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Eighteenth Annual Report of the Right to Know Advisory Committee

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Office of Policy and Legal Analysis

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Eighteenth Annual Report of the Right to Know Advisory Committee

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EXECUTIVE SUMMARY

This is the eighteenth annual report of the Right to Know Advisory Committee (RTKAC or Advisory Committee). The Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The members are appointed by the Governor, the Chief Justice of the Supreme Judicial Court, the Attorney General, the President of the Senate and the Speaker of the House of Representatives.

As in previous annual reports, this report includes a brief summary of the legislative actions taken in response to the Advisory Committee's January 2023 recommendations and a summary of relevant Maine court decisions from 2023 related to the freedom of access laws. This report also summarizes several topics discussed by the Advisory Committee that did not result in a recommendation or further action.

For its eighteenth annual report, the Advisory Committee makes the following recommendations:

- ❒ **Amend certain provisions of law in Title 22 relating to previously-enacted public records exceptions**

- ❒ **Provide an explanation to the Blue Ribbon Commission to Study Emergency Medical Services in the State of why the RTKAC did not recommend amending Title 32, section 98, to establish a public records exception for financial information provided by applicants for Emergency Medical Services Stabilization and Sustainability Program grants**

- ❒ **Reinforce the importance of following the statutory requirements applicable to public bodies and agencies going into executive session**

- ❒ **Request that the Public Access Ombudsman include more guidance regarding the Freedom of Access Act's (FOAA) requirements for public bodies and agencies going into executive session on the Maine Freedom of Access Act website**

- ❒ **Send a letter to Maine School Management Association confirming that FOAA allows a public body to create an internal form for responding to public records requests and that the Public Access Ombudsman can assist in the development of such a form**

- ❒ **Solicit from entities within the State responsible for responding to public records requests examples of burdensome public records requests and situations that the entity believes represent an abuse of the FOAA process, as well as suggested statutory changes, for consideration by the Advisory Committee next year**

- ❒ **Send a letter to Maine Chiefs Police Association requesting that it coordinate with the Maine Sheriffs Association, Maine State Police, Maine Office of the Attorney General, Maine Press Association and Maine Association of Broadcasters to convene a meeting**

to share information among stakeholders regarding the pressures and constraints experienced by both members of the media and law enforcement when reporting on or releasing information related to public safety incidents and ongoing criminal investigations

- ❒ **Propose that the Joint Standing Committee on Judiciary report out a bill in the Second Regular Session of the 131st Legislature to create a legislative study group to develop recommendations related to public employee disciplinary records, taking into consideration progressive discipline structures and employee incentives across different types of public employment**

In 2024, the Right to Know Advisory Committee will continue to discuss the unresolved issues identified in this report, including issues related to burdensome public records requests and to the development of recommendations to increase collaboration between law enforcement and the media to ensure the public has access to timely, reliable information about significant public safety incidents and criminal investigations. The Advisory Committee will also continue to provide assistance to the Joint Standing Committee on Judiciary relating to proposed legislation affecting public access. The Advisory Committee looks forward to another year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

I. INTRODUCTION

This is the eighteenth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The Advisory Committee's authorizing legislation, located at Title 1, section 411, is included in Appendix A.

More information on the Advisory Committee, including meeting agendas, meeting materials and summaries of meetings and its previous annual reports can be found on the Advisory Committee's webpage at http://legislature.maine.gov/right-to-know-advisory-committee. The Office of Policy and Legal Analysis provides staffing to the Advisory Committee when the Legislature is not in regular or special session.

The Right to Know Advisory Committee has 18 members. Currently, there is one vacancy. The chair of the Advisory Committee is elected by the members. Current Advisory Committee members are:

Rep. Erin Sheehan, Chair	*House member of Judiciary Committee, appointed by the Speaker of the House*
Sen. Anne Carney	*Senate member of Judiciary Committee, appointed by the President of the Senate*
Amy Beveridge	*Representing broadcasting interests, appointed by the President of the Senate*
Jonathan Bolton	*Attorney General's designee*
Vacant	*Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House*
Justin Chenette	*Representing the public, appointed by the President of the Senate*
Lynda Clancy	*Representing newspaper and other press interests, appointed by the President of the Senate*
Linda Cohen	*Representing municipal interests, appointed by the Governor*

Julia Finn	*Representing the Judicial Branch, designated by the Chief Justice of the Supreme Judicial Court*
Betsy Fitzgerald	*Representing county or regional interests, appointed by the President of the Senate*
Chief Michael Gahagan	*Representing law enforcement interests, appointed by the President of the Senate*
Kevin Martin	*Representing state government interests, appointed by the Governor*
Judy Meyer	*Representing newspaper publishers, appointed by the Speaker of the House*
Tim Moore	*Representing broadcasting interests, appointed by the Speaker of the House*
Kim Monaghan	*Representing the public, appointed by the Speaker of the House*
Eric Stout	*A member with broad experience in and understanding of issues and costs in multiple areas of information technology, appointed by the Governor*
Cheryl Saniuk-Heinig	*A member with legal or professional expertise in the field of data and personal privacy, appointed by the Governor*
Victoria Wallack	*Representing school interests, appointed by the Governor*

The complete membership list of the Advisory Committee is included in **Appendix B**.

By law, the Advisory Committee must meet at least four times per year. During 2023, the Advisory Committee met five times: on September 18, October 2, October 23, November 6 and December 4. In accordance with the Advisory Committee's remote participation policy, Advisory Committee meetings were conducted in a hybrid manner. Meetings were remotely accessible to the public through the Legislature's website.

II. COMMITTEE DUTIES

The Right to Know Advisory Committee was created to serve as a resource and advisor about Maine's freedom of access laws. The Advisory Committee's specific duties include:

❒ Providing guidance in ensuring access to public records and public proceedings;

- ❒ Serving as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know;

- ❒ Supporting the provision of information about public access to records and proceedings via the Internet;

- ❒ Serving as a resource to support training and education about Maine's freedom of access laws;

- ❒ Reporting annually to the Governor, the Legislative Council, the Joint Standing Committee on Judiciary and the Chief Justice of the Supreme Judicial Court about the state of Maine's freedom of access laws and the public's access to public proceedings and records;

- ❒ Participating in the review and evaluation of public records exceptions, both existing and those proposed in new legislation;

- ❒ Examining inconsistencies in statutory language and proposing clarifying standard language; and

- ❒ Reviewing the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public.

In carrying out these duties, the Advisory Committee may conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss and consider solutions to problems concerning access to public proceedings and records.

The Advisory Committee may make recommendations for changes in statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws. The Advisory Committee is pleased to work with the Public Access Ombudsman, Brenda Kielty. Ms. Kielty is a valuable resource to the public and public officials and agencies.

III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES

By law, the Advisory Committee serves as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know. In carrying out this duty, the Advisory Committee believes it is useful to include in its annual reports a digest of recent developments in case law relating to Maine's freedom of access laws. For this annual report, the Advisory Committee has identified and summarized the following Maine Supreme Judicial Court decisions related to freedom of access issues. In addition, the Advisory Committee includes a summary of an October 2022 Superior Court decision related to a Title 22 exception that the Advisory Committee has recommended be amended in this report.

Human Rights Defense Center v. Maine County Commissioners Association Self-Funded Risk Management Pool

In this case, *Human Rights Defense Center v. Maine County Commissioners Association Self-Funded Risk Management Pool,* the Maine County Commissioners Association Self-Funded Risk Management Pool appealed the Superior Court's decision finding that the risk pool wrongfully refused to release documents requested by the Human Rights Defense Center (HRDC) from the risk pool related to the settlement of a case against Kennebec County and that the risk pool did so in bad faith, warranting award of attorney's fees. HRDC sought records showing payments disbursed related to a settlement. In response to the request, the risk pool stated that counsel for Kennebec County had already provided a release document and that the settlement amount was $30,000, but failed to produce any documentation supporting payment for that amount. When an additional request was made, the risk pool provided a link to a newspaper article quoting a representative of the risk pool about the settlement. No documentation showing an actual payment was produced. The Superior Court found that the risk pool used the clarification process to avoid disclosing responsive documents and failed to adequately respond to the request. Further, the Superior Court found that the risk pool acted in bad faith because it used the clarification process to invent a pretext to justify the refusal to disclose responsive documents. While the court was not able to find any other case of attorney's fees being granted in the FOAA context, the Superior Court granted the HRDC's request for reasonable attorney's fees pursuant to 1 MRSA section 409, subsection 4.

The Law Court affirmed the Superior Court's decision and, in a case of first impression, upheld the awarding of attorney's fees because the risk pool acted in bad faith in its refusal to fully comply with HRDC's request for records. The Law Court determined that, based on the facts cited by the Superior Court, the risk pool deliberately withheld access to payment-related documents in its possession that clearly were responsive to the request and should have been disclosed.

Fairfield v. Maine State Police

In this case, *Fairfield v. Maine State Police*, the plaintiff, Mr. Fairfield appealed a Superior Court order that affirmed the Maine State Police's (MSP) refusal to produce documents sought pursuant to a FOAA request. Mr. Fairfield requested records relating to: (1) documentation of MSP Crime Laboratory protocols including standing operating procedures; (2) DNA contamination logs; (3) quality assurance records; and (4) quality assurance manuals dating back to 2008. The Maine State Police produced certain documents responsive to the request, but withheld other documents that were determined to be confidential by statute, citing the Intelligence and Investigative Record Information Act, the DNA Data Base and Data Bank Act and personnel records provisions applying to state employees (Maine State Police). Maine State Police provided approximately 6,800 pages of requested materials in full, as well as 40 partially redacted pages. The MSP withheld approximately 2,700 pages on the basis that the records were confidential. Mr. Fairfield appealed and contended that the DNA contamination logs and quality assurance records were not confidential.

For the first time, the Law Court set forth the standard for review in cases that appeal a trial court's determination that a large number of requested documents are confidential. The Law Court outlined a 2-part analysis; first, the court must analyze de novo whether the trial court has created a sufficient factual record upon which it can determine whether the withheld documents are confidential, and second, the court independently reviews the factual record, including any documents submitted for in camera review, to ensure that the trial court did not commit clear error in its description and categorization of the withheld document. The Law Court noted that its review is completed by spot-checking a random selection of any withheld documents submitted for *in camera* review and reviewing other components of the factual record. In this case, the trial court conducted an *in camera* review of the records and also reviewed briefs submitted by the parties, affidavits submitted by the parties and an exceptions log prepared by the MSP as the factual record. Based on its independent review of the record, the Law Court affirmed the trial court's order, finding that there was no error when it determined that DNA contamination logs and quality assurance records were confidential and therefore not subject to disclosure under FOAA.

Feltis v. Frey

In this case, *Feltis v. Frey*, the plaintiff, Mr. Feltis, requested records from the Office of the Attorney General (OAG) related to his son's (Roger Feltis) death. Mr. Feltis's son died during an altercation and his death was investigated as a criminal matter. Although two individuals were presented to the Grand Jury, the Grand Jury returned a No Bill for both individuals. The OAG denied the request for records contained in the OAG investigative file and Mr. Feltis appealed. The Superior Court rejected the OAG argument that the investigative file as a whole was confidential because it contained confidential information that, if redacted, would render the information in the file unintelligible. The Superior Court analyzed the information asserted as confidential to determine if the information was confidential based on application of a specific statute and ordered the release of the records, stating that any redactions made by the OAG should be made consistent with the rulings made by the court with regard to the application of each confidentiality exception. Of particular interest to the Advisory Committee, one of the specific confidentiality statutes cited by the OAG that protected information in the investigative file from disclosure was 22 MRSA §3022. The OAG asserted that this provision designated autopsy photographs as confidential. The statute provides that certain records "in the possession or custody of a medical examiner or the Office of Chief Medical Examiner are not public records .... " 22 MRSA §3022(8). The court determined that these records were not in the custody of a medical examiner or the Office of Chief Medical Examiner, but were in the custody of the OAG so the statute, by its express language, did not apply. Further, although the photographs may implicate the privacy interests of Roger Feltis and his family under other confidentiality provisions in the Intelligence and Investigative Records Information Act, 16 MRSA §804(3), those privacy interests did not warrant a refusal to release the records given the death of Roger Feltis.

IV. ACTIONS RELATED TO COMMITTEE RECOMMENDATIONS CONTAINED IN SEVENTEENTH ANNUAL REPORT

The Advisory Committee made the following recommendations in its Seventeenth Annual Report. The legislative actions taken in 2023 as a result of those recommendations are summarized below.

Recommendation:	**Action:**
Amend certain provisions of law in Titles 23, 24 and 24-A relating to previously-enacted public records exceptions	LD 1207, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Public Records Exceptions*, was enacted as Public Law 2023, ch. 123.
Recommendation: Enact legislation to revise the membership of the Archives Advisory Board to include a member representing journalists, newspapers, broadcasters and other news media interests	**Action:** LD 133 was enacted as Public Law 2023, ch. 24, *An Act to Include a Representative of Newspaper and Other Press Interests on the Archives Advisory Board and to Require the Member Representing a Historical Society to Have Expertise in Archival Records*. As enacted, the law requires that the existing board member representing a state or local historical society have expertise in archival records and that the new member proposed by RTKAC have expertise in journalism.
Recommendation: For FOAA training purposes, recommend that the Public Access Ombudsman review the Freedom of Access website and FOAA training materials to include guidance on best practices for conducting remote meetings to optimize public participation	**Action** Staff communicated this recommendation to the Public Access Ombudsman.
Recommendation: Encourage the Maine Municipal Association, the Maine County Commissioners Association and the Maine School Management Association to develop guidance documents related to remote meetings	**Action:** Staff shared a copy of the 17th Annual Report with representatives of these organizations.
Recommendation: Enact legislation to amend the law related to remote participation	**Action:** LD 1322, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning*

	Remote Participation, was enacted as Public Law 2023, ch. 158. In addition, LD 1425, *An Act to Strengthen Freedom of Access Protections by Allowing Remote Meetings to Be Recorded*, was also enacted as Public Law 2023, ch. 185. This law requires that members of the public be allowed to record a meeting with remote participation using the electronic platform used to conduct the meeting, as long as additional costs are not incurred and the recording does not interfere with the orderly conduct of the proceeding.
Recommendation: Recommend that the Legislature direct funding to provide grants and technical assistance to all public bodies authorized to adopt remote participation policies, including counties, municipalities, school boards and regional or other political subdivisions	**Action:** No specific action taken by the Legislature during the First Regular Session or the First Special Session.
Recommendation: Recommend a statutory change and the revision of the record retention schedules applicable to state, county and municipal employee personnel records (1 member opposed; 1 member abstained)	**Action:** LD 1397, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees*, included the language recommended by RTKAC that would prevent a collective bargaining agreement or employment contract from overriding the records retention schedule established by the State Archivist and would require that records related to disciplinary actions be retained for a period of 20 years, with potentially shorter retention periods for less serious conduct and potentially longer retention periods for law enforcement disciplinary actions reflecting on the credibility of the officer. But, these provisions were each removed before the bill was enacted as Public Law 2023, chapter 159.
Recommendation: Enact legislation to amend state and county employee personnel records statutes to align with the municipal employee personnel record statute	**Action:** The enacted version of LD 1397, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees*, Public Law 2023, chapter 159, implements this recommendation.

Recommendation: Enact legislation to ensure that responses to FOAA requests for "personnel records" include records that have been removed from the personnel file and are otherwise retained	**Action:** LD 1397, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees*, included the language recommended by RTKAC to implement this recommendation, but, this language was removed before the bill was enacted as Public Law 2023, chapter 159.
Recommendation: Recommend that the State Archivist, the Maine Archives Advisory Board and legislative proposals use standardized language related to record retention in schedules developed for public bodies and consider the inclusion of definitions of terms such as "remove," "purge" and "destroy" when they are used in record retention schedules	**Action:** LD 1397, *An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees*, included the language recommended by RTKAC to implement this recommendation. Although this language was removed before the bill was enacted as Public Law 2023, chapter 159, the State Archivist indicated a willingness to continue working on this issue.
Recommendation: Request information from municipal, county and state law enforcement agencies regarding the prevalence and frequency of use of encrypted radio channels	**Action:** Staff requested that municipal, county and state law enforcement agencies participate in a survey regarding the prevalence and frequency of the use of encrypted radio channels. Several responses were received, each indicating that the responding law enforcement agencies were not using encryption. Anecdotal evidence suggests that encrypted radio channels have been used only in the Lewiston/Auburn area.
Recommendation: Recommend that the Judiciary Committee, in consultation with the Criminal Justice and Public Safety Committee, continue to discuss providing expanded access to participation in the legislative process by residents of correctional facilities, including the barriers that must be resolved to allow participation	**Action:** No action taken by the Judiciary Committee during the First Regular Session or the First Special Session.

V. COMMITTEE PROCESS

In 2023, the Advisory Committee formed 3 subcommittees to assist in its work: the Public Records Exceptions Subcommittee, the Public Records Process Subcommittee and the Law Enforcement Records Subcommittee. Each subcommittee discussed its assigned topics and issues thoroughly and determined whether to make recommendations for consideration by the full Advisory Committee. More information on the subcommittee activities, including meeting agenda and materials, can be found on the Advisory Committee's webpage at http://legislature.maine.gov/right-to-know-advisory-committee.

The deliberations of each subcommittee are summarized below. Part VI of this report contains the specific recommendations from the subcommittees that were adopted by the full Advisory Committee. Unless otherwise noted, subcommittee recommendations were unanimously approved by those subcommittee members present.

Public Records Exceptions Subcommittee

The Public Records Exceptions Subcommittee was chaired by Kim Monaghan. Jonathan Bolton, Lynda Clancy and Cheryl Saniuk-Heinig served as members of the Subcommittee. The Subcommittee met 4 times: on October 23, November 9, November 28 and December 4. On December 4, the Subcommittee made its report and recommendations to the Advisory Committee.

The focus of the Public Records Exceptions Subcommittee is to review and evaluate public records exceptions as required of the Advisory Committee pursuant to 1 MRSA, section 433, subsection 2-A. The guidelines in the law require the Advisory Committee to review all public records exceptions in Titles 22, 23, 24 and 24-A by 2025. In 2022, the Subcommittee completed its review of the exceptions in Titles 23, 24 and 24-A. During 2023, the Subcommittee reviewed the public records exceptions in Title 22 and, at the Advisory Committee's request, also considered whether to recommend a new proposed public records exception to protect from public disclosure certain information included in grant applications under the Emergency Medical Services Stabilization and Sustainability Program, enacted as part of the biennial budget law, Public Law 2023, chapter 412, Part GGGGG. The Emergency Medical Services Stabilization and Sustainability Program was enacted by the Legislature to provide financial assistance to emergency medical services entities based in the State that are facing immediate risk of failing and leaving their communities without access to adequate emergency medical services.

- *Review of exceptions in Title 22*

As a first step to the review of existing public records exceptions, the Subcommittee reached out to state agencies for information, comments and suggestions with respect to the relevant public records exceptions administered by that body. Subcommittee members reviewed the agency responses to the questionnaires and also had available a chart that included the following information: the statutory citation for each exception and links to the statutory language; the

agency that is responsible for administering each exception; and each agency's recommendation whether to continue, amend or repeal the exception.

The Subcommittee reviewed 79 exceptions in Title 22. While the members agreed that most of the exceptions under review were appropriate and did not need to be discussed further, the members did cull out certain exceptions for discussion before making their recommendation as to whether the exception should continue without change, should be amended or should be repealed. Of the 79 exceptions originally identified for review, 14 exceptions were subsequently repealed so Subcommittee review was not necessary. The Subcommittee recommended that there be no changes to 62 exceptions and that 3 exceptions be amended.

The Advisory Committee unanimously approved these recommendations, which are discussed in Part VI of this report. *See also the list of existing exceptions recommended to continue without change provided in Appendix F and the proposed amendments to existing exceptions in Appendix E.*

- *Consideration of new proposed public records exception to protect from public disclosure certain information included in grant applications under the Emergency Medical Services Stabilization and Sustainability Program*

At the request of the Advisory Committee, the Subcommittee was asked to consider recommending that a new public records exception be added to protect as confidential financial statements required to be included in grant applications for funding under the Emergency Medical Services Stabilization and Sustainability Program. This program was enacted by the Legislature as part of the biennial budget law, Public Law 2023, chapter 412, Part GGGGG, and established to provide financial assistance to emergency medical services entities based in the State that are facing immediate risk of failing and leaving their communities without access to adequate emergency medical services. The request originated from Advisory Committee member, Sen. Anne Carney, after a discussion with staff in the Speaker's Office. Under the law as currently written, emergency medical services entities applying for financial assistance must submit a financial statement for the most recent year.

While members of the Subcommittee recognized that certain emergency medical services entities may have concerns about releasing this information to the public because it may create a competitive disadvantage to those entities, the Subcommittee concluded that there is no need for a public records exception at this time given that this financial information is already public for many emergency medical services entities. The Subcommittee felt that there should be a level playing field between municipal emergency medical services programs which are funded by taxpayers and whose records are public and other non-profit or for-profit entities who are competing for these grants. These organizations regularly share information about their financial position with the public and disclosure of that information is not protected under the Freedom of Access Act. Further, financial information related to nonprofit entities is also available to the public. The Subcommittee members also noted that there is an existing public records exception that protects trade secrets as confidential; emergency medical services entities applying for grants that are concerned about the public disclosure of their financial statements may invoke that exception when submitting records with any grant application. Because financial assistance

will be provided by Maine taxpayers, the members believed that the public interest in the information provided to support an application for assistance outweighs any proprietary business interest in maintaining the confidentiality of that information.

The Subcommittee members agreed to not recommend legislation to enact a public records exception for these financial records.

Public Records Process Subcommittee

The Public Records Process Subcommittee was chaired by Victoria Wallack. Representative Sheehan, Julie Finn, Judy Meyer, Kevin Martin and Eric Stout served as members of the Subcommittee. The Subcommittee met three times: on October 23, November 6 and December 4. On December 4, the Subcommittee made its report and recommendations to the Advisory Committee.

The Subcommittee was formed to consider 7 specific topics associated with the process requirements of FOAA described and discussed below. Several of the topics were suggested for Advisory Committee review in a June 29, 2023 letter sent to the RTKAC from the Joint Standing Committee on Judiciary; these topics related to proposals considered by the Judiciary Committee in the First Regular and First Special Sessions of the 131st Legislature. A copy of this letter is included in **Appendix C**. The Subcommittee also considered additional topics suggested by Advisory Committee members at the first Advisory Committee meeting.

- *Require body or agency to cite the reason for going into executive session*

This topic was raised for consideration by Rep. Sheehan at the first Advisory Committee meeting based on concerns shared with her by a member of the public regarding the appropriateness of a public body going into executive session. The Subcommittee started its discussion by reviewing the relevant statute, 1 MRSA §405, which requires, among other things, that a motion to go into executive session include the precise nature of the business of the executive session and a citation of one or more sources of statutory or other authority that permits an executive session for that business. Subcommittee members noted that they have seen situations in which motions for executive session are incomplete, and they discussed the remedies available to a member of the public if they believe the public body or agency does not have authority to move into executive session, including appealing to superior court, raising their concerns during a public comment period or submitting a letter to the body or agency. Brenda Kielty, the Public Access Ombudsman, added that it is also the responsibility of the members of a public body or agency to object to the motion if the reasons for the executive session are not sufficiently clear. Ms. Kielty noted that there is tension between needing to provide sufficient detail in the motion to go into executive session while maintaining the confidentiality of the matters that are to be discussed. The members discussed the origin of the language in section 405, subsection 4, and several commented that, in their recent experience, public bodies are including a citation in the motion to go into executive session, but failing to include the "precise nature of the business." The members specifically considered two of the permitted reasons for an executive session: section 405, subsection 6, paragraph C, related to real and personal property, and section 405, subsection

6, paragraph E, related to the presence of the attorney for the body or agency. Ms. Kielty provided some examples of the types of business a public body might be discussing in which paragraph C could be appropriately used for an executive session, but noted that much more information would be necessary to evaluate the propriety of a specific situation. The members considered whether additional guidance or education related to the appropriate use of executive sessions is necessary, and Ms. Kielty reviewed the current guidance provided in three of the frequently asked questions posted on the Maine Freedom of Access Act website, https://www.maine.gov/foaa/.

The members agreed to recommend that the Advisory Committee send a letter providing an overview of the Subcommittee's discussions regarding public bodies and agencies going into executive session and asking the recipients to remind their members of the importance of including in the motion both the precise nature of the business of the executive session and a citation of one or more sources of statutory or other authority that permits an executive session for that business. The letter would be distributed to the state agency FOAA contacts, the Maine School Management Association, Maine Municipal Association, Maine County Commissioner's Association, the Maine Town and City Manager Association and the Maine Town and City Clerks' Association as well as the RTKAC interested parties list. The members also agreed to recommend that the Public Access Ombudsman update the frequently asked questions on the Maine Freedom of Access Act website to include more guidance regarding FOAA's requirements for executive sessions, with particular focus on the need to identify the precise nature of the business of the executive session.

The Advisory Committee unanimously approved these recommendations, which are discussed in Part VI of this report.

- *Use of a standard form for FOAA requests*

This topic was suggested to the Advisory Committee by the Judiciary Committee, as a proposal for a form for submission of public records requests was included in LD 1649. The Subcommittee identified two contexts in which the use of a standard form could be implemented: a form used by a requestor to access public records and a form used internally by a responding entity to facilitate a FOAA response. Although it was noted that a form for use by a requestor could be useful for ensuring that a public records request is complete and may make providing records easier for responders, some members expressed concern that a form could create a barrier to members of the public seeking public records, especially for those with lower reading abilities. Several members also described the importance of the conversations and negotiations that are involved in refining a FOAA request that could be negatively impacted by the use of a standard form. At the request of the Subcommittee, Ms. Kielty prepared and shared with the members an example of a form that could be provided by requestors when making a request under FOAA for public records. In discussing the form example, the Subcommittee members noted that FOAA does not require a request for public records to be made in writing and, in fact, public records requests may be made anonymously, so a form would need to be carefully drafted to ensure readability and to not create the impression that a form is required or that all fields must be filled out. The Subcommittee learned that schools have been receiving broad public records requests and a requestor form, such as that proposed in LD 1649, was a possible

mechanism for narrowing the scope of these requests. The members agreed that creating a template form to be used by individuals requesting public records raises many issues and decided to focus their discussions instead on forms that could be used internally by a responding entity. The members reviewed a form shared by Eric Stout that is intended for internal use by agencies and others to document and track a public records request after it has been made. Mr. Stout also shared a document with search tips that may be useful for an entity that is responding to a public records request, but noted that responding entities would need different resources due to differences in the technology used by the entities. Ms. Kielty added that she is willing to assist agencies that are interested in creating a form.

The Subcommittee agreed to recommend that the Advisory Committee send a letter to the Maine School Management Association confirming that a public body or agency is free to create an internal form to facilitate efficient responses to public records requests and that the Public Access Ombudsman is a resource for best practices and assistance in developing such a form.

The Advisory Committee unanimously approved this recommendation, which is discussed in Part VI of this report.

- *Allow prioritization of certain FOAA requests based on the type of requestor*

This topic was suggested to the Advisory Committee by the Judiciary Committee, as a proposal for prioritizing public records requests for certain types of requestors, specifically residents of the State or journalists acting in a journalistic capacity, and was included in LD 1203. Rep. Sheehan shared that when the Judiciary Committee considered prioritization of certain types of requestors as proposed in LD 1203, members were concerned about making these kinds of distinctions and several Subcommittee members noted that there would be ways to circumvent such prioritization efforts. The Subcommittee members agreed to not recommend legislation or other action related to this issue.

- *Responding entity to provide notice to individual who is the subject of a Freedom of Access request*

This topic was suggested to the Advisory Committee by the Judiciary Committee, as a proposal for requiring notice to a school employee who is the subject of a FOAA request was included in LD 1649. Members discussed potential issues associated with providing notice to the subject of a public records request, including the lack of recourse for the subject once they receive such notice and the risk that providing notice could create an impression that the subject has the ability to influence the production of records. One member observed that providing notice to an individual named in a public records request could be a best practice implemented by a responding entity and does not need to be in statute. The Subcommittee discussed "weaponized" public records requests (i.e., requests that appear intended to be harassment or to target specific individuals) and the available remedy of an action in Superior Court, as well as whether school employees should be treated differently than public employees generally. Subcommittee members recognized the strain that FOAA requests place on school boards and school officials, but expressed concern about a mandatory notice requirement when the subject of the FOAA request would have no authority to stop the public disclosure of the records. A majority of the

Subcommittee members agreed that they would not recommend legislation or other action related to this issue.

- *Define "burdensome" request as used in 1 MRSA §408-A(4)*
- *Repeat requestors and incomplete/delayed public records request responses*
- *Give the Public Access Ombudsman authority to waive an agency response requirement under certain circumstances*

The Subcommittee considered the above three topics together, as each relates to challenges faced by entities responding to public records requests. The first two topics were raised in Advisory Committee discussions at the first meeting and the third was suggested to the Advisory Committee by the Judiciary Committee, as a proposal for allowing the Public Access Ombudsman to relieve an agency or official of its obligation to provide records pursuant to FOAA was included in LD 1649. The Subcommittee considered various ways in which a "burdensome" request could be defined and agreed that what is considered a burdensome request would vary by situation, including the type of entity responding to the request, and may be subjective in nature. The members discussed the possibility of identifying specific metrics that could be included in statute, such as the number of hours involved to produce the records or the cost to the requestor, for classifying a request as burdensome. Some members believed this approach might be too broad given that some responding entities have significant resources and others do not; the members agreed that resource limitations contribute to whether a request is burdensome to a responding entity. Kevin Martin suggested that there is a distinction between a burdensome request and a request that could be considered an abuse of the FOAA process, and he shared examples of situations in which he believed a FOAA request was designed for reasons other than accessing records.

The Subcommittee also considered how the Public Access Ombudsman could assist responding entities with burdensome requests. Ms. Kielty pointed out that her involvement in a FOAA dispute would create an extra step in the process and a determination would need to be made quickly. In her role, she does not have a structure for implementing an adjudicatory process and would need additional resources. She also noted that such a structure would be necessary to ensure that members of the public are not losing their rights to access public records without appropriate consideration. The members struggled with how to best approach providing clear guidance for responding entities while maintaining the policy goal of FOAA to make records available. Members agreed that additional time and information would be necessary to fully consider this topic, including examples of what responders believe are burdensome requests and situations in which the FOAA process is abused.

The Subcommittee agreed to recommend that the Advisory Committee consider these topics again next year. To assist the Advisory Committee, the Subcommittee also recommended that RTKAC staff send a survey to the state agency FOAA contacts, the Maine School Management Association, Maine Municipal Association, Maine County Commissioner's Association, the Maine Town and City Manager Association and the Maine Town and City Clerks' Association requesting examples of burdensome public records requests and situations the responder believes represent an abuse of the FOAA process as well as any recommended statutory changes.

The Advisory Committee unanimously approved this recommendation, which is discussed in Part VI of this report.

Law Enforcement Records Subcommittee

The Law Enforcement Records Subcommittee was chaired by Senator Carney. Amy Beveridge, Jonathan Bolton, Julia Finn, Betsy Fitzgerald, Chief Michael Gahagan, Judy Meyer, Tim Moore and Cheryl Saniuk-Heinig served as members of the Subcommittee. The Subcommittee met two times: on October 23 and November 13. On December 4, the Subcommittee made its report and recommendations to the Advisory Committee. The Subcommittee was formed to consider two topics, described and discussed below.

- *Amending the Intelligence and Investigative Record Information Act*

The Subcommittee considered whether to recommend amending the Intelligence and Investigative Record Information Act (IIRIA), 16 MRSA §804(3). This topic was suggested for Advisory Committee review in the June 29, 2023 letter sent to the RTKAC from the Joint Standing Committee on Judiciary, as the Judiciary Committee considered a bill during the First Special Session, LD 1203, which among other things, would have amended provisions of the IIRIA. A copy of this letter is included in **Appendix C**. Specifically, the proposal in LD 1203 would authorize a Maine criminal justice agency to disclose intelligence and investigative records—despite a reasonable possibility that the public disclosure would constitute an unwarranted invasion of personal privacy—with either the consent of the individual who is the subject of the record or, if that individual is deceased, incapacitated or a minor, with the consent of the individual's "family or household member" as defined in the State's protection from abuse laws. The Judiciary Committee did not move forward with the bill and instead requested that the Advisory Committee study the issue further to determine: whether to authorize an individual whose personal privacy might be invaded to consent to release of the record; whether the individual's status as a suspect, victim, witness or bystander should affect their authority to consent; whether each individual whose personal privacy might be invaded must consent to the record's release; and who, if anyone, should have the authority to consent to release of the record if the individual whose personal privacy is implicated has died or is incapacitated.

The Subcommittee began its consideration of this topic by reviewing background information on the IIRIA, the proposal from LD 1203 and research it had requested reviewing the history of the confidentiality provisions for investigative and intelligence record information in the IIRIA. This research demonstrated the parallels between the state IIRIA and the federal Freedom of Information Act (FOIA); specifically that the language of the provision of the IIRIA rendering intelligence and investigative record information confidential if there is a reasonable probability release of the information would constitute an unwarranted invasion of personal privacy, 16 MRSA §804(3), closely tracks the provision of federal law exempting law enforcement records and information from FOIA if production of those materials could reasonably be expected to constitute an unwarranted invasion of personal privacy. Maine Courts have therefore viewed caselaw interpreting FOIA as persuasive, albeit not binding, when interpreting this provision of the IIRIA.

The Subcommittee solicited input from various groups, including the Office of the Attorney General, law enforcement and the media. It received written and oral comments from the Department of Corrections and the Maine Coalition Against Sexual Assault (MeCASA) which cautioned against amending the IIRIA as proposed in LD 1203. Law enforcement stakeholders and MeCASA observed that in many instances multiple individuals' personal privacy is at stake with the release of a record such as a video recording, including the suspect or suspects, victim or victims, witnesses and potential bystanders. In addition, law enforcement emphasized several additional procedural and resource challenges that would be present if consent forms were required from every individual whose personal privacy might be implicated by that record, including how to identify who must provide consent and who is responsible for the identification process and obtaining consent. It was noted that requiring law enforcement officers to identify and locate all affected individuals in response to a public records request would place a large burden on already strained law enforcement resources. The members also considered the difficulties associated with determining who has the authority to consent when the individual whose privacy interests might be implicated by release of information protected by the IIRIA is deceased, a minor or incapacitated. Both law enforcement stakeholders and MeCASA urged the Subcommittee not to craft a proposal that might grant a parent suspected of abducting or abusing a minor, who as the subject of the investigation does not have the right to access intelligence and investigative information under current law, to nevertheless obtain access to those records by consenting to the record's release on behalf of their child. Similar concerns arise if family members have the authority to consent to the release of intelligence and investigative information on behalf of deceased or incapacitated victims of domestic violence. Members also considered whether the law should recognize residual privacy protections for a person who has died, rather than allowing the deceased person's family members to consent to the release of embarrassing information the person would presumably want to keep private, were they alive.

The Subcommittee also discussed that there are numerous, sometimes overlapping, criteria under the IIRIA for rendering intelligence and investigation information confidential in addition to the potential for an invasion of privacy. Members of the Subcommittee representing media interests expressed frustration that these criteria have been broadly interpreted, resulting in the media not receiving adequate information in a timely manner. As an example they cited experiences when law enforcement uses the personal privacy interests provision of the IIRIA to justify denying public access to a dashcam video recording of an incident occurring on a public street. These members shared that their primary concern involves the way law enforcement interprets section 804, subsection 1 of the IIRIA, which renders otherwise public records confidential if they might interfere with law enforcement investigations as this provision has been used to deny public access to records including video recordings of incidents occurring in public places, accident reports, portions of police reports and other records based solely on whether an investigation is ongoing. For this reason, amendments to the personal privacy provision of the IIRIA may not have much impact on the prompt release of information during the early stages of an investigation.

Law enforcement stakeholders added that individuals seeking access to intelligence and investigative records that implicate personal privacy have the ability under current law to seek court orders for access to those records under §805(4) of the IIRIA. This process allows the court to redact sensitive information before releasing the records and craft orders limiting further

dissemination of information that invades personal privacy which may make amending this provision of the IIRIA unnecessary.

After a thoughtful discussion, the Subcommittee agreed to not recommend legislation or other action related to this issue.

- *Release by law enforcement of information about a critical public safety incident or criminal investigation, without the delays incident to submitting formal FOAA requests*

The Subcommittee considered ways to facilitate prompt release by law enforcement of information about a critical public safety incident or criminal investigation, without submitting formal FOAA requests that may have a delayed response. This topic was raised in Advisory Committee discussions at the Advisory Committee's first meeting. The Subcommittee solicited input from various groups, including the Office of the Attorney General, law enforcement and the media. The Subcommittee received written and oral public comments from Maine State Police Staff Attorney Paul Cavanaugh, the Maine Chiefs of Police Association and Stanford resident Sarah Johnson. The Subcommittee reviewed copies of media relations policies adopted by the Auburn Police Department, a relatively large law enforcement agency in the State, and the Presque Isle Police Department, a smaller law enforcement agency in the State. Staff noted that, while current law requires the chief administrative officer of each law enforcement agency to adopt written policies regarding procedures to respond to public records requests and to designate a person trained to respond to such requests on behalf of the agency, 25 MRSA §2803-B(1)(M), the law does not require law enforcement agencies to adopt broader media relations policies governing media access to information outside of the public records request process or to designate media relations officers.

After reviewing these materials, Subcommittee members discussed both the difficulties and benefits of amending the law to require law enforcement agencies to adopt media relations policies. While larger police departments and agencies with ample resources are more likely to have media relations policies and designated public relations officers, many smaller law enforcement agencies do not, in part because of the statewide shortage of certified law enforcement officers. Although many smaller departments maintain positive relationships with local media, if the chief of police who serves as the primary contact for media inquiries must patrol the streets due to staff vacancies, delays may occur in responding to media requests. Members of the Subcommittee representing media interests noted the critical role played by the media in the aftermath of important public safety incidents and, while these members are not necessarily advocating for a requirement that police departments designate media relations officers, they emphasized that currently information is not disseminated by law enforcement as quickly as it should be, especially when incidents occur on the weekend. Even a 48-hour delay in the release of information can have serious negative effects, especially given the advent of social media and the ability for misinformation to spread quickly in the immediate aftermath of an incident. Once misinformation has been spread, it is difficult to correct the record with the public: people remember what they learned immediately after an incident, even if it is later shown to be incorrect.

Subcommittee members agreed that more information should be gathered before deciding whether legislative action should be recommended on this issue. While Subcommittee members agree on the importance of public access to critical information during and immediately after certain incidents, it is not clear whether the release of information should be required and, if a requirement is imposed, how to define the types of information that law enforcement must release. Nor is it clear what the appropriate timeframe should be for the release of different types of critical information and how staffing and other resource shortages should be considered in making these decisions. Ultimately, Subcommittee members decided to accept the offer made by the Maine Chiefs of Police Association in its written comment dated November 7, 2023, to partner with members of the media to increase understanding between the members of the law enforcement and media communities regarding each other's concerns in an effort to enhance collaboration with regard to these issues.

The Subcommittee agreed to recommend that the Advisory Committee send a letter to Maine Chiefs Police Association requesting that it coordinate with the Maine Sheriffs Association, Maine State Police, Maine Office of the Attorney General, Maine Press Association and Maine Association of Broadcasters to convene a meeting to share information among stakeholders regarding the pressures and constraints experienced by both members of the media and law enforcement when reporting on or releasing information related to public safety incidents and ongoing criminal investigations. The letter will ask the parties to develop recommendations for increasing collaboration between law enforcement agencies and representatives of the media in a way that will ensure the public has access to timely, reliable information about significant public safety incidents and criminal investigations.

Full Advisory Committee Discussions

The Advisory Committee also discussed a number of topics and issues as a full Advisory Committee. The Advisory Committee made recommendations related to one of these issues, access to public employee disciplinary records, which is discussed in Part VI of this report. The Advisory Committee decided not to recommend further action with respect to the remaining topics and issues which are described below.

- *Inclusion of records of certain tax-exempt, nonprofit organizations in public record definition*

This topic was suggested to the Advisory Committee by the Judiciary Committee, as a proposal for including in the definition of public records the records of tax-exempt, nonprofit organizations that receive at least 50% of their annual revenue from federal, state or municipal sources was included in LD 1699. The members discussed the legal issues associated with this proposal, such as the First Amendment rights of nonprofit entities, and noted that it would need significant time to explore these issues. The Advisory Committee members agreed to take no further action with respect to this topic at this time.

- *Use of radio encryption by law enforcement*

The issue of the use of radio encryption by law enforcement was discussed by a RTKAC Subcommittee last year and it was determined at that time that additional information was needed regarding the scope of its use. In accordance with the recommendation of the Advisory Committee in the 17th Annual Report, RTKAC staff sent a survey to police departments and the Executive Director of the Maine Chiefs of Police Association to obtain information regarding the use of radio encryption by law enforcement in the State. The responding law enforcement agencies advised that they were not using encryption and the Executive Director of the Maine Chiefs of Police Association indicated that he was not aware of any county or municipal police department using radio encryption other than the Lewiston and Auburn police departments. Although there were fewer responses to the survey than had been hoped for, the Advisory Committee decided that because there appears to be no statewide use of radio encryption, they agreed to take no further action with respect to this issue at this time.

- *Grants and technical assistance to all public bodies authorized to adopt remote participation policies*

Justin Chenette, who chaired the Subcommittee on Remote Participation last year, suggested that the Advisory Committee should focus on its recommendation to provide guidance and information about remote participation through the Ombudsman's website before pursuing a recommendation for more funding from the Legislature. The Advisory Committee members agreed to take no further action with respect to this issue at this time.

- *Participation in the legislative process by residents of correctional facilities*

The Judiciary Committee did not take any action to develop a working group to continue discussion of this issue as recommended by the Advisory Committee in its 17th Annual Report. Chair Sheehan advised that she would discuss informal study options with RTKAC staff, and the Advisory Committee did not make any recommendations for further action at this time.

VI. RECOMMENDATIONS

The Advisory Committee makes the following recommendations. Unless otherwise noted, the following recommendations were unanimously approved by those members present.

❒ Amend certain provisions of law in Title 22 relating to previously-enacted public records exceptions

The Advisory Committee recommends that the following public records exceptions reviewed in 2023 be amended:

- Title 22, section 3022, subsection 8, relating to medical examiner information; *(Vote: 11- 4[1]; 1 abstention)*

[1] Those Advisory Committee members voting in opposition to the recommendation, Amy Beveridge, Lynda Clancy, Judy Meyer and Tim Moore, expressed discomfort with the full implications of this proposal, not just for the media

- Title 22, section 5409, subsections 1 and 2, relating to records held by the Maine Health Insurance Marketplace;
- Title 22, section 3294, subsection 3, relating to confidential information provided to professional and occupational licensing boards; and
- Title 22, section 2454-A, subsection 12, relating to applications and supporting information submitted by patients, caregivers and providers under the Maine Medical Use of Marijuana Act. [Note: this recommendation is to amend the existing public records exception with specific language to be developed by the Judiciary Committee or during the committee process.]
  (Vote: 15 - 0, 1 abstention)

See recommended legislation in Appendix E and a list of public records exceptions for which no amendments are recommended in Appendix F.

❒ **Provide an explanation to the Blue Ribbon Commission to Study Emergency Medical Services in the State of why the RTKAC did not recommend amending Title 32, section 98, to establish a public records exception for financial information provided by applicants for Emergency Medical Services Stabilization and Sustainability Program grants**

The Advisory Committee recommends sending a letter to the Blue Ribbon Commission to Study Emergency Medical Services providing an explanation for why it did not recommend creating a public records exception for financial information provided by applicants for Emergency Medical Services Stabilization and Sustainability Program grants.

See correspondence in Appendix D.

❒ **Reinforce the importance of following the statutory requirements applicable to public bodies and agencies going into executive session**

The Advisory Committee recommends sending a letter to the state agency FOAA contacts, the Maine School Management Association, Maine Municipal Association, Maine County Commissioner's Association, the Maine Town and City Manager Association and the Maine Town and City Clerks' Association as well as the RTKAC interested parties list explaining that the Advisory Committee discussed concerns surrounding public bodies and agencies going into executive session and asking the recipients to remind their members of the importance of including in the motion both the precise nature of the business of the executive session and a citation of one or more sources of statutory or other authority that permits an executive session for that business.

See correspondence in Appendix D.

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and the press but also for families of victims and were concerned with the timing of the Chief Medical Examiner's Office request to amend the statute.

❒ **Request that the Public Access Ombudsman include more guidance regarding the Freedom of Access Act's (FOAA) requirements for public bodies and agencies going into executive session on the Maine Freedom of Access Act website**

The Advisory Committee recommends that the Public Access Ombudsman update the Maine Freedom of Access Act website's frequently asked questions to include more guidance regarding the requirements for public bodies and agencies going into executive session.

❒ **Send a letter to Maine School Management Association confirming that FOAA allows a public body to create an internal form for responding to public records requests and that the Public Access Ombudsman can assist in the development of such a form**

The Advisory Committee recommends sending a letter to the Maine School Management Association confirming that FOAA allows a public body or agency to create an internal form for responding to public records requests and that the Public Access Ombudsman can assist in the development of such a form.

See correspondence in Appendix D.

❒ **Solicit from entities within the State responsible for responding to public records requests examples of burdensome public records requests and situations that the entity believes represent an abuse of the FOAA process, as well as suggested statutory changes, for consideration by the Advisory Committee next year**

The Advisory Committee recommends continuing its consideration of defining a "burdensome" request, giving the Public Access Ombudsman authority to waive the obligation to produce records in accordance with FOAA under certain circumstances and issues related to repeat requestors and incomplete and delayed public record request responses. To assist in its discussions, the Advisory Committee will distribute a survey seeking examples of burdensome public records requests and situations that a responding entity believes represent an abuse of the FOAA process, as well as suggested statutory changes, for consideration by the Advisory Committee next year. The survey will be sent to state agency FOAA contacts, the Maine School Management Association, Maine Municipal Association, Maine County Commissioner's Association, the Maine Town and City Manager Association and the Maine Town and City Clerks' Association.

See correspondence in Appendix D.

❒ **Send a letter to Maine Chiefs Police Association requesting that it coordinate with the Maine Sheriffs Association, Maine State Police, Maine Office of the Attorney General, Maine Press Association and Maine Association of Broadcasters to convene a meeting to share information among stakeholders regarding the pressures and constraints experienced by both members of the media and law enforcement when reporting on or releasing information related to public safety incidents and ongoing criminal investigations**

The Advisory Committee recommends sending a letter to the Maine Chiefs Police Association requesting that it coordinate with the Maine Sheriffs Association, Maine State Police, Maine Office of the Attorney General, Maine Press Association and Maine Association of Broadcasters to convene a meeting to share information among stakeholders regarding the pressures and constraints experienced by both members of the media and law enforcement when reporting on or releasing information related to public safety incidents and ongoing criminal investigations. The parties should develop recommendations for increasing collaboration between law enforcement agencies and representatives of the media in a way that will ensure the public has access to timely, reliable information about significant public safety incidents and criminal investigations. The Advisory Committee's letter will ask for a report on the meeting, including any recommendations that are developed by meeting participants, when the Advisory Committee reconvenes next year.

See correspondence in Appendix D.

- ❒ **Propose that the Joint Standing Committee on Judiciary report out a bill in the Second Regular Session of the 131st Legislature to create a legislative study group to develop recommendations related to public employee disciplinary records, taking into consideration progressive discipline structures and employee incentives across different types of public employment**

In its most recent Annual Report, the Advisory Committee made several recommendations related to disciplinary records of public employees including statutory changes which were proposed in LD 1397. As noted in Section IV of this report, language related to all but one recommendation was removed before LD 1397 was enacted as Public Law 2023, chapter 159. The Advisory Committee agreed that it would reconsider the issues raised by the provisions in LD 1397 which were not enacted. These issues included: accessing records of disciplinary actions located outside of personnel files, shorter retention periods for final written decisions relating to disciplinary action involving less serious conduct and the effect of collective bargaining agreements on retention schedules.

To assist in its consideration of these issues, the Advisory Committee requested additional comment on the proposals in LD 1397 from various entities, including those that testified at the public hearing for the bill. The Advisory Committee also solicited public comment at each of its five meetings, with two comment periods specific to the issue of disciplinary records of public employees.

The Maine Education Association (MEA) encouraged the Advisory Committee to address concerns about police disciplinary records through legislation focused on law enforcement instead of public employees generally. MEA explained that LD 1397 as printed is too broad and could undermine labor relations at municipal, county and state levels and deter people from entering or staying in public employment. The Maine Association of Police expressed support for a consistent policy with respect to all public employees, but agreed with MEA's concerns regarding the impact greater disclosure could have on attracting and retaining employees. The Maine Service Employees Association (MSEA) shared the concerns voiced by other about how the policies in LD 1397 as printed would affect attracting and retaining public employees and

added that disciplinary records could be weaponized against workers, with consequences that are felt for the remainder of an individual worker's career. MSEA discouraged the Advisory Committee from recommending legislation that has the potential to override collective bargaining agreements. On behalf of the Maine State Archives' Advisory Board, State Archivist Kate McBrien addressed the changes to state and local government personnel records record retention schedules that were proposed in section 5 of LD 1397. Ms. McBrien shared that the Board believes 5 years is a sufficient period of time to retain written decisions concerning public employees and disciplinary action; however, law enforcement disciplinary records represent a unique case given this group of state employees' close interaction with members of the public and their responsibility for public safety. The Board's recommendation is to consult with the Department of Public Safety to create an individual agency record retention schedule to address the final written decision of a disciplinary action of law enforcement officers. The Board recommends that this record retention schedule be for 15-20 years, a longer period than the 5-year retention period for disciplinary decisions of other state employees. The Advisory Committee also received information from the Maine State Police (MSP) which emphasized that issues regarding law enforcement disciplinary records are incredibly complicated and noted that law enforcement disciplinary records, unlike those of public employees generally, may be used as *Brady/Giglio* materials and are not subject to a statute of limitations. This issue was also raised by Attorney Marcus Wraight who submitted written comments for the Advisory Committee's consideration. Attorney Wraight urged the Advisory Committee to establish retention periods in statute for disciplinary records for law enforcement as well as state employees who may be called as witnesses to ensure that such records are consistently retained and not subject to collective bargaining agreements.

The Advisory Committee focused the majority of its discussions on how they might define "less serious" misconduct subject to a shorter retention period. Kate McBrien shared with the members that the Archives Advisory Board has also discussed this issue and recommends that records retention schedules include clear guidance so that the determination of what is "less serious" is not at discretion of individual agencies or supervisors. The members approached the definition of "less serious" in two ways: 1) with a focus on the type of misconduct, for example longer retention for more serious misconduct; and 2) the type of discipline imposed, with longer retention schedules applicable with more serious disciplinary sanctions under a progressive discipline model.

In considering a focus on the underlying conduct, the members reviewed various statutes in Titles 10, 20-A and 25 enumerating the types of misconduct that may form the basis for professional discipline—including license or certificate denial, nonrenewal, modification, suspension or termination—for public educators, law enforcement officers and licensed professionals. Members also reviewed the statutory definition of the types of misconduct that disqualify someone from receiving unemployment benefits.

In considering a focus on the severity of discipline imposed on a public employee, the members sought additional information regarding progressive discipline that may be imposed on employees from the Maine Municipal Association (MMA) and the State Bureau of Human Resources (BHR), as well as additional information about how collective bargaining agreements affect both the types of discipline that may be imposed and the time periods for retention of those

disciplinary records. Both MMA and BHR shared information regarding progressive discipline and the effect of collective bargaining agreements on the retention of disciplinary records. MMA noted that even when discipline may not be used for internal progressive discipline, municipal law enforcement is working to ensure that those records are retained elsewhere and disclosed to other law enforcement agencies considering hiring the individual. BHR explained that for most state employers, once the records are removed from the employee's file under pursuant to a collective bargaining agreement, it is destroyed; however, in some cases additional reporting of discipline to Maine Criminal Justice Academy is required by law. The members discussed the lack of a standard process or timeframe for requesting the removal of a disciplinary record from a person's file and uncertainty regarding whether, if the disciplinary record is removed from the personnel file but retained by the agency, the records remain publicly accessible.

Kate McBrien also explained that existing state and local government records retention schedules currently provide that a collective bargaining agreement creating a shorter retention period for employee discipline records takes precedence over the period set forth in the retention schedules. Several members pointed out that unions and public employers are frequently able to avoid litigation by negotiating agreements for shorter retention of specific disciplinary records, especially records involving less significant employee misconduct. Several members expressed discomfort with allowing collective bargaining agreements to limit the availability of and access to public records.

Members requested the perspective of Assistant Attorney General, Jonathan Bolton, regarding the implications of prohibiting collective bargaining agreements from overriding record retention schedules. Mr. Bolton explained that if legislation affects existing contracts it raises issues under the contracts clauses of the Maine and U.S. Constitution. He noted that this is a policy question for the Legislature; however, any legislation affecting current contracts would need to be carefully considered.

Advisory Committee members generally agreed that additional input should be obtained from multiple stakeholders before a final decision is made regarding the adjustment of records retention schedules for public employee disciplinary decisions. Members questioned whether to craft recommendations to the State Archivist and have her work with the Archives Advisory Board to solicit broader stakeholder input; to propose legislation for the Judiciary Committee, which will then be able to gather additional perspectives through the public hearing process; or instead to itself continue studying and soliciting public comment on this issue over the next year.

The Advisory Committee agreed that this issue is important and complex, as there are many different types of public employees and legal and logistical considerations to keep in mind. Several members commented on the limited time available to the Advisory Committee and that this issue goes beyond the charge of the RTKAC, as it implicates important employment and labor issues. The Advisory Committee recommends that the Judiciary Committee report out a bill creating an interim legislative study group to develop recommendations for the next Legislature addressing the public records issues around public employee disciplinary records. The study could also address issues of progressive discipline, promotions and merit pay increases across different types of public employees and consider the relationship between access to public

records and collective bargaining agreements.

VII. FUTURE PLANS

In 2024, the Right to Know Advisory Committee will continue to discuss the ongoing issues identified in this report, including issues related to burdensome public records requests and to the development of recommendations to increase collaboration between law enforcement and the media to ensure the public has access to timely, reliable information about significant public safety incidents and criminal investigations. The Advisory Committee will also continue to provide assistance to the Joint Standing Committee on Judiciary relating to proposed legislation affecting public access. The Advisory Committee looks forward to another year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

APPENDIX A

Authorizing Legislation: 1 MRSA §411

AUTHORIZING LEGISLATION

TITLE 1
GENERAL PROVISIONS

CHAPTER 13
PUBLIC RECORDS AND PROCEEDINGS

SUBCHAPTER 1
FREEDOM OF ACCESS

§411. Right To Know Advisory Committee

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

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

A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;

B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;

C. One representative of municipal interests, appointed by the Governor;

D. One representative of county or regional interests, appointed by the President of the Senate;

E. One representative of school interests, appointed by the Governor;

F. One representative of law enforcement interests, appointed by the President of the Senate;

G. One representative of the interests of State Government, appointed by the Governor;

H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;

I. One representative of newspaper and other press interests, appointed by the President of the Senate;

J. One representative of newspaper publishers, appointed by the Speaker of the House;

K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;

L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House;

M. The Attorney General or the Attorney General's designee;

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

O. One representative having legal or professional expertise in the field of data and personal privacy, appointed by the Governor.

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

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

A. Except as provided in paragraph B, members are appointed for terms of 3 years.

B. Members who are Legislators are appointed for the duration of the legislative terms of office in which they were appointed.

C. Members may serve beyond their designated terms until their successors are appointed.

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

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

6. Duties and powers. The advisory committee:

A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws;

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

C. Shall serve as a resource to support the establishment and maintenance of a central publicly accessible website that provides the text of the freedom of access laws and provides specific guidance on how a member of the public can use the

law to be a better informed and active participant in open government. The website must include the contact information for agencies, as well as whom to contact with complaints and concerns. The website must also include, or contain a link to, a list of statutory exceptions to the public records laws;

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

E. Shall serve as a resource for the review committee under subchapter 1-A in examining public records exceptions in both existing laws and in proposed legislation;

F. Shall examine inconsistencies in statutory language and may recommend standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released;

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

H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered;

I. May conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records;

J. Shall review the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public; and

K. May undertake other activities consistent with its listed responsibilities.

7. Outside funding for advisory committee activities. The advisory committee may seek outside funds to fund the cost of public hearings, conferences, workshops, other meetings, other activities of the advisory committee and educational and training materials. Contributions to support the work of the advisory committee may not be accepted from any party having a pecuniary or other vested interest in the outcome of the matters being studied. Any person, other than a state agency, desiring

to make a financial or in-kind contribution shall certify to the Legislative Council that it has no pecuniary or other vested interest in the outcome of the advisory committee's activities. Such a certification must be made in the manner prescribed by the Legislative Council. All contributions are subject to approval by the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council along with an accounting record that includes the amount of funds, the date the funds were received, from whom the funds were received and the purpose of and any limitation on the use of those funds. The Executive Director of the Legislative Council shall administer any funds received by the advisory committee.

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

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

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

APPENDIX B

Membership List: Right to Know Advisory Committee

Right to Know Advisory Committee

1 MRSA §411

Membership List

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

APPENDIX C

Correspondence from the Judiciary Committee to the Right to Know Advisory Committee dated June 29, 2023

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

June 29, 2023

Dear Right to Know Advisory Committee,

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

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

1. Whether to expand FOAA's definition of "public records" to include the records of tax-exempt, nonprofit organizations that receive a certain threshold of their annual revenue from federal, state or municipal sources. *See* LD 1699, §1 (proposing to include the records of such organizations that receive at least 50% of their annual revenue from federal, state or municipal sources).

2. Whether the Public Access Ombudsman should be directed to design a form for public records requests under FOAA. And if so, whether all public agencies or officials, or a specific subset of public agencies or officials, may require that members of the public use the form when submitting public records requests. *See* LD 1649, §2 and §6 (proposing to authorize the Public Access Ombudsman to design a "simple, short" form "designed to provide only the basic information required to fulfill the request" and to authorize school districts, in their discretion, to require use of the form).

3. Whether and how to define the "reasonable time" after receipt of a public records request under FOAA within which an agency or official having custody of the record must provide a good faith, nonbinding estimate of the time frame within which it will comply with the request. Alternatively, or additionally, whether to establish a deadline for full compliance with a public records request and, if so: whether agencies or officials should have the ability to request an extension of the deadline; who should decide whether to grant an extension; and what criteria must be met for an extension to be granted. *Compare* LD 1203, §1 (proposing to amend 1 M.R.S. §408-A(3) to require that an estimate of the time to respond to a public records request be provided "no later than 30 days following receipt of the request") *with* LD 1699, §5 (requiring an agency or official to "fully respond to a request" within 60 days of "the date a sufficient description of the public record is received . . . at the office responsible for maintaining the public record" and authorizing the Public Access Ombudsman to extend the deadline for "good cause").

4. Whether and to what extent, under FOAA, an agency or official should be either authorized or directed to prioritize a public records request received from a Maine resident, a journalist or other specific preferred party over a request received from an out-of-state resident, a request for bulk data received from a for-profit, data-mining company, or other specific type of request or requester. If prioritization is appropriate, is it possible to craft the law in a way that will prevent someone with a low priority from soliciting the assistance of a proxy with a higher priority to submit a request on their behalf? *See* LD 1203, §2 (proposing a statutory priority for Maine residents and journalists).

5. Given the testimony we received regarding the burden on staff time and resources caused by public records requests, should the maximum hourly rate a public agency or official may charge for each hour of staff time beyond the first 2 hours spent "searching for, retrieving and compiling the requested public record" be increased? Similarly, should a public agency or official be authorized to charge for the first 2 hours of staff time if the requester previously made a public records request of the same public agency or official during the same calendar year? *Compare* LD 1649, §1 (proposing to increase the maximum hourly fee from $25 to $40 and to authorize charging for the first 2 hours of staff time in the circumstances described above) *with* LD 1764 (proposing to replace the maximum hourly fee in current law with a set hourly fee of $25 for all staff time, including the first 2 hours, spent on a public records request). Alternatively, given the testimony we received regarding the sometimes exorbitant fees charged for public records requests that do not, on their face, appear to be overly burdensome, should the Legislature establish a maximum fee that may be charged either in response to a single public records request or for all requests submitted to a single public entity by the same person in a single calendar year? *See* LD 1699, §7 (proposing to establish a maximum single-request fee of $500, except that there would be a maximum calendar-year-fee of $100 for all public records requests submitted by the same person to a school administrative unit).

6. Whether, given the testimony we received regarding the recent increase in public records requests under FOAA that appear designed to harass specific public employees, especially school personnel, the following procedures, or different procedures, should be established:

    a. If a public agency or official receives a series or a pattern of public records requests that it believes are frivolous or designed to intimidate or harass and not intended for the dissemination of information about government activity to the public, should the public agency or official have an opportunity to request that the Public Access Ombudsman relieve it from the requirement to comply with the request? *See* LD 1649, §2 (proposing to establish such a process for school districts). Would this new process provide meaningful assistance beyond that currently afforded

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

b. Should a public employee who is the "subject" of a public records request be provided an opportunity to inspect the records before they are disclosed to the requester? Should this opportunity be provided only when a public employee is specifically named in the request or should it also be available whenever a public record that will be disclosed names a specific public employee? *See* LD 1649, §2 (proposing to provide such an opportunity to school employees).

7. Whether to amend IIRIA's current requirement that a Maine criminal justice agency treat as confidential and not disseminate a record that contains intelligence and investigative record information—including, for example, a dashboard or body camera recording of a law enforcement encounter—if there is a reasonable possibility that public release or inspection of the record would constitute an unwarranted invasion of personal privacy. For example, should the individual whose personal privacy might be invaded have the authority to consent to the release of the record; if so, should that individual's status as a potential victim or potential perpetrator affect their authority to consent to the record's release; must each individual whose personal privacy might be invaded by the release of a record consent to its release; and who, if anyone, should have the authority to consent to release of a record if the individual whose privacy might be invaded by its release has died? *See* LD 1203, §3 (proposing amendments to 16 M.R.S. §804(3)).

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

Sincerely,

Anne M. Carney

Sen. Anne M. Carney
Senate Chair

Matt W. Moonen

Rep. Matthew W. Moonen
House Chair

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

APPENDIX D

Correspondence from the Right to Know Advisory Committee

- Draft Letter in re PRP Topic 1
- Draft Letter in re LER Topic 2
- RTKAC Letter to EMS Commission
- Draft Letter in re PRP Topic 2
- Draft Letter in re PRE Topic 5-7

STATE OF MAINE

RIGHT TO KNOW ADVISORY COMMITTEE

December XX, 2023

Re: Requirements for executive sessions pursuant to 1 M.R.S. §405(4)

[name of entity, if applicable]

Dear [name of entity/State Freedom of Access Contact/Right to Know Advisory Committee interested party]:

I am writing on behalf of the Right to Know Advisory Committee regarding a matter that was discussed by the Advisory Committee this year after a member of the public shared concerns about the circumstances in which a public body may go into executive session. During discussions of this issue, several Advisory Committee members noted that, in their experience, motions to go into executive sessions are sometimes incomplete. Pursuant to 1 M.R.S. §405(4), fully quoted below, a motion to go into executive session must include both the precise nature of the business of the executive session and a citation of one or more sources of statutory or other authority that permits an executive session for that business.

> **4. Motion contents.** A motion to go into executive session must indicate the precise nature of the business of the executive session and include a citation of one or more sources of statutory or other authority that permits an executive session for that business. Failure to state all authorities justifying the executive session does not constitute a violation of this subchapter if one or more of the authorities are accurately cited in the motion. An inaccurate citation of authority for an executive session does not violate this subchapter if valid authority that permits the executive session exists and the failure to cite the valid authority was inadvertent.

The Advisory Committee is sending this letter as a reminder to public bodies and agencies that utilize executive sessions of the importance of including both statutory elements in a motion to go into executive session. [We ask that you share this letter with your members, as well.] If you have questions regarding the statutory requirements applicable to executive sessions or other aspects of the Freedom of Access Act, you may wish to visit the Maine Freedom of Access Act website, www.maine.gov/foaa, or contact the Public Access Ombudsman.

Thank you for your consideration of these comments.

Sincerely,

Representative Erin Sheehan, Chair
Right to Know Advisory Committee

STATE OF MAINE

RIGHT TO KNOW ADVISORY COMMITTEE

December XX, 2023

Maine Chiefs of Police Association
Chief Edward J. Tolan (ret.), Executive Director
Via Email: mcopa@maine.rr.com

Re: Meeting between representatives of the press and representatives of law enforcement to share concerns regarding the prompt release of information during critical public safety incidents

Dear Chief Tolan:

I am writing on behalf of the Right to Know Advisory Committee regarding a matter we discussed this year. Representatives of the media asked the Advisory Committee to develop recommendations for facilitating the prompt release by law enforcement of information about critical public safety incidents or criminal investigations, especially those that occur on the weekend, without the delays incident to submission of formal public records requests under the Freedom of Access Act (FOAA).

The Advisory Committee formed a subcommittee to discuss this and other proposals related to the public release of information involving law enforcement investigations. After soliciting input from representatives of both law enforcement and the media and after reviewing media relations policies adopted by the Auburn and Presque Isle Police departments, members of the subcommittee agreed that more information should be gathered before deciding whether to recommend legislative action on this issue. While subcommittee members agreed on the importance of public access to critical information during and immediately after critical public safety incidents, it is not clear whether the release of certain information should be required and, if a requirement is imposed, how to define the types of information that law enforcement must release. Nor is it clear what the appropriate timeframe should be for the release of this critical information and how staffing and other resource challenges faced by many law enforcement agencies across the State should be considered in making these decisions.

The Advisory Committee unanimously adopted the subcommittee's recommendation to accept the offer made by your organization to work to increase understanding between members of the law enforcement and media communities regarding each other's concerns in an effort to enhance collaboration during and immediately after critical public safety incidents. Accordingly, we respectfully request that the Maine Chiefs of Police Association coordinate with the Maine Sheriffs Association, Maine State Police, Maine Office of the Attorney General, Maine Press Association and Maine Association of Broadcasters to convene a meeting in the greater Augusta area or another convenient, central location between representatives of both large and small law enforcement agencies as well as members of both print and broadcast media from different areas of the State. We hope that, with the assistance of an experienced facilitator, meeting participants will:

- Share information about the pressures and constraints experienced by members of the media when gathering and timely reporting information regarding public safety incidents and ongoing criminal investigations on the one hand and the deadlines, staffing issues, complex legal issues and other challenges facing law enforcement during these incidents on the other hand; and
- Develop recommendations for increasing collaboration between law enforcement agencies and representatives of the media in a way that will ensure the public has access to timely, reliable information about significant public safety incidents and criminal investigations.

If possible, we would appreciate receiving a report on the meeting and any recommendations that are developed by meeting participants when the Advisory Committee reconvenes next year, which we anticipate will occur in late June or early July.

Thank you for your offer of assistance and for your consideration of this request.

Sincerely,

Representative Erin Sheehan, Chair
Right to Know Advisory Committee

STATE OF MAINE

RIGHT TO KNOW ADVISORY COMMITTEE

December 11, 2023

Sen. Chip Curry, Senate Chair
Speaker Rachel Talbot Ross, House Chair
Blue Ribbon Commission to Study Emergency Medical Services in the State

Re: Review of request for a new public records exception for certain information included in grant applications under the Emergency Medical Services Stabilization and Sustainability Program

Dear Sen. Curry and Speaker Talbot Ross:

On behalf of the Right to Know Advisory Committee, I want to share our comments related to a request that the Advisory Committee consider whether to recommend the enactment of a public records exception to protect from public disclosure certain information included in grant applications under the Emergency Medical Services Stabilization and Sustainability Program, enacted as part of the biennial budget law, Public Law 2023, chapter 412, Part GGGGG. As you know, the Emergency Medical Services Stabilization and Sustainability Program was enacted by the Legislature to provide financial assistance to emergency medical services entities based in the State that are facing immediate risk of failing and leaving their communities without access to adequate emergency medical services.

The Advisory Committee was asked to consider recommending in its report to the Legislature that a public records exception be added to protect as confidential financial statements required to be included in grant applications for funding under the program. The request was made by one of our Advisory Committee members, Sen. Anne Carney, after a discussion with staff in the Speaker's Office. Under the law enacted by the Legislature, emergency medical services entities applying for financial assistance must submit a financial statement for the most recent year. The Advisory Committee referred the issue to its Public Records Exceptions Subcommittee for initial discussion and then considered the issue at its final meeting on December 4th.

While members of the Advisory Committee appreciate that certain emergency medical services entities may have concerns about releasing this information to the public because it may create a competitive disadvantage to those entities, the Advisory Committee concluded that there is no need for a public records exception at this time given that this financial information would already be public for many emergency medical services entities. The Advisory Committee

reasoned that there should be a level-playing field between municipal emergency medical services programs which are funded by taxpayers and whose records are public and other non-profit or for-profit entities who are competing for these grants. These organizations regularly share information about their financial position with the public and disclosure of that information is not protected under the Freedom of Access Act. Further, financial information related to nonprofit entities is also available to the public. The Advisory Committee also noted that there is an existing public records exception that protects trade secrets as confidential; emergency medical services entities applying for grants that are concerned about the public disclosure of their financial statements may invoke that exception when submitting records with any grant application. Because financial assistance will be provided by Maine taxpayers, the members believe that the public interest in the information provided to support an application for assistance outweighs any proprietary business interest in maintaining the confidentiality of that information.

Thank you for your consideration of these comments.

Sincerely,

Representative Erin Sheehan, Chair
Right to Know Advisory Committee

cc: Members, Blue Ribbon Commission to Study Emergency Medical Services in the State
Members, Right to Know Advisory Committee

STATE OF MAINE

RIGHT TO KNOW ADVISORY COMMITTEE

December XX, 2023

Maine School Management Association
Steven Bailey, Executive Director
Via Email: sbailey@msmaweb.com

Re: Public Records Requests Under the Freedom of Access Act

Dear Steven Bailey:

I am writing on behalf of the Right to Know Advisory Committee regarding a matter that was discussed by the Advisory Committee this year. The Joint Standing Committee on Judiciary asked the Advisory Committee to review a proposal contained in LD 1649, considered by the Judiciary Committee in the First Special Session of the 131st Legislature, related to the development and use of a form for the submission of public records requests.

A subcommittee of the full Advisory Committee considered this issue and, while the members understand that schools having been receiving very broad public records requests and are seeking ways to narrow their scope, the subcommittee did not recommend the creation of a form to be used by individuals requesting public records due to concerns about creating barriers to accessing public records. The subcommittee noted, however, that public bodies and agencies are able to create forms for their internal use that may be useful in narrowing down the scope of public records requests and facilitating efficient responses. As a result of the subcommittee's discussions, the Advisory Committee voted to provide your organization with this correspondence and to advise that the Public Access Ombudsman, Brenda Kielty, is available as a resource for best practices and assistance in developing a form.

Thank you for your consideration of these comments.

Sincerely,

Representative Erin Sheehan, Chair
Right to Know Advisory Committee

STATE OF MAINE

RIGHT TO KNOW ADVISORY COMMITTEE

TO: XX

FROM: Representative Erin Sheehan, Chair, Right to Know Advisory Committee

DATE: December X, 2023

RE: Survey: Requests for public records that are burdensome or an abuse of the Freedom of Access Act process

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This year, the Right to Know Advisory Committee considered several topics related to challenges faced by entities responding to public records requests under the Freedom of Access Act (FOAA). The Advisory Committee formed a subcommittee which was charged with discussing, among other things, defining what is a "burdensome" FOAA request as used in 1 M.R.S. §408-A(4), issues related to individuals making repeated FOAA requests and whether the Public Access Ombudsman should be given the authority to relieve an agency or official of its obligation to provide records pursuant to FOAA.

The Subcommittee considered various ways in which a "burdensome" request could be defined and agreed that what is considered a burdensome request would vary by situation. They also discussed situations in which a responding entity might consider a request or series of requests as an abuse of the FOAA process.

The Subcommittee members agreed that additional time and information would be necessary to fully consider this topic. As such, Advisory Committee voted to consider these topics when the committee reconvenes next year and to contact entities that are subject to FOAA for additional information that will assist the Advisory Committee in its work. The Advisory Committee requests the following information from your organization by July 1, 2024. The Advisory Committee is looking for general descriptions of examples to assist with developing recommendations related to these topics – please do not identify specific requestors or share copies of FOAA requests. **Please note that information provided to the Right to Know Advisory Committee in response to this survey will be distributed to Advisory Committee members and will be public.**

1. Please provide examples of the types of public records requests that your organization considers to be "burdensome" requests for public records.

2. Please provide examples of the types of public records requests or situations that your organization believes represent an abuse of the FOAA process.

3. Do you have any recommendations for statutory changes to FOAA to address the examples described in questions 1 or 2? If so, please describe your recommendations.

Thank you for your attention to this matter. You may provide your responses by email to Lindsay.Laxon@legislature.maine.gov or via mail to:

Right to Know Advisory Committee
c/o Office of Policy and Legal Analysis
13 State House Station
Cross Office Building, Room 215
Augusta, Maine 04333-0013

If you have any questions or concerns about our request, please do not hesitate to reach out to Advisory Committee staff, Lindsay Laxon or Colleen McCarthy Reid at (207) 287-1670.

APPENDIX E

Recommended Legislation to amend previously enacted public records exceptions

RECOMMENDED LEGISLATION TO AMEND EXISTING PUBLIC RECORDS EXCEPTIONS REVIEWED IN TITLE 22

Sec. 1. 22 MRSA §3022, sub-§8 is amended to read:

8. Certain information confidential. The following records ~~in the possession or custody of a medical examiner or the Office of Chief Medical Examiner are not public records within the meaning of Title 1, section 402, subsection 3 and~~ are confidential:

A. Medical records relating to a medical examiner case;

B. Law enforcement agency reports or records relating to a medical examiner case;

C. Communications with the Department of the Attorney General relating to a medical examiner case;

D. Communications with the office of a district attorney relating to a medical examiner case;

E. Death certificates and amendments made to the certificates, except for the information for which the medical examiner is responsible, as listed in section 2842, subsection 3, and not ordered withheld by the Attorney General relating to a medical examiner case or missing person;

F. Photographs and transparencies, histological slides, videotapes and other like items relating to a medical examiner case;

G. Written or otherwise recorded communications that express or are evidence of suicidal intent obtained under section 3028, subsections 4 and 5.

Sec. 2. 22 MRSA §3294 is amended to read:

§3294. Confidential information provided to professional and occupational licensing boards

If confidential information regarding a person subject to or seeking licensure, certification or registration by a licensing board indicates that the person may have engaged in unlawful activity, professional misconduct or conduct which may be in violation of the laws or rules relating to the licensing board, the director may release this information to the appropriate licensing board. Confidential information ~~shall~~ must be disclosed and used in accordance with section 3292 and may also be disclosed to members, employees and agents of a licensing board who are directly related to the matter at issue.

1. Notice to the licensee or applicant. Notice of the release of confidential information ~~shall~~ must be provided by the board to the licensee or applicant in accordance with the law and rules relating to the licensing board. If the law or rules relating to a licensing board do not provide for notice to licensees or applicants subject to or seeking licensure, certification or registration, the licensing board shall provide notice to the licensee or applicant upon determination of the board to take further action following its investigation.

2. Licensing board requests for confidential information. Any licensing board pursuing action within the scope of the board's authority or conducting an investigation of any person subject to or seeking licensure, certification or registration by the board for engaging in unlawful activity, professional misconduct or conduct which may be in violation of the laws or rules relating to the board may request confidential information from the bureau. Any information provided to the board for an investigation ~~shall be~~ is governed by section 3292 and this section.

3. Use of confidential information in investigations and proceedings. The use of confidential information in proceedings, informal conferences and adjudicatory hearings ~~shall be~~ is governed by Title 5, section 9057, subsection 6. The use of confidential information in investigations is governed by Title 10, section 8003-B, subsection 2, paragraph G as long as any confidential information disclosed under that subsection is not further disclosed by any person for purposes other than an investigation by a licensing board.

Sec. 3. 22 MRSA §5409 is amended to read:

§5409. Records

Except as provided in this section or by other provision of law, information obtained by the marketplace under this chapter is a public record within the meaning of Title 1, chapter 13, subchapter 1.

1. Financial information. Any personally identifiable financial information, supporting data or tax return of any person obtained by the marketplace under this chapter is confidential ~~and not open to public inspection~~ pursuant to 26 United States Code, Section 6103 and Title 36, section 191.

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

3. Personally identifiable information. Personally identifiable information not otherwise described in subsection 1 or 2 that is obtained by the marketplace under this chapter is confidential. As used in this subsection, "personally identifiable information" means information that permits the identity of an individual to whom the information applies to be able to be reasonably inferred or known by either direct or indirect means.

Summary

This draft implements statutory changes recommended by the Right To Know Advisory Committee after reviewing certain existing public records exceptions in Title 22.

Section 1 amends the public records exception to clarify that records relating to a medical examiner case are confidential and that the location or custodian of the record does not affect its

confidentiality. It also makes other technical and grammatical changes to conform with drafting standards recommended by the Right to Know Advisory Committee.

Section 2 amends the public records exception to clarify that a licensing board that receives confidential information from the department may release that information during the pendency of an investigation as long as that confidential information is not further disclosed for any other purpose. It also makes other technical and grammatical changes.

Section 3 amends the public records exception to clarify that any personally identifiable information obtained by the marketplace confidential. It also makes other technical and grammatical changes.

APPENDIX F

Existing public records exceptions in Title 22 recommended to continue without change

PUBLIC RECORDS EXCEPTIONS REVIEWED IN 2023:
TITLE 22 EXCEPTIONS RECOMMENDED TO BE CONTINUED WITHOUT CHANGE

The following public records exceptions reviewed in Title 22 should remain in law as written:

- Title 22, section 17, subsection 7, relating to records of child support obligors
- Title 22, section 42, subsection 5, relating to DHHS records containing personally identifying medical information
- Title 22, section 261, subsection 7, relating to records created or maintained by the Maternal and Infant Death Review Panel
- Title 22, section 264, subsection 8, relating to records held by the coordinator of the Aging and Disability Mortality Review Panel
- Title 22, section 664, subsection 1, relating to State Nuclear Safety Program facility licensee books and records
- Title 22, section 666, subsection 3, relating to the State Nuclear Safety Program concerning the identity of a person providing information about unsafe activities, conduct or operation or license violation
- Title 22, section 811, subsection 6, relating to hearings regarding testing or admission concerning communicable diseases
- Title 22, section 815, subsection 1, relating to communicable disease information
- Title 22, section 824, relating to persons having or suspected of having communicable diseases
- Title 22, section 832, subsection 3, relating to hearings for consent to test for the source of exposure for a blood-borne pathogen
- Title 22, section 1064, relating to immunization information system
- Title 22, section 1233, relating to syphilis reports based on blood tests of pregnant women
- Title 22, section 1317-C, subsection 3, relating to information regarding the screening of children for lead poisoning or the source of lead exposure
- Title 22, section 1413, relating to information that directly or indirectly identifies individuals included in amyotrophic lateral sclerosis (ALS) registry
- Title 22, section 1494, relating to occupational disease reporting
- Title 22, section 1596, relating to abortion and miscarriage reporting
- Title 22, section 1597-A, subsection 6, relating to a petition for a court order consenting to an abortion for a minor
- Title 22, section 1711-C, subsection 2, relating to hospital records concerning health care information pertaining to an individual
- Title 22, section 1714-E, subsection 5, relating to department records regarding determination of credible allegation of MaineCare fraud
- Title 22, section 1717, subsection 15, relating to personally identifying information or health information created or obtained in connection with DHHS licensing or quality assurance activities

- Title 22, section 1816, subsection 2, paragraph B, relating to survey findings of health care accrediting organization, including deficiencies and work plans, of hospitals reported to DHHS
- Title 22, section 1828, relating to Medicaid and licensing of hospitals, nursing homes and other medical facilities and entities
- Title 22, section 2140, subsection 17, relating to information collected by DHHS regarding compliance with Maine Death with Dignity Act
- Title 22, section 2153-A, subsection 1, relating to information provided to the Department of Agriculture by the US Department of Agriculture, Food Safety and Inspection Service
- Title 22, section 2153-A, subsection 2, relating to information provided to the Department of Agriculture by the US Food and Drug Administration
- Title 22, section 2425-A, subsection 12, relating to applications and supporting information submitted by patients, caregivers and providers under the Maine Medical Use of Marijuana Act
- Title 22, section 2706, subsection 4, relating to prohibition on release of vital records in violation of section; recipient must have "direct and legitimate interest" or meet other criteria
- Title 22, section 2706-A, subsection 6, relating to adoption contact files
- Title 22, section 2769, subsection 4, relating to adoption contact preference form and medical history form
- Title 22, section 3022, subsections 8, 12,13 and 14, relating to medical examiner information
- Title 22, section 3034, subsection 2, relating to the Chief Medical Examiner missing persons files
- Title 22, section 3109, subsection 2-A, relating to personal information of TANF participants surveyed by DHHS
- Title 22, section 3174-X, subsection 6, relating to records of the Medicaid ombudsman program
- Title 22, section 3188, subsection 4, relating to the Maine Managed Care Insurance Plan Demonstration for uninsured individuals
- Title 22, section 3192, subsection 13, relating to Community Health Access Program medical data
- Title 22, section 3292, relating to use of confidential information for personnel and licensure actions
- Title 22, section 3293, relating to confidential information provided to state employees and Bureau of Human Resources
- Title 22, section 3295, relating to confidential information provided in unemployment compensation proceedings related to state employment
- Title 22, section 3474, subsection 1, relating to adult protective records
- Title 22, section 3762, subsection 3, relating to TANF recipients
- Title 22, section 4007, subsection 1-A, relating to a protected person's current or intended address or location in the context of child protection proceeding
- Title 22, section 4008, subsection 1, relating to child protective records

- Title 22, section 4008, subsection 3-A, relating to records of child death and serious injury review panel
- Title 22, section 4018, subsection 4, relating to information about a person delivering a child to a safe haven
- Title 22, section 4019, subsection 9, relating to files, reports, records, communications and working papers used or developed by child advocacy centers
- Title 22, section 4021, subsection 3, relating to information about interviewing a child without prior notification in a child protection case
- Title 22, section 4036, subsection 1-A, relating to child protective case documents in a proceeding awarding parental rights and responsibility
- Title 22, section 4087-A, subsection 6, relating to information held by or records or case-specific reports maintained by the Child Welfare Ombudsman
- Title 22, section 4306, relating to general assistance
- Title 22, section 5307, subsection 2, relating to fingerprint-based criminal background check for "high-risk" MaineCare providers
- Title 22, section 5328, subsection 1, relating to community action agencies records about applicants and providers of services
- Title 22, section 5409, subsections 1 and 2, relating to records held by the Maine Health Insurance Marketplace
- Title 22, section 7250, subsection 1, relating to the Controlled Substances Prescription Monitoring Program
- Title 22, section 7703, subsection 2, relating to facilities for children and adults
- Title 22, section 8110, subsection 5, relating to criminal history record information for employees of a children's residential care facility, an emergency children's shelter, a shelter for homeless children or any group home that provides care for children
- Title 22, section 8302-C, subsection 1, relating to criminal history record information for child care providers and child care staff members
- Title 22, section 8707, relating to records of the Maine Health Data Organization
- Title 22, section 8714, subsection 1, relating to protected health information in data collected by MHDO
- Title 22, section 8715-A, subsection 2, relating to cancer-incidence registry data and vital statistics data reported to MHDO
- Title 22, section 8733, relating to information provided to MHDO by a prescription drug manufacturer, wholesale drug distributor or pharmacy benefits manager
- Title 22, section 8754, relating to medical sentinel events and reporting
- Title 22, section 8824, subsection 2, relating to the newborn hearing program
- Title 22, section 8943, relating to the registry for birth defects
- Title 22, section 9061, relating to criminal background check record or other personally identifiable information for direct access worker