RIGHT TO KNOW ADVISORY COMMITTEE
Law Enforcement Records Subcommittee
Monday, October 23, 2023
Following the full RTKAC meeting at 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

Subcommittee topics:

1. The Intelligence and Investigative Record Information Act (16 M.R.S. §804(3)) currently provides that information in intelligence and investigative records is confidential if there is a "reasonable possibility that public release or inspection of the record would . . . Constitute an unwarranted invasion of personal privacy." The subcommittee will consider whether to recommend amending the law to define the circumstances under which the person whose personal privacy might be invaded, or that person's representative if the person is incapacitated, may consent to release of the information.
2. Whether to make recommendations regarding prompt release by law enforcement of information about a public safety incident or criminal investigation that occurs on a weekend, without the delays incident to submitting formal FOAA requests.

AGENDA

1. **Subcommittee Member Introductions**

2. **Background Information: Subcommittee topic #1**
   - Janet Stocco, subcommittee staff

3. **Law Enforcement and Media Perspectives on both Subcommittee Topics**

   a. Law Enforcement Perspective
      - Jonathan Bolton, Assistant Attorney General
      - Paul Cavanaugh, Staff Attorney, Maine State Police

   b. Media Perspective
      - Judy Meyer, Executive Editor, Kennebec Journal, Morning Sentinel, Sun Journal and Western Maine Weeklies

4. **Next Steps and Future Subcommittee Meetings**
   - Thursday, November 9, 2023 at 1:00 p.m. (JUD Committee Room?)
   - Third meeting date?

5. **Adjourn**

Recall that the full RTKAC meets:
- *Monday, November 6th @ 1 pm*
- *Monday, December 4th @ 1 pm*

131st MAINE LEGISLATURE

FIRST REGULAR SESSION-2023

Legislative Document	**No. 1203**
H.P. 763	House of Representatives, March 14, 2023

An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

Reference to the Committee on Judiciary suggested and ordered printed.

ROBERT B. HUNT
Clerk

Presented by Representative BOYER of Poland.
Cosponsored by Senator BRAKEY of Androscoggin and
Representatives: ANDREWS of Paris, HENDERSON of Rumford, LEE of Auburn, LIBBY of Auburn, POIRIER of Skowhegan, RECKITT of South Portland, SUPICA of Bangor.

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

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

3. Acknowledgment; clarification; time estimate; cost estimate. The agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within 5 working days of receiving the request and may request clarification concerning which public record or public records are being requested. Within a reasonable time of receiving the request, but no later than 30 days following receipt of the request, the agency or official shall provide a good faith, nonbinding estimate of the time within which the agency or official will comply with the request, as well as a cost estimate as provided in subsection 9. The agency or official shall make a good faith effort to fully respond to the request within the estimated time. For purposes of this subsection, the date a request is received is the date a sufficient description of the public record is received by the agency or official at the office responsible for maintaining the public record. An agency or official that receives a request for a public record that is maintained by that agency but is not maintained by the office that received the request shall forward the request to the office of the agency or official that maintains the record, without willful delay, and shall notify the requester that the request has been forwarded and that the office to which the request has been forwarded will acknowledge receipt within 5 working days of receiving the request.

Sec. 2. 1 MRSA §413, sub-§5 is enacted to read:

5. Prioritization of requests. A public access officer may give priority to a request for public records from a resident of this State or from a journalist acting in the journalistic capacity of gathering, receiving, transcribing or processing news or information for potential dissemination to the public.

Sec. 3. 16 MRSA §804, sub-§3, as enacted by PL 2013, c. 267, Pt. A, §3, is amended to read:

3. Constitute an invasion of privacy. Constitute an unwarranted invasion of personal privacy, except when the disclosure of the record is consented to by the individual who is the subject of the record or, if that individual is deceased, incapacitated or a minor, by a person who is a family or household member of the individual. As used in this subsection, "family or household member" has the same meaning as in Title 19-A, section 4102, subsection 6;

SUMMARY

This bill amends the Freedom of Access Act to specify that the reasonable time within which an agency or official having custody or control of a document has to provide a good faith, nonbinding estimate of the time that it will take the agency or official to comply with the request may not be longer than 30 days following receipt of the request. This bill allows the public access officer for an entity subject to the Freedom of Access Act to give priority to requests for public records from residents of Maine and journalists. This bill also amends the Intelligence and Investigative Record Information Act to allow the disclosure of a record that may constitute an unwarranted invasion of privacy if that disclosure is

consented to by the individual who is the subject of the record or, if the individual is deceased, incapacitated or a minor, by a family or household member of that individual.

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April 3, 2023

Testimony of Representative David Boyer

Presenting L.D. 1203 An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

Before the Joint Standing Committee on Judiciary

Senator Carney, Representative Moonen and distinguished members of the Joint Standing Committee on Judiciary, my name is Representative David Boyer and I am proud to present L.D. 1203 An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act. The goal of this legislation is to strengthen Maine's Right to Know law and does so in three ways.

As you know, under current law, agencies or officials must, within a reasonable time, provide a good faith, nonbinding estimate of the time it will take to fulfil the public records request. The issue many journalists, activists, and concerned citizens run into is the definition of "reasonable time." I have personally had requests that seem to hang in the abyss. My bill would set a deadline of 30 days for an estimate to be given. This is just for the estimate, not actually fulfilling the request.

The next change would be to allow Maine's Public Access Ombudsman to have the discretion to prioritize requests from Mainers or journalists over commercial and other out-of-state interests. This came about after having a conversation with the Ombudsman who said their office is bogged down with requests from commercial data mining companies. These types of requests should only be worked on when there isn't requests from Mainers or journalists.

Finally, this bill amends the Intelligence and Investigative Record Information Act to allow the disclosure of a record that may constitute an unwarranted invasion of privacy if that disclosure is consented to by the individual who is the subject of the record, or if the individual is deceased, incapacitated or a minor, by a family or household member of that individual.

I have spoken with Maine journalists who have ran into this part of law that has been used to prevent newsworthy information from becoming public.

One example of this law being used was the 2017 death of Chance Baker. Mr. Baker was shot and killed by a Portland Police officer. At the time, the Bangor Daily News made a public records request for the dashboard camera video from the scene of the shooting. The Portland Police Department denied the request stating that it was an open investigation. Additionally, the departments lawyer, BethAnne Poliquin also stated that personnel records are exempt from freedom of access requests, and this was interpreted to include the dash camera footage. Ms. Poliquin also cited the Intelligence and investigative information carveout that my bill addresses. What is the point of bodycams and dashcams if their footage can never be made public. I have included the Bangor Daily News article detailing this event with my testimony.

In 2020, the Portland Press Herald was denied a public records request by the Cumberland County Sheriff's Office. The request was for the footage of an alleged assault on an incarcerated man by a jail guard. Cumberland County Sheriff Kevin Joyce requested a criminal investigation after seeing video footage of the July 2020 altercation. His office cited the exemption for intelligence and investigative information when refusing to release the footage.

Furthermore, in 2014 the Maine Supreme Court reversed a lower court decision and ruled that 911 emergency call transcripts should be considered public records and are able to be released. This came after police would often refuse to release these transcripts because of the exception in the Intelligence and Investigative Record Information Act.

It's clear that Maine's Right to Know law needs updating and strengthening and I hope the committee considers these common-sense changes.

Thank you for your time and consideration today.

STATE OF MAINE

MAINE PROSECUTORS ASSOCIATION
SHIRA BURNS, EXECUTIVE DIRECTOR

"An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act"
Before the Joint Standing Committee on Judiciary

Public Hearing Date: April 3, 2023
Testimony in Opposition of LD 1203

Senator Carney, Representative Moonen and members of the Joint Standing Committee on Judiciary. My name is Shira Burns and I represent the Maine Prosecutors Association. I am here to testify in opposition of LD 1203.

Intelligence and investigative record information contains information about many subjects, a potential suspect, victims and witnesses. The current statute allows consideration to be taken regarding everyone's unwarranted invasion of personal privacy, not just one person contained in a record. This change narrows the focus to the "subject" of the record, but doesn't define who the subject of the record would be.

Furthermore, family or household members could have differing opinions regarding consenting to the dissemination of the intelligence and investigative record information. The bill does not give guidance if the record should be released when at least one family member objects to the dissemination. Family members might also not be in the best position to make this decision if they are involved in the substance of the record. Also, it would be a very big time burden if all "family or household members" needed to be contacted to obtain their consent for release of the records pursuant to this subsection.

For these reasons, the Maine Prosecutors Association is in opposition of LD 1203.

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CHIEF

LT. COL. BRIAN P. SCOTT
DEPUTY CHIEF

Testimony of Paul Cavanaugh, DPS FOAA records officer, Legislative Liaison, and MSP Staff Attorney

IN REGARD TO LD 1203

An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

Senator Carney, Rep. Moonen and distinguished Members of the Joint Standing Committee on Judiciary. My name is Paul Cavanaugh, and I am the FOAA officer and legislative liaison for the Department of Public Safety and the Staff Attorney for the Maine State Police. I am here today to testify on behalf of the Department of Public Safety and the Maine State Police regarding LD 1203: we are neither for nor against sections 1 and 2 as they would amend FOAA but are opposed to section 3 and the amendments to the intelligence and investigative record information act.

Section 1 and section 2 of LD 1203 propose amendments that we feel will have no impact on our response to requests or will have a very minor impact on our responses, so we are neither for nor against those changes.

Section 3 proposes a drastic change to the intelligence and investigative record information act that would at its best create confusion and more likely would create conflicting duties on this agency and result in much

more litigation over implementation. We have a number of specific concerns that I will address in no particular order.

First the proposed change to §804 could be seen to create a conflict with §808 of the Act. Under section 808 a person who is the subject of a record has no right to inspect or review that record for accuracy or completeness, but the proposed amendment to 804 could be read to allow that person to consent to disclosure of those records to a third party.

The proposed amendment allows "the individual who is the subject of the record or if that individual is deceased, incapacitated, or a minor" to consent to the release of records. Intelligence and investigative record information is rarely limited to a specific individual but contains all records about an investigation – suspect, victim, witness, and the like. The proposed amendment does not define who is the "individual who is the subject of the record" such that an argument could be make that each person named in the record is the subject of the record and a suspect could therefore consent to the release of the unwarranted invasion of personal privacy otherwise protected for the victim or anyone else named in the record.

The proposed amendment imports the vocabulary of protection orders in title 19-A into the Act by incorporating "family and household member" language. This creates confusion with section 806 which uses specific familial relation language to allow the release of records (an immediate family member, foster parent, or guardian" for example). Likewise, the extension of people who can consent to the release of personal, private information would include former lovers, former roommates, parents of natural children when the record might not involve that child and divorced or separated people when the record is about that very conflict. For example, if a child were killed – who should be able to consent to the release of those records to the public before anyone is charged criminally – the parent suspected in the death, the other parent, the suspect parent's former lovers or spouse, the non-suspect parent's former lovers or spouses or roommates?

The proposed amendment would allow a third party to consent to the release of information otherwise confidential as an unwarranted invasion of personal privacy if the person who is the subject of the record is deceased, incapacitated, or a minor. Currently, section 806 allows the

release of records to a victim if due to "death, age or physical or mental disease, disorder or defect, the victim cannot realistically act" on their own behalf. Those different standards could result in the release of records in inconsistent manners. Victims are not likely to want suspects to get such information.

For these reasons, we are neither for nor against sections 1 & 2 of LD 1203 but are opposed to section 3.

On behalf of the Department of Public Safety and the Maine State Police, I thank you for your time and would be happy to try and answer any questions that you might have.

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Maine Town & City Clerks' Association

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Date: March 21, 2023

To: Senator Ann Carney, Senate Chair
Representative Matt Mooney, House Chair
And members of the Judiciary Committee

From: Patti Dubois, Chairperson, Legislative Policy Committee
Maine Town and City Clerks' Association

Re: LD 1203 – An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

Position: Neither For Nor Against

The Maine Town & City Clerks' Association is in strong support of LD 1203 and we thank you for the opportunity to outline our points for your Committee.

Members were in support of the language to specify that the reasonable time for an agency to provide a good faith estimate of the time and cost be established to be no longer than 30 days following the receipt of the request. Although there were some concerns stated that there are instances where it may be difficult to meet this requirement for certain complex requests, members still felt it was reasonable.

Since the section regarding the prioritization of requests is not mandatory, members were not overly concerned by this language addition but most felt that it was not necessary since requests are generally processed on a first-come, first-served basis. Focusing on a complex request simply because it is from a journalist may delay responses to other requests.

Many questions were raised regarding the consented release of a record which would constitute an unwarranted invasion of privacy and how these disclosure consents would be administered, if passed.

The Maine Town & City Clerks' Association appreciates the opportunity to share its testimony with the Committee. Should any questions arise, please feel free to contact me at 207)680-4210 or by email: pdubois@waterville-me.gov .

AARON M. FREY
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April 3, 2023

Senator Anne Carney, Chair
Representative Matt Moonen, Chair
Committee on Judiciary
100 State House Station
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Re: *LD 1203, An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act*

Greetings, Senator Carney and Representative Moonen,

I am writing to provide comments neither for nor against LD 1203, *An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act.*

Under current law, and with some exceptions, records containing intelligence and investigative information may not be disclosed if there is a reasonable probability that release would constitute an unwarranted invasion of personal privacy. LD 1203 would allow for disclosure when the "subject" of the record has consented, or, if the "subject" is deceased, incapacitated or a minor, by a person who is a family or household member.

The Office of the Attorney General ("OAG") receives a high volume of FOAA requests. A matter of concern for our office's workload is that investigations rarely involve just one person. The bill references "the subject" of the record but does not provide any definition as to who that would include. While "subject" could mean the person being investigated, there are almost always other individuals identified in investigation files (for example, co-actors, witnesses, contacts, and interviewees and victims) whose privacy would be invaded were the records to be released. Requiring a release from every individual identified in an investigation file before we can respond to a FOAA request would add significant time and work to what can already be a lengthy and labor-intensive process. Our office does not routinely track contacts from resolved investigations over time, and individuals move, change phone numbers, surnames, or pass away. It is unclear how much effort would be required to demonstrate due diligence in the seeking of releases, and it would raise transparency concerns should we be unable to obtain releases from each of these

concerns should we be unable to obtain releases from each of these involved parties. Importantly, the OAG does not have dedicated staff for intake, processing and responding to requests.

We appreciate the privacy concerns behind this bill and always do our best to balance privacy with the public's right to transparency. Our office can be available to answer questions if that would helpful to your process.

Sincerely,

Aaron M. Frey
Attorney General

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TESTIMONY OF MICHAEL KEBEDE, ESQ.

LD 1203 – Ought To Pass

An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

Joint Standing Committee on Judiciary

April 3, 2023

Senator Carney, Representative Moonen, and distinguished members of the Joint Standing Committee on Judiciary, greetings. My name is Michael Kebede, and I am the policy counsel at the ACLU of Maine, a statewide organization committed to advancing and preserving civil rights and civil liberties guaranteed by the Maine and U.S. Constitutions. On behalf of our members, we urge you to support section 1 of LD 1203 because it would provide clarity to the public when they seek public records.

Currently, when a person submits a request to a public agency or official, the agency or official must acknowledge receipt of the request within five working days. However, there is no specified time limit for when the agency or official must give an estimate of how long it will take to fulfill the request for information. If this bill passed, it would require the agency or official to give a "good faith, nonbinding estimate of the time within which the agency or official will comply with the request, as well as a cost estimate" of the request, no later than 30 days following receipt of the request.

The purpose of Maine's FOAA law is to promote transparency in government by, among other things, ensuring that "public proceedings exist to aid in the conduct of the people's business," and that the records of actions from such proceedings are "open to public inspection." 1 M.R.S. §401. The purposes of FOAA are frustrated when citizens must wait for an indeterminate amount of time to get a mere estimate of when their document request may be fulfilled. Section 1 of this legislation strikes a balance between the public's right to receive information from its government, and government officials' needs to perform their jobs outside of responding to FOAA requests. It gives clarity to both parties about what is expected, and when. It does not change FOAA requirements in terms of what work government entities prioritize, but sets clear expectations for both the government and the public. For that reason, we support Section 1 of this bill.

We take no position on Sections 2 or 3 of the bill, but note that Section 2 may encounter legal challenge under the privileges and immunities clause.

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Testimony of the Maine Municipal Association

In Opposition to

LD 1203 - *An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act*

April 3, 2023

Sen. Carney, Rep. Moonen and members of the Judiciary Committee, my name is Rebecca Lambert, and I am providing testimony in opposition to LD 1203 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.

Following current laws as it exists is extremely important to local leaders across Maine, including providing citizens with access to public records and doing so in a timely manner. The part of this proposed bill that specifies a time frame of no later than 30 days in which an agency is to respond to the requestor with a good-faith, nonbinding estimate of the time frame and costs associated with complying with the request does not cause officials as much concern as section two and three, since requests/estimates are typically responded to within the specified time frame.

Section two of the proposed bill allows the entity to prioritize the requests giving preference to Maine residents, or journalists acting in their professional capacity with the intention of providing information to the public. This portion of the bill causes concern among municipal officials where requests are fulfilled in the order they are received and do not typically have issues fulfilling requests in an appropriate time frame.

Municipal officials are also concerned with section three of the proposal as it may constitute an unwarranted invasion of privacy. While individual consent does not cause heartburn among officials, allowing family members to allow the invasion of privacy for incapacitated or deceased individuals and minors, could have unintended consequences when taking into consideration the variety of family styles, dynamics and choices available.

For these reasons the LPC is opposed to LD 1203. Thank you for your time and for considering the municipal perspective on this issue.

MAINE PRESS ASSOCIATION
On the record since 1864

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.

I am here today on behalf of the Maine Press Association to urge this committee not to pass LD 1203, An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act.

* * *

The Maine Press Association enjoys a seat on the Right to Know Advisory Committee, a committee established by the Legislature more than a dozen years ago specifically to serve as a resource for ensuring compliance with Maine's Freedom of Access Act and upholding the integrity of the purposes of the Act as it applies to all public entities in the conduct of the public's business.

Every year, every single year since its inception, RTK Committee members have discussed, debated and deliberated on the question of what is a "reasonable" response time for FOAA estimates and requests and each and every time have landed on what is known as the "reasonable" standard for response, a specific legal standard that applies when one entity owes a duty to another. That means government may take only so long to respond as is reasonable, and no longer.

So, if a person were to request access to Planning Board records approving a recent development project, for instance, a reasonable response time for both estimate and records might be the same or next day. The more complicated the request, the longer it takes for an entity to respond. Which is reasonable.

According to the 2022 annual report of Maine's Public Access Ombudsman, which tracks response time of FOAA requests at various state agencies, there were a total of 2,625 FOAA requests made to these agencies in 2022, of which 1,423 of the requests were fully responded to within five days. Another 639 requests were responded to within 30 days; the remaining requests – 573 – took 30 days or longer for response.

That's a lot of numbers, but the gist is that of all requests received, 2,062 were responded to in full within 30 days, or 78.5 percent. Estimates for these requests flowed much faster than 30 days.

Under the proposal before you, government entities would continue to provide a receipt acknowledging a request within five days, but would have 30 days to provide an estimate of cost rather than the current “reasonable” standard of time.

Thirty days is too long to receive an estimate, and in most cases would be unreasonable. Waiting 30 days to get an estimate on what could be an urgent request and/or a simple request – which includes most media requests – especially if the record access is needed within that 30-day timeframe, is unreasonable and significantly hinders access.

Everyone at the Maine Press Association loves a hard deadline, but the fact is if a person has a 30-day deadline to respond to any request for anything, more than likely they will take nearly all – or all – of that time to respond. It’s how we’re all wired.

Establishing a 30-day deadline to provide a cost estimate will significantly slow access for a vast majority of requestors and does not serve the public good. We know this because we have years of hard data collected by the Ombudsman showing FOAA estimates and responses are currently made much more quickly.

This bill also proposes giving priority FOAA access to journalists and Maine people, which we do not support for two reasons.

Journalists should have no greater access to public records than the public itself. Separating the two would create a tiered system of access – something RTK has also frequently discussed and rejected – because it could create tension to offer privileged access to journalists and not to other "people."

When "people" other than journalists make FOAA requests, it's often for urgent personal needs that --- I would argue --- are equally important if not more important than what we ask for as professionals. As a matter of practicality, journalists may already get quicker access because we know what we're looking for, how to ask for it, and that we may have to pester people to get it. The general public doesn't necessarily have that skillset.

As for giving priority to Maine people, we have seen other states adopt such practices and the instant response is the creation of a network of residents who serve as paid and unpaid proxies for out-of-state requestors. A plea went out on a national FOIA listserve just two weeks seeking in-state proxies in Arkansas and Kentucky “who can help facilitate public records requests” for out-of-state researchers and others. It’s become a cottage industry in some states to work around this obstacle and make in-state standards ineffective.

Testimony in Support of LD 1203: "An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act"

Senator Carney, Representative Moonen, and the distinguished members of the Committee on Judiciary, my name is Nick Murray and I serve as director of policy for Maine Policy Institute. We are a free market think tank, a nonpartisan, non-profit organization that advocates for individual liberty and economic freedom in Maine. Thank you for the opportunity to testify on LD 1203.

The last review of state freedom of access laws by the National Freedom of Information Coalition (NFOIC) in 2017 gave Maine just 6.5 points out of 16 total possible points: an "F" grade.[1] Maine's law has changed very little since then. [2]

We are pleased to see that commonsense Freedom of Access Act (FOAA) reform has bipartisan support in this legislature. The problems in Maine's law are apparent to journalists and observers across the political spectrum, and in our experience, have only gotten worse in the last four years.

In Maine Policy Institute's 20-plus years of experience submitting FOAA requests, state compliance has never been as poor as it is today. Rarely did we struggle to get information from the government under the Baldacci or LePage administrations. It almost seems as if government offices have been instructed by Gov. Mills to slow-walk the process and price certain requestors out of the information they seek.

In the last few years, the FOAA process has been unnavigable. Routine requests that should take a matter of weeks instead take several months or more. The cost estimates have spiraled out of control. The law has no teeth.

Our FOAA law, as it stands today, makes it far too easy for bureaucrats to obfuscate their communications and activities. It empowers the government to sit on state secrets – not citizens to uncover them – and is in desperate need of immediate reform.[3]

The 30-day limitation proposed in this bill is only for the delivery of a time and cost estimate of each request – it is still nonbinding. Of all the issues with FOAA, LD

[1] https://www.nfoic.org/states-failing-foi-responsiveness/
[2] https://northernnewenglandmunicipallaw.blogspot.com/2021/11/foaa-changes-now-in-effect.html
[3] https://www.pressherald.com/2023/03/12/commentary-maines-sunshine-law-has-lost-its-shine/

1203 offers a small change, but one that is basic to ensure some level of public access. This committee will likely face far more ambitious proposals this session; these should also be given serious consideration.

Please deem LD 1203 “Ought To Pass” and provide just a little more government accountability to the people and their right to know. Thank you for your time and consideration.

MAINE CHIEFS OF POLICE ASSOCIATION

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Statement of Opposition to L.D. 1203,
An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act
April 3, 2023

Senator Carney, Representative Moonen, and distinguished Committee on Judiciary. My name is Charles Rumsey, and I am the Chief of the Cumberland Police Department. I am submitting testimony on behalf of the Maine Chiefs of Police Association in opposition to section three of LD 1203.

The Mission of the Maine Chiefs of Police is to secure a closer official and personal relationship among Maine Police Officials; to secure a unity of action in law enforcement matters; to enhance the standards of police personnel, police training and police professionalism generally; to devise ways and means for equality of law enforcement throughout the state of Maine; to advance the prevention and detection of crime; to prescribe to the Law Enforcement Code of Ethics; and to promote the profession of law enforcement as an integral and dedicated force in today's society sworn to the protection of life and property.

According to the bill summary,

> This bill amends the Freedom of Access Act to specify that the reasonable time within which an agency or official having custody or control of a document has to provide a good faith, nonbinding estimate of the time that it will take the agency or official to comply with the request may not be longer than 30 days following receipt of the request. This bill allows the public access officer for an entity subject to the Freedom of Access Act to give priority to requests for public records from residents of Maine and journalists. This bill also amends the Intelligence and Investigative Record Information Act to allow the disclosure of a record that may constitute an unwarranted invasion of privacy if that disclosure is consented to by the individual who is the subject of the record or, if the individual is deceased, incapacitated or a minor, by a family or household member of that individual.

We are in opposition to section three of the bill because it has the potential to add a tremendous amount of work to the process of fulfilling a record request. This provision adds a complicating factor to records which, if released, would constitute an unwarranted invasion of privacy and would require us to determine whether someone consents to the release.

Many of the records in law enforcement possession reference multiple subjects, and in the case of a subject who is deceased, incapacitated or a minor, this statute change would allow for release of the record if there is consent by "a," or one person who is a family or household member of the individual. In practice, this is unworkable – generally, individuals who are deceased, incapacitated or a minor have multiple family or household members and frequently, those individuals are not in agreement with the decision to release a record. This law would require us to identify and then contact each family or household member, to determine if they ALL consent to the release.

We are not taking a position on the other pieces of this bill.

And so, for these reasons, we ask that you strike section three of LD 1203 in the work session. And, on behalf of the Maine Chiefs of Police Association, we want to thank the committee members for your work on this Committee.

MSSA

Maine School Superintendents Association

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TESTIMONY IN OPPOSITION TO

L.D. 1203

AN ACT TO CLARIFY DEADLINES IN THE FREEDOM OF ACCESS ACT AND DISCLOSURE PROVISIONS IN THE INTELLIGENCE AND INVESTIGATIVE RECORD INFORMATION ACT

Senator Carney, Representative Moonen and members of the Committee on Judiciary. I am Victoria Wallack, communications and government relations director for the Maine School Management Association testifying on behalf of the legislative committee of the Maine School Superintendents Association in opposition to L.D. 1203.

This bill says that a good faith estimate of time on how long it will take an entity to comply with a freedom of access request can take no longer than 30 days.

Superintendents are opposed to this bill because of the relatively recent history of receiving requests that are so expansive in some districts extra staff or staff hours have been added to comply.

As an example, the Gorham School District was hit with 34 freedom of information requests that focused on the school's support for its students who identified as gay or bisexual and a demand that books be removed from the school library and posters be taken down that encouraged acceptance. A similar freedom of access request was made to the Hermon School District that resulted in a lawsuit against the district.

CLAC MEMORANDUM/TESTIMONY
LD 1203 (Opposed to Section 3)

TO: Senator Anne Carney
Representative Matt Moonen
Joint Standing Committee on Judiciary

FR: Criminal Law Advisory Commission (CLAC)
c/o laura.yustak@maine.gov

RE: LD 1203, an Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

DA: April 3, 2023

The Criminal Law Advisory Commission (CLAC)* respectfully submits the following testimony in opposition to Section 3 of LD 1203.

CLAC members see the proposal as unworkable. The "subject" of a record may be any number of persons, including a defendant who is charged with a crime, an uncharged suspect who is not aware of an investigation, a witness, a victim, or a person named or described by persons interviewed as part of an investigation. One "subject" of a record cannot waive privacy rights of others identified in the record.

Unintended negative consequences may flow from a statutory requirement to disclose if a family or household member consents to release on behalf of an incapacitated, deceased, or minor subject. Members of the same family or household may not agree as to whether records should be released. Family or household members may be involved in crimes against the subject of a record or not be the next of kin or personal representative of a deceased subject. Record custodians may not know which persons to contact or whether there are conflicts between people named in or acting on behalf of persons named in records.

CLAC has no position with respect to Sections 1 and 2 of the bill, which address provisions of the FOAA outside the statutory role of the Commission.

*CLAC is an advisory body established by the Legislature. 17-A M.R.S. §§ 1351-1357. It consists of 9 members appointed by the Attorney General. Our current members include current defense attorneys, prosecutors, Maine Bar Counsel, and a retired practitioner with experience as defense counsel, prosecutor and in court administration. In addition, three sitting judges and one retired practitioner, appointed by the Chief Justice of the Supreme Judicial Court, and, by statute, the Co-Chairs of the Legislature's Committee on Criminal Justice and Public Safety, serve as consultants. The Supreme Judicial Court's Criminal Process Manager serves as liaison from the Court to CLAC. CLAC advises the Legislature on matters relating to crimes in the Criminal Code and in other Titles, the Bail and Juvenile Codes, and with respect to other statutes related to criminal justice processes.

Maine State Legislature
OFFICE OF POLICY AND LEGAL ANALYSIS
www.mainelegislature.gov/opla
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MEMORANDUM

TO: RTKAC – Law Enforcement Records Subcommittee

FROM: Janet Stocco, Legislative Analyst / Subcommittee Staff

DATE: October 19, 2023

RE: **Background on Subcommittee Topic #1**

A. Current law – Relevant IIRIA definitions

The Intelligence and Investigative Record Information Act, which is located in Title 16, Chapter 9 of the Maine Revised Statutes, "applies to a record that is or contains intelligence and investigative record information and that is collected by or prepared at the direction of or kept in the custody of any Maine criminal justice agency." 16 M.R.S. §802.

The IIRIA applies only to information held by a "**criminal justice agency**," defined as:

> a federal, state or State of Maine government agency or any subunit of a government agency at any governmental level that performs the administration of criminal justice pursuant to a statute or executive order. "Criminal justice agency" includes the Department of the Attorney General, district attorneys' offices and the equivalent departments or offices in any federal or state jurisdiction. "Criminal justice agency" also includes any equivalent agency at any level of Canadian government and the government of any federally recognized Indian tribe. 16 M.R.S. §803(4).

The IIRIA also applies only to "**intelligence and investigative record information**," which **includes**:

> information of record collected by or prepared by or at the direction of a criminal justice agency or kept in the custody of a criminal justice agency while performing the administration of criminal justice or, exclusively for the Department of the Attorney General and district attorneys' offices, the administration of civil justice. "Intelligence and investigative record information" includes information of record concerning investigative techniques and procedures and security plans and procedures prepared or collected by a criminal justice agency or other agency.... 16 M.R.S. §803(7).

- This definition specifically **excludes**, however, the following 2 categories of information:

  (1) "Criminal history record information," which is information collected or maintained by a criminal justice agency "that connects a specific, identifiable person, including a juvenile treated by

statute as an adult for criminal prosecution purposes, with formal involvement in the criminal justice system either as an accused or as a convicted criminal offender." Criminal history record information includes criminal charges, arrests, bail, convictions or acquittals, sentences, involuntary commitments and releases from involuntary commitment, appeals, petitions for appeal or for pardons, commutations, etc. The confidentiality of this criminal history record information is governed separately by the Criminal History Record Information Act in Title 16, chapter 7.

(2) Information collected or kept while performing the "administration of juvenile justice," which is defined as "activities related to the anticipation, prevention, detection, monitoring or investigation of known, suspected or possible juvenile crimes and the apprehension or summonsing, detention, conditional or unconditional release, informal adjustment, initial appearance, bind-over, adjudication, disposition, custody and supervision or rehabilitation of accused juveniles or adjudicated juvenile criminal offenders." 15 M.R.S. §3003(1-A). The confidentiality of this information is governed by the Maine Juvenile Code, Title 15, part 6.

Finally, the IIRIA applies only when a criminal justice agency is engaged in the "administration of criminal justice" or, for prosecutorial offices, the "administration of civil justice," which are:

1. **Administration of civil justice.** "Administration of civil justice" means activities relating to the anticipation, prevention, detection, monitoring or investigation of known, suspected or possible civil violations and prospective and pending civil actions. It includes the collection, storage and dissemination of intelligence and investigative record information relating to the administration of civil justice. "Administration of civil justice" does not include known, suspected or possible traffic infractions.

2. **Administration of criminal justice.** "Administration of criminal justice" means activities relating to the anticipation, prevention, detection, monitoring or investigation of known, suspected or possible crimes. It includes the collection, storage and dissemination of intelligence and investigative record information relating to the administration of criminal justice.

16 M.R.S. §803(1), (2).

B. Current Law – Access to and dissemination of intelligence and investigative record information under the IIRIA

1. Access: Under 16 M.R.S. §808 of the IIRIA:

   A person who is the subject of intelligence and investigative record information maintained by a criminal justice agency has no right to inspect or review that information for accuracy or completeness.

2. Dissemination: The chart on the next page summarizes the rules governing the dissemination of intelligence and investigative record information under the IIRIA. Unlawful dissemination of intelligence and investigative record information n violation of the IIRIA is a Class E crime. 16 M.R.S. §809.

May <u>not</u> disclose if a reasonable probability that public release or inspection would:	**<u>May</u> disclose**:	**<u>May</u> disclose**, subject to reasonable limitations imposed "to protect against the harms" in §804:
➢ Interfere with criminal law enforcement proceedings ➢ Result in dissemination of information prejudicial to an accused or concerning the prosecution's evidence that will interfere with impaneling an impartial jury ★ ➢ Constitute an unwarranted invasion of privacy ➢ Disclose the identity of a confidential source or confidential information furnished only by that source ➢ Disclose trade secrets or commercial or financial information designated confidential by the owner or source of the information or by a prosecutor ➢ Disclose investigative techniques, procedures or security plans not known by the general public ➢ Endanger the lives or physical safety of any individual, including law enforcement ➢ Disclose information made confidential by statute ➢ Interfere with civil violations and other civil proceedings conducted by the OAG or DAs ➢ Disclose statements or documents submitted in the course of mediation or arbitration ➢ Identify the source of a complaint regarding a violation of consumer or antitrust laws 16 M.R.S. §804.	➢ To another criminal justice agency ➢ To a person or public or private entity as part of the administration of civil or criminal justice ➢ To a **person accused of a crime** or the person's "agent" or attorney: o For trial or sentencing purposes if authorized by the prosecutor, court order or a court decision. o For purposes of this provision, "**agent**" includes licensed professional investigator, expert witness or parent, foster parent or guardian of a minor. ➢ To a federal or state court ➢ To a person authorized to receive the information by statute, executive order, court rule, court decision or court order ➢ To the Secretary of State - for driver's license issuance/suspension purposes 16 M.R.S. §805. ➢ AG may publicly disseminate a portion of a video depicting the use of deadly force by law enforcement: "when the public interest in the evaluation and use of deadly force and the review and investigation of those incidents by the [AG] outweighs the harms in [§] 804." ***AG must respond to request w/in 30 days* 16 M.R.S. §806-A (effective 2021).	➢ To a government agency responsible for licensing or regulating facilities for the care of children or dependent or incapacitated adults (if the information relates to suspected abuse, neglect or exploitation) ➢ To a government agency responsible for investigating abuse, neglect or exploitation of children or dependent or incapacitated adults (if the agency requests information about a specific person and the information regards proof of criminal conduct) ➢ To a **crime victim** or the victim's agent or attorney. o For purposes of this provision "**agent**" includes a licensed professional investigator, insurer <u>or</u> "or an immediate family member, foster parent or guardian if due to death, age or physical or mental disease, disorder or defect the victim cannot realistically act on the victim's own behalf." ➢ To a sexual assault counselor or advocate—who may use the information only for planning the safety of the victim, must not further disseminate the information, must keep the information secure and destroy it within 30 days, and must permit criminal justice agencies to perform reasonable and appropriate audits to ensure these requirements are being followed. 16 M.R.S. §806.

C. Current law – Unwarranted invasion of personal privacy

In *Fairfield v. Maine State Police*, 2023 ME 12, the Law Court explained that a 3-part test applies when a person requests a public record under FOAA, a criminal justice agency denies that record on the basis that it is made confidential by the "unwarranted invasion of personal privacy" provision of IIRIA, 16 M.R.S. §804(3), and the requester files an appeal of that denial:

> [¶15] . . . [A court must consider] "(1) the personal privacy interests ... in maintaining the confidentiality of the records sought by [the requesting party]; (2) the public interest supporting disclosure of the records; and (3) the balancing of the private and public interests."
>
> [¶16] Intelligence and investigative records often contain sensitive personal information that may not have been verified and "[f]ew people wish to be publicly associated with investigations of alleged criminal conduct, whether as a perpetrator, witness, or victim." Accordingly, individuals referenced in intelligence and investigative records have a significant interest in keeping their identities private.
>
> [¶17] As to the public interest prong, the requesting party must demonstrate that the information sought is likely to advance a significant public interest. We have previously acknowledged, however, that the public has a significant interest in "information that might document governmental efficiency or effectiveness ... [and] information documenting governmental negligence or malfeasance."

Id. ¶¶15-18 (citations omitted). In that case, for example, an individual requested disclosure of DNA contamination logs, which track all instances of identified contamination of from the Maine State Police crime laboratory and contain information about the identification of suspects or victims, the nature of the offense and the nature of evidence such as anal or vaginal sways and bodily fluids. The Law Court agreed with the Superior Court's determination that release of this information would lead to an unwarranted invasion of personal privacy and, thus, the information was confidential under the IIRIA. Although "there is a strong public interest in the release of information as to the integrity and credibility of" law enforcement work, the Court concluded that "it is difficult to imagine information more sensitive than the genetic information" in the logs and "when the subject of a law enforcement record is a private individual, the privacy interested protected by the privacy exception is at its apex." *Id.* ¶22.

D. Proposal in LD 1203 from last session

Last session the Judiciary Committee considered LD 1203, *An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the [IIRIA]*. Section 3 of LD 1203 would have amended §804(3) to provide that a Maine criminal justice agency may disclose intelligence and investigative records information even when there is a reasonable possibility that public release of that information would constitute an unwarranted invasion of person privacy with either (a) the consent of "the individual who is the subject of the record" or (b) if the individual is deceased, incapacitated or a minor, with the consent of the individual's "family or household member" (as defined in the protection from abuse laws).

The definition of **"family or household member"** in the protection from abuse laws includes (a) present or former spouses or domestic partners; (b) individuals presently or formerly living together as spouses; (c) parents of the same child; (d) adult household members; (e) minor children of a parent or guardian if the defendant is an adult household member of that parent or guardian; (f) individuals presently or formerly living together; and (g) individuals who are or were sexual partners. 19-A M.R.S. §4102(6).

LD 1203 was not enacted, in part because all members of the Judiciary Committee agreed that section 3 of the bill required further study to determine: (1) whose consent should be required to release affected records, all or only one suspect, victim or witness whose privacy is implicated? and (2) if that person or those persons are deceased, incapacitated or minor(s), who (if anyone) should be authorized to consent on their behalf?

CHAPTER 9

INTELLIGENCE AND INVESTIGATIVE RECORD INFORMATION ACT

§801. Short title

This chapter may be known and cited as "the Intelligence and Investigative Record Information Act." [PL 2013, c. 267, Pt. A, §3 (NEW).]

SECTION HISTORY

PL 2013, c. 267, Pt. A, §3 (NEW).

§802. Application

This chapter applies to a record that is or contains intelligence and investigative record information and that is collected by or prepared at the direction of or kept in the custody of any Maine criminal justice agency. [PL 2013, c. 267, Pt. A, §3 (NEW).]

SECTION HISTORY

PL 2013, c. 267, Pt. A, §3 (NEW).

§803. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings. [PL 2013, c. 267, Pt. A, §3 (NEW).]

1. Administration of civil justice. "Administration of civil justice" means activities relating to the anticipation, prevention, detection, monitoring or investigation of known, suspected or possible civil violations and prospective and pending civil actions. It includes the collection, storage and dissemination of intelligence and investigative record information relating to the administration of civil justice. "Administration of civil justice" does not include known, suspected or possible traffic infractions.
[PL 2013, c. 267, Pt. A, §3 (NEW).]

2. Administration of criminal justice. "Administration of criminal justice" means activities relating to the anticipation, prevention, detection, monitoring or investigation of known, suspected or possible crimes. It includes the collection, storage and dissemination of intelligence and investigative record information relating to the administration of criminal justice.
[PL 2013, c. 267, Pt. A, §3 (NEW).]

3. Administration of juvenile justice. "Administration of juvenile justice" has the same meaning as in Title 15, section 3003, subsection 1-A.
[PL 2021, c. 365, §26 (AMD); PL 2021, c. 365, §37 (AFF).]

4. Criminal justice agency. "Criminal justice agency" means a federal, state or State of Maine government agency or any subunit of a government agency at any governmental level that performs the administration of criminal justice pursuant to a statute or executive order. "Criminal justice agency" includes the Department of the Attorney General, district attorneys' offices and the equivalent departments or offices in any federal or state jurisdiction. "Criminal justice agency" also includes any equivalent agency at any level of Canadian government and the government of any federally recognized Indian tribe.
[PL 2013, c. 267, Pt. A, §3 (NEW).]

5. Dissemination. "Dissemination" means the transmission of information by any means, including but not limited to orally, in writing or electronically, by or to anyone outside the criminal justice agency that maintains the information.

[PL 2013, c. 267, Pt. A, §3 (NEW).]

6. Executive order. "Executive order" means an order of the President of the United States or the chief executive of a state that has the force of law and that is published in a manner permitting regular public access.
[PL 2013, c. 267, Pt. A, §3 (NEW).]

7. Intelligence and investigative record information. "Intelligence and investigative record information" means information of record collected by or prepared by or at the direction of a criminal justice agency or kept in the custody of a criminal justice agency while performing the administration of criminal justice or, exclusively for the Department of the Attorney General and district attorneys' offices, the administration of civil justice. "Intelligence and investigative record information" includes information of record concerning investigative techniques and procedures and security plans and procedures prepared or collected by a criminal justice agency or other agency. "Intelligence and investigative record information" does not include criminal history record information as defined in section 703, subsection 3 and does not include information of record collected or kept while performing the administration of juvenile justice.
[PL 2013, c. 267, Pt. A, §3 (NEW).]

8. State. "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam and American Samoa. "State" also includes the federal government of Canada and any provincial government of Canada and the government of any federally recognized Indian tribe.
[PL 2013, c. 267, Pt. A, §3 (NEW).]

9. Statute. "Statute" means an Act of Congress or an act of a state legislature or a provision of the Constitution of the United States or the constitution of a state.
[PL 2013, c. 267, Pt. A, §3 (NEW).]

SECTION HISTORY

PL 2013, c. 267, Pt. A, §3 (NEW). PL 2021, c. 365, §26 (AMD). PL 2021, c. 365, §37 (AFF).

§804. Limitation on dissemination of intelligence and investigative record information

Except as provided in sections 805 and 806, a record that is or contains intelligence and investigative record information is confidential and may not be disseminated by a Maine criminal justice agency to any person or public or private entity if there is a reasonable possibility that public release or inspection of the record would: [PL 2013, c. 507, §4 (AMD).]

1. Interfere with criminal law enforcement proceedings. Interfere with law enforcement proceedings relating to crimes;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

2. Result in dissemination of prejudicial information. Result in public dissemination of prejudicial information concerning an accused person or concerning the prosecution's evidence that will interfere with the ability of a court to impanel an impartial jury;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

3. Constitute an invasion of privacy. Constitute an unwarranted invasion of personal privacy;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

4. Disclose confidential source. Disclose the identity of a confidential source;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

5. Disclose confidential information. Disclose confidential information furnished only by a confidential source;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

6. Disclose trade secrets or other confidential commercial or financial information. Disclose trade secrets or other confidential commercial or financial information designated as such by the owner or source of the information, by the Department of the Attorney General or by a district attorney's office;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

7. Disclose investigative techniques or security plans. Disclose investigative techniques and procedures or security plans and procedures not known by the general public;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

8. Endanger law enforcement or others. Endanger the life or physical safety of any individual, including law enforcement personnel;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

9. Disclose statutorily designated confidential information. Disclose information designated confidential by statute;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

10. Interfere with civil proceedings. Interfere with proceedings relating to civil violations, civil enforcement proceedings and other civil proceedings conducted by the Department of the Attorney General or by a district attorney's office;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

11. Disclose arbitration or mediation information. Disclose conduct of or statements made or documents submitted by any person in the course of any mediation or arbitration conducted under the auspices of the Department of the Attorney General; or
[PL 2013, c. 267, Pt. A, §3 (NEW).]

12. Identify source of consumer or antitrust complaints. Identify the source of a complaint made to the Department of the Attorney General regarding a violation of consumer or antitrust laws.
[PL 2013, c. 267, Pt. A, §3 (NEW).]

SECTION HISTORY

PL 2013, c. 267, Pt. A, §3 (NEW). PL 2013, c. 507, §4 (AMD).

§805. Exceptions

This chapter does not preclude dissemination of intelligence and investigative record information that is confidential under section 804 by a Maine criminal justice agency to: [PL 2013, c. 267, Pt. A, §3 (NEW).]

1. Another criminal justice agency. Another criminal justice agency;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

2. A person or entity for purposes of intelligence gathering or ongoing investigation. A person or public or private entity as part of the criminal justice agency's administration of criminal justice or the administration of civil justice by the Department of the Attorney General or a district attorney's office;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

3. An accused person or that person's agent or attorney. A person accused of a crime or that person's agent or attorney for trial and sentencing purposes if authorized by:

A. The responsible prosecutorial office or prosecutor; or [PL 2013, c. 267, Pt. A, §3 (NEW).]

B. A court rule, court order or court decision of this State or of the United States. [PL 2013, c. 507, §5 (AMD).]

As used in this subsection, "agent" means a licensed professional investigator, an expert witness or a parent, foster parent or guardian if the accused person has not attained 18 years of age;
[PL 2013, c. 507, §5 (AMD).]

4. Court. A federal court, the District Court, Superior Court or Supreme Judicial Court or an equivalent court in another state;
[PL 2013, c. 267, Pt. A, §3 (NEW).]

5. An authorized person or entity. A person or public or private entity expressly authorized to receive the intelligence and investigative record information by statute, executive order, court rule, court decision or court order. "Express authorization" means language in the statute, executive order, court rule, court decision or court order that specifically speaks of intelligence and investigative record information or specifically refers to a type of intelligence or investigative record; or
[PL 2013, c. 267, Pt. A, §3 (NEW).]

6. Secretary of State. The Secretary of State for use in the determination and issuance of a driver's license suspension.
[PL 2013, c. 267, Pt. A, §3 (NEW).]

SECTION HISTORY

PL 2013, c. 267, Pt. A, §3 (NEW). PL 2013, c. 507, §5 (AMD).

§806. Exceptions subject to reasonable limitations

Subject to reasonable limitations imposed by a Maine criminal justice agency to protect against the harms described in section 804, this chapter does not preclude dissemination of intelligence and investigative record information confidential under section 804 by a Maine criminal justice agency to:
[PL 2013, c. 267, Pt. A, §3 (NEW).]

1. A government agency responsible for regulating facilities and programs providing care to children or adults. A government agency or subunit of a government agency in this State or another state that pursuant to statute is responsible for licensing or regulating the programs or facilities that provide care to children or incapacitated or dependent adults if the intelligence and investigative record information concerns the investigation of suspected abuse, neglect or exploitation;
[PL 2021, c. 252, §1 (AMD).]

1-A. A government agency or subunit of a government agency responsible for investigating child or adult abuse. A government agency or subunit of a government agency in this State or another state that pursuant to statute is responsible for investigating abuse, neglect or exploitation of children or incapacitated or dependent adults if:

A. The intelligence and investigative record information is being provided in response to a request by that agency or subunit of an agency for records regarding a particular person or persons; and [PL 2021, c. 252, §2 (NEW).]

B. The intelligence and investigative record information relates to alleged or proven conduct that is criminal under Title 17-A, chapters 9, 11, 12, 13, 21, 23, 33, 35, 41, 43 or 45 by a person in paragraph A. [PL 2021, c. 252, §2 (NEW).]

The intelligence and investigative record information obtained pursuant to this subsection may be used only for the purpose for which it was obtained and, as necessary, for administrative or ombudsman office oversight of the agency or subunit of an agency obtaining the information;
[PL 2021, c. 252, §2 (NEW).]

2. A crime victim or that victim's agent or attorney. A crime victim or that victim's agent or attorney. As used in this subsection, "agent" means a licensed professional investigator, an insurer or an immediate family member, foster parent or guardian if due to death, age or physical or mental disease, disorder or defect the victim cannot realistically act on the victim's own behalf; or

[PL 2013, c. 507, §7 (AMD).]

3. A counselor or advocate.

[PL 2015, c. 411, §1 (RP).]

4. A counselor or advocate. A sexual assault counselor, as defined in section 53-A, subsection 1, paragraph B, or an advocate, as defined in section 53-B, subsection 1, paragraph A. A person to whom intelligence and investigative record information is disclosed pursuant to this subsection:

A. May use the information only for planning for the safety of the victim of a sexual assault or domestic or family violence incident to which the information relates; [PL 2015, c. 411, §2 (NEW).]

B. May not further disseminate the information; [PL 2015, c. 411, §2 (NEW).]

C. Shall ensure that physical copies of the information are securely stored and remain confidential; [PL 2015, c. 411, §2 (NEW).]

D. Shall destroy all physical copies of the information within 30 days after their receipt; [PL 2015, c. 411, §2 (NEW).]

E. Shall permit criminal justice agencies providing such information to perform reasonable and appropriate audits to ensure that all physical copies of information obtained pursuant to this subsection are maintained in accordance with this subsection; and [PL 2015, c. 411, §2 (NEW).]

F. Shall indemnify and hold harmless criminal justice agencies providing information pursuant to this subsection with respect to any litigation that may result from the provision of the information to the person. [PL 2015, c. 411, §2 (NEW).]

[PL 2015, c. 411, §2 (NEW).]

SECTION HISTORY

PL 2013, c. 267, Pt. A, §3 (NEW). PL 2013, c. 507, §§6, 7 (AMD). PL 2015, c. 411, §§1, 2 (AMD). PL 2021, c. 252, §§1, 2 (AMD).

§806-A. Video depicting use of deadly force

This chapter does not preclude the public dissemination of that portion of a video in the custody of the Attorney General depicting the use of deadly force by law enforcement when the public interest in the evaluation of the use of deadly force by law enforcement and the review and investigation of those incidents by the Attorney General outweighs the harms contemplated in section 804. Upon receiving a request for video depicting the use of deadly force, the Attorney General shall issue a decision on whether to release the video no later than 30 days after the request and, in the event of denial, shall provide written notice stating in detail the basis for the denial, a time frame for release of all or part of the video and the process to appeal the decision pursuant to Title 1, section 409. [PL 2021, c. 353, §2 (NEW).]

SECTION HISTORY

PL 2021, c. 353, §2 (NEW).

§807. Confirming existence or nonexistence of confidential intelligence and investigative record information

(REPEALED)

SECTION HISTORY

PL 2013, c. 267, Pt. A, §3 (NEW). PL 2013, c. 507, §8 (AMD). PL 2021, c. 153, §1 (RP).

§808. No right to access or review

A person who is the subject of intelligence and investigative record information maintained by a criminal justice agency has no right to inspect or review that information for accuracy or completeness.
[PL 2013, c. 267, Pt. A, §3 (NEW).]

SECTION HISTORY

PL 2013, c. 267, Pt. A, §3 (NEW).

§809. Unlawful dissemination of confidential intelligence and investigative record information

1. Offense. A person is guilty of unlawful dissemination of confidential intelligence and investigative record information if the person intentionally disseminates intelligence and investigative record information confidential under section 804 knowing it to be in violation of any of the provisions of this chapter.
[PL 2013, c. 507, §9 (AMD).]

2. Classification. Unlawful dissemination of confidential intelligence and investigative record information is a Class E crime.
[PL 2013, c. 507, §9 (AMD).]

SECTION HISTORY

PL 2013, c. 267, Pt. A, §3 (NEW). PL 2013, c. 507, §9 (AMD).

ADDITIONAL MATERIALS

RIGHT TO KNOW ADVISORY COMMITTEE

Law Enforcement Records Subcommittee

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

STATE OF MAINE
Department of Public Safety
Maine State Police
State House Station 42
45 Commerce Drive,
Augusta, Maine
04333-0042

JANET T. MILLS
GOVERNOR

MICHAEL SAUSCHUCK
COMMISSIONER

COL. WILLIAM ROSS
CHIEF

LT. COL. BRIAN P. SCOTT
DEPUTY CHIEF

From Paul Cavanaugh, DPS FOAA records officer, Legislative Liaison, and MSP Staff Attorney

TO THE LAW ENFORCEMENT RECORDS SUBCOMMITTEE OF THE RIGHT TO KNOW ADVISORY COMMITTEE ON MONDAY, OCTOBER 23, 2023.

Senator Carney, and distinguished Members of the Law Enforcement Records Subcommittee of the Right to Know Advisory Committee, thank you for the opportunity to address this important issue. My name is Paul Cavanaugh, and I am the FOAA officer and legislative liaison for the Department of Public Safety and the Staff Attorney for the Maine State Police.

I am here to provide our perspective on two questions being addressed by the committee. Those two questions are:

1. Whether to recommend amending the Intelligence and Investigative Record Information Act (16 M.R.S. §804(3)), which currently provides that information in intelligence and investigative records is confidential if there is a "reasonable possibility that public release or inspection of the record would . . . Constitute an unwarranted invasion of personal privacy." The Judiciary Committee has asked the RTKAC to consider whether the statute should be amended to define the circumstances under which the person whose personal privacy might be invaded, or that person's representative if the person is incapacitated, may consent to release of the information. As you may know, this issue came to the Judiciary Committee's attention because section 3 of LD 1203 included such a proposal.

2. Whether to make recommendations regarding release of information by law enforcement entities even in the absence of a public records request under FOAA.

I will address each question separately and in order.

(1) Amending §804(3) to allow release by waiver

As the first question notes, the issue was raised during the consideration of LD 1203. I have brought and provided a copy of my testimony given to the Judiciary committee during its consideration of LD 1203.

What records are under review when a FOAA request implicates an unwarranted invasion of personal privacy and how are such requests now reviewed to decide if those records should be released?

What records are involved?

The Intelligence and Investigative Record Information Act defines intelligence and investigative record information to mean "information of record collected by or prepared by or at the direction of a criminal justice agency or kept in the custody of a criminal justice agency while performing the administration of criminal justice or, exclusively for the Department of the Attorney General and district attorneys' offices, the administration of civil justice." It includes information of record concerning investigative techniques and procedures and security plans and procedures prepared or collected by a criminal justice agency or other agency but does not include criminal history record information nor information about the administration of juvenile justice. 16 MRS §803(7).

Such records include "police reports" written by an officer whenever the officer's agency's policy requires one. For example, criminal investigations, but also include any call for services – suicides, well-being checks, third party reports, police-initiated events, DHHS assists, and other episodes. It should go without saying that police respond and assist people at what is frequently the worst day of their life after the worst thing that will ever happen to them.

How are requests for those records handled now?

As implicated by this discussion, such records may not be released by a criminal justice agency to any person, or public or private entity, if there is a reasonable possibility that public release would constitute an unwarranted invasion of personal privacy. 16 MRS §804(3).

The Maine Supreme Judicial Court has provided guidance to State agencies trying to decide if the release of certain records would be an unwarranted invasion of personal

privacy.[1] To determine if records should be released or if their release would be an unwarranted invasion of personal privacy, the private and public interests involved must be identified and then balanced to determine if the invasion of personal privacy is warranted. *Blethen Maine Newspapers Inc. v. State*, 2005 ME 56, ¶14 (hereafter, *Blethen*).[2]

The privacy interest:

This protection extends to avoiding disclosure of personal matters and personal information. *Blethen* at ¶15. The Law Court recognized that few people wish to be publicly associated with investigations of alleged criminal conduct, whether as a perpetrator, witness, or victim. *Id.* When the subject of a law enforcement record is a private individual, the privacy interest protected by this exception is at its apex. *Id.* Our Court cited with approval the SCOTUS' recognition that relatives of deceased persons may invoke their own privacy in connection with a FOAA request. *Id.*, at ¶23.

The public interest in a FOAA request relates back to the central purpose of FOAA – to open agency action to the light of public scrutiny. *Id.*, at ¶28. The focus is on the citizens' right to be informed about what their government is up to, and a request that is directed at information about people who are the subject of police files rather than the government's own conduct is not within the sphere of public interest protected by FOAA. *Id.*, at ¶29.

The public interest:

Once those interests are identified in a particular request, the public interest sought must be a significant, particular one (more than just having the information for its own sake) and that release of the information will advance that purpose. *Id.*, at ¶30. If either prong is not strong, the release would be an unwarranted invasion of personal privacy. *Id.*, at ¶33.[3]

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[1] Prior to PL 2013, Maine law mixed intelligence and investigative record information and criminal history record information in a single statute, 16 MRS §614. Case law interpreting section 614(1)(C) is helpful as that statute is now section 804(3).

[2] For ease of reading, I have omitted citations and references from the Maine Supreme Judicial Court to other cases and history. If one wants to read the original Court decisions, the citations and references are included there.

[3] It should be noted that the *Blethen* decision resulted in the Chief Justice concurring in result but advocating for a different balancing test and two Justices dissenting on the application of the adopted test.

The balancing test:

The other issue inherent in this balance is to determine what is a "reasonable possibility" of the harm (unwarranted invasion of personal privacy in this discussion) occurring. Again, our Law Court has provided guidance. Reasonable means simply the product of a rational thought process; or, in other words, not absurd, ridiculous, extreme, or excessive. *Maine Media Today v. State*, 2013 ME 10, ¶26. A reasonable possibility is less burdensome to prove than a reasonable probability; lower than a preponderance of the evidence; and less onerous that more likely than not. *Id.*, at §27. A blanket conclusion about the type of records sought is not sufficient to say the release would cause the harm, but a more particularized review of the circumstances of each request must be made. *Id.*, at ¶30.

Amending §804(3) to allow waiver:

The Department of Public Safety and the Maine State Police do not take a position or make recommendations to Committees or the legislature on policy. That is purely your prerogative. We also cannot comment on a specific LD with regard to amending §804(3) as this is a concept/policy discussion. My contribution is intended to provide "food for thought" as this Committee considers the issue and should the Legislature consider the issue. In that spirit, what follows are some issues or areas we hope will be considered when making these policy choices.

When the subject of a record waives release:

That lengthy background understanding is important when considering the amendment of section 804(3) to allow the release or personal information by a waiver. Such an amendment would remove the need to determine if the release is in the public interest or whether the release advances the public interest. Our Law Court has emphasized that the point of FOAA is to monitor the government not a puritanical interest in what fellow citizens are doing. A waiver could change that balance or completely eliminate the need to consider whether release is in the public's interest.

> What happens when the request for the records is from a media source asking for material for film, book or documentary creation and not for government oversight – would we release the investigation file after a killer or rapist signed a waiver to become famous in a real-life crime drama?
>
> When the reason for the release is not identified so the public private balance cannot be determined, does the waiver trump all other interests?

Releasing a person's record after a waiver would conflict with another part of the IIRIA; specifically, 16 MRS §808. "A person who is the subject of intelligence and investigative record information maintained by a criminal justice agency has no right to inspect or review that information for accuracy or completeness." Amending §804(3) would create a situation where an individual's request for a copy of their records would be denied by §808, but then those same records could be released with a waiver.

Who is the subject of a record? As the Law Court noted, police investigations include information about people in many potential categories – suspects, victims, witnesses.

> Could someone sign a waiver and learn personal information about the other people named in the report?
>
> If a suspect in a sexual assault investigation signed the waiver to get early access to the police investigation but the complainant of that attack objected to the release, would the suspect's waiver or the victim's privacy be paramount?
>
> Would the agency be expected to contact everyone in the record to determine their position on a release?

A waiver under subparagraph 3 would not affect the analysis of the other harms listed in section 804.[4] Each criterion must be evaluated before records are released.

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[4] The twelve harms listed in section 804 are:
1. Interfere with criminal law enforcement proceedings. Interfere with law enforcement proceedings relating to crimes;
2. Result in dissemination of prejudicial information. Result in public dissemination of prejudicial information concerning an accused person or concerning the prosecution's evidence that will interfere with the ability of a court to impanel an impartial jury;
3. Constitute an invasion of privacy. Constitute an unwarranted invasion of personal privacy;
4. Disclose confidential source. Disclose the identity of a confidential source;
5. Disclose confidential information. Disclose confidential information furnished only by a confidential source;
6. Disclose trade secrets or other confidential commercial or financial information. Disclose trade secrets or other confidential commercial or financial information designated as such by the owner or source of the information, by the Department of the Attorney General or by a district attorney's office;
7. Disclose investigative techniques or security plans. Disclose investigative techniques and procedures or security plans and procedures not known by the general public;
8. Endanger law enforcement or others. Endanger the life or physical safety of any individual, including law enforcement personnel;
9. Disclose statutorily designated confidential information. Disclose information designated confidential by statute;
10. Interfere with civil proceedings. Interfere with proceedings relating to civil violations, civil enforcement proceedings and other civil proceedings conducted by the Department of the Attorney General or by a district attorney's office;
11. Disclose arbitration or mediation information. Disclose conduct of or statements made or documents submitted by any person in the course of any mediation or arbitration conducted under the auspices of the Department of the Attorney General; or

How would the law enforcement agency receiving the request verify the authenticity of the waiver?

Who can waive if the subject of the records is incapacitated:

Section 804 limits the dissemination of intelligence and investigative record information generally; while sections 805 and 806 provide for some limited release. The only language in IIRIA that addresses an incapacitated person's request for records is found in §806(2) when allowing release to a crime victim or the victim's agent or attorney. The statute provides that such records may be released to "a crime victim or that victim's agent or attorney. As used in this subsection, "agent" means a licensed professional investigator, an insurer or an immediate family member, foster parent or guarding if due to death, age or physical or mental disease, disorder or defect the victim cannot realistically act on the victim's own behalf".

LD 1203 proposed to allow release to a "family or household member" as defined in the protection from abuse statutes if the subject of the record was deceased, incapacitated, or a minor.

Remember, this would be an amendment to 804 and authorize the release generally not in the limited circumstances of a release to a victim. Amending 804 would expand both who could get the records (family or household members of the subject of the report – instead of the victim or agent) and would allow release under different circumstances (if the subject of the report were deceased, incapacitated, or a minor – instead of when the victim, due to death, age or physical or mental disease, disorder or defect, cannot realistically act on the their own behalf).

An amendment to 804(3) would create conflicting standards with 806(2) and could cause records to be denied under one section but authorize the release under a different section. Such inconsistencies are sure to lead to confusion and litigation.

Importing the definition of family or household member from title 19-A would greatly expand the group of people who could gain access to these records.[5] Such an extension

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12. Identify source of consumer or antitrust complaints. Identify the source of a complaint made to the Department of the Attorney General regarding a violation of consumer or antitrust laws.

[5] 19-A MRS §4102(6) defines family or household member:
"Family or household members" means:

of the people who could gain access to personal information would create absolute conflict and misery.

If a child were killed or missing – who should be able to consent to the release of those records to the public? The proposed amendment would authorize, with a waiver, the release to

(1) the parent suspected in the death or disappearance, AND
That parent's current spouse,
That parent's other former spouses,
That parent's current roommates,
That parent's former roommates,
That parent's current sexual partners,
That parent's former sexual partners, and
People related to that parent by marriage or blood;

(2) the other parent, AND
That parent's current spouse,
That parent's other former spouses,
That parent's current roommates,
That parent's former roommates,
That parent's current sexual partners,
That parent's former sexual partners, and
People related to that parent by marriage or blood.

Likewise, this same list of people for every person would is the subject of a report would have authority to access these records if section 804(3) were so amended.

A. Present or former spouses or domestic partners;
B. Individuals presently or formerly living together as spouses;
C. Parents of the same child;
D. Adult household members related by consanguinity or affinity;
E. Minor children of a parent or guardian when the defendant is an adult household member of that parent or guardian;
F. Individuals presently or formerly living together; and
G. Individuals who are or were sexual partners.
Holding oneself out to be a spouse is not necessary to constitute "living together as spouses." For purposes of this subsection, "domestic partners" means 2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare.

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And, if the waiver is sufficient reason to release, as discussed above, there would be no need to determine if the release was in the public interest or advanced the public interest.

Again, DPS and MSP are not trying to take a position on policy and as no bill is proposed we are not discussing specific language. I am simply calling attention to issues that we believe warrant consideration by those making the policy decisions.

(2) Releasing information without a FOAA request

Further clarification leads me to understand this request addresses law enforcement releasing information about a public safety incident or criminal investigation over a weekend and delay caused by FOAA requests.

First, the Department of Public Safety has a public information officer who is available every hour of every day, including the weekends. Shannon Moss routinely releases information to the press on the weekend and overnights. Other, smaller agencies may not have the luxury or ability to hire a PIO and to mandate that they stop responding to the public safety incident or criminal investigation to release information to the press seems to lose the focus on the point of law enforcement. Officers should be responding to the crises and resolving it, not stopping to let it continue so the press can be alerted.

Second, I have been the FOAA point of contact for over a year at DPS. I do not recall any weekend urgent FOAA requests, but do recall getting FOAA requests for police reports, videos, and 911 information as homicides were happening and before suspects were in custody. Again, DPS is fortunately to have a FOAA point of contact who is not responding to the crisis. Many small agencies cannot do so. More to the merits, under section 804, information will not be released that will compromise the investigation, put people at risk, or challenge a suspect's ability for a fair trial or strong defense. A weekend or overnight request, or a request well after the fact, will get the same response.

Thank you for the opportunity to present our thoughts and concerns. We wish you good luck in addressing these important policy considerations.

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Testimony of Paul Cavanaugh, DPS FOAA records officer, Legislative Liaison, and MSP Staff Attorney

IN REGARD TO LD 1203

An Act to Clarify Deadlines in the Freedom of Access Act and Disclosure Provisions in the Intelligence and Investigative Record Information Act

Senator Carney, Rep. Moonen and distinguished Members of the Joint Standing Committee on Judiciary. My name is Paul Cavanaugh, and I am the FOAA officer and legislative liaison for the Department of Public Safety and the Staff Attorney for the Maine State Police. I am here today to testify on behalf of the Department of Public Safety and the Maine State Police regarding LD 1203: we are neither for nor against sections 1 and 2 as they would amend FOAA but are opposed to section 3 and the amendments to the intelligence and investigative record information act.

Section 1 and section 2 of LD 1203 propose amendments that we feel will have no impact on our response to requests or will have a very minor impact on our responses, so we are neither for nor against those changes.

Section 3 proposes a drastic change to the intelligence and investigative record information act that would at its best create confusion and more likely would create conflicting duties on this agency and result in much

more litigation over implementation. We have a number of specific concerns that I will address in no particular order.

First the proposed change to §804 could be seen to create a conflict with §808 of the Act. Under section 808 a person who is the subject of a record has no right to inspect or review that record for accuracy or completeness, but the proposed amendment to 804 could be read to allow that person to consent to disclosure of those records to a third party.

The proposed amendment allows "the individual who is the subject of the record or if that individual is deceased, incapacitated, or a minor" to consent to the release of records. Intelligence and investigative record information is rarely limited to a specific individual but contains all records about an investigation – suspect, victim, witness, and the like. The proposed amendment does not define who is the "individual who is the subject of the record" such that an argument could be make that each person named in the record is the subject of the record and a suspect could therefore consent to the release of the unwarranted invasion of personal privacy otherwise protected for the victim or anyone else named in the record.

The proposed amendment imports the vocabulary of protection orders in title 19-A into the Act by incorporating "family and household member" language. This creates confusion with section 806 which uses specific familial relation language to allow the release of records (an immediate family member, foster parent, or guardian" for example). Likewise, the extension of people who can consent to the release of personal, private information would include former lovers, former roommates, parents of natural children when the record might not involve that child and divorced or separated people when the record is about that very conflict. For example, if a child were killed – who should be able to consent to the release of those records to the public before anyone is charged criminally – the parent suspected in the death, the other parent, the suspect parent's former lovers or spouse, the non-suspect parent's former lovers or spouses or roommates?

The proposed amendment would allow a third party to consent to the release of information otherwise confidential as an unwarranted invasion of personal privacy if the person who is the subject of the record is deceased, incapacitated, or a minor. Currently, section 806 allows the

release of records to a victim if due to "death, age or physical or mental disease, disorder or defect, the victim cannot realistically act" on their own behalf. Those different standards could result in the release of records in inconsistent manners. Victims are not likely to want suspects to get such information.

For these reasons, we are neither for nor against sections 1 & 2 of LD 1203 but are opposed to section 3.

On behalf of the Department of Public Safety and the Maine State Police, I thank you for your time and would be happy to try and answer any questions that you might have.

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