Rogers to corporal, transferred him to a different unit and prohibited him from applying for a promotion for three years because he "engaged in conduct unbecoming" of a state police sergeant while on duty in June or July of 2016, according to his discipline record. It's unclear why the state police did not pinpoint which month. There is no description of what Rogers did or the effect of his actions.

Similarly, the state police suspended Cpl. Kyle Pelletier for 20 days and required him to pay back the state $108 "on account of the July 2019 incident."

Pelletier's record appears to contain a description of his misconduct, but that sentence is redacted, followed by another that states: "This is a violation of our Code of Conduct policy (E-24) and Vehicle Use policy (E-80)."

In other parts of the country, some police chiefs actively publicize major discipline.

Luther T. Reynolds, the chief of police in Charleston, South Carolina, said he has held press conferences after firing an officer. The audience is twofold, he said. Answering questions about misconduct helps build trust among the public. It also demonstrates to other officers the consequences for misbehavior.

The state police's argument that descriptions are optional "is a discretionary interpretation used to conceal police misconduct from the public," said Rep. Jeff Evangelos, I-Friendship, who sits on the Judiciary Committee and has been a frequent critic of law enforcement policies. "They could do a lot better job at transparency if they wanted to."

‘Under the hood of government’

The state police is not an outlier in failing to include details about officer misconduct in its discipline records. When the BDN previously examined hundreds of discipline records kept by the state’s 16 county sheriff’s offices, the newspaper found that many left out specific descriptions of what police and corrections officers did wrong, especially when the punishments were more severe.

The Maine State Police Troop C barracks in Skowhegan. *Callie Ferguson/Bangor Daily News*

Still, the county records ranged in their specificity, illustrating how law enforcement agencies interpret their responsibility to document discipline differently and that they can be more forthcoming about their mistakes when they choose to.

The Cumberland County Sheriff’s Office, for instance, suspended a corrections officer in 2017 for 20 days – the same length of time as Pelletier – for showing favoritism, making sexual comments toward a female inmate and then lying about it to supervisors when she complained.

The sheriff documented the incident in a seven-page record that detailed the findings of an internal investigation. It also noted the specific sections of policy that the corrections officer violated, and a bulleted list of the officer's objections and defense of his behavior.

It is important to show "that due process was provided, and there exists just cause for the discipline meted out," Cumberland County Sheriff Kevin Joyce said when he provided the records last year.

While it's not uncommon for Maine police agencies to have vague discipline records, it appears to be unusual for them to black out entire portions of them. The BDN examined more than 1,000 pages of discipline records from county sheriff's offices. Two counties redacted some portions of the records but agreed to unredact them when asked. The Portland Police Department provided five years of records to the Press Herald, with no redactions.

There should be consistency in public access across the state, one lawmaker said.

"I think if you're finding different sets of rules and procedures in the different counties in Maine, or in the hundreds of different municipalities we have, that means that people in certain communities are getting less information than in other communities," said Rep. Thom Harnett, D-Gardiner, who is a former assistant attorney general. "Openness and transparency protects the good actors. We should not sacrifice the character of the good actors by hiding the conduct of the bad ones."

Lawmakers such as Harnett, Warren, Evangelos and Sen. Lisa Keim, R-Dixfield, all said they want to consider requiring law enforcement agencies to add descriptions of misconduct to the public records. Some also talked about the possibility of requiring the state police to submit an annual report to the Legislature with statistics on officer misconduct and the agency's response.

"The whole point of freedom of access laws is to allow us to see under the hood of government," said Keim, who sits on the Legislature's Judiciary Committee.

"They are completely sidestepping that if they're keeping records that are so inadequate."

Cote, who leads the state police, said he was unable to comment on legislation that has not been drafted.

"We support transparency in all aspects of our work and remain committed to abiding by and enforcing State of Maine laws," Cote wrote, adding that the state police annually reports broad agency information, such as statistics on allegations of excessive force, to the Maine Criminal Justice Academy, the licensing body for law enforcement.

It does not report annual discipline matters, however.

Officer misconduct is not the only type of information concealed by the state police but not by other agencies. For example, the state police refused to disclose policies and practices related to the use of digital surveillance tools, such as facial recognition technology, something other police agencies have revealed. And while the state police relied on a specific law to keep such information secret, some lawmakers want to eliminate that law to force more public disclosure.

Col. John Cote, chief of the Maine State Police, addresses reporters during a press conference in Norridgewock on April 27, 2018. *Michael G. Seamans/Morning Sentinel*

‘He’s the boss’

Then there are the cases of trooper misconduct with no corresponding public discipline records.

In the last five years, at least three troopers allegedly broke the law, but the state police had no internal public records documenting the circumstances.

One example is Trooper Justin “Jay” Cooley, who resigned from the state police in January 2020, five months after being charged with domestic violence assault.

Another is Michael Lane. Saco police arrested the trooper for criminal mischief in 2016, but York County District Attorney Kathryn Slattery decided not to prosecute after finding insufficient evidence to prove the case beyond a reasonable doubt. What happened remains unclear. The prosecutor declined to comment on the facts of the case. But Lane received a letter of guidance from the criminal justice academy that provides general clues: The academy reminded him to comply with the law at all times, maintain his composure in “difficult and frustrating situations” and recognize how the use of alcohol could cloud his judgment.

Lane remains with Alfred-based Troop A and was promoted to corporal last month.

The third involved Trooper Ethan Doody, who resigned in March 2015 shortly before the criminal justice academy found he had committed theft by deception and revoked his law enforcement license.

The investigation into Doody stemmed from the night of Dec. 26, 2014, when he responded to a pickup truck that crashed into a bull moose in Aroostook County’s Cyr Plantation. The driver, Brian Dufour, and his passenger were not injured, but the moose was killed, and the

truck was too damaged to drive.

When the driver's father, Joel Dufour of Madawaska, arrived on scene to help, he noticed the moose's antlers had been cut off, he said. His son told him the trooper, Doody, had done it, even though he'd asked to keep the moose. Joel Dufour found it odd and didn't get a clear answer from Doody as to why he took the antlers from the family, he said.

"I was not in a position to argue. He's the boss," Joel Dufour said.

More than two months later, the academy found the trooper had committed theft by deception when he used a hack saw to claim the antlers for himself and falsely said they had to be removed "to prevent people from just taking the antlers and discarding the carcass," according to the academy's paperwork documenting Doody's license revocation.

The Maine Attorney General's Office also looked into Doody's conduct, according to the academy, but he didn't face criminal charges.

Staff attorney Parr said there were no discipline records for Doody.

But the agency did reach an agreement with Doody to resign. The document shows Doody was investigated and quit. In return, the state police agreed to only verify his employment to his future employers. Other parts of the agreement were redacted without explanation. There was no mention of the moose antlers.

The only way to know why Doody resigned would be to ask a different agency than the one that employed him.

This is how the process works, Cote said: If the state police can't complete an internal investigation, it is closed. The agency has no control over an officer's decision to resign, Cote said.

Police in other states complete internal investigations even after officers resign, however.

And while the criminal justice academy, which handles police licensing in Maine, may pick up a complaint regardless of the officer's employment status, it only reviews a limited number of cases, nearly all of which involve allegations of criminal behavior. The police force also does not assist the academy by handing over internal investigative reports into its officers. Rather, under its union contract, the agency only sends a synopsis. The union contract is approved by a number of officers and officials, including the governor.

When law enforcement agencies don't document or disclose misconduct, it makes it easier for officers to get policing jobs elsewhere, including in other states.

“This is one of the biggest problems in American policing because it’s so seriously decentralized. I’ve seen it over and over and over … that officers were allowed to resign agencies, and then they joined another agency, and there was no record really of any type of misconduct in the previous agency,” said Haberfeld, with the John Jay College of Criminal Justice.

There are other ways troopers can avoid public documentation of their discipline. Under their union agreement, troopers can request that the state police remove corrective memorandums, reprimands and suspensions from their personnel files after varying periods of time. Unlike other law enforcement agencies in Maine with similar contracts, they are then destroyed.

Maine State Troopers Association Executive Director Craig Poulin, left, speaks with Sen. William Diamond, D-Windham, in 2009 in Augusta. *Andy Molloy/Kennebec Journal*

Cote pointed out that removal is not allowed if the officer has received subsequent, similar discipline.

Wiping clean an officer’s disciplinary history hinders the ability of supervisors to discipline officers in the future, said experts who study police accountability. The practice can also threaten the constitutional rights of defendants who are entitled to know if the officer testifying against them has a history of dishonesty, violence or criminal behavior.

Click on the image below to read the Maine State Police discipline records.

“It’s about fairness, about giving us the information we need to present to the jury that this witness may or may not be credible, may or may not have his own biases or histories that would make him less than heroic in the eyes of the jury,” said Tina Nadeau, executive director of the Maine Association of Criminal Defense Lawyers.

Craig Poulin, executive director of the Maine State Troopers Association and a former chief of the state police, did not respond to three interview requests.

The state police does not track how many discipline records it destroys, Parr said.

But it’s clear that cases resulting in discipline with a corresponding public record make up a small percentage of total complaints.

Most reports to the state police’s internal affairs division – 477 out of 685 over the last six years – are inquiries deemed informational only, according to statistics provided by the agency. Of the 208 internal affairs cases that resulted in findings for or against officers in 2015 through 2020, 65 were sustained, meaning the allegations against officers were found to be true.

It’s not known how many of the 65 cases resulted in discipline, but the newspapers received 20 records of discipline for 19 officers through the first half of 2020.

‘Where the problem starts and ends’

Political leaders who oversee police departments are ultimately responsible for ensuring agencies release more information about misconduct, said Haberfeld, with the John Jay College of Criminal Justice.

“There’s too much focus on what police organizations can or cannot do,” she said, “and not enough focus on the fact that it’s the politicians that can tell or not tell them to do certain things.”

The overseers of the state police include lawmakers and the governor – a former attorney general who has worked closely with law enforcement throughout her career.

Gov. Janet Mills’ office didn’t respond directly to questions about whether the governor believes a lack of detail in misconduct records is a problem and, if so, what she wants to do about it. Mills believes the records “must strike the appropriate balance between providing transparency into matters of police misconduct while adhering to state laws involving personnel matters – and that these must be the only considerations when creating these records,” spokesperson Lindsay Crete said.

In addition to guarding transparency, politicians are also responsible for picking the leader of the state police, who, per state law, must be chosen from within the ranks of the organization.

Lawmakers and experts were split on the requirement that the colonel come from within the state police. Some said they believe it could be a good motivator for the rank and file, and picking from within the organization ensures the leader knows the operations thoroughly. Others questioned why it was a requirement and said only being allowed to pick from within the state police could create a culture that rejects outside oversight.

Haberfeld said the practice is not common, but she's not opposed to it. "The question becomes: Who is picking the person? If it's a local politician, this is where the problem starts and ends," she said.

Within the last two decades, no one has been sworn in as leader of the state police with less than 20 years of experience in the agency. Over that period, the Legislature's criminal justice committee didn't turn down any of the five colonels' nominations. They were confirmed with zero opposition in the Maine Senate.

Have more information to share? Contact us at , and .

Coming Monday: Misconduct kept secret by the Maine State Police is revealed, and some details raise doubts about accountability.

Coming Tuesday: A woman who was married to a state trooper says it took weeks for the agency to take seriously her reports of domestic violence.

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PRESS RELEASE

From: Maine Freedom of Information Coalition
Embargoed: Until 4 a.m. Friday Morning January 7, 2022
Further Information: mfoic@earthlink.net, 207 930-2400

Only Half of Maine Law Enforcement Agencies Offer Insight into Complaints and Discipline

A nearly year-long investigation from the Maine Freedom of Information Coalition into 135 law enforcement agencies highlights inconsistencies in record keeping and access to information.

The Maine Freedom of Information Coalition (MFOIC) is a 501(c)(3) non-profit, non-partisan statewide membership organization that exists to broaden knowledge and awareness of public access to Maine government proceedings and government records.

In a recent project, using Maine's Freedom Of Access Act (FOAA), MFOIC requested information from 135 Maine law enforcement agencies regarding citizen complaints and police disciplinary action and record keeping. The results revealed widespread discrepancies in the public's ability to access documents members of the public are legally entitled to view.

Beginning in January of 2021, the Maine Freedom of Information Coalition requested police departments in Maine provide all records concerning the total number of complaints filed against law enforcement officers from January 2016 to present. The coalition asked agencies to provide the total number of complaints received, their type, time period from the initial complaint to determination made, and any disciplinary action that resulted from the complaints.

The coalition's findings demonstrate Maine has no uniform system of tracking and maintaining records on police discipline. Some records were redacted. Those that were not redacted revealed a wide-ranging approach to accessing police records.

- 52% of agencies provided an aggregate number of complaints against officers.

- 32% demonstrated disciplinary action having been taken against at least one officer.

- Portland Police reported the most complaints with 116, with data from 2020 still unavailable. Augusta Police reported 71 complaints with 18 incidents resulting in discipline.

- Kennebunk Police reported 55 complaints with none of the events resulting in discipline.

- Maine State Police said the agency does not maintain an aggregate number of complaints but reported 17 disciplinary incidents.

Beyond the basic information of number of complaints and their resolution, information about disciplinary action also varied widely.

- Incidents resulting in disciplinary action included a written reprimand from Pittsfield's Town Manager to Police Chief Pete Bickmore for failing to follow CDC COVID-19 guidance while ill.

- Documents released by the Waterville Police Department revealed Officer Brian Gardiner was demoted for allegedly having a "sexual in nature" extramarital affair while on duty.

- Internal documents from the Skowhegan Police Department show officer Alex Burns was assigned to write a 500 word essay, with citations, on "the importance of following orders" over accusations of being insubordinate.

While most departments agreed to waive fees to produce the requested records, 9 departments requested payment for the time needed to collate documents. In several cases, the MFOIC chose to withdraw requests due to payments deemed excessive. The Cumberland County Sheriff's Office asked for $353 to produce records, citing 16 hours of research. Sanford Police provided a cost estimate of at least $225 for 10 hours of research.

Access to detailed findings, including MFOIC's initial FOAA request, a spreadsheet containing police department responses, and the full text of disciplinary records that were provided by police agencies are open to the public and are available at ***https://drive.google.com/drive/folders/1IhAS4pvP2uL9ja2MUffWxH4QTHio8M9E?usp=sharing***
using the following sign-in information:
Email: Mainefreedomofinfo@gmail.com
Password: Mainenews1!

#END#

Maine Freedom of Information Coalition audits Maine law enforcement agencies

cm centralmaine.com/2022/01/07/maine-freedom-of-information-coalition-audits-maine-law-enforcement-agencies/

By Vanessa Paolella January 7, 2022

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Public record details law enforcement disciplining

One in five agencies did not respond to nonprofit group's Freedom of Access Act request

By Vanessa Paolella
SUN JOURNAL

The Maine Freedom of Information Coalition sent Freedom of Access Act requests to 135 law enforcement agencies across Maine last year, seeking records of people's complaints and disciplinary letters over five years.

After receiving the request for records, some departments presented the coalition with an abundance of disciplinary records, while others offered only basic information that lacked identifiable details.

One in five did not respond, despite be-

The Maine Freedom of Information Coalition sent Freedom of Access Act requests to 135 law enforcement agencies across Maine last year, seeking records of people's complaints and disciplinary letters over five years.

After receiving the request for records, some departments presented the coalition with an abundance of disciplinary records, while others offered only basic information that lacked identifiable details.

Find It

Detailed findings, including Maine Freedom of Information Coalition's Freedom of Access Act request, a spreadsheet containing police department responses, hundreds of email and voice messages exchanged with members of law enforcement over the last year, and the full text of disciplinary records that were provided by police agencies, are available here.

Email:

Password: Mainenews1!

Click “my drive” on left to access the documents.

One in five did not respond, despite being required to do so under Maine’s public access law.

Among the disciplinary actions reported by law enforcement agencies, an Auburn police officer was admonished after leaving headquarters with his loaded service pistol in plain sight inside his open locker. The officer received a verbal reprimand, according to one of the disciplinary records provided by the Auburn Police Department.

Other Auburn police records show multiple officers received oral or written warnings when they failed to show up at court hearings or for their scheduled shifts, and three officers were disciplined for more serious infractions.

In Mexico, the Police Department did not create written disciplinary records for two sustained complaints of rudeness and conduct unbecoming an officer. It is unclear whether any public records detailing the incidents exist because they were not provided to the coalition.

Similarly, a three-sentence disciplinary letter issued to a Windham police officer stated he was suspended for 40 hours, but provided no information as to why, beyond referencing Article 17 of “the contract.”

Many departments, including Augusta, Monmouth and Rumford, supplied registers with the most basic details, but did not provide the actual disciplinary letters.

Thirty agencies did not respond to the Freedom on Access Act request, including sheriff’s offices in Aroostook, Washington and York counties.

In January 2021, the nonprofit coalition submitted public records requests to law enforcement agencies related to people’s complaints and police disciplinary records, including all municipal police departments, all of Maine’s county sheriffs’ offices, and a few state agencies.

The requests sought access to the total number of complaints received, their type, time period from the initial complaint to determination of discipline, and copies of all final written disciplinary letters from January 2016 to January 2021.

All correspondence and the records obtained by the coalition, which is made up of representatives of Maine’s news media, librarians and other public access advocates, were made public this week.

The coalition board members say the informal audit demonstrated a need to standardize the creation and maintenance of complaints and disciplinary records in law enforcement agencies.

“In this particular case, it makes sense if complaints are filed, to have a system for determining how they are handled that is consistent across the state,” coalition President Jim Campbell said. “What’s the process of generating and maintaining the records? That is the question. That, as far as I know, is not mandated in any way and is not consistent across different departments or different levels of policing.”

Disciplinary action, too, was highly variable. When an officer failed to pay the Skowhegan Police Department the balance of $9.95 he owed for the purchase of an external vest, he was ordered to pay that balance and to write an original 500-word essay on the importance of following orders. When writing, he was ordered to use Times New Roman size 12 font, single spaced, with 1 inch margins and citations.

In Waterville, two officers were disciplined for holding down a 12-year-old boy by his wrists and ankles in 2018 as the child’s mother spanked him. One of the officers was suspended without pay for three days. The second officer was suspended for two days.

The purpose of the project was not necessarily to compile a database of complaints and disciplinary records, said coalition Vice President Judith Meyer, who is also executive editor of the Sun Journal, Kennebec Journal and Morning Sentinel. Rather, the organization sought to gauge how agencies respond to Freedom of Access Act requests, as well as the availability and thoroughness of complaint and disciplinary records.

“The problem, I think, is that having records is not perceived to be a core responsibility for a lot of agencies,” Campbell said. “To their mind, dealing with the everyday things they have to deal with, it’s just one more dumb thing that they have to pay attention to. Except it isn’t a dumb thing.”

In one notable instance, the South Portland police chief promised to remove a reprimand from an officer’s personnel file six months after the reprimand if the behavior were not repeated. The removal date was set at Nov. 14, 2020. However, the department provided that record to the coalition as part of its response to the records request in January 2021, months after the officer was told the document would be removed.

Under state law — Title 30-A for municipalities and counties and Title 5 for state employees — final written decisions of discipline taken against public employees are not confidential, and the decisions are required to contain enough information about the details of the conduct for the public to understand the basis on which the disciplinary action was imposed, and what that action was.

There is no allowance for removal of disciplinary records from personnel files.

Rep. Jeffrey Evangelos, I-Friendship, serves on the Judiciary Committee in the state Legislature, where he is a strong advocates for law enforcement reform. He said he has found it difficult and, at times, impossible to obtain clear disciplinary records for serious wrongdoing.

“The police (should) be held accountable to the same laws that you and I have to follow,” Evangelos said. “And if they break them, they (should) be held to the same standards, and it should be public information.”

The Maine Freedom of Information Coalition board members were inspired to pursue the unofficial audit after learning about the joint investigation by the Portland Press Herald and Bangor Daily News into the redaction of information in Maine State Police disciplinary records.

“If we had done this as a journalistic project, I would have hammered every one of those police chiefs to get me a response within 30 days, or something like that, and then written back to them again, and again, and again until we got it,” Meyer said. “This was more of a point-in-time survey. We’re going to send it out, see what we get, and let the public know what we found.”

All but 10 of the departments that responded waived search and copying fees, under the provision in the Freedom of Access Act that fees may be waived in the public interest “because doing so is likely to contribute significantly to public understanding of the operations or activities of government.” The coalition withdrew requests from five agencies which requested more than $200 in fees.

Those five departments were the Maine Warden Service, the police departments in Sanford, Brewer and Belfast, and the Cumberland County Sheriff’s Office.

At least 10 of the agencies that responded redacted information, including the Maine State Police; the sheriff’s offices in Oxford, Waldo and Piscataquis counties; and police departments in Cumberland, Scarborough, Farmington, Fairfield, Pittsfield and Kittery.

State law allows disciplinary records to be redacted only if an employee who has been disciplined appeals the decision and wins, according to Meyer.

If a decision is overturned, the employee’s name may be redacted from the otherwise public document, unless the employee publicly discloses the discipline on their own.

“The statute is really clear that a final disciplinary letter is a public document,” Meyer said. “It doesn’t say ‘except for.’ It says the whole record is a public record, so when we strike the content out of what is supposed to be a public record, it just raises questions and, for some people, it may raise suspicions.”

The Pittsfield Police Department redacted one of three final written decisions made available to the coalition. It was dated Feb. 24, 2020, involving a sergeant. The letter concludes the officer engaged in conduct that discredited the department. He was issued a written reprimand, but there is no detail of that conduct.

Two other disciplinary letters were not redacted, including one very detailed decision issued to police Pittsfield Chief Pete Bickmore in March 2020 by Town Manager Kathryn Ruth for violating COVID-19 protocols, violating a directive to leave the office when he was sick and joking about the pandemic in early 2020.

The chief was instructed to read state Center for Disease Control & Prevention guidance and the governor's directives on COVID-19 protocols, follow the instructions of Emergency Management Director Bernard Williams, provide medical clearance to return to work and apologize to all of his co-workers.

Standardizing the type of information disciplinary records should and should not contain could lead to fewer redactions and increased public trust, Meyer said.

"It was clear from Auburn, because we've got dozens of (disciplinary letters), that that's a high priority for them, that officers are held accountable," Meyer said. "The public should know that, for the good, as well as when officers misbehave, that the department itself is upholding its standards in a very regular, consistent way."

The issues are not only with law enforcement agencies. Other public service sectors struggle to maintain records, too.

According to data from the Office of State Fire Marshal, 61% of fire departments in Maine submitted at least one report to the state in 2020, despite being mandated to do so for every response under the law.

From 2016 to 2020, Maine Public Access Ombudsman Brenda Kielty received 429 inquiries and complaints related to municipalities, compared to 85 for law enforcement, according to annual reports from the Office of Attorney General.

Most members of the public are not familiar with navigating Freedom of Access Act laws, so it is important that requesting records be as simple as possible, Meyer said. When people encounter barriers, they may feel their only option is to give up.

"I've seen it happen too many times," Meyer said. "I wish it would never happen. But you know, people don't necessarily have the perseverance to just, you know, push and push and push until they get a record."

Oftentimes, when people meet resistance, they contact the Maine Freedom of Information Coalition, journalists or the state public records ombudsman for help, according to Meyer.

“Everybody’s willing to help,” she said, “but the best help would be if the records are available and accessible to the public when they ask for it.”

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Justin Silverman: Without more transparency requirements, potential for police secrecy is staggering

SJ sunjournal.com/2022/03/13/justin-silverman-without-more-transparency-requirements-potential-for-police-secrecy-is-staggering/

March 13, 2022

Justin Silverman

A judge in Bangor heard arguments in January about whether Maine State Police must release details about the discipline of its officers. The case — brought by the Portland Press Herald and the Bangor Daily News — involves excessively redacted misconduct records and has spotlighted the need for transparency within the department.

The newspapers explained in their lawsuit that: “Public awareness of whether law enforcement agencies are engaged in effective oversight and discipline of officers serves as a vital check on police corruption and misconduct.”

Such misconduct, however, often goes unchecked in Maine. As a recent survey of more than 100 local law enforcement agencies suggests, there’s a blue wall of silence that extends far beyond the state police headquarters in Augusta.

Fortunately, there is a common-sense solution that can help increase public awareness and allow citizens to better oversee their police departments. But first, it’s important to understand the breadth of the problem and how police misconduct secrecy is pervasive throughout the state.

The Maine Freedom of Information Coalition (MFOIC) earlier this year released a survey of 135 law enforcement agencies that were asked to provide the number of citizen complaints against their respective officers since 2016. The coalition also asked for the details of any disciplinary actions taken.

Despite being required to release this information under the state’s Freedom of Access Act, nearly half of all agencies (48%) declined to release any information or failed to respond at all. Of those agencies that did respond, some demanded hundreds of dollars to release the data.

Several agencies that did comply with the law — such as Pittsfield, Waterville and Skowhegan — underscored the need for transparency by revealing instances of misconduct that citizens have a right to know. Without this knowledge, after all, there can be no public oversight and accountability.

Instances of misconduct and disciplinary actions included:

- A police chief not following Centers for Disease Control and Prevention COVID-19 guidance while ill.
- An officer allegedly having a “sexual in nature” extramarital affair while on duty.
- An officer being required to write a 500-word essay with citations on “the importance of following orders” after accusations of being insubordinate.

When questioned by WMTW about the agencies that did not respond to the requests, Maine Chiefs of Police President Jared Mills blamed a lack of resources and inconsistent internal policies on how the information should be maintained.

Granted, some agencies are understaffed. Without a uniform policy on how misconduct records should be maintained and released, it can also be difficult to comply with the state’s public records law. But while these may be valid explanations in some cases, we should not accept them as excuses for any.

The Freedom of Access Act requires that agencies respond to requests within five days and produce records within a reasonable period of time. Compared to public record laws in other states, these are very lenient requirements. There is no excuse for not responding. There is no excuse for not taking the time — especially when broadly defined as “reasonable” — to gather records. There is no excuse for the secrecy.

Still, it’s incumbent on all of us to look for solutions and to create, whenever possible, a better system. Considering the comments of Mills and the challenges he said police departments encounter when receiving requests for instances of misconduct, there is a very simple way we can guarantee transparency, at least in respect to citizen complaints:

Require by statute that all law enforcement agencies not only maintain but also publicly and regularly post the number of citizen complaints against their officers and the disciplinary action taken.

Legislating such a requirement will make the expectation of transparency explicitly clear. It will force agencies to maintain data on police misconduct in a way that it can be easily managed and made accessible. It will remove the burden of making public record requests — requests that are often ignored. This required transparency will also encourage citizens to come forward with complaints and to help deter misconduct in the future.

A longer-term consideration is to comprehensively reform the Freedom of Access Act. A goal of the MFOIC survey was to show how difficult it is for citizens to get access to basic law enforcement data. Under the current law, there is little recourse when that data is denied other than to pursue litigation. Most citizens (and most newsrooms) lack the time and money needed to sue agencies for records they are entitled to under FOAA. Whether we grant the state's public records ombudsman powers to enforce the law or provide statutory incentives such as mandatory attorney fees for prevailing plaintiffs, we need to create more avenues for enforcement.

Prior to commencing their lawsuit against the Maine State Police, the Portland Press Herald and the Bangor Daily News requested about five years of disciplinary records. But because not all the information requested was provided, the newsrooms couldn't determine the misconduct of a majority of officers disciplined during that time.

Now take that one experience and multiply it by the 100-plus law enforcement agencies throughout the state. That is what's at stake. The opportunity for secrecy is staggering.

Justin Silverman is executive director of the New England First Amendment Coalition. Learn more about the coalition's work at nefac.org.

Court orders state police to reveal more details about misconduct by troopers

SJ sunjournal.com/2022/05/31/court-orders-state-police-to-reveal-more-details-about-misconduct-by-troopers/

By Penelope Overton May 31, 2022

A Superior Court judge has ordered the Maine State Police to provide the state's two biggest newspapers with previously concealed parts of disciplinary records detailing misconduct and rule-breaking by its troopers.

In a May 26 ruling, Judge William R. Anderson of Penobscot Superior Court also ordered the Maine State Police to search for and turn over missing disciplinary records the state failed to release in response to public records requests from the Portland Press Herald and Bangor Daily News.

Anderson sided with police, however, in defending redactions that may reveal confidential medical data.

"We got what we really needed," said Stephen Stich, supervising attorney at Yale Law School's Media Freedom & Information Access Clinic at Yale Law School, which helped the newspapers file their suit. "We'll not only find out why these officers were disciplined, but we could get the missing records, too."

The ruling did not say when the Maine State Police must provide the papers with the unredacted records, or how long the agency has to conduct a new search for the missing disciplinary records. The agency may even appeal the ruling. A state police spokeswoman did not respond to calls or emails Tuesday seeking an interview.

The lawsuit, which combined separate complaints filed by both newspapers, centers on records requests filed under the state's Freedom of Access Act seeking final decisions of discipline for all Department of Public Safety employees between 2015 and 2019.

Final disciplinary measures against public employees, including police, are public records in Maine.

In response to the request, the state handed over documents involving disciplinary cases of 22 officers. But in 13 of those cases, the records were either too heavily redacted or too vague to provide any meaningful description of the conduct that gave rise to the discipline.

The state refused to cite a specific legal justification for each redaction in the records, saying that to do so would reveal the contents of the redacted sections. It also did not provide all disciplinary records referenced in the released information or information about an unknown number of inactive disciplinary measures.

During the investigation, the Maine State Police revealed that some final disciplinary actions were removed from trooper personnel files after a period of time, ranging from as little as a year for minor infractions and preventable accidents to five years for demotions and serious infractions.

Police lawyers say they cannot find all of these “inactive” files, and the court can’t be sure they were not destroyed, which is prohibited under Maine’s record retention laws. Anderson has ordered a second review for these missing inactive disciplinary records.

Related

Inside the Maine State Police, officers misdeeds are kept secret

The newspapers published a three-day series revealing the nature of misconduct in the ranks of the state police based on the records the police provided. The reporting showed a secretive process in which misconduct records are only briefly available to the public before they are destroyed. The lack of disclosure prevented public accountability of the troopers and the department’s disciplinary process.

State police redacted substantive descriptions of what some officers did to warrant punishment.

The reporting and the lawsuit were supported by the Pulitzer Center and the Media Freedom and Information Access Clinic at Yale Law School, where law students help media organizations advocate for greater government transparency through legal action.

Sigmund Schutz of Preti Flaherty, the lawyer representing the Press Herald, was pleased with the ruling.

“This is a terrific win for government transparency and police accountability,” Schutz said.

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MEMORANDUM

TO: Right To Know Advisory Committee

FROM: Janet Stocco, Legislative Analyst

DATE: October 23, 2023

RE: LD 1397, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees

BACKGROUND

1. Confidentiality of government employee disciplinary records. Under the current statutes governing state, county and municipal employee personnel records (in sections 2-4 of LD 1397):

- "Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action" are confidential and therefore not "public records" for purposes of the Freedom of Access Act (FOAA).
- "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."

2. Disciplinary record retention. Whether a record is subject to disclosure under FOAA depends not only on whether the record is a "public record" or is instead made "confidential" by statute, but also on whether the public entity has the record within its files at the time that the FOAA request is received. Under 5 M.R.S. §95-B(7) of current law, records "may not be destroyed or otherwise disposed of by any local government official" except as authorized by records retention schedules established by the State Archivist (*see* section 1 of LD 1397). When the Judiciary Committee considered LD 1397, Government employee disciplinary records were governed by two provisions of these record retention schedules.

- **State employees.** The records retention schedule for state employee personnel files provides as follows:

  "Retain disciplinary records for up to 5 years. Retention is counted for active service, not calendar time. If an employee leaves State service with active discipline in the file that discipline remains until employee returns or complete file is destroyed. If collective bargaining contract requires that disciplinary documents be destroyed earlier than described above, the contract shall be followed."

- **Local government employees**. The records retention schedule for local government employee personnel files provides the following retention period for "employee disciplinary records":

  "60 years after separation unless collective bargaining contract requires that disciplinary documents be destroyed earlier than the contract shall be followed."

3. Collective Bargaining Agreements; recent caselaw. In *Thurlow v. City of South Portland*, No. CV-21-0216, 2002 WL 17403421 (Me. Super. Ct. June 24, 2022), a city patrol officer plaintiff, sought to prevent the release, pursuant to FOAA public records requests, of 2 written reprimands. The collective bargaining agreement (CBA) between the City and plaintiff's union provided for *removal* of written reprimands from employee personnel folders after one year upon request of the employee. Plaintiff had accordingly requested that the written reprimands be removed from her personnel folder and the City had complied. Nevertheless, the City's practice was to keep a second copy of each written reprimand in the department's internal affairs file. When the City later received requests for public records under FOAA for disciplinary records that included plaintiff's reprimands, the City argued that it had the authority to release those reprimands from that file to the requester under FOAA.

The Superior Court agreed with the City that the written reprimands were subject to disclosure. The court explained that written reprimands within government files are public records generally subject to disclosure under FOAA unless they fall within an applicable statutory exception to FOAA. Plaintiff pointed to the State Archivist's authority in 5 M.R.S. §95-B(7) to establish a records retention schedule directing when a local government may *destroy* public records. She further noted that the applicable records retention schedule provides that the local government may follow a provision in a "collective bargaining contract [that] requires that disciplinary documents be *destroyed* earlier" than the default 60-year retention period. The Superior Court explained that, although the record retention schedule authorized the early *destruction* of disciplinary records under a CBA, the language of the CBA only required the *removal* of the record *from the personnel file*. The court noted that the CBA could have been drafted to prevent the retention of or to require the destruction of final written disciplinary decisions in an internal affairs file, but the CBA in this case did not.

4. Discipline that may be used to impeach law enforcement testimony. In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court concluded that "a due process violation occurs when the government fails to disclose evidence that is favorable to an accused and material either to guilt or to punishment." Subsequent cases, including *Giglio v. United States*, 405 U.S. 150 (1972), clarified that "when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within" the *Brady* rule. Prosecutors are thus required, under the *Brady/Giglio* line of cases, to disclose to a defendant the following types of material that may be used by the defendant to impeach a prosecution witness: evidence that the witness (a) has committed perjury; (b) has a motive to lie—for example, if the witness agreed to testify in exchange for immunity or a reduced sentence; (c) was convicted of a crime or was, for example if the witness is a police officer, formally found to have engaged in job-related misconduct; or (d) has traits that undermine the witnesses' truthfulness, bias, or ability to truthfully perceive or recall events.

SUMMARY OF LD 1397

As originally drafted, LD 1397 would have implemented the recommendations on the Seventeenth Annual Report of the Right To Know Advisory Committee related to records of disciplinary actions against public employees.

- Section 1 of the bill provided that, notwithstanding any collective bargaining agreement or other employment contract entered into on or after January 1, 2024 to the contrary, local government records may not be disposed of except in accordance with record retention schedules established by the State Archivist.

- Section 2 (p. 1, lines 26-28), Section 3 (p. 2, lines 9-12) and Section 4 (p. 2, lines 36-39) of the bill would have amended the statutes governing state, county and municipal employee personnel records (in that order) to require that, in response to FOAA requests for final written disciplinary decisions imposing or upholding discipline, the responding public body must provide the records in its possession or custody regardless of whether the final written decision was located in the employee's personnel file or in another location.

- Sections 2 and 3 of the bill also required that final written disciplinary decisions imposing or upholding discipline for state (p. 1, lines 17-19) and county (p. 2, lines 1-3) employees must indicate the conduct or

other facts on the basis of which the disciplinary action is being imposed and the conclusions of the state or county employer as to the reasons for that action. Similar language was already included in the statute governing municipal employee personnel records (*see* p. 2, lines 28-30). ***This was the only portion of the bill approved by a majority of the Judiciary Committee and enacted by the Legislature. P.L. 2023, ch. 159.***

- Section 5 of the bill directed the State Archivist:
  - To revise the record retention schedules applicable to state and local government personnel records to require, as a default rule, that final written disciplinary decisions be maintained for a period of 20 years, **except** (a) a *shorter retention period* (but not less than 5 years) could be authorized for final written disciplinary decisions involving *less serious conduct* or discipline and (b) *a longer retention period* beyond 20 years could be required for final written disciplinary decisions relating to law enforcement *employee disciplinary actions that could be used to impeach the credibility of the law enforcement officer*.
  - To use consistent terminology in records retention schedules regarding records that are not retained and to define terms including "remove," "purge" and "destroy" related to the disposition of records.

The State Archivist indicated a willingness to make these changes even absent legislation. The version of LD 1397 enacted by the Legislature, P.L. 2023, ch. 159, thus did not include these provisions.

ADDITIONAL MATERIALS

RIGHT TO KNOW ADVISORY COMMITTEE

The following documents were provided by interested parties and distributed to committee members at the meeting.

Testimony of Dean Staffieri
Maine Service Employees Association, SEIU Local 1989
In Opposition to LD 1397, An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees

October 23, 2023

I am Dean Staffieri, President of the Maine Service Employees Association, Local 1989, which proudly represents over 13,000 dedicated workers across the state of Maine. Our members serve in various critical roles, ranging from all three branches of Maine State Government to the Maine Community College System, Maine Maritime Academy, Child Development Services, and more. We take great pride in advocating for the welfare of our members and upholding their rights as public employees.

Today, I stand before you to address a pressing concern, one that has the potential to significantly impact the morale and future of our workforce. I'm referring to the proposed access to state employee discipline records, a matter of deep concern for our union and our members. While transparency and accountability are essential principles in government, we must approach this issue with great caution.

Access to ongoing discipline records is a double-edged sword. On one hand, it's important for our institutions to learn and grow, as progressive discipline can serve as a valuable tool for personal and professional development. But, on the other hand, we must ensure that these records are not weaponized against our workers for the entirety of their careers. It's vital to strike a balance between accountability and an employee's opportunity to rehabilitate and advance in their profession.

Furthermore, the proposal to override collective bargaining agreements is deeply concerning. Collective bargaining is a cornerstone of labor rights, ensuring that workers have a say in the conditions of their employment. When this agreement is circumvented, it undermines the very principles upon which our labor movement is built.

Allowing unfettered access to discipline records can have dire consequences for the recruitment and retention of employees. Public employees already face unique challenges, including lower wages compared to the private sector. Opening these records to the public without clear guidelines and safeguards can further deter potential workers from considering public service as a career. It can also push current employees away, fearing the potential long-term consequences for minor infractions. At a time where one out every six State jobs goes unfilled, the State should not be erecting further disincentives to recruit and retain State workers.

In conclusion, as we deliberate the issue of access to state employee discipline records, we must remember that our workers are not disposable. They deserve a fair chance to grow and excel in their professions, and they rely on the protections offered through collective bargaining agreements. Let us not forget that public service is a calling, and we must do everything in our power to attract and retain the best and brightest among us. We must engage in a thoughtful and balanced dialogue that respects the rights and dignity of our public employees while maintaining accountability. Thank you for your time and attention.

Shenna Bellows
Secretary of State

MAINE STATE ARCHIVES

Department of the Secretary of State

Katherine McBrien
Maine State Archivist

Maine State Archives Recommendations for LD 1397

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

Senator Carney, Representative Sheehan, and Distinguished Members of the Right to Know Advisory Committee,

My name is Kate McBrien. I live in Union, Maine, and I serve as the Maine State Archivist. On behalf of the Maine State Archives, I am here to share our perspective and recommendations for the changes to records retention schedules proposed in portions of LD 1397, which were carried over for discussion in the upcoming legislative session.

The Maine State Archives Advisory Board created under Title 5 exists to advise the Maine State Archivist with regards to proposed retention schedules and related policy issues with a goal of ensuring that records of continuing value are preserved for use by future generations. The Archives Advisory Board held a special meeting last week to discuss section 5 of LD 1397, specifically the requirement to change the record retention schedules applicable to state and local government personnel records. The provision, which was carried over, would direct the State Archivist to change the retention schedule for final written decisions of disciplinary action from 5 years to 20 years The Board greatly appreciated the assistance and input from representatives of several Unions who were able to join us for the discussion.

For purposes of the special meeting, the Board agreed to not address the issue of whether a collective bargaining agreement could override any records retention schedule, as we believe that determination falls outside of the powers and duties of the Maine State Archivist.

While the Board agrees that the issue is complicated with no easy answer, we felt that for the majority of public employees and the types of positions they hold in state government, 5 years was a sufficient time period in which to retain a final written decision of disciplinary action for the duration of the employee's service. (Note: Employee personnel records are kept for 10 years after an employee leaves state service but are reactivated if they return within that time frame.) It is important to understand that the 5-year retention period is based on someone's time of service – not calendar year. So if an employee leaves state employment with a disciplinary decision in their file, that decision is kept in their individual employee record with the clock on the 5 year retention period paused. That clock will restart when or if they rejoin the Maine State Government as a state employee at any time within the ten-year period following their departure from state service.

The Board also discussed the Right to Know Advisory Committee's initial concern specifically about law enforcement employee disciplinary records. They agreed that this group of state employees stand out due to their interaction with members of the public and their responsibility for public safety. For this reason, the Board recommends working with the Department of Public Safety to create an individual agency record retention schedule to address the final written decision of a disciplinary action of law enforcement officers. This records retention schedule should be a longer period (possibly 15 or 20 years) and as a specific agency schedule would override the State General Schedule which would maintain the records for a shorter period. Maine State Archives is committed to moving forward with this recommendation from the Board. For local government (County and Municipal government) the Maine State Archives will create a specific retention schedule for law enforcement disciplinary records. We are currently updating the Local Government General Schedules to bring them more in line with State General schedules, so will plan to include this provision for law enforcement.

I hope this helps to address the concerns of the Right to Know Advisory Committee. Thank you for your time. I am available to answer any questions.

TESTIMONY OF TOM FEELEY, GENERAL COUNSEL

MAINE SERVICE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989

BEFORE THE RIGHT TO KNOW ADVISORY COMMITTEE

WRITTEN COMMENTS REGARDING LD 1397

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

October 23, 2023

Members of the Right to Know Advisory Committee, I am Tom Feeley, the General Counsel of the Maine Service Employees Association, SEIU Local 1989, a labor union representing over 13,000 public and private sector workers statewide.

I am here today to share the concerns that my organization and its members have with the language of LD1397. We certainly appreciate that this bill was crafted with the best intentions. There is a real interest in the public's right to know about certain types of workplace misconduct, such as in the *Brady-Giglio* context, where criminal defendants have a constitutional right to certain information. However, this bill does not distinguish between the types of misconduct that are relatively inconsequential versus those that are of inherent public interest.

Further, the bill as drafted undermines the industrial due process that labor unions have fought for and won over the last century. The bill would significantly raise the stakes of relatively minor disciplines and inhibit the ability of unions and employers to resolve our disputes over disciplinary matters.

I want to begin by briefly discussing the nature of discipline in a unionized public sector workplace.

The vast majority of workers in this country and in this state are not unionized. The typical non-union worker is "at will," meaning that they can be terminated at any time for any lawful, non-discriminatory reason. In fact, the employer does not have to articulate a basis for terminating an at will employee or even reduce the termination to writing. To borrow the tagline of a famous gameshow host, the at will employer need only utter a simple "you're fired" in order to terminate the worker.

In contrast, unionized workers have fought for and won industrial due process in the form of "just cause"—which places a heavy burden on the employer to demonstrate a valid, fair, and just basis for any disciplinary action. Of particular relevance here, the Supreme Court has held that, in the case of public sector workers, just cause provisions grant workers a protectable property interest in their job which cannot be severed without due process of law. Specifically, the

Supreme Court found that public sector workers have a constitutional right to advance written notice of any discipline that would impact pay, such as suspensions, demotions, and terminations, as well as the right to a pre-disciplinary hearing and having the final discipline reduced to writing. These written notices of discipline are for the protection of the individual worker. They provide the employee with the opportunity to rebut the express charges against him, and ensure that the employer will not introduce *post facto* pretextual rationales to justify the discipline. If the worker and union challenge the discipline through the grievance and arbitration process, the employer will bear the burden of proving that the worker specifically engaged in the alleged misconduct as articulated on the disciplinary form itself.

As drafted, LD1397 takes this shield of the written disciplinary form—which, again, arises from the public sector worker's fundamental constitutional right of due process—and turns it into a sword that will follow the worker for the next twenty years.

Another concept central to industrial due process is that of progressive discipline. Under the progressive discipline model, discipline is meant to be a corrective action—not a punitive measure. Progressive disciplinary ladders begin with lower-level warnings, move up to suspension and demotion, and finally culminate in termination. The employer is required to discipline employees at the lowest level of discipline that is appropriate for the nature of the infraction. If the worker engages in related misconduct within a certain amount of time, then the employer may move up the ladder to the next level of discipline. But if the worker refrains from further misconduct for a certain amount of time, the discipline is removed from their record. Thus, the promise of a clean record is the carrot, and the threat of escalating discipline is the stick.

By requiring that all discipline remains on the employee's record for twenty years, LD1397 effectively eliminates the carrot from the progressive discipline model.

The longer retention period means that past disciplines will continue to haunt employees as they seek career advancement. It could also subject public sector workers to harassment and abuse away from work, as any member of the public would be ability to dig up old disciplinary records.

As such, this bill would significantly raise the stakes of discipline. This will inhibit unions and employers' ability to resolve disputes and necessitate far more adversarial disciplinary hearings.

The primary means to challenge discipline is through the grievance and arbitration process. By statute, while the disciplinary grievance is pending, the discipline is not a "final discipline" and it is not subject to Maine's freedom of access laws. The grievance process is cumbersome, and it can sometimes take years before the grievance actually reaches the arbitrator.

Often, while the grievance is in process, the union and employer will resolve the dispute by removing the discipline from the employee's record earlier than required by the contract—say at two and a half years rather than the full three years required by the contract. Another common

resolution where the employee leaves public service while the grievance is pending is that the employer will pull the discipline in exchange for an agreement by the worker to not reapply to the employer. This bill would eliminate both of these forms of resolution.

More commonly, the employee may vehemently disagree with the discipline, but they will decide that it simply is not worth the aggravation of arbitration for something that will be coming off their record within a relatively short period of time. LD1397 ensures that more workers will go through the adversarial arbitration in order to wipe clean their records.

In all, we have serious concerns about the impact that the bill as drafted would have on public sector employment and labor relations.

We ask that the Committee considering narrowing this bill to address the types of misconduct that is inherently in the public interest.

Thank you and I would be glad to answer any questions.