RIGHT TO KNOW ADVISORY COMMITTEE
Public Employee Disciplinary Records Subcommittee
Monday, September 23, 2024
9:00 a.m. – 10:00 a.m.

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

AGENDA

1. Introductions

2. Review of issue and past committee activities related to public employee disciplinary records – subcommittee staff

3. Next steps and future meeting dates

4. Adjourn

Maine State Legislature
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MEMORANDUM

TO: Members, Right to Know Advisory Committee Subcommittee on Public Employee Disciplinary Records

FROM: Lindsay J. Laxon, Legislative Analyst

DATE: September 23, 2024

RE: Public Employee Disciplinary Records

The Right to Know Advisory Committee (RTKAC) has considered the issue of access to disciplinary records of public employees over the course of the last two years. This memo is intended to provide a general overview for subcommittee members regarding the topic and past actions recommended by the RTKAC. For more specific information, please see the relevant statutes cited in this memo.

I. General Background

During its interim meetings in 2022, the RTKAC was advised of instances in which police disciplinary records were removed from personnel files pursuant to collective bargaining agreements (CBA) and there were concerns about the availability of these records in the event of a Freedom of Access Act (FOAA) request. The committee established a subcommittee to consider access to disciplinary records of public employees generally. As a result of the subcommittee's and RTKAC's discussions, the 17th Annual Report included four recommendations for legislation; however, only one of the recommended statutory changes was enacted (see LD 1397 in the 131st Legislature).

During its interim meetings in 2023, the RTKAC revisited the topic and requested additional comment from various entities on the proposals from LD 1397 which were not enacted. Due to the importance and complexity of the issues involved, the RTKAC's 18th Annual Report included a recommendation that the Joint Standing Committee on Judiciary 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 Judiciary Committee did not report out a bill related to the RTKAC's recommendation and instead provided a letter to the RTKAC discussed at the end of this memo.

II. What public employee disciplinary records are public under FOAA?

	State Records **5 MRSA** **§7070(2)(E)**[1]	**County Records** **30-A MRSA** **§503(1)(B)(5)**	**Municipal Records** **30-A MRSA** **§2702(1)(B)(5)**
Disciplinary Record – confidential v. public	*Confidential:* complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action.		

[1] See also 5 MRSA §7070-A related to the name of a law enforcement officer involved in cases of deadly force or physical force.

	Public: **If disciplinary action is taken, the final written decision[2] relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline.** The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action.
Differences in provisions	*State* records statutes include: 1. A provision that allows for union representative access to otherwise confidential personnel records to carry out collective bargaining responsibilities; however, the records remain confidential; and 2. A statute that provides, in cases of deadly or physical force involving a law enforcement officer, the officer's name is public and findings of an investigation related to the officer's conduct are public under certain circumstances.

III. For what period of time do public employee disciplinary records need to be retained?

Maine law requires that state agency and local government records be retained in accordance with records retention schedules (RRS) established by the State Archivist[3], in consultation with the heads of agencies and their records officers. An RRS is a policy document that defines the minimum time a record must be retained and contains disposition instructions addressing how the record must be handled when no longer needed for agency business. The RRS must define the period of time for which each agency must retain records based on four criteria: (1) administrative use; (2) legal requirements; (3) fiscal and audit requirements; and (4) historical and research value.

The State Archivist establishes general schedules for records commonly created and maintained by state agencies as well as agency-specific schedules for records that are unique to a given agency.

The general schedules applicable to both state agencies and local government disciplinary records include an exception in the event that a collective bargaining agreement requires such records to be destroyed at an earlier time.

State agencies – General Schedule	Local government[4]
Current (2022) RRS GS4.5 provides that when an employee terminates (is no longer an employee of State government) the last employing agency will be responsible for retaining employee personnel records for 10 years (after termination). Employee disciplinary records must be retained for up to 5 years, but "[i]f a collective bargaining contract requires that disciplinary documents be destroyed earlier than described above, the contract shall be followed."	Current (May 2024) RRS LG4.1 provides that disciplinary records must be retained for 10 years after separation "unless collective bargaining contract requires that disciplinary documents be destroyed earlier" then the contract shall be followed. *[Note: The retention period prior to May 2024 was 60 years after separation]*

IV. Issues/Questions Considered by the RTKAC Related to Disciplinary Records

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[2] The definition of "final written decision" is the same for state, county, and municipal records. "Final written decision" means:
(1) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or
(2) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.
A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days. *See e.g.,* 5 MRSA §7070(2)(E).

[3] *See* 5 MRSA §§95-B(7) & 95-C(2)(A)(3).

[4] "Local government" means a municipality, county, school district or other special-purpose district or multi-purpose district. 5 MRSA §92-A(2-A).

A. Location of records: It isn't always clear where disciplinary records are stored – they may be retained in a "personnel file" or elsewhere (e.g., a compliance file). Records may also be retained by more than one agency. For example, in some cases, law enforcement conduct is subject to reporting to the Maine Criminal Justice Academy.[5]

B. Removal/destruction/purging of records: The language in CBAs may not be consistent regarding what must be done with the record – it may not always be physical removal.

i. In a 12/4/23 memo to the RTKAC, Maine Municipal Association commented: "For contract purposes, records retention pertains to the amount of time a record can be used against an employee for the purposes of escalating disciplinary action, and do not play a role in the retention of records in many municipalities."

ii. The sample of CBAs reviewed by the RTKAC subcommittee in 2022 generally required removal from the personnel file and did not specify limitation on use; however, one CBA[6] distinguished between limitations on use and removal from the file – the latter took place only at the employee's request.

C. Brady/Giglio materials: Law enforcement disciplinary records raise different issues than other public employee records which may create a need to establish different RRS. The Supreme Court has held[7] that records that may reflect on the credibility of a witness in a criminal case, including a law enforcement officer, must be disclosed. These are often referred to as "Giglio materials."

i. The Department of Public Safety has an agency-specific schedule for State Police records that addresses Giglio-related issues and provides for permanent retention of such records.

D. Retention times in statute: If the RTKAC were to recommend establishing record retention time periods in statute, the committee would need to determine what time period is appropriate for a given type of record (e.g., if mandating the retention of a record for a given period of time is based on the severity of the conduct, how should that be determined?).

V. Past Recommendations Related to Disciplinary Records of Public Employees

17th Annual Report Recommendations

1. Enact legislation to prohibit CBAs from overriding FOAA and require the revision of the record retention schedules applicable to public employee personnel records to require retention of records related to disciplinary actions for a period of at least 20 years. The recommendation specified that consideration should be given to a longer retention period for law enforcement disciplinary actions that could reflect on the credibility of the law enforcement officer (so-called "Giglio material") and to a shorter retention period (no fewer than 5 years) for less serious conduct.
[Legislation was proposed, LD 1397 in the 131st Legislature, however provisions related to this recommendation were not enacted]

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[5] *See* 25 MRSA §2807

[6] *Source:* County of Penobscot and Fraternal Order of Police Lodge 012 Representing the Penobscot County Sheriff's Office Supervisory Bargaining Unit (pages 17-19).

[7] *See* United States v. Giglio, 405 U.S. 150 (1972).

2. Enact legislation to amend state and county employee personnel records statutes to align with the municipal employee personnel record statute
   [Public Law 2023, chapter 159, implements this recommendation]

3. 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
   [Legislation was proposed, LD 1397 in the 131st Legislature, however provisions related to this recommendation were not enacted]

4. 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
   [Legislation was proposed, LD 1397 in the 131st Legislature, however provisions related to this recommendation were not enacted. The State Archivist indicated a willingness to continue working on this issue]

18th Annual Report Recommendations

The RTKAC recommended 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 Judiciary Committee responded to the Advisory Committee's recommendation by letter dated May 10, 2024, requesting that the RTKAC reexamine the issues raised in its recommendations using the expertise of its members and, as necessary, gathering additional input from stakeholders with relevant expertise in law enforcement; labor law and collective bargaining agreements; progressive discipline and the impact of employee discipline on promotion and merit pay increases across different categories of public employees; and any existing constitutional and statutory requirements for retention or disclosure of specific types of employee disciplinary records to specific recipients, such as criminal defendants or professional licensing boards, in certain circumstances. The Judiciary Committee asked that, if the RTKAC is unable to develop final recommendations on these issues, the RTKAC provide guidance in its 19th Annual Report on the establishment of a commission to meet between the First and Second Regular Sessions of the 132nd Legislature—including recommendations on the desired qualifications of commission members and the best way to frame the issues that the commission should be charged with examining.

131st MAINE LEGISLATURE

FIRST REGULAR SESSION-2023

Legislative Document	**No. 1397**
H.P. 892	House of Representatives, March 28, 2023

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

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

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

ROBERT B. HUNT
Clerk

Printed on recycled paper

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

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

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

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

E. Except as provided in section 7070-A, complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the Bureau of Human Resources shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

For purposes of this paragraph, "final written decision" means:

(1) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(2) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days;

Sec. 3. 30-A MRSA §503, sub-§1, ¶B, as amended by PL 2019, c. 451, §2, is further amended by amending subparagraph (5) to read:

(5) Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it

imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the county shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

For purposes of this subparagraph, "final written decision" means:

(a) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(b) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days; and

Sec. 4. 30-A MRSA §2702, sub-§1, ¶B, as amended by PL 2019, c. 451, §3, is further amended by amending subparagraph (5) to read:

(5) Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the municipality shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

For purposes of this subparagraph, "final written decision" means:

(a) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(b) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

1 A final written administrative decision that is appealed to arbitration is no longer
2 confidential 120 days after a written request for the decision is made to the
3 employer if the final written decision of the neutral arbitrator is not issued and
4 released before the expiration of the 120 days; and

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

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

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

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

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

22 **SUMMARY**

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

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

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

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

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

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

May 10, 2024

Representative Erin Sheehan, Chair
Right to Know Advisory Committee

Re: *Retention of and public access to public employee disciplinary records*

Dear Chair Sheehan and members of the Right to Know Advisory Committee,

The Judiciary Committee deeply appreciates the Right to Know Advisory Committee's longstanding dedication to the principles of open government and its annual recommendations for improving the State's freedom of access laws.

This session, we carefully considered the recommendation from the Right to Know Advisory Committee's Eighteenth Annual Report that the Judiciary Committee report out a bill to establish a legislative study group to examine several issues related to public employee disciplinary records. As we understand it, the following issues require further consideration and exploration:

1) Whether the Legislature should direct the State Archivist to revise the record retention schedules applicable to state and local government personnel records—which currently direct that disciplinary records for state employees be retained for up to 5 years of active service and that disciplinary records for local government employees be retained for 60 years after separation—to provide:

   a) A default retention period for final written decisions relating to disciplinary action taken against a public employee, regardless of the level of government service—and, if so, what length of time is appropriate;

   b) A shorter retention period for final written decisions involving "less serious misconduct"—and, if so, whether the severity of the misconduct should be measured by focusing either (A) on the type of misconduct committed, which would require a detailed description of the types of misconduct that should be considered "less serious" and careful consideration whether an employee's job description influences this calculus; or (B) on the type of discipline imposed, with longer retention schedules applicable to more serious sanctions under a progressive discipline model; and

   c) A longer retention period for final written decisions imposing discipline on certain types of public employees whose positions involve greater degrees of public trust and for whom restricted public access to disciplinary records raises constitutional concerns—for example, law enforcement officers

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who are responsible for preserving public safety and whose disciplinary records could be used to impeach the credibility of the officer who appears as a witness in a criminal case.

2) Whether the Legislature should enact legislation prohibiting a collective bargaining agreement from impacting records retention schedules; and

3) Whether the Legislature should amend the laws governing access to state, county and municipal employee personnel records to require that, in response to a public record request for a final written disciplinary decision, the responding public body must provide all of the records retained in its possession or custody regardless of whether the final written decision is located in the employee's personnel file or (perhaps as the result of a settlement agreement in the underlying disciplinary proceeding) is stored by the public body in another location.

We understand the difficulty in answering these questions in a way that strikes the appropriate balance between ensuring transparency and accountability of governmental business and avoiding the negative impacts greater disclosure may have on attracting and retaining employees, especially given that our increasingly polarized and digital world can facilitate the weaponization of disciplinary records against government employees. We believe that the Right to Know Advisory Committee, which includes representatives of the press and broadcasting interests, representatives of school and municipal interests, members with expertise in information technology, data and personal privacy, and advocates for freedom of access, is uniquely positioned to thoroughly study and tackle these complex issues.

Accordingly, we respectfully request that the Right to Know Advisory Committee reexamine the issues outlined above, drawing on the expertise of its members and, as necessary, gathering additional input from stakeholders with relevant expertise in law enforcement; labor law and collective bargaining agreements; progressive discipline and the impact of employee discipline on promotion and merit pay increases across different categories of public employees; and any existing constitutional and statutory requirements for retention or disclosure of specific types of employee disciplinary records to specific recipients, for example criminal defendants or professional licensing boards, in certain circumstances. If the Right to Know Advisory Committee is unable to develop final recommendations on these issues, we request that the committee provide guidance in its Nineteenth Annual Report on the establishment of a commission to meet between the First and Second Regular Sessions of the 132nd Legislature—including recommendations on the desired qualifications of commission members and the best way to frame the issues that the commission should be charged with examining.

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

Sincerely,

Sen. Anne M. Carney
Senate Chair

Rep. Matthew W. Moonen
House Chair

cc: Members, Joint Standing Committee on Judiciary
Members, Right to Know Advisory Committee