RIGHT TO KNOW ADVISORY COMMITTEE
Public Employee Disciplinary Records Subcommittee
Thursday, October 17, 2024
9:00 a.m. – 11:00 a.m.

Location: Cross Building, Room 202, Labor & Housing Committee Room
(Hybrid Meeting)
Public access also available through the Maine Legislature's livestream:
https://legislature.maine.gov/Audio/#202

AGENDA

1. Introductions

2. Overview of meeting materials and updates from last meeting – subcommittee staff
   - Collective bargaining agreement language – county and municipal law enforcement examples – November 2022
   - Collective bargaining agreement language – Maine Service Employees Association Professional and Technical Bargaining Unit
   - Summary of October 23, 2023 meeting of the RTKAC including summaries of comments regarding proposals in LD 1397 from the First Regular Session of the 131st Legislature from: General Counsel for the Maine Education Association, the Executive Director of the Maine Association of Police, the President of the Maine Service Employees Association, General Counsel for the Maine Service Employees Association, and the State Archivist.
   - Written comments submitted by Dean Staffieri, Tom Feely, & Kate McBrien for October 23, 2023 meeting
   - Comments from Attorney Marcus Wraight, November 3, 2023
   - Comments from MMA, December 4, 2023
   - Copy of Judiciary Committee letter to RTKAC

3. Public employee disciplinary records - interested party perspectives

   i. Michael Dunn, Equal Employment Opportunity Coordinator (Office of Employee Relations)
   ii. Lt. Col. Brian P. Scott, Maine State Police (Department of Public Safety)
   iii. Chief Jason Moffitt, Maine Chiefs of Police Association

4. Public comment regarding public employee disciplinary records

5. Next steps and future meeting dates

6. Adjourn

Collective bargaining agreement examples and responses to inquiry regarding current record retention guidelines that would be applicable to employee personnel records and/or internal affairs files:

Page of Combined PDF	Collective Bargaining Agreement	Record Retention Response
Municipalities		
Page 4	City of Auburn and Fraternal Order of Police Command Unit (see page 6 of agreement)	City of Auburn record retention response: "All city personnel records are kept in perpetuity as per state law."
Page 9	Town of Wells and Wells Police Association (see pages 40-42 of agreement)	Town of Wells record retention response: Follows Maine State Archives: Local Government Record Retention Schedules, May 2018 Edition
Counties		
Page 13	Waldo County Commissioners and the Waldo County Deputy Sherriff's Association (see pages 24-25 of agreement)	Waldo County record retention response: Follows Maine State Archives: Local Government Record Retention Schedules, August 2018 Edition
Page 17	County of Penobscot and Fraternal Order of Police Lodge 012 Representing the Penobscot County Sheriff's Office Supervisory Bargaining Unit (see pages 17-19 of agreement)	Penobscot County record retention response: Follows Maine State Archives: Local Government Record Retention Schedules

COLLECTIVE BARGAINING AGREEMENT

BETWEEN

CITY OF AUBURN

AND

FRATERNAL ORDER OF POLICE

COMMAND UNIT

July 1, 2021, to June 30,2024

PREAMBLE

Pursuant to the provisions of Chapter 9A, Revised Statutes of Maine, Title 26 as enacted by the Maine Legislature, Revised September 1989 the Municipal Public Employees Labor Relations Act, this agreement is entered into by the City of Auburn, Maine (hereinafter known as the City) and Fraternal Order of Police (hereinafter known as the Union).

It is the intent and purpose of the parties to set forth herein the entire Agreement covering rates of pay; wages, hours of employment and other conditions of employment; to increase the efficiency and productivity employees in the Police Department; to provide for the prompt and fair settlement of grievances without any interruption of or other interference with the operation of the Police Department.

ARTICLE 1 - BARGAINING UNIT

It is expressly agreed that previous negotiations are without prejudice to the right of the City to object to the composition of the bargaining unit being represented by the negotiating team of the Union in any subsequent contract year. For the purpose of this agreement, the Fraternal Order of Police will represent all Lieutenants and Sergeants in the Auburn Police Department.

ARTICLE 2 - RECOGNITION OF CITY RIGHTS

Except as otherwise provided in this contract, the City shall remain vested solely and exclusively with all of its common law and its statutory rights and with all management functions including the full and exclusive control, direction, and supervision of operations and personnel including the right to hire, promote, suspend or otherwise discipline superior officers under the City Charter and Ordinances.

ARTICLE 3 - RECOGNITION OF RIGHTS OF MEMBERS OF THE UNION

Section 1 - Investigation of Police Misconduct

Members of the Auburn Police Department hold a unique status as public officers, and the security of the City and its citizens depends to a great extent upon the manner in which members of the department perform their many duties, of contacts and relationships with the public. Out of such contacts and relationships may arise questions concerning the actions of members of the force. Such questions may require prompt investigation by superior officers designated by the Chief of Police or other competent authority.

To ensure that such investigations are conducted in a manner conducive to good order and discipline, while observing and protecting the individual rights of each member of the department, the following rules of procedure are established:

A) To the extent possible, the interrogation will be conducted at a reasonable time taking into consideration the working hours of the member and the legitimate interests of the department. The officer conducting the interrogation shall advise the member that an investigation is being conducted. The investigating officer shall inform the member of the nature of the alleged conduct, which is the subject matter of the interrogation and, unless circumstances warrant anonymity, shall identify the complainant. If it is known that the member being interrogated is a witness only, he shall be so informed.

B) In any case in which a police officer has been identified as a suspect in a criminal investigation, the interrogation shall be tape recorded and the tape shall be preserved by the investigating officer until the investigation is completed and all charges dropped or processed to conclusion. At his request, the member or his attorney may listen to, transcribe, or copy all or any portion of the tape.

The interrogation shall be conducted with as much confidentiality as possible. The interrogation of a member suspected of violating department rules and regulations shall be limited to questions which are reasonably related to the member's performance as it relates to the alleged violation.

C) If the member is under arrest or is likely to be, that is, if he is a suspect or the target of a criminal investigation, he shall be afforded all rights granted under such circumstances to other persons.

D) In all cases in which a member is interrogated concerning a serious violation of departmental rules and regulations which, if proven, would be likely to result in his removal from the department, and where the same can be accomplished without unreasonably delaying or impeding the investigation, he shall be afforded a reasonable opportunity and facilities to contact and consult privately with an attorney of his choosing and/or a representative of the Union before being interrogated and his attorney and/or a representative of the Union may be present during the interrogation, but may not participate in the interrogation except to counsel the member.

E) If the member under investigation is requested to submit to a polygraph examination, he or she will be furnished a list of questions which will be asked prior to the commencement of the examination. If a member is requested to submit to any other type of test, he or she will be advised of the type of test and the member will be afforded an opportunity to obtain a similar independent test if available.

F) The investigation will be conducted without unreasonable delay and the member will be advised of the final outcome of the investigation.

Section 2 - Disciplinary Proceedings

Any member charged with a violation of department rules and regulations, incompetence, misconduct, negligence, insubordination, disloyalty, or other serious disciplinary infraction may request a hearing provided such request is made in writing and delivered to the Chief or his representative no more than five days after the member is advised of the charge against him. No member shall be dismissed without first being given notice and an opportunity for a hearing whether he requests it or not. In the case of a member who has been suspended, the hearing shall, if requested by the member, be held no more than five days after the date when the suspension began.

The member shall be informed of the exact nature of the charge and shall be given sufficient notice of the hearing date and time to allow him an opportunity to consult legal counsel, conduct an investigation, and prepare a defense. The hearing, which shall be before the Chief, or in his absence or incapacity, the Acting Chief, shall be informal in nature. The member may be accompanied by legal counsel or a representative of the Union. The member shall have the right to confer with his representative at any time during the hearing and shall have the right to have his representative speak on his behalf. The member shall have the right to appeal the decision of the Chief, to the City Manager, as provided in Article 8, in any case involving a suspension. Any matters as to which a member has a right to a hearing under this Article shall not also be the subject of a grievance proceeding.

Section 3 - Personnel Files

A. Insofar as permitted by law, all personnel records, including home addresses, telephone numbers, and pictures of Employees shall be confidential and shall not be released to any person other than officials of the department and other City Officials, except upon a legally authorized subpoena or written consent of the Employee.

B. Upon request, an Employee shall have the right to inspect his or her employee personnel file. The inspection shall be conducted during regular business hours and shall be conducted under the supervision of the Department. An Employee shall have the right to make duplicate copies for his own use. No records in the official personnel file shall be withheld from an Employee's inspection. An Employee shall have the right to have added to his official personnel file a written refutation of any material which he considers detrimental.

C. No written reprimand which has not previously been the subject of a hearing shall be placed in an Employee's official personnel file unless the Employee is first given the opportunity to see a copy of the reprimand. Within five days thereafter, the Employee may file a written reply. If the Chief thereafter places the written reprimand in the Employee's official personnel file, he shall also include the reply.

D. Discipline issued to an employee, shall be removed from an employee's personnel file after the following timelines. It will be up to the employee to request that the discipline be removed. Requests for removal of discipline shall be made in writing, to the Chief of Police.

- Written Warning – One year from date of action taken unless a violation of the similar nature has occurred within that time period. In cases of a repeat violation of a like nature, the letter(s) shall remain in the personnel file until twelve (12) months have passed since the most recent violation.
- Written Reprimand – Two years from date of action taken unless a violation of the similar nature has occurred within that time period. In cases of a repeat violation of a like nature, the letter(s) shall remain in the personnel file until twelve (12) months have passed since the most recent violation.
- Suspension – Five years from date of action taken unless a violation of the similar nature has occurred within that time period or unless the violation was of a more serious nature, i.e., causing bodily harm or life threatening in nature, whereas the letter(s) shall remain as a permanent part of the personnel file.

E. Incidents of Sustained sexual harassment shall not be purged from the personnel file. "Sustained" incidents are those in which the investigation disclosed evidence proven beyond a reasonable doubt used to prove the allegations made in the complaint.

ARTICLE 4 - NON-DISCRIMINATION

All employees have the right to work in an environment free from discrimination unrelated to job performance. Intimidation and harassment of employees, whether by fellow employees or management personnel, including sexual harassment in all its various forms, is unacceptable conduct which may constitute grounds for disciplinary action. This provision shall not in any way prevent the Union from discharging its duty of fair representation of any of its members.

ARTICLE 5 - NOSTRIKE/NO LOCKOUT

During the term of this Agreement, neither the Union nor its agents nor any employee, for any reason, will authorize, institute, aid, condone or engage in a slowdown, work stoppage, strike, or any other interference with the work and statutory functions or obligations of the City. During the term of this Agreement, neither the City nor its agents for any reason shall authorize, institute, aid, or promote any lockout of employees covered by this Agreement.

The Union agrees to notify all Local officers and representatives of their obligation and responsibility for maintaining compliance with this Article, including their responsibility to remain at work during any interruption which may be caused or initiated by others, and to encourage employees violating this Article to return to work. Any or all employees who violate the provisions of this Article may be discharged or otherwise disciplined.

ARTICLE 6 - CHECK-OFF

The employer agrees to deduct the Union's weekly membership dues (uniform amount per member) and benefit premiums from the pay of those employees who voluntarily sign a check-off authorization form. The amounts to be deducted shall be certified to the Employer by Fraternal Order of Police, and the aggregate deductions of all employees shall be submitted together with an itemized statement to the Union on a quarterly basis, after such deductions are made. The written authorization for payroll deductions of Union membership dues shall be irrevocable during the term of this Agreement except that an employee may revoke the authorization, effective upon the expiration date of this Agreement, provided the employee notifies, in writing, the Employer and Fraternal Order of Police at least thirty (30) days, but not more than sixty (60) days prior to the expiration date of this Agreement.

The authorization for deduction of benefit fund contributions may be stopped at any time, provided the employee submits in writing, to the Employer and the Union a sixty (60) day notice of such intent. The Union shall indemnify the City and any Department of the City and hold it harmless against any and all claims, demands, suits, or other forms of liability that may arise out of, or by reason of, any action taken by the City or any Department of the City for the purpose of complying with the provisions of this Article.

ARTICLE 7 - NEGOTIATIONS TIME-OFF

Section 1

The President or his designee shall be allowed reasonable time-off without loss of any benefits to represent members, at the members request, at any grievance procedure or departmental hearing and shall be allowed reasonable time to interview and represent a requesting member during all stages of a grievance procedure.

Section 2

Members of the Negotiating Committee shall be allowed reasonable time- off without loss of benefits to represent the Union on all negotiations with the City concerning the collective bargaining agreement.

AGREEMENT

between

TOWN OF WELLS

and

WELLS POLICE ASSOCIATION

July 1, 2020 to June 30, 2023

on his behalf. Any disciplinary action taken against a member shall be subject to the grievance procedure.

3. Work Rules/Rules of Discipline

3a. The Town may adopt disciplinary rules and work rules which will be posted from time to time during this Agreement. All rules and amendments thereto shall be forwarded to the Shop Steward or Alternate, who shall have ten (10) working days to request a meeting to confer concerning the proposed changes. If no such request is received, the changes shall go into effect.

3b. All suspensions and discharges shall be for just cause including, but not limited to, violations of any rules adopted above and written reasons for suspensions or discharge shall be stated in writing to the affected employee within five (5) calendar days of the action.

3c. Employees are required to abide by the terms of this Agreement and to comply with such rules and regulations as the Town may adopt which are not inconsistent with this Agreement. Should there be any doubt as to the employee's obligations, he shall comply with the rules and then grieve if he feels he has been wronged. The disciplinary measure stands should he be found to have violated the rules and regulations or any provision of this Agreement.

C. Personnel File

1. Insofar as permitted by law, all personnel records, including home address, telephone numbers, and pictures of members shall be confidential and shall not be

released to any person other than officials of the department and other Town officials, except upon a legally authorized subpoena or written consent of the member.

2. Upon request, a member shall have the right to inspect his official personnel record. Inspection shall be during regular business hours and shall be conducted under supervision of the Town Manager or designee. A member shall have the right to make duplicate copies for his own use. No records shall be withheld from a member's inspection. A member shall have a right to have added to his personnel file a written, signed, and dated refutation of any material which he considers detrimental. Nothing detrimental may be added to the member's file without first providing a copy to the member.

3. No written reprimand which has not previously been the subject of a hearing shall be placed in a member's personnel file unless the member is first given the opportunity to see a copy of the reprimand. Within five (5) calendar days thereafter, the member may file a signed and dated written reply. If the Chief thereafter places the reprimand in the member's personnel file, he shall also include the reply.

4. For Police Officers, all discipline infractions placed in an employee's file which are received for an infraction which is less than a suspendable offense shall be purged from the file if there is no disciplinary offense within the next eighteen (18) months subsequent. Suspensions shall be purged from the file if no recurrence of the disciplinary action is received by the employee within a thirty-six (36) month period subsequent to the offense. All employee refutations which go into the personnel file shall also be expunged along with the items to which they pertain.

5. For Dispatchers, all discipline infractions placed in an employee's file which are received for an infraction which is less than a suspendable offense shall be purged from the file if there is no disciplinary offense within the next twenty-four (24) months subsequent.

ARTICLE 35 - HEALTH AND SAFETY

The Association recognizes the right of the Town to establish reasonable rules and regulations for the safe, sanitary and efficient conduct of the Town's business and reasonable penalties for the violation of such rules and regulations subject to restrictions of this Agreement.

The Town is responsible for meeting safety standards which are considered to be minimum standards required by the Occupational Safety and Health Act of 1970 as well as other federal and state laws. Non-compliance with the Act may result in fine and penalty to the Town.

Proper safety devices shall be provided by the Town for all employees engaged in work where such devices are necessary. Such devices, where provided, must be used as intended.

If a member of the unit deems his vehicle or equipment to be unsafe, he shall notify his superior who, in turn, shall arrange for or conduct an appropriate inspection and shall determine whether the vehicle or equipment is safe for use. The reasonableness of this determination shall be subject to the grievance procedure.

Any employee involved in any accident shall promptly report to his immediate superior said accident and any physical injury sustained. Said report will be made on a proper form provided by the Town.

ARTICLE 36 - EXTRA-HAZARDOUS INJURIES

Employees covered by this Agreement who are injured on the job while performing extra-hazardous duties shall receive, in addition to compensation paid by or payable under the Workers' Compensation Act, an amount sufficient to bring up to net pay while an incapacity exists, and until they are either placed on disability retirement or return to active duty. Absence because of such injuries shall not be charged to accumulated sick leave.

A. Extra-hazardous injuries shall be defined as follows:

1. Injuries sustained while pursuing, apprehending, arresting, or detaining suspects.

2. Injuries incurred during the official operation of a police motor vehicle in emergency situations.

3. Injuries incurred while standing in a roadway directing traffic, providing the officer has not unreasonably neglected to wear safety equipment provided the officer when available.

4. Injuries sustained while actively engaged in suppressing riots, insurrections and similar civil disturbances.

5. Injuries sustained in any other authorized situation in which the Officer, because he is a police officer, is exposed to conditions not confronted by the average non-public safety employee as determined by the Chief of Police.

During the three (3) day waiting period prescribed in the law, prior to receiving Workers' Compensation benefits, the employee who may become eligible for such benefits may elect to use sick leave, if he/she has the sick time accumulated.

AGREEMENT

BETWEEN

WALDO COUNTY COMMISSIONERS

AND

THE WALDO COUNTY DEPUTY SHERIFF'S ASSOCIATION

JANUARY 1, 2022 - DECEMBER 31, 2024

ACCEPTED OCTOBER 7, 2021

Section 4: Right of Appeal:

All non-probationary Associates have the right to appeal disciplinary actions to the County Commissioners pursuant to established appeal procedures. Probationary associates do not have the right to appeal.

PERSONNEL FILES

Section 1: Inspection of Records

Upon written request, any Associate or former Associate shall have the right to inspect or have his/her authorized representative inspect his/her official personnel record in accordance with M.R.S.A Title 26, Section 631. Inspection shall be during regular business house and shall be conducted under the supervision of the Human Resources Director. An Associate shall have the right to make duplicate copies for his/her own use, without fee one time per calendar year. Additional copies in the same year are subject to copying fees consistent with County Policy. No records shall be withheld from the Associate's inspection. An Associate shall have the right to place in his/ her personnel file a written refutation of any material that he/she considers detrimental.

Section 2: Written Reprimand

No written reprimand which has not previously been the subject of a meeting between the employee and the Sheriff or his/her designee [Reference 7.6.2 of Personnel Policy] shall be placed in an Associate's personnel file unless the Associate is first given the opportunity to see a copy of the reprimand. Within five (5) days thereafter, the Associate may file a written reply. If the Sheriff thereafter places the written reprimand in the Associate's personnel file, he/she shall also include the reply.

Section 3: Disciplinary Actions

The initiation of disciplinary action is the responsibility of the Sheriff or his/her designee.

Section 4: Time Limits for Disciplinary and Counseling Action

The following time schedules shall be placed upon Disciplinary Actions, unless otherwise agreed upon by the Sheriff and the Employee. Requests for removal of disciplinary action from an employee's personnel file shall be initiated by the employee by notifying the Human Resources Director in writing of the request.

A) Counseling (Oral & Written). 1 year from date of issuance

B) Oral Reprimand. 1 year from date of issuance

C) Written Reprimand. 2 years from date of issuance

D) Demotion. 3 years from the date of demotion.

E) Suspension. 5 years from date employee started suspension.

GRIEVANCE PROCEDURES/SETTLEMENT OF DISPUTES

Section 1: Grievance Procedure

Any grievance or dispute arising between the parties that involves the application or interpretation of a specific section of this Agreement shall be settled in the following manner:

Step 1. The employee, with or without the Association, shall take up the grievance or dispute with the employee's immediate supervisor within ten (10) working days of the date of the incident or the date the employee knew or should have known of the act or occurrence giving rise to the grievance. The supervisor shall attempt to adjust the grievance and will respond to the employee within ten (10) working days.

Step 2. If the grievance has not been resolved, it may be presented in writing to the department head by the grievant, with or without the Association, within ten (10) working days after the receipt of response in Step 1. The grievance at Step 2 and at all following steps must state specifically the nature of the grievance, the sections of the agreement that are alleged to be violated and the remedy sought. The department head shall respond in writing within ten (10) working days.

Step 3. If the grievance is still unresolved after Step 2, the grievant, with or without the Association, may within fifteen (15) working days notify the Commissioners of the nature of the grievance, the sections of the agreement alleged to be violated and the remedy sought. The Commissioners may, at their election, meet with the grievant and, if the employee desires, a representative of the Association, and hear or otherwise attempt to resolve the grievance. If the Commissioners elect to hear the grievance, a grievance meeting will be scheduled within fifteen (15) working days of receipt by the Commissioners of notification of the grievance. A decision or response by the Commissioners will be given, in writing, within ten (10) working days after the grievance meeting. If the Commissioners elect not to hear or otherwise attempt to resolve the grievance at Step 3, they will notify the grievant within ten (10) working days of receipt of notification of the grievance.

Step 4. If the grievance remains unresolved after Step 3, the Association may determine that the grievance will proceed to final and binding arbitration between the Association, acting on behalf of the grievant, and the County. The Association will notify the Commissioners of the request for arbitration within fifteen (15) working days of the Commissioners response or notification at Step 3. The Association and the Commissioners will attempt to agree on an arbitrator. If no agreement on an arbitrator has been reached between the Association and the Commissioners within fifteen (15) working days after notice of the request for arbitration has been filed with the Commissioners, the Association may file a request for arbitration through the processes of the American Arbitration Association within ten (10) working days.

Section 2: Applicable Procedures

The County and the Association agree to provide all documents, notations or other relevant and necessary documents concerning the act or occurrence that gave rise to the grievance upon written request from the other party at Step 4.

The decision of the arbitrator shall be final and binding on the parties and the arbitrator or arbitrators shall be requested to issue a decision within thirty (30) days after the conclusion of testimony, argument or brief. If a brief is written, it will be given to the other side at the same time it is sent to the arbitrator(s). The arbitrator will have no authority to add to, subtract from, modify or go beyond the scope of the specific provisions of the agreement in reaching a decision.

Expenses for the arbitrator's services shall be borne equally by the County and the Association. However, each party shall be responsible for compensating its own representatives.

Time limits under this Article may be extended in writing at the mutual agreement of the parties. Failure to comply with the time limits in the absence of written agreement for extension will have the effect of resolving the grievance against the party failing to comply.

MILEAGE AND REIMBURSEMENT

All official travel by Waldo County employees covered by this agreement shall be reimbursed at the level equal to the maximum IRS rate. Should any changes occur in the prevailing IRS rate during the terms of this agreement, they shall become effective on the date that coincides with the IRS date or change.

NEPOTISM AND CONFLICT OF INTEREST

To protect against favoritism, conflict of interest or undue influence, no person will be hired, promoted or transferred to a position where the hiring authority, Department Head, or supervisor is a relative of the employee. If promotion or transfer of a current employee would result in supervision by or of a relative, the County may, if operationally feasible and at its sole discretion, alter the normal reporting relationship or take other action to avoid or reduce conflict with this Policy. Relatives are defined as: Spouse, parents, children, parents-in-law, brother, brother-in-law, sister, sister-in-law, daughter-in-law, son-in-law, aunt, uncle, niece, nephew, stepparent, and stepchild.

WORKERS COMPENSATION

The County of Waldo will provide Workers' Compensation protection for all members of the Deputies Association ("Associate(s)"). The County will process diligently all claims pertaining to on-the-job injuries.

During an absence resulting from a disability specifically covered by Workers' Compensation, the County will pay the Associate at his/her regular rate of pay and the Associate will turn over to the County all his/her Workers' Compensation payments for loss of income during the period of disability. The County will not be liable for any payments under this provision for any

COLLECTIVE BARGAINING AGREEMENT

COUNTY OF PENOBSCOT

AND

FRATERNAL ORDER OF POLICE LODGE 012

REPRESENTING THE

PENOBSCOT COUNTY SHERIFF'S OFFICE

SUPERVISORY

BARGAINING UNIT

EXPIRES DECEMBER 31, 2023

intermittent basis. The amount of the benefit will be determined based on the employee's regular rate of pay. The payment will be made based on the employee's regular payroll dates.

The requesting employee is responsible for submitting a request to HR. The leave should be requested as soon as the date is known and with as much notice as possible. This leave is in addition to other forms of leave detailed in the handbook; an employee is not required to use Earned Paid Leave for this leave period.

ARTICLE 10 - WORKERS' COMPENSATION

Employees may utilize any available accrued vacation or sick time for days not paid by the County on a medical leave based on a work-related injury. For non-controverted claims, the County will pay for days one through seven of a medical leave based on a work-related injury. The employee may have that portion of the accrued vacation or sick time reinstated by reimbursing the County from a Workers compensation award on a day for day basis and must turn over to the County that portion of the Workers compensation award made for days one through seven.

Sick and vacation days utilized for this purpose will not be counted in calculating incentive days, therefore the employee will be eligible for monthly and annual incentive days earned pursuant to Article 8: Sick Leave. Employees not utilizing sick or vacation days while out on Workers Compensation will also be eligible for monthly and annual incentive days earned pursuant to Article 8: Sick Leave.

If the employee receives Workers Compensation covering days one through seven, the employee must reimburse the County one week of the Workers Compensation benefit.

ARTICLE 11 - DISCIPLINE AND DISCHARGE

Disciplinary action or measures shall be documented in writing and mean only the following:

Verbal or Written Counseling
Written Reprimand
Suspension
Corrective Probation
Demotion
Discharge

Discipline shall only be administered for just cause.

The parties understand and agree that "Corrective Probation," if used, is a later step in the disciplinary process, holding the same weight as a Suspension and prior to Discharge.

During any meeting with the Sheriff and/or his designee(s), or any supervisor and should it become apparent that the purpose is to either investigate for a possible disciplinary offense or to discipline the employee, then the employee may terminate the meeting until such time as Union representation can be obtained.

Nothing in this contract shall prevent the Sheriff and/or his designee(s) from calling an employee in for counseling purposes as deemed necessary by the Sheriff and/or his designee(s). Such counseling shall not be considered disciplinary action, but written documentation of the counseling session may be placed in the employee's file.

Documentation of counseling and/or discipline shall be maintained in the employee's personnel file. Provided no further counseling or discipline has been taken regarding the employee, previous counseling or discipline may be a factor in determining discipline and may only be used for the purpose of discipline within the following time frames:

Counseling(s): One Year
Written Reprimand: Three Years. However, after two years, the employee may request that the Sheriff remove the written reprimand from the personnel file. The Sheriff has the sole discretion as to whether the reprimand is removed.

Suspension: Five Years
Corrective Probation: Five Years
Demotion: Five Years

Further, all documentation of such counseling and discipline shall be removed from the employee's personnel file at the time periods specified above upon the request of the employee, provided no further counseling or discipline has been taken regarding the employee. Further, if the counseling and discipline action is based upon violations of any human rights, civil rights, or sexual harassment rights law, and such documentation is removed from the employee's personnel file, the department may maintain such documentation in its compliance file.

The Sheriff or his designee may place an employee on administrative leave with pay for purposes of conducting an administrative investigation or if the employee is the subject of a criminal investigation. When an employee becomes the subject of an internal affairs investigation, they shall be notified in writing of such investigation, unless such notification would interfere with or compromise an ongoing investigation. In the event of a criminal investigation, such paid leave shall end if the employee is charged with a crime by any law enforcement agency or after sixty (60) days whichever is sooner. If criminal charges are pending against an employee, the unpaid administrative leave may extend until such time as the charges are finally resolved. Only if the employee is acquitted or similarly absolved from guilt on all charges (unless acquittal or absolution is the result of a procedural or technical issue such as an invalid search or confession) and if the employee is returned to work, the employee shall be paid regular base wages for that time spent on leave.

When conducting an investigation, it may be an option to temporarily transfer an employee to another shift or assignment. The Sheriff/designee, the Union, and the affected employee must agree to the temporary transfer. This action must be taken in a way that would have the least negative impact on all parties. Such cases shall be by written agreement, which shall describe the assignment and duration, and shall be signed by all involved parties. If no mutual agreement can be reached, the parties shall follow the applicable language in Article 11.

A demotion shall be defined as being employed in a job that is in a lower pay range than the previous job. When an employee is demoted (whether voluntary or involuntary), he/she may be placed in a position in the Patrol bargaining unit and retain all seniority in the bump back as if there was no break in service.

ARTICLE 12 - GRIEVANCE PROCEDURE

A grievance is a Complaint that the Employer has violated this Agreement. Grievances shall be resolved as follows:

For a grievance to be valid, the grievance must contain a statement of fact regarding the alleged violation and specific suggested remedy.

Step One: The grievance may be presented by the Union Steward, Union representative or Grievance Committee, to the Sheriff or his designated representative in writing within ten (10) business days of the date of the grievance or the employee's knowledge of its occurrence. The Sheriff or his designated representative shall respond in writing to the Union Steward, Union representative or Grievance Committee within ten (10) business days of receipt of the grievance. By written mutual agreement between the Union and the Sheriff, the time for the filing of the grievance or the response of the Sheriff or his designated representative may be extended.

Step Two: If the grievance remains unadjusted after Step One, it may be presented by the Union Steward, Union representative or Grievance Committee to the County Commissioners, in writing, within ten (10) business days after the response of the immediate supervisor is due. The Commissioners shall act in accordance with 30-A M.R.S.A. 5501 or the appropriate statute at the time of presentation of the grievance to them, within fifteen (15) business days. The County Commissioners and the Union's Business Agent shall schedule a Step Two meeting to be held between the parties on the second Tuesday of each month. The County Commissioners shall respond in writing to the Union representative within fifteen (15) business days from the date of the Step 2 hearing. By written mutual agreement between the Union and the County

AGREEMENT

between

STATE OF MAINE

and

MAINE SERVICE EMPLOYEES ASSOCIATION SEIU LOCAL 1989

PROFESSIONAL AND TECHNICAL SERVICES BARGAINING UNIT

2023-2025

ARTICLE 21. DISCIPLINE

1. No employee shall be disciplined by the State without just cause. Notwithstanding the foregoing, new employees in an initial probationary period may be dismissed without the necessity on the part of the State of establishing just cause.

Disciplinary action shall be limited to the following: written warning, written reprimand, suspension, demotion, dismissal. The principles of progressive discipline shall be followed.

2. No employee covered by this Agreement shall be suspended without pay, demoted or dismissed without first having been given at least three (3) work days notice in writing of the disciplinary action proposed to be taken. The conduct for which disciplinary action is being imposed and the action to be taken shall be specified in a written notice. Any employee receiving such a notice of suspension, demotion, or dismissal will be afforded an opportunity to meet with the appointing authority or their representative prior to the action proposed, no less than three (3) work days after the notice was given. The employee will be entitled to have a Union representative or steward present. At that meeting the appointing authority or their designee will give the employee an explanation of the employer's evidence against the employee (if that has not already been provided) and offer the employee an opportunity to respond. Employees are on notice that a finding of having committed the offense of physical abuse is excluded from progressive discipline and may result in termination on first offense.

3. If a suspension is scheduled immediately before or after a holiday (as defined in the Holidays article), the affected employee may elect to serve the adjacent day on the holiday instead; if the State cannot accommodate the employee serving the suspension day on the holiday itself, the employee shall receive the holiday benefit as outlined in the Holidays article. In the event that the suspension is scheduled such that a holiday occurs during a suspension, the employee will not receive the holiday benefit as outlined in the Holidays article, but the holiday will be counted as one of the days of suspension.

ARTICLE 22. ELECTRONIC MAIL

Electronic mail capabilities as available to unit members in the course of their work may be used for the purpose of reasonable communication on union matters consistent with applicable law and the State of Maine E-Mail Usage and Management Policy. Any use of the State's e-mail system under this Article must be of an incidental nature (e.g.,meeting announcements) and must not interfere with State government functions and purposes.

ARTICLE 23. EMPLOYEE ASSISTANCE PROGRAM

There shall be a broad-brush comprehensive Employee Assistance Program ("EAP") to provide confidential assessment and referral services for State employees. The EAP is intended to aid State employees and their families, and retirees, in cases where personal problems of any nature are having a detrimental effect on the employee's job performance. Services provided directly by the EAP shall be at no cost.

ARTICLE 48. PERSONAL SERVICES

No employee shall be required to perform services of a personal nature.

ARTICLE 49. PERSONNEL FILES

1. An employee, upon written request to or after prior arrangement with the State Bureau of Human Resources, or the appropriate official at the employee's work location or in the employee's agency, shall be permitted to review their personnel files. Such review shall take place during normal office hours and shall be conducted under the supervision of the appropriate records custodian or agency representative. An employee may review their personnel files at reasonable times during the employee's regular work hours if such review does not require travel out of the normal work area. An employee shall be allowed to place in such file a response of reasonable length to anything contained therein which the employee deems to be adverse.

2. An employee's personnel file shall include, but not be limited to, all memoranda and documents relating to such employee which contain commendations, employee performance appraisals or ratings and records of training programs completed.

3. In addition to the employee's right to view their file as set forth above, the employee shall have the right to receive copies of materials included in the employee's file as set forth below:

a. an employee may request, in writing, a copy of the employee's entire personnel file no more than once in any twelve month period, at no cost to the employee;

b. an employee may request, in writing, a copy of all the material added to the personnel file after the copy of the entire file was provided;

c. an employee may request a copy of specifically identified documents in the employee's personnel files;

d. if a document, other than routine processing documents, is added to the personnel file for an action of which the employee is not reasonably aware, the employee will either be notified or receive a copy of the document; and

e. requested documents may be provided in paper copy or electronically at the discretion of management.

4. Upon request of an employee, records of warnings, reprimands, and preventable accident reports shall be removed from personnel files after three (3) years from the date of the occurrence provided that the employee has had no further disciplinary action since that date. Upon request of an employee, records of suspensions and disciplinary demotions shall be removed from personnel files after five (5) years from the date of the occurrence provided that the employee has had no further disciplinary action since that date. However, records of disciplinary suspensions resulting from patient/client abuse, neglect or mistreatment shall not be removed from personnel files under the provisions of this paragraph.

Records of warnings and reprimands shall be deemed to be removed from the personnel files after three (3) years from the date of the occurrence provided that the employee has had no further discipline since that date.

Records of preventable accident reports shall be deemed to be removed from the personnel files after three (3) years from the date of the occurrence.

Right to Know Advisory Committee
October 23, 2023 (Hybrid: Zoom and Room 438)
Meeting Summary

Convened 1:07 p.m. in person and remote on Zoom; public access on Legislature's website at: https://legislature.maine.gov/audio/#438?event=89571&startDate=2023-10-23T13:00:00-04:00

Present in Room 438:
Rep. Erin Sheehan
Sen. Anne Carney
Jonathan Bolton
Lynda Clancy
Betsy Fitzgerald
Kevin Martin
Tim Moore
Eric Stout
Victoria Wallack

Remote:
Amy Beveridge
Justin Chenette
Julie Finn
Chief Michael Gahagan
Kim Monaghan
Cheryl Saniuk-Heinig

Absent:
Linda Cohen

Staff:
Lindsay Laxon
Colleen McCarthy Reid
Janet Stocco
Anne Davison

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

Committee/Subcommittee Topics – Items from Last Meeting
Staff introduced two topics the Advisory Committee decided at the previous meeting to move to today's meeting: (1) the use of radio encryption by law enforcement and (2) participation in the legislative process by residents of correctional facilities.

On the first point (radio encryption), the Committee wanted to hear from Judy Meyer as she served as chair of the subcommittee that looked at this topic last year. Ms. Meyer expressed disappointment at the lack of response from police agencies on the issue of radio encryption but recommended that the issue be tabled at this time.

On the second point (correctional facility residents' participation in the legislative process), Rep. Sheehan noted that expanded access to participation in the legislative process is something that the Advisory Committee has previously requested the Judiciary Committee and Criminal Justice Committee pursue through an informal study. Rep. Sheehan requested guidance from staff as to what this would look like (i.e. what constitutes an informal study).

Disciplinary Records of Public Employees

Presentation of LD 1397 and Background by Judy Meyer

Staff provided an overview of LD 1397 and Judy Meyer discussed the concerns that sparked the bill in the first place, outlining local papers' attempts to access disciplinary records for several specific state troopers.

The papers' record requests were denied because, according to Ms. Meyer, records were not in the disciplinary files. The papers, the *Press Herald* and *Bangor Daily News*, began to question how disciplinary records are kept by other police departments in the State and the Maine Freedom of Information Coalition decided to issue FOAA requests to all Maine police departments, seeking access to disciplinary records going back 5 years. Ms. Meyer described how responses were "spotty," sometimes reflecting a police department's lack of disciplinary records; other departments had very detailed, readily accessible records going back decades. It became clear that there is not a standard in the State for how police departments should create and maintain disciplinary records, nor guidelines relating to record accessibility. Ms. Meyer noted that this issue extends beyond police departments and their disciplinary records to all public employees.

Interested Party Perspectives

1. **Ben Grant – General Counsel, Maine Education Association**

   Mr. Grant, representing the Maine Education Association, told the Committee that concerns about police disciplinary records could be addressed through more targeted legislation – i.e. through legislation directed only at police departments and their record-keeping, not at all public bodies and employees. As written, Mr. Grant noted that LD 1397 is too broad and would undermine and implicate labor relations at municipal, county and state levels. Mr. Grant said that while the MEA would like to see FOAA used "appropriately," public employees' privacy concerns should also be kept in mind.

   Mr. Grant answered committee members' questions after briefly outlining the MEA's position, including a question about how he would justify a focus on only police departments and their records and record-keeping practices if the legislation were changed so that it was more targeted and did not apply to all public employees. Mr. Grant's response was that, while he had sensitivity to police officers, he believed incremental change was the way to go, starting with legislation focused on police departments and officers rather than focusing from the outset on the disciplinary records of all public employees. Elaborating on his earlier point about investigations and undermining labor relations, Mr. Grant stated that while a small minority of public employees may be engaged in bad behavior that the public should know about, the overwhelming majority of public employees do not engage in bad behavior. Making disciplinary records for more minor offenses or investigations public would be unnecessarily burdensome, according to Mr. Grant, and could deter people from entering or staying in the profession.

   The members discussed different types of misconduct and how discipline for school employees is reported to the Department of Education. Staff will share relevant statutes from Title 20-A with members at the next meeting.

2. **Paul Gaspar – Executive Director of the Maine Association of Police, Maine Law Enforcement Coalition**

   Paul Gaspar, Executive Director of the Maine Association of Police, joined the meeting remotely and argued for a consistent policy with respect to all public employees, saying that if one group of public employees is to be held accountable (e.g. police officers), all should be held accountable. Mr. Gaspar agreed with Mr. Grant that there are some aspects of a person's employment history that, even if embarrassing or illustrative of poor decision-making, should not be made public. Mr. Gaspar also voiced concern over vacancies and employee retention, suggesting that being under such scrutiny could further deter people from entering or staying in law enforcement positions.

The members asked about how a disciplinary action impacts certification through the Maine Criminal Justice Academy. Staff will share relevant statutes from Title 25 with members at the next meeting.

3. **Dean Staffieri – President, Maine Service Employees Association**

Dean Staffieri, President of the Maine Service Employees Association, read aloud the testimony he submitted in advance of the meeting. Mr. Staffieri urged caution and called for balance, stating: "While transparency and accountability are essential principles in government, we must approach [making public employee disciplinary records public] with great caution." Similar to Mr. Grant and Mr. Gaspar, Mr. Staffieri said that making records public without clear guidelines and safeguards has the potential to deter workers from careers in public service. Mr. Staffieri also vocalized a concern that disciplinary records could be weaponized against workers, with consequences that are felt for the remainder of an individual's career, and discouraged passing legislation that has the potential to override collective bargaining agreements.

4. **Tom Feely – General Counsel, Maine Service Employees Association**

Tom Feely, General Counsel for the Maine Service Employees Association, noted that although the requirements related to written employee disciplinary records arose in the context of worker protections, these written records are increasingly being weaponized and used against workers. Mr. Feely asserted that this is the case because, with increasing frequency, records are made a part of employees' permanent records, something Mr. Feely called "detrimental to labor harmony." Mr. Feely also warned that proposals to make disciplinary records a part of workers' files for lengthy periods of time could incentivize employees to challenge more disciplinary decisions through arbitration.

5. **Kate McBrien, State Archivist – Maine State Archives**

Kate McBrien, the Maine State Archivist, spoke on behalf of the Maine State Archives' Advisory Board, conveying the Advisory Board's views concerning proposed changes to records retention schedules contained in section 5 of LD 1397. Ms. McBrien conveyed the Advisory Board's view that, in a majority of cases, 5 years is a sufficient period of time to retain written decisions concerning public employees and disciplinary action. Ms. McBrien also conveyed the Advisory Board's opinion that 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 Advisory Board's recommendation, according to Ms. McBrien, is that the Department of Public Safety be consulted and tasked with creating an individual agency record retention schedule to address the final written decision of a disciplinary action of law enforcement officers. The Advisory 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. As a specific agency schedule, the law enforcement record retention schedule would override the general schedule that relates to other public employees in the State. Ms. McBrien answered committee members' questions, including questions about the size and composition of the Maine State Archives' Advisory Board (10 members, each member with specific expertise, as set out in the governing statute, 5 MRS, §96) and how the Maine State Archives would encourage local governments to create specific law enforcement records retention schedules to align with the schedule developed for the Maine State Police.

6. **Paul Cavanagh, Staff Attorney – Maine State Police, Department of Public Safety**

   Paul Cavanagh, Staff Attorney for the Maine State Police and Department of Public Safety, was present in-person to answer committee members' questions near the end of the meeting. Mr. Cavanagh emphasized that issues regarding law enforcement disciplinary records are incredibly complicated and urged that they be kept confidential. He 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.

Public Comment

The Advisory Committee did not receive any public comment related to public access to disciplinary records of public employees.

Next meeting

The next meeting is scheduled for **Monday, November 6, 2023 @ 1:00 p.m.** The location of the meeting is State House, Room 228.

The final Advisory Committee meeting is scheduled for:

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

The meeting was adjourned at 3:35 p.m.

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

October 23, 2023

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

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

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

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

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

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

TESTIMONY OF TOM FEELEY, GENERAL COUNSEL

MAINE SERVICE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989

BEFORE THE RIGHT TO KNOW ADVISORY COMMITTEE

WRITTEN COMMENTS REGARDING LD 1397

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

October 23, 2023

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10/23/23
RTKAC Mtg.

Shenna Bellows
Secretary of State

MAINE STATE ARCHIVES

Department of the Secretary of State

Katherine McBrien
Maine State Archivist

Maine State Archives Recommendations for LD 1397

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

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

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

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

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

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

current retention schedule nuances

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

will create specific law enforcement retention schedules

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

Laxon, Lindsay

From: Marcus Wraight <marcus@wraight.law>
Sent: Friday, November 3, 2023 1:12 PM
To: Laxon, Lindsay
Subject: RTKAC public comment

Ms. Laxon,
I respectfully submit the following as a comment for Monday's meeting. I hope it is helpful.
My interest in access to the disciplinary records of public employees is as a criminal defense attorney and would cover law enforcement officers and others, such as state experts. Any state employee called as a witness would be covered in my concerns about the status quo.
Destruction of records that is currently allowed by the State Archivist's retention schedule subcontracts access to public records to private contracts in the form of collective bargaining agreements (CBAs). Record retention should be set by the legislature so that documents are available to the public, and not thwarted by such contractual arrangements - as a matter of principle. Some entities allow destruction (not just separation from a personnel file) within months. Public records about discipline should be above negotiating the slalom of various timelines of document destruction in different CBAs before a FOAA request can be made to know they even exist. Records can still be separated for the purpose of tiered discipline, but retained for public records purposes without any issue. Make no mistake. This is about a reluctance to disclose, which needs to be protected. Retention must be uniformly applied state-wide.
There is also an important public policy and legal reason why this practice is hugely problematic. Under Brady v. Maryland (and its progeny, such as Giglio v. United States), impeachment material of witnesses should be disclosed as part of a constitutional obligation of discovery for defendants in criminal cases. This case law is commonly misunderstood, conveniently, and defined narrowly. Discovery of disciplinary records about a state witness in a criminal case is not just about a witness's veracity, accuracy, or the like. If a witness, such as a police officer, testifies that they have never been disciplined, or they always follow policy, and they have been or do not, that is a misstatement that can and should be impeached during a trial. It is the *process of impeachment* that undermines credibility, NOT what the discipline was about. Whether the discipline was for being late, or missing a shift - the misstatement was made. It is incumbent on a prosecutor to disclose before that point to allow that impeachment to happen - or at least give a defendant an opportunity to decide whether to do so through counsel. If a record is shredded, a prosecutor's obligation remains but becomes a hollow one if there is no record to disclose. No one will ever know about the misstatement or that an ability to impeach was lost. This hampers the truth-seeking function of courts and trials. Injustices are inevitable. The current practice must end. Disciplinary records must be retained uniformly for a period of years. State entities should not be able to adopt a patchwork of retention based on the negotiating prowess of union representatives of those to whom the records pertain. They have a job to do in protecting members and can't be faulted for doing so brilliantly. However, foxes do not make good guardians of henhouses.
M

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"Errors do not cease to be errors simply because they're ratified into law." E.A. Bucchianeri, *Brushstrokes of a Gadfly*.

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To: Honorable Members of the Right to Know Advisory Committee

Fr: Rebecca Graham, Senior Legislative Advocate, Maine Municipal Association

Re: Municipal Perspective on Disciplinary Records Retention & Disclosure

Date: December 4, 2023

Maine Municipal Association is a voluntary membership organization the represents the interest of municipal government. The Association has a core belief that local government is a fundamental component of a democratic system of government. MMA is dedicated to assisting local governments, and the people who serve in local government, in meeting the needs of their citizens and serving as responsible partners in the intergovernmental system. MMA's services include advocacy, education, and information, professional legal and personnel advisory services, and group insurance self-funded programs.

My understanding is that the committee would like an overview of the municipal experience regarding the structure of progressive discipline for municipal employees as well as information around the nexus of collective bargaining agreements and arbitration around disciplinary matters. As you may imagine, each department of a full-time municipality may have multiple bargaining agreements centered on each service level expectation, pay and benefits so there is no single approach to how such agreements are established.

For this reason, I will try to address some of the common elements in collective bargaining agreements and ways in which the "notwithstanding" might misunderstand the role terms like "purge" or "removal" play in progressive discipline. 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. Most contracts have language that state records removed from an employee's personnel file may be stored elsewhere in the city's records. A stellar employee who has an unexpected period of behavioral issues is far more likely to be adversely impacted by minor violations if retention of disciplinary records must be kept in a personnel file, instead of simply must be retained.

Additionally, complainants or victims of behavioral issues deserve some consideration with regard to public disclosure to prevent a chilling effect on the reporting of conduct that could otherwise go unseen by supervisors without such disclosure. Final records of discipline should either include a victim or complainant automatic anonymity or the right to not be included by name in the final action. Final records of discipline also include records that the individual employee or complainant or victim may have no knowledge have occurred and require no written reply process. For instance, a colleague may be privy to conduct towards a third party that is below an agency standard through conversation or disclosure from the employee and may report that to a supervisor without the third party's knowledge or consent.

Progressive discipline is a fact and situationally dependent process that must bear a reasonable relationship to the violation. This makes categorizing types of records slightly more nuanced than severity of conduct alone. Even counseling, and verbal warnings are recorded in writing and would be considered a record of final action for the purposes of these records, but unlike the other written documentation do not have a built in appeal or employee reply inclusion because the intent is educate and provide information to the individual around the expected standard and make sure there is not a failure in communication from the supervisor or training system. This is also an important first step in establishing a pattern of behavior that may need additional management steps. Severity of offenses can lead to skipping this process entirely and move directly to a more severe disciplinary action.

For public safety employees, disciplinary action can be triggered by conduct that no other municipal employee would be subject to, and thus the "purging" or "removal" of disciplinary records relate more to how long they can be used against the employee for the progressive escalation of discipline. For instance, failure to adequately pass annual physical fitness tests, preventable spills or unintentional damage to municipal equipment or wear all appropriate pieces of a uniform can reach a severity leading to termination through escalating disciplinary action if they become repetitive or are adjacent to other violations in a certain time period.

A common pattern for escalating discipline is; (1) counseling an employee about the performance deficit and conveying of the expected standard and assessing if more training may be needed or if the employee may be unaware of the standard; (2) verbal warning to the employee usually detailing the unsatisfactory performance and notice that continued failure will lead to harsher discipline; (3) a written reprimand which includes the cause for the action, outlines the corrective action that must be taken with time frames and possible action should the employee fail to comply. This action also has a right of reply by the employee that is also recorded and placed in the file. More than one written warning may be issued but a "final written warning" is usually labeled as such to designate further that next actions will be significant should they occur within a specific time frame this often bears a nexus to both the severity of the offense and the timeline for removal from the employee's file. Likewise, a "first written warning" may also be issued based on the violation.

All these pieces are recorded in an employee's record, even when verbal.

Written warnings provide a statement of the disciplinary actions to be taken along with the effective date, a statement as to why the discipline has been chosen and the nature of the violation along with any supporting material or evidence where appropriate. Additional escalating steps include disciplinary demotions, temporary removal from duty that may include pay or be unpaid, and immediate discharge. Each one of these steps includes a notice with any salary related sanctions, and discharge may include a hearing notice with the facts of the situation, notice of employee rights to appeal. Often the final discharge is signed off and approved by the municipal head such as the city manager or administrator.

Arbitration for employee disciplinary action is an intensive process that can overturn a disciplinary decision if the employee in question can illustrate that similar behavior in other employees was not equally disciplined, or that the action did not bear a reasonable or proportional relationship to the violation. The parties to arbitration have a time limited procedure to agree on the arbitrator who will review all the facts of the case and related disciplinary processes to determine if there was either a technical deficit such as the lack of recording of counselling or verbal warning standards, or an unfair application of standards. The decision of the arbitrator is often outlined as binding and the costs are usually borne equally by both parties. The final decision of the arbitrator can be a removal of the records from the personnel file that led to the termination and full reinstatement of the employee to duty.

I hope this helps clarify some of the municipal reality around employee disciplinary records. I am happy to answer or find answers to any additional questions you may have.

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

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,

Anne Carney

Sen. Anne M. Carney
Senate Chair

Matt Moonen

Rep. Matthew W. Moonen
House Chair

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

MAINE SUPREME JUDICIAL COURT
Decision: 2013 ME 100
Docket: Cum-13-155
Argued: September 9, 2013
Decided: November 14, 2013

Reporter of Decisions

Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, MEAD, GORMAN, and JABAR, JJ.

MAINETODAY MEDIA, INC.

v.

STATE OF MAINE

GORMAN, J.

[¶1] MaineToday Media, Inc., d/b/a Portland Press Herald/Maine Sunday Telegram, appeals from a decision of the Superior Court (Cumberland County, *Cole, J.*) upholding the State of Maine's denial of MaineToday's request to inspect and copy Enhanced 9-1-1 (E-9-1-1) call transcripts. MaineToday argues that the Freedom of Access Act (FOAA), 1 M.R.S. §§ 400-414 (2012), mandates disclosure of the transcripts as public records and that no exception to their disclosure applies.[1] We vacate the judgment.

[1] The Reporters Committee for Freedom of the Press, the New England First Amendment Center, the Maine Association of Broadcasters, the Maine Freedom of Information Coalition, the Maine Press Association, and the Associated Press have filed a joint amicus curiae brief in support of MaineToday's position.

I. BACKGROUND

[¶2] The parties stipulated to the following facts. During 2012, Derrick Thompson, his mother Susan Johnson, and his girlfriend Alivia Welch were renting an apartment in Biddeford from landlord James Earl Pak. On December 29, 2012, at 6:07 p.m., Thompson placed a call to E-9-1-1 regarding an altercation with Pak. Biddeford police responded to the call and left after speaking with Thompson and Pak. Three minutes after police left the scene, and forty-seven minutes after Thompson's initial E-9-1-1 call, Johnson placed a second call to E-9-1-1 to report that Pak had shot her, Thompson, and Welch.[2] Eight minutes after that, Pak's wife, Armit Pak, placed a third call to E-9-1-1. All three calls were recorded and transcripts for each have been prepared.

[¶3] On January 2, 2013, MaineToday sent the first of a series of requests to inspect and copy the three Pak transcripts to the Biddeford Police Department, the Maine State Police within the Department of Public Safety (MSP), the Attorney General's Office, and the Bureau of Consolidated Emergency Communications.[3]

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[2] Pak was charged by criminal complaint on December 31, 2012, and held without bail. *State v. Pak*, ALFSC-CR-2012-2747 (Me. Super. Ct., York Cty.). On February 5, 2013, he was indicted on two counts of intentional or knowing murder, 17-A M.R.S. § 201(1)(A) (2012); one count of aggravated attempted murder (Class A), 17-A M.R.S. § 152-A(1) (2012); one count of elevated aggravated assault (Class A), 17-A M.R.S. § 208-B(1)(A) (2012); and one count of burglary (Class A), 17-A M.R.S. § 401(1)(B)(1) (2012). Pak pleaded not guilty to all charges, is undergoing psychiatric evaluations, and remains in jail awaiting his trial.

[3] Although MaineToday eventually requested "all E-9-1-1 transcripts in connection with all active homicide investigations and all ongoing homicide prosecutions, including but not limited to the three calls

The State[4] denied the requests on the ground that the transcripts constituted "intelligence and investigative information" in a pending criminal matter, and therefore were confidential pursuant to the Criminal History Record Information Act (the CHRIA), 16 M.R.S. §§ 611-623 (2012).

[¶4] MaineToday petitioned the Superior Court for review of the State's denial pursuant to 1 M.R.S. § 409(1). In March of 2013, after conducting a hearing and an *in camera* review of the unredacted transcripts and the audio recordings of each E-9-1-1 call in the Pak matter, the court affirmed in its entirety the State's denial of MaineToday's request. MaineToday appeals.

II. DISCUSSION

[¶5] This case "highlights the conflict that exists between the public interest in open access to governmental records, on the one hand, and the public interest in protecting the integrity of criminal investigations . . . on the other." *Lewiston Daily Sun v. City of Lewiston*, 596 A.2d 619, 622 (Me. 1991). We consider, for the first time, the public disclosure of information transmitted through E-9-1-1 calls by evaluating the interplay of three distinct Maine statutes—FOAA; the CHRIA; and the emergency services communication statute (the ESC), 25 M.R.S. §§ 2921-2935 (2012).

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on the day of the James Pak shooting," the parties' argument focuses only on the Pak transcripts, and those are the only transcripts we consider in this appeal.

[4] The State, as represented by the Attorney General's office, apparently accepted the ultimate responsibility for responding to MaineToday's requests.

[¶6] In interpreting these provisions, we first look to the plain language of the provisions to determine their meaning. *Anastos v. Town of Brunswick*, 2011 ME 41, ¶ 9, 15 A.3d 1279. If the language is unambiguous, we interpret the provisions according to their unambiguous meaning "unless the result is illogical or absurd." *Cyr v. Madawaska Sch. Dep't*, 2007 ME 28, ¶ 9, 916 A.2d 967. If the plain language of a statute is ambiguous—that is, susceptible of different meanings—we will then go on to consider the statute's meaning in light of its legislative history and other indicia of legislative intent. *Anastos*, 2011 ME 41, ¶ 9, 15 A.3d 1279; *Competitive Energy Servs. LLC v. Pub. Utils. Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039.

[¶7] Pursuant to 1 M.R.S. § 409(1), the Superior Court conducted "a trial de novo" to determine whether the denial of MaineToday's FOAA request "was not for just and proper cause." Although the parties filed an agreed-to statement of facts, we review any additional findings made by the Superior Court for clear error, and consider its legal conclusions, including the interpretation of the relevant statutory provisions, de novo. *Blethen Me. Newspapers, Inc. v. State*, 2005 ME 56, ¶ 10, 871 A.2d 523.

A. Applicable Statutes

1. Freedom of Access Act

[¶8] Like its federal counterpart, the Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (West, Westlaw through P.L. 113-31 approved 8-9-13),[5] FOAA's "basic purpose . . . is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[6] *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quotation marks omitted). The Legislature has declared that "public proceedings exist to aid in the conduct of the people's business," and enacted FOAA with the express intent that public actions "be taken openly and that the records of [public] actions be open to public inspection and [public] deliberations be conducted openly." 1 M.R.S. § 401; *see Citizens Commc'ns Co. v. Att'y Gen.*, 2007 ME 114, ¶ 9, 931 A.2d 503. To that end, FOAA requires generally that, "[e]xcept as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a

[5] "Cases decided pursuant to FOIA inform our analysis of Maine's FOAA." *Blethen Me. Newspapers, Inc. v. State*, 2005 ME 56, ¶ 13, 871 A.2d 523.

[6] "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up to*." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989) (quotation marks omitted).

reasonable time of making the request to inspect or copy the public record."[7] 1 M.R.S. § 408-A; *see S. Portland Police Patrol Ass'n v. City of S. Portland*, 2006 ME 55, ¶ 6, 896 A.2d 960. To best promote its "underlying purposes and policies as contained in the declaration of legislative intent," FOAA explicitly states that it must be "liberally construed and applied." 1 M.R.S. § 401.

[¶9] Excepted from the definition of public records, however, and therefore exempt from the general rule of disclosure, are records that fall within any one of nineteen categories set out in 1 M.R.S. § 402(3)(A)-(R). *See S. Portland Police Patrol Ass'n*, 2006 ME 55, ¶ 6, 896 A.2d 960. "The burden of proof is on the agency or political subdivision [from whom the information is sought] to establish just and proper cause for the denial of a FOAA request."[8] *Anastos*, 2011 ME 41, ¶ 5, 15 A.3d 1279 (quotation marks omitted); *see* 1 M.R.S. § 408-A(4). Further, the necessary corollary of the directive to liberally construe FOAA is the "strict

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[7] A "public record" is

> any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business.

1 M.R.S. § 402(3) (2012).

[8] To the extent we have suggested that the party who submitted a FOAA request bears the burden of establishing a FOAA violation, we clarify now that it is the agency's burden—in denying the request, before the Superior Court, and before us—to show that some exception to FOAA applies. *See, e.g., Yusem v. Town of Raymond,* 2001 ME 61, ¶ 16, 769 A.2d 865; *Chase v. Town of Machiasport*, 1998 ME 260, ¶ 9, 721 A.2d 636.

construction of any exceptions to the required public disclosure," *Citizens Commc'ns*, 2007 ME 114, ¶ 9, 931 A.2d 503.

[¶10] The parties do not dispute that the audio recordings of E-9-1-1 calls and documents transcribing those audio recordings are in the possession of one or more government agencies—here, the Bureau of Emergency Services Communication, the Attorney General's Office, the Biddeford Police Department, the Maine State Police, and the Department of Public Safety, at least—and are used in connection with public or governmental business, that is, the provision of public emergency services. *See* 1 M.R.S. § 402(3); *Dow v. Caribou Chamber of Commerce & Indus.*, 2005 ME 113, ¶¶ 10-18, 884 A.2d 667 (discussing whether an entity is a government agency with reference to its function, source of funding, whether the government maintains involvement in or control over the entity, and whether it was created by private or legislative action).

[¶11] The audio recordings of E-9-1-1 calls and the transcripts of those calls therefore are subject to disclosure as public records unless they fall within one of the exceptions found in 1 M.R.S. § 402(3)(A)-(R). Of these, the only exception relevant to the present matter is one for "[r]ecords that have been designated confidential by statute." 1 M.R.S. § 402(3)(A). Whether the transcripts of the Pak E-9-1-1 calls do not qualify as public records and are exempt from FOAA because

they are confidential pursuant to a statute first depends on an analysis of the ESC, and then on the application of the CHRIA.

2. Emergency services communication

[¶12] Pursuant to the ESC, it is the duty of the Emergency Services Communication Bureau (the Bureau), within the Public Utilities Commission, to "implement and manage" the E-9-1-1 system.[9] 25 M.R.S. § 2926(1). Pursuant to 25 M.R.S. § 2926(3), the Bureau has promulgated various rules regarding the E-9-1-1 system. 9 C.M.R. 65 625 001 (2007). These rules provide, inter alia, that both sides of the conversation for every incoming E-9-1-1 call must be recorded, with the year, date, and time of each call contemporaneously documented. 9 C.M.R. 65 625 001-4 § 3(4)(B). Those recordings must be retained for at least thirty days, and ideally, for at least sixty days. 9 C.M.R. 65 625 001-4 § 3(6)(B)(3). The statute further provides that "[t]he system databases, wherever located or stored, are the property of the bureau and their confidentiality is governed by section 2929." 25 M.R.S. § 2926(6).

[¶13] Section 2929, in turn, draws a distinction between the transcripts of E-9-1-1 calls and the audio recordings of the calls; it states that although the

[9] Although MaineToday filed its FOAA request with the Bureau of Consolidated Emergency Communications, that agency is part of the Department of Public Safety and provides call-taking and dispatching services for municipalities and entities that do not have their own public safety answering point. 25 M.R.S. §§ 1533, 2923-A (2012). It is the Emergency Services Communication Bureau, within the Public Utilities Commission, that administers the E-9-1-1 system and maintains E-9-1-1 records. 25 M.R.S. § 2926(1), (6) (2012).

E-9-1-1 audio recordings are "confidential and may not be disclosed," the "information contained in the audio recordings is public information and must be disclosed in transcript form." 25 M.R.S. § 2929(4).

[¶14] When an E-9-1-1 transcript is requested pursuant to section 2929(4), however, "confidential information" from that call, as defined in 25 M.R.S. § 2929(1), may not be disclosed.[10] For purposes of section 2929, only the names, addresses, telephone numbers, and certain medical information of particular people qualifies as "confidential information." In addition, the statute expressly provides that when a transcript contains such "confidential information," any other information from those calls that is not "confidential information" remains subject to the disclosure requirements of FOAA. 25 M.R.S. § 2929(3).

[¶15] In short, title 25 may be read consistently with FOAA to require that, upon request, E-9-1-1 transcripts—but not the audio recordings themselves—must be disclosed after any "confidential information" as defined in section 2929(1) is removed.[11] The next issue, then, is whether, even if redacted pursuant to section

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[10] The statute contains exceptions that allow the disclosure of E-9-1-1 audio recordings, including "confidential information" from those recordings, to certain agencies for specific purposes. 25 M.R.S. § 2929(2)(A)-(D), (4)(A)-(D) (2012). None of these exceptions applies here.

[11] The issue of redaction itself is also the subject of some dispute. The statute requires the excising of confidential information from an otherwise public document. 25 M.R.S. § 2929(1)-(3) (2012); *see Springfield Terminal Ry. Co. v. Dep't of Transp.*, 2000 ME 126, ¶ 11 n.4, 754 A.2d 353. In some instances, however, the information "cannot be dissected into sensitive and nonsensitive information because [it is contained in] a single, integrated [document]. *Anastos v. Town of Brunswick*, 2011 ME 41, ¶ 12, 15 A.3d 1279. The Superior Court in this matter determined that redaction was not appropriate: "Due to the abstract nature of the danger, redacting the transcripts is not feasible . . . ." The State does not

2929, the Pak E-9-1-1 transcripts are otherwise "designated confidential by statute" such that they do not meet the definition of public records and the disclosure generally mandated by FOAA does not apply. 1 M.R.S. § 402(3)(A). The statute on which the State relies in arguing that the E-9-1-1 transcripts are "designated confidential by statute" is the CHRIA.

3. Criminal History Record Information Act

[¶16] The CHRIA dictates whether, when, to whom, and how criminal history information may be disclosed. 16 M.R.S. §§ 611-623. As it applies to the present matter, the CHRIA limits the "dissemination of intelligence and investigative information" as follows:[12]

> **1. Limitation on dissemination of intelligence and investigative information.** Reports or records that contain intelligence and investigative information and that are prepared by, prepared at the direction of or kept in the custody of a local, county or district criminal justice agency; the Bureau of State Police; [or] the Department of the Attorney General . . . are confidential and may not be disseminated if there is a reasonable possibility that public release or inspection of the reports or records would:
>
> **A.** Interfere with law enforcement proceedings;
>
> **B.** Result in public dissemination of prejudicial information concerning an accused person or concerning the prosecution's

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argue that the transcripts here are too integrated with confidential information to redact, but rather that "surgical redaction" is too burdensome for it to accomplish. The statute contains no exception to disclosure based on the onerousness of the task, however.

[12] The intentional dissemination of confidential intelligence and investigative information is a Class E crime. 16 M.R.S. § 614(4) (2012).

> evidence that will interfere with the ability of a court to impanel an impartial jury;
>
> **C.** Constitute an unwarranted invasion of personal privacy;
>
> **D.** Disclose the identity of a confidential source;
>
> **E.** Disclose confidential information furnished only by the confidential source;
>
> **F.** Disclose trade secrets or other confidential commercial or financial information designated as such by the owner or source of the information or by the Department of the Attorney General;
>
> **G.** Disclose investigative techniques and procedures or security plans and procedures not generally known by the general public;
>
> **H.** Endanger the life or physical safety of any individual, including law enforcement personnel;
>
> **I.** Disclose conduct or statements made or documents submitted by any person in the course of any mediation or arbitration conducted under the auspices of the Department of the Attorney General;
>
> **J.** Disclose information designated confidential by some other statute; or
>
> **K.** Identify the source of complaints made to the Department of the Attorney General involving violations of consumer or antitrust laws.
>
> . . . .

16 M.R.S. § 614(1). The unambiguous language of section 614 demonstrates the Legislature's intent to shield law enforcement from the obligation to disclose

materials that might compromise its public safety mission. As we have said, the "important policy objectives" of section 614 are those of

> (1) protecting the integrity of criminal prosecutions and the constitutional right of those charged with crimes to a fair and impartial jury; (2) maintaining individual privacy and avoiding the harm that can result from an unjustified disclosure of sensitive personal or commercial information; and (3) ensuring the safety of the public and law enforcement personnel.

Blethen Me. Newspapers, Inc., 2005 ME 56, ¶ 12, 871 A.2d 523 (footnotes omitted).

[¶17] Despite these important objectives, confidentiality pursuant to the CHRIA is afforded only if the record that the government seeks to shield (1) contains intelligence or investigative information; (2) was prepared by or at the direction of, or is kept in the custody of, a criminal justice agency; and (3) would, if disclosed, create a reasonable possibility of one or more of the harms detailed in section 614(1)(A)-(K).

B. Analysis

1. Intelligence or investigative information

[¶18] For purposes of section 614, "intelligence and investigative information" is defined as

> information collected by criminal justice agencies or at the direction of criminal justice agencies in an effort to anticipate, prevent or monitor possible criminal activity, including operation plans of the collecting agency or another agency, *or* information compiled in the course of investigation of known or suspected crimes, civil violations

> and prospective and pending civil actions. "Intelligence and investigative information" does not include information that is criminal history record information.

16 M.R.S. §§ 611(8) (emphasis added). Section 611(8) therefore presents two alternatives by which a record could meet this definition—if it is collected by or at the direction of a criminal justice agency with regard to criminal activities *or* if it is compiled in the course of investigating a crime. [13]

a. Collected by or at the direction of a criminal justice agency

[¶19] Because the ESC makes clear that E-9-1-1 transcripts are the property of the Bureau no matter where they are located or stored, the entity at issue in determining whether E-9-1-1 transcripts are collected by or at the direction of a criminal justice agency is the Bureau itself. 25 M.R.S. § 2926(6).

[¶20] A "[c]riminal justice agency" is defined as "a federal, state, district, county or local government agency or any subunit thereof that performs the administration of criminal justice under a statute or executive order, and that allocates a substantial part of its annual budget to the administration of criminal justice" and includes "[c]ourts and the Department of the Attorney General." 16 M.R.S. § 611(4).

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[13] To the extent MaineToday suggests that information compiled in the investigation of a crime only qualifies as intelligence or investigative information if it was compiled by a criminal justice agency, it has misread the plain terms and structure of the statute, which provides for two distinct alternatives. 16 M.R.S. § 611(8) (2012).

[¶21] The Bureau is part of the Public Utilities Commission. 25 M.R.S. § 2926(1). It "implement[s] and manage[s] E-9-1-1" by developing system elements, providing quality assurance, and providing call coverage and technical support, and is funded through statewide surcharges on telecommunications services. 25 M.R.S. §§ 2926, 2927. Although the Bureau's product is certainly used for criminal justice purposes on a daily basis, the Bureau manages the telecommunications necessary for the provision of emergency services, and does not meet the definition of a criminal justice agency.

b. Compiled in investigating a crime

[¶22] Alternatively, the E-9-1-1 transcripts qualify as intelligence or investigative information if they were "compiled" for purposes of investigating known or suspected crimes. 16 M.R.S. § 611(8).

[¶23] The United States Supreme Court has had occasion to consider the meaning of "compile" pursuant to FOIA. In *John Doe Agency*, the Supreme Court noted that a compilation, "in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents" and "seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes." 493 U.S. at 153. The Supreme Court also took pains to note that "compiled" is not synonymous with "originally compiled," and thus includes information gathered from multiple sources, and created at

previous times and for different purposes. *Id.* at 154. In short, the Supreme Court held, "information originally compiled for a non-law-enforcement purpose" can nevertheless be exempt from disclosure "when it is recompiled at a future date for law enforcement purposes." *Id.* at 157.

[¶24] According to the plain language of this portion of section 614, as informed by the analyses in *John Doe Agency*, the State has established that the transcripts are intelligence and investigative information pursuant to this alternative.[14] Although the audio recordings and transcripts were created by the Bureau for administrative purposes, we agree that the Maine State Police, the Attorney General's Office, and/or the Biddeford Police Department have "compiled" them for the purpose of investigating the crimes with which Pak was charged.

2. Preparation or custody

[¶25] Next, section 614 applies only to that information prepared for or maintained by particular government agencies or types of agencies. Here, the E-9-1-1 transcripts, even if not prepared by or at the direction of law enforcement,

[14] There is no dispute that the information requested by MaineToday does not constitute "criminal history record information," defined as "notations or other written evidence of an arrest, detention, complaint, indictment, information or other formal criminal charge relating to an identifiable person," including "the identification or description of the person charged and any disposition of the charge." 16 M.R.S. §§ 611(3), (8) (2012).

are kept in the custody of the Bureau of State Police or the Department of the Attorney General, two entities specifically named in section 614(1).[15]

3. Reasonable possibility

[¶26] Finally, it was the State's burden to establish that disclosing the transcripts would create a reasonable possibility of one or more of the harms detailed in section 614(1)(A)-(K).[16] Because the CHRIA does not define a "reasonable possibility" for purposes of determining the scope of a FOAA exception, we look to the plain and ordinary meaning of the terms. *See State v. Paradis*, 2010 ME 141, ¶ 6, 10 A.3d 695. "Reasonable" means "the product of a rational thought process." *State v. Estes*, 418 A.2d 1108, 1115 (Me. 1980) (quotation marks omitted). It may be defined as "[f]air, proper, or moderate under

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[15] MaineToday suggests that even if the copies of the transcripts in the police and prosecutors' files are confidential pursuant to section 614, the copies in the Bureau files are not, given that the transcripts continue to be the property of Bureau no matter where they are stored or how they now are being used, *see* 25 M.R.S. §§ 2926(6), 2929(3) (2012). This argument is not persuasive. We have held that the "location of the document has no bearing on its status" unless the statute affording confidentiality states that such confidentiality depends on where the information is physically kept. *S. Portland Police Patrol Ass'n v. City of S. Portland*, 2006 ME 55, ¶ 8, 896 A.2d 960; *see Cyr v. Madawaska Sch. Dep't*, 2007 ME 28, ¶ 17, 916 A.2d 967 (Calkins, J., dissenting) ("The physical location of the information is not important."). Indeed, allowing the dissemination of the Bureau version of a transcript while maintaining the statutory confidentiality of the AG's identical copy of the same transcript would render the purpose of that statutory confidentiality a complete nullity. The danger is not, as MaineToday contends, that law enforcement can render confidential any document merely by placing it in a police file, but instead that one agency would disclose a document that another agency is entitled to keep confidential. *See Lewiston Daily Sun v. City of Lewiston*, 596 A.2d 619, 622 (Me. 1991) ("[T]he consequences of an erroneous public release are irreversible."). In fact, the Legislature clearly intended that the requirements of the CHRIA, in conjunction with those of the ESC, be rigorous enough to preclude the sheltering of a public document in an unrelated confidential file. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989) (stating that "[e]vasional commingling" is prevented by the language of the statute requiring consideration of the nature of each document).

[16] As a practical matter, this may need to be accomplished through the submission of sealed files or an *in camera* review. *See Springfield Terminal Ry. Co.*, 2000 ME 126, ¶ 14, 754 A.2d 353.

the circumstances," Black's Law Dictionary 1379 (9th ed. 2009), or as "not absurd," "not ridiculous," "not extreme," or "not excessive," Webster's Third New International Dictionary 1892 (2002).

[¶27] As we have stated in other contexts, a reasonable possibility is different, and less burdensome to prove, than a reasonable *probability*; it is synonymous with a "reasonable likelihood," and is a lower standard than a preponderance of the evidence. *See State v. Pabon*, 2011 ME 100, ¶ 35, 28 A.3d 1147 (considering the reasonable possibility standard for determining the likelihood that a different jury instruction would have led to a more favorable verdict); *Terry v. T. J. C. Coin & Stamp Co.*, 447 A.2d 812, 814 (Me. 1982) ("Reasonable possibility is a standard less onerous than proof that success is more likely than not." (quotation marks omitted)); *Bowman v. Dussault*, 425 A.2d 1325, 1328 (Me. 1981) (evaluating the propriety of an attachment order based on whether the underlying claim has a "reasonable possibility of recovery").

[¶28] The State asserted to MaineToday and before the Superior Court that disclosing the E-9-1-1 transcripts would create the reasonable possibility of interfering with law enforcement proceedings pursuant to 16 M.R.S. § 614(1)(A).[17]

[17] The State also asserted that disclosing the transcripts would interfere with its ability to impanel an impartial jury pursuant to 16 M.R.S. § 614(1)(B), and would invade the personal privacy of those involved pursuant to 16 M.R.S. § 614(1)(C). The Superior Court determined that the State did not meet its burden as to either of these two grounds, and the State did not appeal those portions of the court's decision. Thus, we do not consider the State's contentions that it established these two alternative bases for maintaining the confidentiality of the Pak transcripts because they are not preserved for appellate

We considered a similar issue in *Campbell v. Town of Machias*, in which a woman sought—and was denied—access to police records regarding a report lodged against her by her bank. 661 A.2d 1133, 1134 (Me. 1995). We discussed the ways in which the disclosure of records could interfere with law enforcement proceedings—by "prematurely reveal[ing] the scope, nature or direction of the government's case"; "allow[ing] the target of a criminal investigation to construct defenses or to fabricate alibis"; "creat[ing] the possibility of harassment or intimidation of witnesses"; or "result[ing] in the destruction of evidence." *Id.* at 1136. We concluded that the prosecutor's justification for denying the request on grounds that disclosure would "compromise the case by providing discovery prior to a formal charged being lodged" against her, and would "interfere with the collection of evidence and might result in the harassment of witnesses" was sufficient to meet the State's burden because it was "the kind of showing approved" by federal courts in FOIA matters. *Id.* at 1136.

[¶29] Here, in contrast, the State identified no such specific concerns, but instead offered an explanation for the denial that merely reiterated the language of the statute itself. The timing of the charges also affects the comparison of *Campbell* with the present matter. Whereas the State in *Campbell* had not yet

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review. *See* M.R. App. P. 2(b)(4); *Langevin v. Allstate Ins. Co.*, 2013 ME 55, ¶ 6 n.4, 66 A.3d 585 (stating that when a party does not cross-appeal, its contentions of error by the trial court are not preserved for appellate review); *Lyle v. Mangar*, 2011 ME 129, ¶ 22, 36 A.3d 867 (same); *Millien v. Colby Coll.*, 2005 ME 66, ¶ 9 n.3, 874 A.2d 397 (same).

pursued any charges against the defendant, Pak had already been the subject of an initiating criminal complaint when MaineToday first requested the transcripts.[18] Although the State contends that, even while an indictment is pending, the investigation remains ongoing, it did not identify any particular investigation yet to be completed in the Pak matter or how those portions of the investigation could be affected by the availability of the Pak E-9-1-1 transcripts.[19] Rather, the State seeks a blanket rule that "in any active homicide investigation (including unsolved cases) and/or prosecutions, any E-911 recording and transcript constitutes intelligence and investigative information subject to 16 M.R.S. § 614," and that such recordings and transcripts fulfill the requirements of section 614 and therefore are confidential as a matter of course.

[¶30] The United States Supreme Court has rejected such "universal" approaches that ask the court to "presume that virtually every [record] is confidential" and render these rebuttable presumptions "in practice all but irrebuttable." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 175, 177 (1993). The Supreme Court instead interpreted FOIA to require a "more particularized

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[18] By the time MaineToday filed its petition with the Superior Court, Pak had already been indicted on the five counts.

[19] Even the Superior Court was unable to determine any specific evils that disclosure of the transcripts would cause, referring to the possibility of any resulting harm as "abstract," "hypothetical[]," and "impossible to conceive." Such unidentified and speculative harms are not the types of harm that FOAA seeks to prevent. FOAA's exceptions are to be narrowly construed to serve its larger purpose of transparency in government. 1 M.R.S. § 401; *Citizens Commc'ns Co. v. Att'y Gen.*, 2007 ME 114, ¶ 9, 931 A.2d 503.

approach" based on the circumstances surrounding each record at issue, which is an approach that more closely aligns with the purposes and language of the statute. *Id.* at 180. If the Maine Legislature had intended to exempt from disclosure all E-9-1-1 transcripts, or even all E-9-1-1 transcripts that relate to active homicide cases, it could have, as it did with juvenile fire setter records and ambulance medical reports, for example. *See* 1 M.R.S. § 402(3)(H)-(I); *Landano*, 508 U.S. at 178 (noting that there is "no persuasive evidence that Congress intended for [a law enforcement agency] to be able to satisfy its burden in every instance simply by asserting that [the record was obtained] during the course of a criminal investigation").

[¶31] Here, the Attorney General did not present any particularized possibility of harm. For example, there is no suggestion that other witnesses at the scene would amend their testimony to be consistent with that of the 9-1-1 callers. Given the broad purpose of FOAA and the narrow reach of its exceptions, and mindful of the presumptive right of public access to criminal court proceedings, *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980), we conclude that the State failed to meet its burden of establishing the reasonable possibility that disclosure of the Pak E-9-1-1 transcripts would interfere with law enforcement proceedings pursuant to section 614(1)(A). Thus, the Pak E-9-1-1

transcripts, as redacted pursuant to 25 M.R.S. § 2929(2)-(3), are public records subject to disclosure pursuant to the Freedom of Access Act.

The entry is:

> Judgment vacated and remanded to the Superior Court with instructions to enter a judgment requiring the State to disclose the E-9-1-1 call transcripts associated with the Pak matter, as redacted pursuant to 25 M.R.S. § 2929(2)-(3) (2012).

On the briefs:

Sigmund D. Schutz, Esq., and Jonathan G. Mermin, Esq., Preti Flaherty Beliveau & Pachios, LLP, Portland, for appellant MaineToday Media, Inc.

Janet T. Mills, Attorney General, and William R. Stokes, Dep. Atty. Gen., Office of Attorney General, Augusta, for appellee State of Maine

Patrick Strawbridge, Esq., Bingham McCutchen LLP, Boston, Massachusetts, for amici curiae The Reporters Committee for Freedom of the Press, New England First Amendment Center, Maine Association of Broadcasters, Maine Freedom of Information Coalition, Maine Press Association, and Associated Press

At oral argument:

Sigmund D. Schutz, Esq. for appellant MaineToday Media, Inc.

William R. Stokes, Dep. Atty. Gen., for appellee State of Maine

Cumberland County Superior Court docket number AP-2013-6
FOR CLERK REFERENCE ONLY

765 A.2d 73
Supreme Judicial Court of Maine.

Nancy A. HARDING
v.
WAL–MART STORES, INC.

Docket No. PEN–00–394.
|
Argued Dec. 13, 2000.
|
Decided Jan. 22, 2001.

Synopsis
Employer appealed from the judgment entered in the Superior Court, Penobscot County, Hjelm, J., affirming the judgment entered in the District Court, Newport, Stitham, J., ordering employer to disclose to its former employee internal investigative reports relating to an incident which led to the termination of her employment. The Supreme Judicial Court, Saufley, J., held that internal investigative reports were part of employee's "personnel file" for purposes of statute providing that employer shall, upon written request, provide former employee with copy of her personnel file which includes reports relating to her character and work habits.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***73** Janet T. Mills (orally), Wright & Mills, P.A., Skowhegan, for plaintiff.

Mark V. Franco (orally), Thompson & Bowie, Portland, for defendant.

***74** Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER, and CALKINS, JJ.

Opinion

SAUFLEY, J.

[¶ 1] Wal–Mart Stores, Inc., appeals from the judgment entered in the Superior Court (Penobscot County, *Hjelm, J.*) affirming the judgment entered in the District Court (Newport, *Stitham, J.*) ordering Wal–Mart to disclose to its former employee, Nancy Harding, internal investigative reports relating to an incident which led to the termination of Harding's employment. Wal–Mart contends that the court erred in concluding that internal investigative files are part of an employee's personnel file pursuant to 26 M.R.S.A. § 631 (Supp.2000). We affirm the judgment.

I. BACKGROUND

[¶ 2] Harding was terminated from her employment at the Palmyra Wal–Mart. The reason given for her termination was the "[u]nauthorized removal of company property." James Bryant, a loss prevention district supervisor for Wal–Mart, had conducted an investigation into an internal loss at the Wal–Mart store in Palmyra. Bryant interviewed several witnesses and obtained

statements from them. Bryant also interviewed Harding, who wrote a two-page statement. Based on Bryant's investigation, management of the Palmyra store terminated Harding's employment.

[¶ 3] Bryant is a Wal–Mart employee. After Harding was terminated, Bryant retained the statements and his notes on the investigation in a separate file which he kept in an office located in his home. Pursuant to Wal–Mart policy, Bryant did not put copies of the investigative records in Harding's personnel file.

[¶ 4] After she was discharged, Harding wrote to the store manager explaining her version of the events, but received no response. She then requested, first orally and then in writing, a copy of her personnel file. In her written request, she specifically asked for the documents relating to the investigation. In response, Wal–Mart twice gave her documents which included her evaluations, pay scale, application for employment, and a one-page "Exit Interview" form which simply stated that she was involuntarily terminated for the "unauthorized removal of company property." Wal–Mart did not, however, provide Harding with any of the statements or notes relating to Bryant's investigation.

[¶ 5] Harding then filed this action seeking access to the investigative records pursuant to 26 M.R.S.A. § 631. Although Wal–Mart eventually provided Harding a copy of the statement she had given to Bryant, as well as a copy of the letter she had sent to the store manager after her termination, it did not release to her any other records contained in Bryant's investigative file.

[¶ 6] After a hearing, the District Court held that the investigative records were components of Harding's personnel file pursuant to 26 M.R.S.A. § 631 and that Wal–Mart was required to produce the file at Bryant's request. The court found that Wal–Mart's failure to do so was in bad faith, assessed a civil forfeiture of $500, and required Wal–Mart to reimburse Harding for her reasonable attorney fees.

[¶ 7] Wal–Mart appealed to the Superior Court pursuant to M.R. Civ. P. 76D. The Superior Court affirmed the judgment of the District Court, and Wal–Mart filed this appeal.

II. DISCUSSION

[¶ 8] We are asked to determine whether an employer's records relating to investigations of allegations of employee wrongdoing are included in the statutory definition of "personnel file" set out at 26 M.R.S.A. § 631. Wal–Mart argues that materials regarding an internal investigation conducted by an employer do not constitute personnel records within the ***75** meaning of the section, first because such records are not identified by name in the language of section 631, and second, because inclusion of investigatory records in personnel files would be contrary to public policy.

A. Standard of Review

[¶ 9] "When a Superior Court acts in an appellate capacity, we directly review the record of the District Court." *Clum v. Graves,* 1999 ME 77, ¶ 9, 729 A.2d 900, 904. The facts here are not in dispute. The dispute turns on the statutory construction of section 631. "Because statutory construction is a matter of law, we review decisions regarding the meaning of a statute de novo." *Kimball v. Land Use Regulation Comm'n,* 2000 ME 20, ¶ 18, 745 A.2d 387, 392. "When reviewing the construction of a statute, '[w]e look first to the plain meaning of the statutory language as a means of effecting the legislative intent.' " *Home Builders Ass'n v. Town of Eliot,* 2000 ME 82, ¶ 4, 750 A.2d 566, 569 (alteration in original) (quoting *Coker v. City of Lewiston,* 1998 ME 93, ¶ 7, 710 A.2d 909, 910). "If the meaning of this language is plain, we must interpret the statute to mean exactly what it says." *Kimball,* 2000 ME 20, ¶ 18, 745 A.2d at 392 (quotations and citations omitted).

B. Plain Language

[¶ 10] 26 M.R.S.A. § 631 (Supp.2000) provides in pertinent part,

> For the purpose of this section, a personnel file includes, *but is not limited to,* any formal or informal employee evaluations and reports relating to the employee's *character,* credit, *work habits,* compensation and benefits and nonprivileged medical records or nurses' station notes relating to the employee that the employer has in the employer's possession.

Id. (emphasis added).

[¶ 11] Preliminarily, it is noteworthy that the Legislature did not limit documents included in a personnel file to those records physically included within a particular file folder; rather, the language of the statute makes it applicable to any such records "the employer has in the employer's possession." 26 M.R.S.A. § 631; *cf. Miller v. Chico Unified Sch. Dist.,* 24 Cal.3d 703, 157 Cal.Rptr. 72, 597 P.2d 475, 477 (1979) (holding that the school district could not avoid the requirements of a statute allowing employees to comment on any derogatory information placed in their personnel files, by putting derogatory material in another file not designated "personnel file").

[¶ 12] We next note that the Legislature used broad category descriptors rather than an extensive list of specifically designated records to describe the contents of a personnel file. The use of such broad descriptors in this context is both sensible and reasonable. Employment related records may be given many different labels. The records at issue, for example, are referred to by the parties as investigative records. They could as easily have been called "loss prevention records," "internal inquiries," or "employee conduct records." Accordingly, an attempt on the part of the Legislature to identify each type of record by name could become a fruitless pursuit and lead to avoidance of the statute's reach simply by use of inventive labels.

[¶ 13] The question then is whether the records created by Bryant, regardless of where they were kept or what they were labeled, fall within the broad categories of documents enumerated in section 631. The plain language of at least two of the general categories set out in section 631 are designed to encompass such records. Records "relating to the employee's character ... [or] work habits" certainly encompass records pertaining to an alleged theft by the employee. *See* 26 M.R.S.A. § 631.

C. Public Policy

[¶ 14] Wal–Mart argues nonetheless that there are numerous policy reasons for ignoring the plain language of the statute. ***76** Among them are: (1) ensuring the confidentiality of witness statements and allowing employers the ability to conduct a meaningful investigation; (2) maintaining the confidentiality of records that may be used by law enforcement in later criminal investigations; (3) protecting the employees' interests by maintaining the confidentiality of investigations which, if kept in the personnel files, could be subject to disclosure in a variety of settings such as workers' compensation proceedings and civil actions; and (4) protecting employers from having to disclose potentially defamatory witness statements and notes taken during investigations should the allegations turn out to be baseless. In addition, Wal–Mart asserts that other states with similar statutes have specifically excluded internal investigations from the definition of personnel file.

[¶ 15] Although Wal–Mart articulates reasonable arguments in support of a policy decision exempting certain investigative records from the disclosure requirements of 26 M.R.S.A. § 631, the statute as enacted by the Legislature does not contain such an exemption. It is not our role to second guess the Legislature. The Legislature is the appropriate body for weighing the competing interests at stake.

[¶ 16] Finally, Wal–Mart's argument urging us to accept the wisdom of other states who have created statutory exemptions for investigative records proves too much. If our Legislature also determines that investigative and related records should not be included within the meaning of "personnel file," it may say so. To date it has not. The fact that other legislative bodies have

chosen to exempt investigative records from the requirements of similar statutes, however, does not support a construction of the Maine statute as containing an exemption which is not expressly contained in the language of the statute.

[¶ 17] Accordingly, the District Court correctly concluded that the records sought by Harding relate to her "character" and "work habits." Such records in the possession of the employer, whether or not they are physically placed in a file labelled "personnel file," are part of the employee's personnel file for purposes of 26 M.R.S.A. § 631.

The entry is:

Judgment affirmed.

All Citations

765 A.2d 73, 142 Lab.Cas. P 59,151, 17 IER Cases 282, 2001 ME 13

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