

Why LD 127? Why now?

“It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.

“[T]he only really self-governing people is that people which discusses and interrogates its administration.”

United States v. Rumely, 345 U. S. 41, 43 (1953), citing Woodrow Wilson, Congressional Government: A Study in American Politics 303 (1913).

Created by the passage of [LD 2193](#) in 2001 as amended, the **Government Oversight Committee** and its dedicated nonpartisan **Office of Program Evaluation and Government Accountability** have become synonymous with the Maine State Legislature’s investigatory and evaluative functions over Maine’s other co-equal branches of government.

ORIGINAL BILL

LD 2193, which was a committee bill of the Joint Standing Committee on State and Local Government, proposed to create the new [Chapter 37](#) under 3 MRSA to establish both the Joint Legislative Oversight Committee and the Office of Program Evaluation and Government Accountability for the purposes of providing legislative oversight of programs of State Government and to ensure the appropriate use of public funds. The bill, as proposed, described the duties of the

committee and the office. It proposed to authorize the committee to hire a director to operate the office. It also described the duties and powers of the director and the office. The bill also described the manner in which program evaluations would be conducted by the office and the manner in which reports would be released to the committee and to the public. The bill also proposed to prohibit employees of the office from organizing or joining a union. This bill also proposed to include an appropriations and allocations section and a fiscal note.

CONTEXTUAL HISTORY

In 1989, the Legislature enacted and the Governor signed [LD 1689](#), the “*Maine Sunset Act*.” It updated what was described as an “overly complicated” evaluative and accountability statutes with “up-to-date laws which simplify and clarify the process used by the Legislature to review state agencies on a regular basis.” The bill was enacted as [P.L. 1989, Chap. 483](#).

Title 3 would be amended by [LD 2011](#) in 1994, which changed the chapter title to the “State

Government Evaluation and Justification Act.” The bill was enacted as [P.L. 1993, Chap. 714](#) and made changes to the legislative process used to conduct evaluation, oversight and justification of state government agencies.

When [LD 1348](#) was enacted as [P.L. 1995, Chap. 488](#) in June 1995, it repealed the previous sunset review process and established a new process by which the committees of jurisdiction conduct the program evaluations for agencies and independent agencies. The amended version also established new standards for review.

CREATION OF OPEGA AND THE GOVERNMENT OVERSIGHT COMMITTEE

The Legislature used to have the Joint Standing Committee on Audit and Program Review. Created in 1977, the committee was tasked to administer Maine's Sunset Act, which "provides for a system of periodic justification of agencies and independent agencies of State Government in order to evaluate their efficacy and performance," then under 3 MRSA § 501 et. seq. That particular statute was later repealed and replaced by 3 MRSA § 921, et. seq. as established under LD 1689 in 1989. Ultimately, the latter statute was also later repealed and replaced by Chapter 35 established through LD 1348 in 1995.

However, the state's fiscal crisis in the mid-1990s led the Legislature to eliminate that committee to save approximately \$1 million, according to [Chamber remarks](#) made by several lawmakers. Still, problems with Child Protective Services and other Executive Branch issues continued to surface. At the time, Sen. John Martin, D-Aroostook, and Sen. Edward Youngblood, R-Penobscot, both shared their concerns that the Legislature was too centered on legislating and not providing oversight.

After lawmakers on the State and Local Government examined legislative government oversight programs in Florida, Idaho and Kansas, and after discussing such programs with the National Council for Legislative Government, the committee worked on legislation and reported out a bill pursuant to Joint Order 2001, H.P. 1597.

In presenting LD 2193 to the Maine Senate on April 3, 2002, **Sen. Peggy Pendleton, D-Cumberland**, [told the body](#) the legislation garnered a 13-0 committee vote after months of research and negotiation.

"This is something that, having returned to the [L]egislature after having been out a few years, I feel is very necessary. The reason that I feel it is necessary is because the [L]egislature, I believe, needs a tool to get information through a non-partisan and working professional committee," Pendleton said. "They would have subpoena power. They would have questioning power. The [L]egislature would have some kind of idea of what is going on in the different bureaus and commissions. The [L]egislature would have a tool so they would be able to get the same type of information that perhaps the Executive Branch is privy to and perhaps the Legislature is not."

The bill was amended by Committee Amendment "A" (H-1039), which made the following changes:

1. To change the name of the Joint Legislative Oversight Committee to the "Government Oversight Committee;"
2. To allow the committee to adopt rules that are not in conflict with the Joint Rules of the Legislature;
3. To allow the committee to report out legislation;
4. To prohibit a director of the Office of Program Evaluation and Government Accountability from being hired prior to April 1, 2003, and other employees of the office before July 1, 2003;
5. To provide that the office be a separate appropriation in the General Fund appropriation bill and in the event of a difference between the Governor's budget request and the office's budget request, it proposed to require the Governor to explain why the budget for the office submitted by the Governor differs from the budget submitted by the Legislative Council; and

6. To change the appropriations and allocations section and to add a fiscal note to the bill.

Senate Amendment "A" to Committee Amendment "A" (S-570), which was not adopted, proposed to provide for the establishment of the Office of Program Evaluation and Government Accountability as included in the bill, but that the Government Oversight Committee, the committee that would oversee the work of the office, be a joint committee of the Legislature established under Joint Rules of the Legislature. The joint rules would establish the membership of the committee and the manner in which the chairs would be selected. This amendment also proposed to make technical changes to carry out those changes. It also proposed to provide that the Director of the Office of Program Evaluation and Government Accountability be appointed by the committee, but that the Legislative Council recommend a list of 5 candidates from which the committee would select the director. The amendment also proposed to set the term of appointment for the director at 5 years. This amendment also proposed to correct the title of the office in the appropriation and allocation section of the amendment.

Senate Amendment "C" to Committee Amendment "A" (S-595) incorporated the changes made by Senate Amendment "A" to Committee Amendment "A" and to make the following changes:

1. That the Legislative Council appoint by an affirmative vote of 8 members the Director of the Office of Program Evaluation and Government Accountability;
2. That the legislative committee that oversees the work of the office evaluates the director and makes a recommendation in

writing to the Legislative Council before the director is reappointed;

3. That money appropriated or allocated to the office must be expended in the discretion of the director and the legislative committee that oversees the work of the office only; and

4. That prior to the release of a program evaluation report or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report remain confidential and may not be released or disclosed by the director to the Legislative Council or an agent or representative of the Legislative Council.

Enacted law summary

[Public Law 2001, chapter 702](#) establishes the Office of Program Evaluation and Government Accountability for the purposes of providing legislative oversight of programs of State Government and to ensure the appropriate use of public funds by public and private entities in the State. The bill describes the duties of the Government Oversight Committee, which will be established in Legislative rules, and of the office. It authorizes the Government Oversight Committee to oversee the operations of the office. It describes the duties and powers of the director and the office. The law also describes the manner in which program evaluations are to be conducted by the office and the manner in which reports are to be released to the committee and to the public. The law authorizes the committee to report out legislation based on evaluation reports submitted to it by the office. Under chapter 702 of Public Law 2001, the director would be

hired on or after April 1, 2003, and other employees of the office would be hired on or after July 1, 2003. Under the law, the Legislative Council appoints by an affirmative vote of at least 8 members the Director of the Office of Program Evaluation and Government Accountability. The Government Oversight Committee that oversees the work of the office evaluates the director and makes a recommendation in writing to the Legislative Council before the director is reappointed. The law requires that money appropriated or allocated to the office must be expended in the discretion of the director and the Government Oversight Committee

that oversees the work of the office only. Finally, the law provides that prior to the release of a program evaluation report or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and may not be released or disclosed by the director to the Legislative Council or an agent or representative of the Legislative Council.

THE NEED FOR OVERSIGHT

Legislative oversight is and should be a critical function of state government, helping assure that executive operations are efficient and effective. It also provides lawmakers with the ability to look more intensively into critical issues facing state residents, businesses and government. Additionally, oversight is a key activity to update or repeal laws the Legislature deems necessary.

The separation of powers inherent in the American system of government provides that one branch will make the laws, another will execute those laws, and a third will adjudicate the laws and their application.

These and other checks and balances are bedrock elements of the American federal government and the state systems modeled after it. Such a structure is elemental to a democratic republic, providing the needed tension that in turn leads to or

forces constructive cooperation on policy decisions that should work to the public's benefit.

Oversight comes with historic tensions, particularly between the legislative and executive branches. In Maine, there have been several disputes between its governors and lawmakers over appointments, administrative rules and overall oversight. Other states have instituted a variety of legislative oversight methods, including some of the sunset laws Maine originally had on the books. Some states like Maine employ special or directed joint committees to conduct reviews.

Routine or Event-Driven Oversight?

Routine: "cop on the beat"	Event-Driven: "firefighter"
Program Outcomes	Scandal
Budgetary	Disaster
Contracts	Chronic Problems
Compliance	Escalating Problems
Deter Malfeasance	Long-term Investigation

It is equally critical that such reviews be done with as little overt partisanship as possible. The primary focus

should be on how to prepare state government to react more effectively, plan more thoroughly, and execute more efficiently for whatever future crises may arise.

WHAT IS OVERSIGHT?

“Good government requires good oversight.”

-Senator Carl Levin



Oversight is the process by which Congress and the 50 state legislatures tackle problems by digging into the facts and sharing what they learn with the public. Lawmakers use their findings to establish new programs or reform existing ones, reallocate funds, address abuses, and provide checks and balances across government.

THE OVERSIGHT PROCESS

Problem

Lawmakers learn of a concern facing the public. This can be anything from an industry defrauding consumers to citizens unfairly being denied government services.

1

Fact Finding

Legislators work with government agencies and the public to identify exactly what the problem is, why it's happening, and who is being affected.

2

Hearings, Reports, and Subpoenas

Lawmakers may hold hearings to receive testimony about a problem and publish reports to highlight the findings of their investigations. Legislatures may issue subpoenas to compel individuals to provide documents or appear at a hearing.

3

Most oversight involves asking questions of agencies and monitoring program performance, rather than in-depth investigations.

4

Next Steps

Based on its findings, the legislature may pass legislation or take other measures to solve the problem.

5

Outcomes

Oversight is never over. New laws or other actions to solve a problem should have clearly stated goals against which the legislature can judge progress.

“It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.”



WAYNE STATE
UNIVERSITY

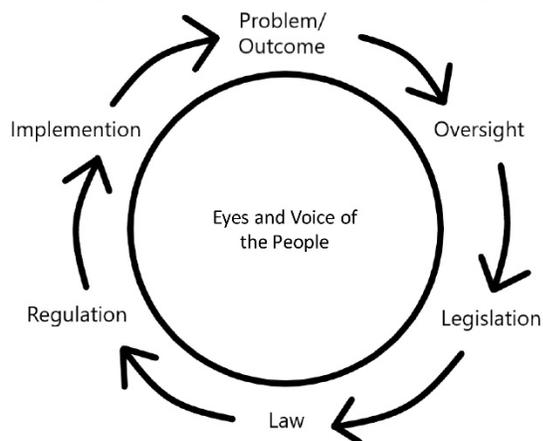
Trump v. Mazars USA, LLP, 140 S.Ct. 2019, 2031 (2020), citing *United States v. Rumely*, 345 U. S. 41, 43 (1953) which quoted an article by Woodrow Wilson.



THE NEED FOR ACCESS TO CONFIDENTIAL RECORDS

Access to confidential government records is vital for **accountability, preventing corruption, fostering public trust, and ensuring effective governance**, allowing

Cycle of Accountability



oversight bodies, journalists, and citizens to scrutinize decisions, expose wrongdoing (like waste, abuse, or malfeasance), and understand government operations, even while balancing necessary privacy protections for individuals.

It enables evidence-based policymaking, helps citizens seek remedies for wrongs, and ensures officials serve the public interest rather than personal gain.

Accountability & Transparency: Allows the public and oversight committees to see how money is spent, policies are implemented, and decisions are made, preventing abuse of power and building trust.

THE CONFIDENTIALITY CONTROVERSY

Upon passage of LD 2193, concerns persisted about giving OPEGA unfettered access to agency-held confidential information and records. The following year, the Legislature amended section 997(4) through the supplemental budget to remove OPEGA's authority to access confidential

Preventing Corruption: Exposes waste, fraud, and unethical behavior by officials, creating disincentives for misconduct.

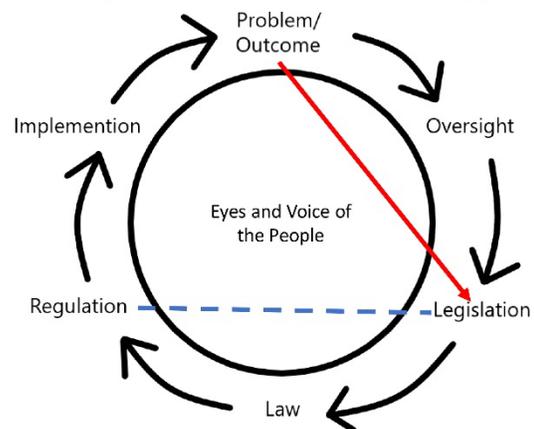
Informed Policymaking: Provides data for evidence-based decisions, helping to improve programs and services for the public.

Public Trust: Demonstrates that government isn't hiding failures or protecting officials at the public's expense, strengthening democratic legitimacy.

Vindicating Rights: Helps individuals understand their own stories (e.g., in cases of police misconduct or institutional abuse) and seek justice or remedies.

Oversight Authority: Committees such as

Cycle of Accountability



the Maine Legislature's Government Oversight Committee specifically require access to confidential data to fulfill their watchdog role effectively.

information in the possession of state agencies without consent and instead restricted OPEGA to information and records publicly available under FOAA.

The language also included another provision requiring that the Committee review and determine the kind of confidential information required for OPEGA to fulfill its

purpose and then “report its findings and recommendations, together with any necessary proposed implementing legislation” to the 121st Legislature.

Upon review of the report, the Legislature amended section 997(4) in 2004 to restore OPEGA’s access to agency-held confidential records through a subsequent budget bill. The amendment was paired with a new provision, section 994(11), that limited the Committee’s access to confidential information.

GOC v. DHHS SUMMARY [KEN-23-61]¹

After the high-profile deaths of several young children within months of each other in 2021, the Committee directed OPEGA in July of that year to conduct an immediate review of the child protective services provided by the Department. The scope of the review was divided into three components with staggered reporting dates.

OPEGA issued its first report in January 2022, focusing on state and federal oversight of child protective services. OPEGA issued its second report in March 2022, which reviewed child protective services investigations and examining “how child safety is protected and the risks to child safety from the point at which alleged child abuse or neglect is reported to [the Department] through the completion of the investigation.”

Before OPEGA issued its third report on reunification of families after a child is removed from a custodian and planning for children’s permanency when the family cannot be reunited, the Committee sought to make a separate inquiry into matters discussed in the previous reports, specifically a “further inquiry” into the deaths of the four children who died in 2021. On Aug. 9,

The newly added section restricted the information that could be received by or made available to the Committee to information “governed by chapter 21, which governs legislative investigating committees, and by Title 1, chapter 13, which governs public records and proceedings.” Essentially, the same language that had been used to remove OPEGA’s ability to access confidential records was used to define (and limit) the information accessible by the Committee.

2022, as part of its “continued oversight of child protective services,” the Committee sent a written request to the Department asking it to produce the records pertaining to those children.

The Department, through its Commissioner at the time, Jeanne Lambrew, responded in an Aug. 19, 2022, letter stating that, upon advice of the Office of the Maine Attorney General, the Department was unable to share the requested records directly with the Committee due to statutory confidentiality restrictions, but that it would provide the records to OPEGA as authorized in Title 3. The Committee served a subpoena to produce documents on the Department on Sept. 22, 2022, demanding that the records pertaining to the four children be produced on or before its Oct. 19, 2022, meeting.

The Department served an objection to the subpoena, reiterating its position that it could not legally disclose the records to the Committee but could, and would, furnish the requested records to OPEGA.

On Sept. 26, 2022, OPEGA made a formal request for the same records that the Committee had subpoenaed. OPEGA sent the Department an executed confidentiality agreement, which required OPEGA, among

¹ See [Government Oversight Committee v. Department of Health and Human Services](#), 2024 ME 81.

other things, to store the files “on a server that can be accessed only by OPEGA staff and appropriate staff from the Legislative Information Services Department” and maintain working papers containing confidential information in locked storage cabinets. The Department subsequently supplied the files to OPEGA pursuant to the confidentiality agreement.

On Oct. 21, 2022, the Committee filed a complaint in the Superior Court together with a motion, as required by statute, seeking to compel obedience with the subpoena. The Department answered and filed a responsive pleading. The parties submitted briefs and waived oral argument. The trial court concluded that the Committee did not have statutory authority to access confidential Department records, denied the motion to compel, and entered judgment in favor of the Department.

In its opinion affirming a lower court decision against the Legislature, the Maine Law Court found the “Legislature controls the authority and functioning of its own committees. For the reasons set out above, we conclude that the Legislature has determined the role of the Committee in the scheme of governmental oversight and review as well as the information available to it in that process. It is free to clarify or change the Committee’s role, the scope of its authority, and the nature of the information believed necessary for the Committee to carry out its work.”

In his concurring opinion, Justice Lawrence agreed with the majority but thought their

opinion went “too far in concluding that the Committee is never authorized to seek and, if necessary, demand the production of confidential information like the Department’s child protective records.”

He found that when the Committee issued its subpoena, it had not yet received any of OPEGA’s evaluations on the Department’s handling of investigations regarding the four deceased children to supplement the report on child protective services investigations, nor the final phase of the comprehensive review. He concluded the Committee would not have been in a position to determine whether it needed access to the confidential files in order to decide whether to fully endorse, endorse in part, or withhold endorsement of the reports or propose legislation based on them.

“The judgment therefore should be affirmed on these grounds rather than those set forth in the Court’s opinion,” he wrote. He added that he did not believe the ruling precludes the future use of subpoenas or motions to compel compliance if the Committee takes such action to review and determine whether it endorses the OPEGA reports and to determine what, if any, legislation to propose to implement OPEGA’s findings and recommendations.

“Despite the circuitous nature of the authority to access confidential information fashioned by the Legislature at issue here, the Committee nonetheless has that authority and may bring it to bear in appropriate circumstances,” he concluded.

POST-DECISION CONSIDERATIONS

It is obvious the Maine Law Court decision recognized the authority of the Legislature to define its own roles and responsibilities and determine the process to do so. The concurring opinion went further in that the Legislature already had the authority but activated it at the wrong time. Where the opinions brought clarity was the fact that the

Legislature is free to chart its own course forward.

However, the underlying question of how an organization – in this case, a co-equal branch of government – typically operates in the organizational behavior management space went unanswered. The Executive Branch’s refusal to allow Government Oversight Committee members access to the

underlying child protective case files laid bare the chasm between an office of the legislative body having access and conducting its investigation and the office's supervisory body – in this case, the Committee itself – having no access to validate the veracity of the office's work or conclusions it reached.

In a system when management is unable to improve organizational behavior through employee performance, productivity or even culture by means of the traditional pillars of people, structure, technology and environment due to flaws in the construction, recognition or execution of any pillar, the system is at risk of failure.

One of those potential failures is the lack of data or measurement. Without proper metrics, verification of data or even missing institutional knowledge, management cannot determine whether underlying functions and processes are working or the people executing those functions are doing so properly. In essence, the Executive Branch and by extension the Judicial Branch have at most interfered with the Legislature's management function or at the very least exposed its defects.

PROPOSED AMENDMENT FOR LD 127

The proposed amendment to LD 127 accomplishes that. It updates several sections of Title 3 to reflect not only the Government Oversight Committee's role and responsibility as it has evolved over the last two decades, but also the necessary safeguards to handle confidential information that comes into the possession of the Committee's members.

Specifically, **Section 1** outlines the director of OPEGA's responsibility in preparing and presenting an annual briefing to committee members on the confidentiality and non-disclosure policies, standards and

In the case of institutional knowledge, the Law Court decision also didn't take into account how the Government Oversight Committee's role and responsibility has changed over the last 20 years since its inception. Legislative oversight has evolved both at the state level in many states and nationally. In fact, even the process by which OPEGA conducts its work has evolved with the advent and use of new technology.

Unfortunately, the statutes by which both the Government Oversight Committee and OPEGA operate have not. Many of the processes initiated in 2004 are much different today; and the significance of the sheer amount of taxpayer dollars involved has only grown, as have the methods and techniques of those wishing to defraud or waste government resources.

If the primary goal of legislative oversight is to ensure the Executive Branch implements laws effectively, efficiently and in accordance with legislative intent, and serve as a vital check and balance against executive excesses and to promote accountability, investigation into agency operations, policy implementation and the potential for scandal is the primary tool to accomplish it.

procedures under which OPEGA operates when conducting program evaluations.

Section 2 accomplishes the goal of determining the accuracy and veracity of reports by giving the Committee the ability to review sources and methods used to produce them in an executive session.

Section 3 directly and explicitly empowers the Committee to receive privileged or confidential information and also explicitly states such information is and remains confidential. Enforcement of these provisions is outlined in **Section 4**, which provides that each member will sign a code of conduct for each occurrence of executive session as authorized by the Legislative Council.

Violation of these provisions may result in penalties up to and including expulsion from the Legislature.

Section 5 reflects a necessary change in how the Government Oversight Committee receives OPEGA reports. To provide for the review of accuracy and veracity, and to better reflect operational reality, Section 5 allows for the release of a confidential draft of any OPEGA report to Committee members before public release. This has several benefits, including:

1. It allows better committee member preparation for the presentation itself, which can include requests for witnesses or additional information.
2. It also allows for more complete preparation to any response from agency or organizational personnel included in the report.
3. It speeds up the entire process for subsequent public hearings and legislative meetings, which presently can take and have taken months or even more than a year to complete.

CONCLUSION

The Maine State Legislature is the body closest to the people of Maine. As the first branch of government, it has the unique responsibility and constitutional necessity to ensure accountability, transparency and efficiency in Maine's Executive Branch to prevent fraud, waste, abuse and mismanagement within the State's agencies that have far-reaching effects on the lives of our citizens. The Legislature's ubiquitous role in protecting the public's trust and having the power to be the people's check and balance on their Executive Branch is critical to ensuring that State Government remains functional.

However, decades of deference to the Executive Branch and the so-called "administrative state" have eroded both the Legislature's unique role and inherent power, especially when it comes to the interpretation of policies, the budgeting process and, yes, oversight of agencies and their processes. It is time to restore the proper separation of co-equal branches of government and therefore our legislative role and power to their fullest potential.

It is for these reasons that we ask the members of the Joint Standing Committee on the Judiciary to adopt the proposed amendment.

/s/ Craig V. Hickman
Senate District 14
Sponsor

/s/ Jeffrey L. Timberlake
Senate District 17
Cosponsor