

## RIGHT TO KNOW ADVISORY COMMITTEE

### AGENDA

October 5, 2016

1:00 p.m.

Room 438, State House, Augusta

#### **Convene**

1. Welcome and Introductions
2. Discussion related to public hearing on Maine's Freedom of Access Act held September 14, 2016
3. Review proposed rule of the Department of Health and Human Services, Maine Center for Disease Control and Prevention: Data Release Rule, 10-144 CMR, Ch. 175
4. Review subcommittee recommendations relating to existing public records exceptions
5. Discussion regarding the recent Superior Court case, *Flanders v. State et. al.*, as it relates to (1) requiring advance payment for FOAA requests; and, (2) repeated requests for records that have lawfully been withheld by a government entity
6. Discussion regarding potential formation of a subcommittee of the Right to Know Advisory Committee in 2017 to focus on technology issues
7. Review Annual Report – preliminary draft
8. Other issues or questions

#### **Adjourn**



## Notice of Agency Rulemaking Proposal

**AGENCY:** Department of Health and Human Services  
Maine Center for Disease Control and Prevention

**RULE TITLE OR SUBJECT:** Data Release Rule

**PROPOSED RULE NUMBER:** 10-144 CMR, Ch.

**CONCISE SUMMARY:** This proposed rule outlines the policies of the Maine Center for Disease Control and Prevention (Maine CDC) for the release of health-related data and makes clear to all parties the conditions under which unrestricted and restricted data will be released by the Maine CDC.

**STATUTORY AUTHORITY:** 22 M.R.S. §§ 42 and 824

**PUBLIC HEARING:** 10:00 a.m., July 13, 2016 in Room 16 at Key Bank Plaza, 286 Water Street, Augusta, Maine

**DEADLINE FOR COMMENTS:** July 25, 2016

**AGENCY CONTACT PERSON:** Bridget Bagley

**AGENCY NAME:** Department of Health and Human Services  
Maine Center for Disease Control and Prevention

**ADDRESS:** 286 Water Street, 11 State House Station  
Augusta, Maine 04333-0011

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Please approve bottom portion of this form and  
assign appropriate MFASIS number.

**APPROVED FOR PAYMENT:** \_\_\_\_\_ **DATE:** \_\_\_\_\_  
*Authorized signature for DHHS*

FUND	AGENCY	ORG	APP	JOB	OBJT	AMOUNT
010	10A	2000	01			

# Rulemaking Fact Sheet

(5 MRSA §8057-A)

**AGENCY:** Department of Health and Human Services-  
Maine Center for Disease Control and Prevention

**NAME, ADDRESS, PHONE NUMBER OF AGENCY CONTACT PERSON:** Bridget Bagley, 11  
State House Station, Augusta, ME 04333-0011, (207) 287-9394

**CHAPTER NUMBER AND RULE TITLE:** Data Release Rule, 10-144 CMR, Ch. 175

**STATUTORY AUTHORITY:** 22 M.R.S. §§42 and 824

**DATE AND PLACE OF PUBLIC HEARING:** 10:00 a.m., July 13, 2016 in Room 16 at Key Bank  
Plaza, 286 Water Street, Augusta, Maine

**COMMENT DEADLINE:** 5:00 p.m., July 25, 2016

**PRINCIPAL REASON OR PURPOSE FOR PROPOSING THIS RULE:** The health-related information acquired, stored and used by the Maine Center for Disease Control and Prevention (Maine CDC) is vital to performing expected public health functions of the agency. Safeguarding against inappropriate release of directly or indirectly identifiable data is necessary to ensure a level of public trust and confidence in the agency's methods and reasoning for disclosure. The Maine CDC considers the protections of individuals' privacy and the public's health when releasing personal health information. This proposed new rule formally outlines the Maine CDC policies for the release of health-related data and makes clear to all parties the conditions under which unrestricted and restricted data will be released by the Maine CDC.

**ANALYSIS AND EXPECTED OPERATION OF THE RULE:** This proposed rule directs the release of health-related data released by the Maine CDC. This proposed rule is discrete from rules governing data release specifically by Data, Research and Vital Statistics and expands definitions to address privacy protections and the disclosure of personal health information that could indirectly or directly identify individuals. The definitions and descriptions of appropriate types of data sharing and methods to safeguard privacy provide clarity to Maine CDC staff in order to respond to internal and external user for restricted and unrestricted data for specified uses.

**FISCAL IMPACT OF THE RULE:**

**Counties/Municipalities:** None anticipated.

**Department:** None anticipated.

**Small Businesses:** None anticipated.

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**10-144 DEPARTMENT OF HEALTH AND HUMAN SERVICES****MAINE CENTER FOR DISEASE CONTROL AND PREVENTION****Chapter : DATA RELEASE RULE**

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**SUMMARY:** This rule outlines the policies of the Maine Center for Disease Control and Prevention (Maine CDC) for the release of data, other than data released, as described in the Rules for Data, Research and Vital Statistics.

**1. INTRODUCTION**

Public health agencies acquire, use, disclose or store an increasing amount of health-related information about individuals, some of which is highly sensitive, in paper-based and electronic forms for legitimate public health purposes. Use of health related information for legitimate public health purposes is critically important to preserving, monitoring and improving population-based health as well as personal health of individuals. Public health agencies have a significant interest in protecting the privacy of health-related information in their possession where protecting the privacy of such information encourages individuals to participate in public health programs and objectives.

Maine CDC is not required to collect or create data in order to respond to a data request nor is Maine CDC obligated to provide the data in the form requested.

**2. DEFINITIONS**

Cell refers to the space formed by the intersection of a row and column in a data table. For example, a data table may include the category "race" in columns and the category "county" in rows. The resulting cells within the table describe a population by race and county. In some instances, cells provide very specific information about a limited number of people.

Data release refers to provision of data to entities outside of the program where data are collected, stored and managed. To the extent a unit of the Maine CDC is considered a covered entity within the meaning of the Health Insurance Portability and Accountability Act of 1996 (45 CFR Parts 160 and 164), the applicable standards, rules and regulations established under that statute are applicable to the particular unit of the Maine CDC.

Denominator refers to the divisor in a rate or frequency calculation. It is typically the number of persons that gave rise to the cases of interest, based on characteristics such as place, time and demographics. For example, a cumulative rate of emergency asthma events could be calculated based on a denominator that is the entire number of female residents for a specific county and year, and a numerator that is the number of females with asthma-related emergency department visits in the same county and year. Note that in some data releases, the denominator(s) used may differ from the underlying population. For instance, child lead poisoning may be reported as a percent of children age <6 among those *tested* (denominator), but the underlying population would be the *total* number of children age <6. See the definition for "underlying population."

**Direct identifier** refers to information that allows the identity of a person to be determined with a specified degree of certainty. This could be a single data element or several pieces of data which, when taken together, may be used to identify an individual. The following list includes the most common direct identifiers.

- Name(s) of the individual or of relatives, employers or household members of the individual;
- All elements of dates (except year) for dates directly related to an individual including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older;
- Postal/residential street address information Latitude and longitude of street address
- Geocoded coordinates of a health event depicted as points on a map
- Telephone numbers
- Fax numbers
- Electronic mail (email) address
- Social Security numbers, certificate and license numbers, student and employee ID numbers, and any other unique identifying number
- Medical record numbers
- Health plan beneficiary numbers
- Account numbers
- Vehicle identifiers and serial numbers, including license plate numbers
- Device identifiers and serial numbers
- Personal Internet Protocol (IP) addresses
- Biometric identifiers, including finger and voice prints
- Personal photographic images
- Genetic information, including family history
- Any information that the Maine CDC has actual knowledge could be used alone or in combination with other information to identify an individual who is a subject of the information

**Identifiable information** refers to information that can be used to discover the identity of individuals. This could be accomplished either using a **direct identifier(s)** or by indirect identification.

**Indirect identification** is the identification of an individual(s) using information that does not contain direct identifiers, such as name, address or specific dates, but does contain less specific characteristics that could be used in combination with other information to identify individuals. The potential for using data without direct identifiers to identify individuals increases with the amount of information given (such as specific diagnosis codes, age, sex, year, limited geographic area, etc.) and with small numerators or underlying population (ex., 1 in a population of 10 individuals). There is also risk of identification if the underlying population is small and the numerator is nearly the same size (ex., 98 out of 100 individuals). The following criteria are used to determine whether data may indirectly identify individuals:

1. Data at or greater than State-level shall not be deemed to indirectly identify an individual, regardless of numerator or underlying population size.

2. For geographic areas or organizations within the State (including schools or other named organizations), data in a cell will be deemed to indirectly identify individuals under the following conditions:
  - a. The underlying population of the cell is less than 2,000 persons and either the numerator or the difference between the numerator and the underlying population is less than 6; or
  - b. The underlying population of the cell is less than 50, regardless of the numerator.

**Internal users** are Maine CDC employees, including contracted workers within Maine CDC programs directed by Maine CDC staff.

**External users** include users of data who are not internal users.

**Geocoding** is the process of assigning geographic identifiers (e.g., town/region codes or geographic coordinates expressed as latitude-longitude) to data records, such as those containing street addresses.

**Geographic unit or area** refers to defined spacial areas such as a county, census block or town.

**Numerator** means the number or count of health events (cases, diagnoses, clients, discharges, admissions or visits, etc.) being considered for release for a particular population.

**Organization** refers to any public or private entity with an identifiable proper name operating or doing business in the State of Maine (such as a school, church, restaurant, company).

**Rates** refers to a measure of the frequency of a health event per population unit, with a numerator as the count of the health event and the denominator as the count of the underlying population.

**Restricted Data** include any and all information created or received by the Maine CDC that relates to the past, present or future physical or mental health or condition of an individual; the provision of health services to an individual; the past, present or future payment for the provision of health services to an individual; or certain environmental, environmental health or toxicological data derived from individually-owned dwellings, land or organizations; and that allows for the direct or indirect identification of that individual. It includes any other Maine CDC data specifically identified as confidential under statute or rule.

**Suppression** refers to the practice of withholding the release of a count or count-derived value (e.g., rate) that does not meet the numerator and/or underlying population thresholds to prevent indirect identification. For example, if the minimum reportable value, based on the underlying population size, is 6, a cell value of 3 would be suppressed, and reported as either "<6" or "1 – 5," while the rate would not be computed. This is called *Primary Suppression*. In the event there is only one cell with a value too small to disclose, and totals are presented or available, one or more "complementary" cell values will also be suppressed. This *Complementary Suppression* prevents inadvertent disclosure of the first cell through back-calculation.

**Underlying population** is a defined portion of the Maine population that pertains to data of interest. The underlying population may be defined by demographics (e.g., race, age, gender, etc.), as well as place characteristics, such as residing in a particular town, being a client of a particular program, a patient of a particular facility or an employee of a specific workplace. Note that in some data releases, the denominator(s) used may differ from the underlying

population. For instance, child lead poisoning may be reported as a percent of children age <6 among those tested (denominator), but the underlying population would be the total number of children age <6.

Unrestricted data is data that contain no information that could be used directly or indirectly to identify individuals. Therefore, these data will be made available for use by both internal and external users.

### 3. DATA RELEASE

Although Maine CDC data are vitally important for promoting and maintaining public health, inappropriate release of directly or indirectly identifiable data could result in harm both to individuals and to the Department's responsibility to perform its public health functions. Therefore, this rule sets out the various types of data sharing and appropriate methods used to safeguard confidentiality or the identification of individuals.

#### A. Release of Unrestricted Data

Requests for unrestricted data will be satisfied through use of existing documents, reports and publications produced by the Maine CDC. Maine CDC is not required to collect or create data in order to respond to a data request nor is Maine CDC obligated to provide the data in the form requested.

#### B. Release of Restricted Data

##### 1. Internal Users

The minimum amount of restricted data should be released to adequately perform a given public health function.

##### 2. External Users

Restricted data will not be released except as necessary to carry out the public health functions of the Maine CDC and at the sole discretion of the Department of Health and Human Services. Restricted data will only be released to external users after the Maine CDC designee(s) responsible for managing data requests has reviewed and approved the request to assure that it is released in accordance with this Rule.

##### 3. External Users for Research Purposes

Restricted data may be released to external users for research purposes. The request must include an Application for Release of Restricted Data (see example, Attachment 1: Model Document 1) along with the Data Use Agreement (Attachment 2) and a research protocol and proof of approval by, or exemption from, an Institutional Review Board, if applicable.

If it is determined that part or all of a data request can be accomplished through in-house analysis, use of unrestricted data or the creation of proxy variables, the Maine CDC reserves the right to create such products to fill a request, rather than release the restricted data.

##### 4. To Carry out Statutory or Municipal Obligations

For specific entities (such as municipal health departments) data sharing is necessary to carry out statutory or municipal obligations, or if the outside entity meets the following criteria:

- Its mission contributes to fulfilling an identified public health role, (this may be demonstrated through existing statute(s) or local ordinances); and
- It has staff who have demonstrated competence in epidemiology, data security and confidentiality and
- It has demonstrated the need to know the information requested.

Data sharing with these entities requires a contract, memorandum of understanding (MOU) or agreement (MOA), trading partner agreement, client consent statement, or other written agreement that holds the organization/individual accountable to this rule.

STATUTORY AUTHORITY: 22 MRS 42 and 22 MRS §824

EFFECTIVE DATE:



## Maine Revised Statutes

### Title 22: HEALTH AND WELFARE

#### Chapter 1: DEPARTMENT OF HEALTH AND HUMAN SERVICES HEADING: PL 2003, c. 689, Pt. B, §6 (rev)

#### §42. RULES AND REGULATIONS

**1. General.** The department shall issue rules and regulations considered necessary and proper for the protection of life, health and welfare, and the successful operation of the health and welfare laws. The rules and regulations shall be adopted pursuant to the requirements of the Maine Administrative Procedure Act.

[ 1977, c. 694, §331 (AMD) .]

**1-A. Administration of medication.** The administration of medication in boarding care facilities, drug treatment centers, day care facilities, children's homes and nursery schools and group home intermediate care facilities for persons with intellectual disabilities must be in accordance with rules established by the department. In other facilities licensed or approved by the department, excluding those facilities licensed under section 1811, other than group home intermediate care facilities for persons with intellectual disabilities, the department may establish rules for the administration of medication as it considers necessary. In establishing rules for each type of facility, the department shall consider, among other factors, the general health of the persons likely to receive medication, the number of persons served by the facility and the number of persons employed at the facility who might be involved in the administration of medication. Any rules for the administration of medication must be established in accordance with Title 5, chapter 375.

[ 2011, c. 542, Pt. A, §24 (AMD) .]

**2. Department records.** The department shall make and enforce reasonable rules and regulations governing the custody, use and preservation of the records, papers, files and communications of the department, and especially those which pertain to the granting of public assistance. The use of such records, papers, files and communications by any other agency or department of government to which they may be furnished shall be limited to the purposes for which they are furnished and by the law under which they may be furnished. It shall be unlawful for any person, except for purposes directly connected with the administration of the public assistance and in accordance with the rules and regulations of the department, to solicit, disclose, receive, make use of or authorize, knowingly permit, participate in or acquiesce in the use of, any list of or names of, or any information concerning, persons applying for or receiving such assistance, directly or indirectly, derived from the records, papers, files or communications of the State or subdivisions or agencies thereof, or acquired in the course of the performance of official duties. Any person violating any provision of this subsection shall be punished by a fine of not more than \$500 or by imprisonment for not more than 11 months, or by both.

[ 1973, c. 521, §1 (RPR) .]

**3. Subsurface sewage disposal.** The department shall adopt minimum rules relating to subsurface sewage disposal systems. All rules, including installation and inspection rules, must be consistent with Title 30-A, chapter 185, subchapter III and Title 32, chapter 49, but this does not preempt the authority of municipalities under Title 30-A, section 3001 to adopt more restrictive ordinances. These rules may regulate the location of water supply wells to provide minimum separation distances from subsurface sewage disposal systems. The department may require a deed covenant or deed restriction when determined necessary.

Any person who violates the rules adopted under this subsection, or who violates a municipal ordinance adopted pursuant to Title 30-A, sections 4201 and 4211 or uses a subsurface waste water disposal system not in compliance with rules applicable at the time of installation or modification must be penalized in

accordance with Title 30-A, section 4452. Enforcement of the rules is the responsibility of the municipalities rather than the department. The department or a municipality may seek to enjoin violations of the rules or municipal ordinances. In the prosecution of a violation by a municipality, the court shall award reasonable attorney's fees to a municipality if that municipality is the prevailing party, unless the court finds that special circumstances make the award of these fees unjust.

[ 1997, c. 727, Pt. C, §4 (AMD) .]

**3-A. Licensing of persons to evaluate soils for subsurface wastewater disposal systems.** The department shall adopt rules providing for professional qualification and competence, ethical standards, licensing and relicensing and revocation of licenses of persons to evaluate soils for the purpose of designing subsurface wastewater disposal systems. The hearings provided for in subsection 3 must include consideration of the adoption or change of those rules.

The department shall investigate or cause to be investigated all cases or complaints of noncompliance with or violations of this section and the rules adopted pursuant to this section. The department has the authority to grant or amend, modify or refuse to issue or renew a license in accordance with the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter V. The District Court has the exclusive jurisdiction to suspend or revoke the license of any person who is found guilty of noncompliance with or violation of the rules adopted pursuant to this subsection or subsection 3.

The department may charge applicants no more than \$100 for examination to become a licensed site evaluator. The department shall by rule charge a biennial site evaluator license fee of not more than \$150. A licensed site evaluator who is employed by the department to administer this section and does not practice for the public is exempt from the licensee fee requirement. Appropriate rules must be adopted by the department defining the appropriate financial procedure. The fees are paid to the Treasurer of State to be maintained as a permanent fund and used by the department for carrying out its plumbing and subsurface wastewater disposal rules and site evaluation program.

[ 1999, c. 86, §1 (AMD); 1999, c. 547, Pt. B, §78 (AMD); 1999, c. 547, Pt. B, §80 (AFF) .]

**3-B. Inspection of plumbing and subsurface waste water disposal systems.** The department shall adopt rules providing for the inspection of plumbing and subsurface waste water disposal systems. In municipalities, the municipal officers shall provide for the appointment of one or more plumbing inspectors. In plantations, the assessors shall appoint plumbing inspectors in accordance with Title 30-A, section 4221. In the unorganized areas of the State, the department shall appoint plumbing inspectors or act in the capacity of a plumbing inspector until a person is appointed.

[ 1991, c. 824, Pt. A, §39 (AMD) .]

#### **4. Industrial employees.**

[ 1977, c. 83, §2 (RP) .]

**5. Confidentiality of records containing certain medical information.** Department records that contain personally identifying medical information that are created or obtained in connection with the department's public health activities or programs are confidential. These records include, but are not limited to, information on genetic, communicable, occupational or environmental disease entities, and information gathered from public health nurse activities, or any program for which the department collects personally identifying medical information.

The department's confidential records may not be open to public inspection, are not public records for purposes of Title 1, chapter 13, subchapter 1 and may not be examined in any judicial, executive, legislative or other proceeding as to the existence or content of any individual's records obtained by the department.

Exceptions to this subsection include release of medical and epidemiologic information in such a manner that an individual can not be identified; disclosures that are necessary to carry out the provisions of chapter 250; disclosures made upon written authorization by the subject of the record, except as otherwise provided in this section; and disclosures that are specifically provided for by statute or by departmental rule. The department may participate in a regional or national tracking system as provided in sections 1533 and 8824.

Nothing in this subsection precludes the department, during the data collection phase of an epidemiologic investigation, from refusing to allow the inspection or copying of any record or survey instrument, including any redacted record or survey instrument, containing information pertaining to an identifiable individual that has been collected in the course of that investigation. The department's refusal is not reviewable.

[ 2009, c. 514, §1 (AMD) .]

**6. Preadministrative hearing settlement process.** The department may adopt rules to establish a preadministrative hearing settlement process. Rules adopted pursuant to this subsection are routine technical rules as defined by Title 5, chapter 375, subchapter II-A.

[ 1997, c. 218, §1 (NEW) .]

**7. Appeal process.** The department shall amend the rules governing appeals of informal review decisions of MaineCare payment and cost report audit and review issues filed by MaineCare providers of goods and services or initiated by the department and any other informal review decisions that seek to impose repayment, recovery or recoupment obligations or sanctions or fines on providers as provided in this subsection.

A. The department shall allow a provider 60 days after the provider's receipt of an audit report, examination report or other audit determination to seek informal review of that determination. The department shall give to the provider involved in an informal review decision written notice of the informal review decision and of the appeal process and the time period for filing a notice of appeal. The department shall allow an additional 60 days for a provider to request an appeal hearing for review of the department's informal review decision. [2005, c. 588, §3 (AMD).]

B. [2003, c. 419, §2 (RP).]

C. Compensation under any contract into which the department enters for hearing officer services may reflect the number of appeals on which recommendations are made by the hearing officer and may not reflect the substance of the recommendations made by the hearing officer. [2003, c. 419, §2 (AMD) .]

D. The hearing officer shall conduct a hearing de novo on issues raised in the notice of appeal filed by the provider and shall in a timely manner render a written recommendation based on the record and in accordance with applicable state and federal law, rule and regulation. The hearing officer shall provide a copy of the recommendation to the department and to the provider along with notice of the opportunity to submit written comments to the commissioner. [2001, c. 666, Pt. C, §1 (NEW) .]

E. The recommendation of the hearing officer must be forwarded to the commissioner for a final decision, based on the record, which must include any written comment submitted in a timely manner by the provider and the department. The commissioner may adopt, adopt with modification or reject the recommendation of the hearing officer. The commissioner shall issue a final decision in writing, which must include the reasons for any departure from the recommendation of the hearing officer and notice of the process for appeal pursuant to Title 5, chapter 375, subchapter 7. If the commissioner deviates from a prior decision cited in the course of a proceeding, the final decision must include an explanation of the reason that the prior decision was not followed. [2003, c. 419, §2 (AMD) .]

F. By July 1, 2004 the department shall make available on its publicly accessible website the decisions in all MaineCare provider appeals beginning January 1, 2004, including the recommendations of the hearing officer and the decision of the commissioner. By October 1, 2006 the department shall make available on the same website all decisions issued by the department regarding audit findings, audit

reports or examination reports, including final informal review decisions issued as well as decisions on appeal pursuant to the Maine Uniform Accounting and Auditing Practices Act for Community Agencies. The Office of Audit for MaineCare and Social Services also shall include on the website a summary of key interpretations and findings in recent audits that, in the opinion of the office, are to be considered generally by providers in their operations and cost reporting.

(1) The website must include a search feature allowing users to obtain information on specific issues of interest.

(2) The website must protect information that is personal or confidential. [2005, c. 588, §4 (AMD) .]

G. In lieu of the appeal procedure provided in this subsection, the parties may choose arbitration by a qualified arbitrator or panel of arbitrators as provided in this paragraph. By January 1, 2004, the department shall adopt rules to implement this paragraph that are consistent with federal law and regulation. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

(1) The arbitrator or panel of arbitrators must be selected and compensated as agreed by the parties.

(2) Arbitration under this paragraph is available only when the amount in controversy is \$10,000 or less and the subject matter in controversy is assessments, recovery or recoupment orders, sanctions or administrative fines.

(3) A provider choosing arbitration under this paragraph may waive any right of appeal. [2003, c. 419, §2 (NEW) .]

H. In an administrative appeal of an informal review decision under this subsection, the department bears the burden of proving a violation of law or rule by a preponderance of the evidence. If the department proves that existing and available records of goods or services are defective, the department may impose a penalty or sanction, including total recoupment. Total recoupment for defective records is warranted only when the provider has failed to demonstrate by a preponderance of the evidence that the disputed goods or services were medically necessary, MaineCare-covered goods or services and were actually provided to eligible MaineCare members. [2003, c. 688, Pt. C, §7 (AMD) .]

The department shall provide funding for contractual services under this subsection from within existing resources.

[ 2005, c. 588, §§3, 4 (AMD) .]

**8. Adoption of rules with retroactive application.** The department is authorized to adopt rules that have a retroactive application for a period not to exceed 8 calendar quarters prior to the date of issuance of the rule in accordance with the provisions of this subsection.

A. The Bureau of Medical Services is authorized to adopt rules that have retroactive application when necessary to maximize available federal revenue sources, specifically regarding the federal Medicaid program, or to conform to the state Medicaid plan as filed with the Federal Government. The Bureau of Family Independence is authorized to adopt rules in the MaineCare, Temporary Assistance for Needy Families and food stamp programs that have retroactive application to comply with federal requirements or to conform to the state Medicaid plan as filed with the Federal Government. [2003, c. 612, §1 (NEW) .]

B. With respect to any services that MaineCare providers have rendered prior to the date of adoption of retroactive rules adopted pursuant to this subsection, such rules may not reduce or otherwise negatively affect the reimbursement or other payments that those providers are entitled to receive under the previously applicable rules. The reimbursement or other payments under the amended rules must be equal to or greater than the reimbursement under the rules previously in effect. The rules may retroactively increase provider reimbursement on an emergency basis if needed to ensure that MaineCare members have access to covered medically necessary services. [2005, c. 648, §1 (AMD) .]

C. For any benefits or services in the MaineCare, Temporary Assistance for Needy Families or food stamp programs that beneficiaries have received prior to the date of adoption of retroactive rules adopted pursuant to this subsection, such rules may not reduce or otherwise negatively affect the reimbursement or other payments, benefits or services that those beneficiaries are entitled to have covered or paid under the previously applicable rules. The reimbursement or other payments, benefits or services under the amended rules must be equal to or greater than under the rules previously in effect. [2003, c. 612, §1 (NEW).]

D. This subsection does not give the department the authority to adopt retroactively any rule that has an adverse financial impact on any MaineCare provider or member, Temporary Assistance for Needy Families program or food stamp recipient or the beneficiary or recipient of any other program administered by the department. Specific statutory authority is required for adoption of a retroactive rule that has an adverse financial impact on any MaineCare provider or member, Temporary Assistance for Needy Families program or food stamp recipient or the beneficiary or recipient of any other program administered by the department. [2003, c. 612, §1 (NEW).]

E. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A; except that, if the underlying statutory rule-making authority for a rule or set of rules specifies that rules adopted pursuant to that authority are major substantive rules, then the related rule or rules adopted under this subsection are major substantive rules. [2003, c. 612, §1 (NEW).]

F. [2005, c. 648, §2 (RP).]

[ 2005, c. 648, §§1, 2 (AMD) .]

**9. Effective date of newly adopted rules.** Notwithstanding any other provision of law, when the department adopts a rule affecting a process or procedural change for licensed health care providers, the rule may not take effect for at least 30 days unless the department determines that an emergency rule is necessary pursuant to Title 5, section 8054 or unless the rule affects reimbursement rates applicable to those licensed health care providers. For the purposes of this subsection, "licensed health care provider" means a physician, clinic, hospital, health maintenance organization, home health agency, private clinical laboratory or other person who provides primary health care services and is registered or licensed by the State.

[ 2005, c. 241, §1 (NEW) .]

#### SECTION HISTORY

1967, c. 233, (AMD). 1973, c. 521, §1 (RPR). 1975, c. 293, §4 (AMD). 1975, c. 760, §§3,4 (AMD). 1975, c. 762, §1 (AMD). 1977, c. 83, §2 (AMD). 1977, c. 286, §1 (AMD). 1977, c. 497, §2 (AMD). 1977, c. 694, §§331,332 (AMD). 1979, c. 244, (AMD). 1979, c. 390, (AMD). 1981, c. 38, §§1-3 (AMD). 1981, c. 60, (AMD). 1981, c. 376, §§1-3 (AMD). 1983, c. 284, §1 (AMD). 1983, c. 796, §8 (AMD). 1985, c. 612, §§1-3 (AMD). 1987, c. 737, §§C64,C106 (AMD). 1989, c. 6, (AMD). 1989, c. 9, §2 (AMD). 1989, c. 104, §§C4,C8,C10 (AMD). 1989, c. 483, §A32 (AMD). 1989, c. 878, §A53 (AMD). 1991, c. 548, §A16 (AMD). 1991, c. 824, §A39 (AMD). 1991, c. 827, §1 (AMD). 1991, c. 827, §2 (AFF). 1993, c. 295, §1 (AMD). 1997, c. 218, §1 (AMD). 1997, c. 727, §C4 (AMD). 1999, c. 86, §1 (AMD). 1999, c. 547, §B78 (AMD). 1999, c. 547, §B80 (AFF). 2001, c. 407, §1 (AMD). 2001, c. 666, §C1 (AMD). 2003, c. 419, §2 (AMD). 2003, c. 612, §1 (AMD). 2003, c. 613, §2 (AMD). 2003, c. 688, §C7 (AMD). 2005, c. 241, §1 (AMD). 2005, c. 588, §§3,4 (AMD). 2005, c. 648, §§1,2 (AMD). 2007, c. 508, §1 (AMD). 2009, c. 514, §1 (AMD). 2011, c. 542, Pt. A, §24 (AMD).

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## Maine Revised Statutes

### Title 22: HEALTH AND WELFARE

#### Chapter 250: CONTROL OF NOTIFIABLE DISEASES AND CONDITIONS

HEADING: PL 1989, c. 487, §11 (rpr); 2005, c. 383, §1 (rpr)

#### §824. CONFIDENTIALITY

Any person who receives information pursuant to this chapter shall treat as confidential the names of individuals having or suspected of having a notifiable disease or condition, as well as any other information that may identify those individuals. This information may be released to the department for adult or child protection purposes in accordance with chapters 958-A and 1071, or to other public health officials, agents or agencies or to officials of a school where a child is enrolled, for public health purposes, but that release of information must be made in accordance with Title 5, chapter 501, where applicable. In the event of an actual or threatened epidemic or outbreak or public health threat or emergency, as declared by the Director of the Bureau of Health, the information may also be released to private health care providers and health and human services agencies for the purpose of carrying out public health functions as authorized by this chapter. Information not reasonably required for the purposes of this section may not be released. All information submitted pursuant to this chapter that does not name or otherwise identify individuals having or suspected of having a notifiable disease or condition may be made available to the public at the sole discretion of the department. [2005, c. 383, §19 (AMD).]

Any person receiving a disclosure of identifying information pursuant to this chapter may not further disclose this information without the consent of the infected person. [1989, c. 487, §11 (NEW).]

#### SECTION HISTORY

1989, c. 487, §11 (NEW). 2005, c. 383, §19 (AMD).

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STATE OF MAINE  
WALDO, ss.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. BELSC-CV-15-12

ADAM FLANDERS,

Plaintiff,

v.

STATE OF MAINE, KNOX COUNTY  
DISTRICT ATTORNEY, and MAINE STATE  
POLICE,

Defendants.

**ORDER AND DECISION ON  
DEFENDANTS' MOTION  
FOR JUDGMENT**

Before the Court is Defendants Knox County District Attorney's and Maine State Police's ("Defendants") Motion for Judgment. Specifically, the Defendants request the Court deny Adam Flanders' ("Flanders") appeal made pursuant to the Maine Freedom of Access Act ("FOAA"), 1 M.R.S. § 409(1), uphold Defendants' denials of Flanders' requests for documents, and deny Flanders' request for litigation expenses. For the following reasons, the Motion is granted in part and denied in part.

**BACKGROUND<sup>1</sup>**

Flanders' FOAA requests relate to discovery associated with his underlying 2008 convictions, representing three separate incidences of conduct.<sup>2</sup> (Stips. ¶ 1-9.) Flanders subsequently filed two *pro se* petitions for post-conviction review on the underlying convictions

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<sup>1</sup> The Court draws the below facts from the Stipulations that Defendants submitted to Flanders on November 3, 2015, pursuant to this Court's Order of October 7, 2015. In his Response to Stipulations, Flanders indicated that he does "not contest the stipulated facts dated November 3, 2015, in any way that would require an evidentiary hearing." (Pl.'s Resp. to Stip. 1.) Therefore, the Court does not consider the additional documents Flanders submitted as proposed exhibits.

<sup>2</sup> Docket Nos.: ROCSC-CR-07-08; ROCSC-CR-07-90; BELDC-CR-08-723.

and sentences, which were later consolidated.<sup>3</sup> (*Id.* ¶ 10.) The Superior Court, (*Hjelm, J.*), held a hearing on the consolidated petitions on March 10, 2011 and subsequently issued a decision modifying the periods of probations for the sentences on two counts in ROCSC-CR-07-90, but otherwise denying both petitions. (*Id.* ¶¶ 10-13.)

On November 27, 2014, Flanders submitted a written FOAA request to the Maine State Police for the following documents (hereinafter “FOAA requests ## 1, 2”) related to Docket Nos. ROCSC-CR-07-80 and ROCSC-CR-07-90:

1. The entire computer crime lab report/case report for 07-LEW-4568-OF, the associated search warrant, and any documents related to this investigation into “possession of sexually explicit materials.”
2. A full digital copy of any hard drive copies the MCCU [Maine Computer Crimes Unit] has in its possession that directly related to me [Flanders] and/or my previously seized computers.<sup>4</sup>

(*Id.* ¶ 14.) Christopher Parr, General Counsel for the Maine State Police, acknowledged receipt of the FOAA requests on December 3, 2014. (*Id.* ¶ 15.) On December 10, 2014, he wrote to Flanders setting forth the basis for denial of access to some of the requested materials, the time period for processing the request, and the estimated fee for copies of any public records. (*Id.*) On January 13, 2015, Parr indicated to Flanders that redacted records responsive to FOAA requests ## 1 and 2 would be sent to Flanders upon receipt of the \$10 fee for copies. (*Id.* ¶ 17.) Parr mailed Flanders redacted copies of the following on February 2, 2015:

- a) search warrant affidavit of Det. Russell Thompson of the Rockland Police Department, dated Feb. 22, 2007, and search warrant signed by court on the same date;

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<sup>3</sup> Docket Nos.: ROCSC-CR-09-212; ROCSC-CR-08-338.

<sup>4</sup> Previously, seeking this same material, Flanders submitted FOAA requests to the Maine State Police and Knox County District Attorney’s Office on two occasions in 2012. Both agencies denied his requests on the grounds that the requests sought confidential intelligence and investigative record information.

- b) evidence log, Rockland Police Department;
- c) property invoice, Maine State Police, Computer Crimes Task Force;
- d) a file note re: delivery of computer;
- e) evidence log, Lewiston Police Department;
- f) Lewiston Police Department Incident Report.<sup>5</sup>

(*Id.* ¶ 18.) Flanders confirmed receipt and requested from Parr the following documents relating to the Maine Computer Crimes Task Force analysis of his computer:

- 1) the "Internet History Report"
- 2) the "Drive Geometry Report"
- 3) the "Encase Report"

(*Id.* ¶¶ 19-20.) The Maine State Police denied access. (*Id.* ¶ 20.) Flanders had previously requested these same materials from the Maine State Police on March 7, 2012; that request was denied. (*Id.*)

The Maine State Police returned the computer to Flanders with the hard drive and all files completely intact in 2008. (*Id.* ¶ 21.) On February 26, 2015, in response to further emails from Flanders, Parr repeated that the Maine State Police would not be providing any additional records responsive to Flanders' FOAA request for the reasons previously stated in letters dated December 10, 2014, and February 2, 2015. (*Id.* ¶ 22.)

On November 27, 2014, Flanders submitted a FOAA request to the Knox County District Attorney's Office, including FOAA requests ## 1 and 2, which he sought in his letter of the same date to the Maine State Police (Ex. 16), plus the following nine requests:<sup>6</sup>

- 3. "audio recordings between Flanders and Officer Lindahl," as noted in the discovery checklist.

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<sup>5</sup> Defendants submitted to the Court sealed, unredacted copies of these records, as well as examples of the confidential documents responsive to the request that were withheld.

<sup>6</sup> FOAA Requests ## 3 through 6 concern Docket Nos. ROCSC-CR-07-80 and ROCSC-CR-07-90. FOAA Requests ## 7 through 11 concern Docket No. BELDC-CR-08-723.

4. "Recording of E 9-1-1 call made to Knox Communications," as noted in the discovery checklist. Specifically, audio recordings and/or transcripts of the E 9-1-1 calls made by Christopher Lowell and Danielle Lee/Lowell.
5. Any recordings or documentation relating to Danielle Lee/Lowell including any contact with law enforcement or verbal or written statements.
6. The juvenile criminal record of Joshua Lowell.

BELDC-CR-08-723

7. The recording of the June 10, 2008, interview between Brian Sanders and Detective McFadden, as well as any other recordings between Brian Sanders and any other law enforcement individuals (other than the June 12, 2008, recording, which I [Flanders] have).
8. Any recordings between law enforcement and the parents or family members of Brian Sanders, including recordings of meetings among these parties and law enforcement.
9. Any documents bearing the signatures of Brian Sanders or the parents or other family members of Brian Sanders and any statements written by Brian Sanders or the parents or family members of Brian Sanders.
10. Any recordings or documentation referencing the 8/27/2008 plea discussion between DA Geoffrey Rushlau, Defense Attorney Robert Smith, and Officer Michael McFadden, including any information associated with the discussion concerning my computer and allegations of child porn possession.
11. Documentation that would explain why my computer was investigated following my conviction and sentencing.

(*Id.* ¶ 23.)

Soon after receiving Flanders' November 27, 2014, FOAA request, Geoffrey Rushlau, Knox County District Attorney, became aware that Flanders also had made the first two of these requests to the Maine State Police on November 27, 2014, (as well as in 2012), and that Chris Parr of the Maine State Police would be responding. (*Id.* ¶ 25.) The Knox County District Attorney's office had previously provided Flanders' counsel with discovery materials relating to all three criminal matters referenced in Flanders' FOAA requests on several occasions. Rushlau

also had provided copies of discovery materials to Flanders' attorney, William Maselli, Esq., in the post-conviction review cases. (*Id.* ¶¶ 26-27.)

On March 5, 2015, Flanders renewed FOAA requests ## 1-11 to the Knox County District Attorney's Office and added the following requests, numbered here for reference as FOAA requests ##12 and 13:

12. Information relating to the investigation and indictment against Christopher Lowell for the Class C crime of "Theft by Unauthorized Taking or Transfer."
13. Information relating to the Knox County DA's decision not to prosecute Joshua Lowell for violating probation for a third time (resulting from his contact with me, which was forbidden by his probation conditions.

(*Id.* ¶ 28.) On March 31, 2015, Rushlau responded in writing to Flanders' November and March FOAA requests. (*Id.* ¶ 29.) The Stipulated Facts summarize the responses as follows:

30. The materials sought in FOAA request #1 have been withheld by defendants for reasons set forth in numerous denial letters.
31. The District Attorney's Office has no documents responsive to FOAA request #2.
32. The recording referenced in FOAA request #3 was provided to Flanders' counsel in discovery on December 23, 2010. The only copy of that recording currently in Defendant Rushlau's possession is defective and cannot be accessed.
33. The recording of the E 9-1-1 calls made by Christopher Lowell and Danielle Lee/Lowell referenced in FOAA request #4 is confidential pursuant to 25 M.R.S. § 2929 and access was denied. Since District Attorney Rushlau's denial, a redacted transcript of the recording has been prepared and is being provided to Flanders pursuant to 25 M.R.S. § 2929.
34. Defendant have no documents in their possession, custody or control responsive to FOAA request #5, except as previously referenced in response to FOAA request #4.
35. To the extent FOAA request #6 seeks juvenile intelligence and investigative record information, District Attorney Rushlau denied the request, and advised Flanders that a court order was required to release

any such confidential information. To the extent FOAA request #6 seeks the juvenile criminal record [dispositions] of Joshua Lowell, District Attorney Rushlau advised Flanders that public disposition information would be available from the court. In January 2010, Flanders had requested this same information and District Attorney Rushlau provided the same response.

36. Defendants have no recording in their possession, custody or control that is responsive to FOAA request #7. The recording of an interview with Brian Sanders on June 10, 2008, was provided by the Knox County District Attorney's Office to Flanders, attorney in 2010, during discovery in the post-conviction review matter, but the office did not retain a copy and Flanders' attorney did not respond to a request that he return a copy.
37. Defendants have no recordings in their possession, custody or control that are responsive to FOAA request #8.
38. Defendants have no documents in their possession, custody or control that are responsive to FOAA request #9.
39. Defendants have no documents in their possession, custody or control that are responsive to FOAA request #10.
40. The only document responsive to FOAA request #11 is a letter from District Attorney Rushlau to Flanders, dated March 2, 2010. Ex. 29A.
41. Defendants have withheld documents responsive to FOAA request #12 on the ground that all of the requested material is confidential intelligence and investigative record information.
42. Defendants have no documents in their possession, custody or control that are responsive to FOAA request #13.

(*Id.* ¶¶ 30-42.)

Flanders filed his appeal March 15, 2015. Defendants filed the pending Motion for Judgment on December 11, 2015.

## ANALYSIS

### I. Standard of Review

The basic purpose of FOAA "is 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." *Mainetoday Media, Inc. v. State*, 2013 ME 100, ¶ 8, 82 A.3d 104; 1 M.R.S. § 401. Generally, "[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 reasonable time of making the request to inspect or copy the public record." 1 M.R.S. § 408-A. Where a petitioner's request has been denied, the government actor bears the burden of "establishing that there is just and proper cause for the denial." *Bowler v. State*, 2014 ME 157, ¶ 4, 108 A.3d 1257. The court shall liberally construe FOAA's general requirement of disclosure and, as a "necessary corollary," strictly construe any exceptions to that general requirement. *Mainetoday Media, Inc.*, 2013 ME 100, ¶¶ 8-9, 82 A.3d 104. "When a public record contains information that is not subject to disclosure under FOAA, the information may be redacted to prevent disclosure." *Doyle v. Town of Falmouth*, 2014 ME 151, ¶ 9, 106 A.3d 1145.

## II. Grounds for Non-disclosure

Defendants divide Flanders' 13 requests into three categories: (A) records that the Defendants do not have; (B) records that have been provided to Flanders in response to the request; and (C) records to which Flanders is not entitled under FOAA because of the confidentiality provisions of the Intelligence and Investigative Record Information Act, 16 M.R.S. §§ 801-09, the Criminal History Record Information Act, 16 M.R.S. §§ 701-10, and the Juvenile Code, 15 M.R.S. §§ 3001 *et seq.* The Court adopts this framework to evaluate whether Defendants have met their burden of establishing just and proper cause for their denials.

### A. *FOAA Requests ## 5, 7, 8, 9 and 10: Records That Defendants Do Not Have*

Defendants denied FOAA requests ## 5, 7, 8, 9, and 10 on the basis that the Defendants do not have any documents responsive to those requests. In reviewing Flanders' submission on this Motion, the Court finds one direct response to the Defendants' denial of these five requests.

Regarding Defendants' response to request # 5, Flanders responds that Defendants' response is "implausible." (Pl.'s Resp. Stip. 3.) He alternatively requests "an explanation as to why Danielle Lowell was precluded from the investigation." (*Id.*) FOAA does not require an agency or official to create a record that does not exist. 1 M.R.S. § 408-A(6). Therefore, based on its review of the record, the Court upholds Defendants denials on FOAA requests ## 5, 7, 8, 9, and 10.

**B. FOAA Requests ## 3, 4, 11, and 13: *Requests That Have Been Provided***

Defendants denied FOAA requests ## 3, 4, 11, and 13 on the basis that Defendants have already provided the only documents they have that are responsive to those requests. The implied reason for denial here appears to be that to provide the same material again would be burdensome or oppressive. Indeed, FOAA provides, "[a] request for inspection or copying may be denied, in whole or in part, on the basis that the request is unduly burdensome or oppressive." However, the basis for denial is effective only "if the procedures established in subsection 4-A are followed." *Id.* § 408-A(4). From the record, it does not appear that Defendants followed the procedures established in subsection 4-A.<sup>7</sup> Therefore, to the extent the documents have not been provided in response to these specific requests, the Court orders disclosure of documents already provided in response to ## 3, 4, 11, and 13.

**C. FOAA Requests ## 1, 2, 6, and 12: *Requests Withheld as Confidential***

This leaves only four of Flanders' FOAA requests at issue: FOAA requests ## 1, 2, 6, and 12. The Court addresses each request in turn.

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<sup>7</sup> "A body, an agency or official may seek protection from a request for inspection or copying that is unduly burdensome or oppressive by filing an action for an order of protection in the Superior Court for the county where the request for records was made within 30 days of receipt of the request." 1 M.R.S. § 408-A(4-A).

1. The entire computer crime lab report/case report for 07-LEW-4568-OF, the associated search warrant, and any documents related to this investigation into “possession of sexually explicit materials.”

- i. Repeated requests

Flanders requested the very same material from both Defendants on March 7, 2012, (Ex. 18A), and did not appeal when Defendants denied access pursuant to the Maine Criminal History Record Information Act.<sup>8</sup> (Ex. 19A & 19B). In his 2012 requests to the Maine State Police and District Attorney, Flanders specifically sought the “Internet History Report,” “Drive Geometry Report,” and “Encase Report” referenced in the Computer Crimes Task Force Report #07-LEW-4568-OF. (Exs. 18A & 18B, 1.) When Flanders asked for these materials again in a FOAA request to the Maine State Police on February 7, 2015, (Ex. 22), following up on his November 2014 request, access was denied for the same reasons. (See Exs. 23A, 23B & 26.)

Defendants argue that these repeated requests in 2014 and 2015 should not be treated as new requests since they were previously denied and not appealed in a timely fashion pursuant to 1 M.R.S. § 409(1). The Court is not persuaded the appeal should be dismissed on the grounds that it is a repeated request. FOAA contains no explicit prohibition on repeated requests. There are, however, explicit procedures for an agency or official to deny a request on the basis compliance would be unduly burdensome or oppressive. 1 M.R.S. § 408-A(4). Therefore, the Court proceeds to Defendants substantive arguments for upholding the denials.

- ii. Limitations on dissemination of intelligence and investigative record information

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<sup>8</sup> The applicable provisions on intelligence and investigative record information were at that time contained within the Maine Criminal History Record Information Act, 16 M.R.S. Chapter 3, subchapter 8. Those provisions were subsequently moved to a new subchapter 9 of title 16, entitled the Intelligence and Investigative Records Information Act, pursuant to P.L. 2013, ch. 267, § A-3 (eff. Oct 9, 2013).

Defendants maintain that Flanders is not entitled to access the records within the scope of FOAA request #1 that were withheld by Defendants, either in whole or in part, because the withheld materials are intelligence and investigative record information deemed confidential by 16 M.R.S. § 803(7).

The Maine State Police did provide copies of several documents to Flanders in response to this request, with redactions to withhold confidential material. The Court reviewed the unredacted versions submitted for *in camera* review. These documents include: a search warrant affidavit, a search warrant, an evidence log of the Rockland Police Department, a property invoice of the Maine State Police Computer Crimes Task Force, a file not regarding delivery of the computer, an evidence log of the Lewiston Police Department, and a Lewiston Police Department Incident report (this last unredacted). (Stips. ¶ 18; Exs. 20, 21.)

Except for an “[a]ccused [p]erson” or other person or entity authorized by 16 M.R.S. §§ 805 and 806, “a record that is or contains intelligence and investigative record information is confidential and may not be disseminated by a Maine criminal justice agency to any person or public or private entity if there is a reasonable possibility that public release or inspection of the record would,” in relevant part, “[c]onstitute an invasion of privacy,” “[d]isclose investigative techniques or security plans,” and/or “[e]ndanger law enforcement of others.” 16 M.R.S. 804(3), (7), (8).

Further, Defendants, as holders of confidential intelligence and investigative record information, “may not confirm the existence or nonexistence of intelligence and investigative record information confidential under section 304 to any person or public or private entity that is not eligible to receive the information itself.” 16 M.R.S. § 807. And, “[a] person who is the subject of intelligence and investigative record information maintained by a criminal justice

agency has no right to inspect or review that information for accuracy or completeness.” 16

M.R.S. § 808.

Defendants withheld that material responsive to this request based on their conclusion that the material fell within the three subsections noted above and that Flanders as not an “accused person” entitled to review the confidential material. As noted in the Index to Withheld Records filed with this Motion, the investigative materials that Flanders seeks in request #1 include medical records, crime scene photographs, victim and witness statements and victim correspondence. Defendants concluded that release of any of this material could result in an unwarranted invasion of these individuals’ personal privacy. The “Encase report” generated by the Maine Computer Crimes Task Force in its forensic examination of Plaintiff’s computer contain sexually suggestive photographs, including those of a minor victim. The “Internet History” report contains photographs and information relating to social media accounts of unknown individuals. Defendants concluded that the privacy of these individuals could be seriously invaded by public release of these records, and their personal safety could be at risk as a result. All four of the Maine Computer Crimes Task Force reports that were withheld also contain technical data and descriptions of investigative techniques used in forensic examination of computers in various types of criminal investigations including child pornography. Defendants concluded that release of this information could reveal investigative techniques, procedures, and methodologies that are not generally known to the public and could impede future law enforcement investigations in very serious criminal matters.

As determined by the Legislature, these are just and proper reasons for denying a FOAA request. Furthermore, the Court concludes Flanders is not an “accused person” who would be entitled to this confidential material for purposes of trial and sentencing. The statute defines an

“accused person” as a “person accused of a crime.” 16 M.R.S. § 805(3). Flanders, having been convicted and having exhausted the appellate process for the underlying convictions, is no longer an “accused person.” He is now a member of the general public. As a member of the public, Flanders has no special standing to request these materials. Finding no indication of bad faith or misrepresentation in the record submitted for review regarding this request and responses to it, the Court upholds Defendants denial of Flanders’ FOAA request #1.

2. A full digital copy of any hard drive copies the MCCU [Maine Computer Crimes Unit] has in its possession that directly relate to me [Flanders] and/or my previously seized computers.

Defendants denied this request on the basis that there exists no record technically responsive to what is requested. What Maine State Police Computer Crimes Unit (MCCU) has, Defendants explain, are images of data in a proprietary format that correspond to information that was retrieved from the hard drives of two laptops belonging to Flanders. They maintain these proprietary images are not analogous to “photocopies” of Plaintiff’s laptop hard drives, but are translations of the data on the hard drives that allowed the MCCU to conduct a forensic exam of the hard drives. To be comprehended, Flanders would have to read them by using licensed, proprietary software known as “Encase.” Defendants denied this request, in part, on the basis that review of the data that the MCCU collected would disclose investigative techniques and procedures not known by the general public, which could interfere with law enforcement investigations. *See* 16 M.R.S. § 804(1), (7).

Defendants further argue that even if the images the MCCU has are deemed within the scope of this request, Flanders is not entitled to access them because public disclosure would constitute an unwarranted invasion of personal privacy (including the privacy of the minor who was a victim of Flanders’ 2007 assault) and could endanger the physical safety of those

individuals. *See* 16 M.R.S. § 804(3) & (8). Again, Flanders is a member of the public and not entitled to review documents falling within these subsections. Finding no indication of bad faith or misrepresentation in the record submitted for review regarding this request and responses to it, the Court upholds Defendants denial of Flanders' FOAA request # 2.

**6. The juvenile criminal record of Joshua Lowell.**

Joshua Lowell is one of Flanders' victims in the underlying criminal actions. (*See* Exs. 1, 2.) According to the record, Flanders was not an alleged victim of any of the offenses alleged to have been committed by Joshua Lowell.

Dissemination of any "juvenile crime information" or "juvenile intelligence and investigative record information" is governed by the Juvenile Code and the statutes governing the State Bureau of Identification (SBI) 15 M.R.S. §§ 3307-08-A; 25 M.R.S. § 1541. Flanders appears to be requesting the record of dispositions – "juvenile crime information."<sup>9</sup> These records are available to the public only to the extent the underlying records and proceedings would have been open to the public, which is governed by 15 M.R.S. §§ 3307-08.

If Joshua Lowell, as a juvenile, had been found to have committed juvenile crimes in proceedings open to the public, Flanders could inspect those records at the court of adjudication subject to 15 M.R.S. § 3307(2) and any Administrative Order of the Court. Plaintiff was directed to the court by Rushlau in his March 31, 2015 response. (Ex. 32). Defendants confirmed that Rushlau's file did not contain any SBI record related to the juvenile. Ruchlau referred Flanders to the SBI or the court for any information that may be available; Defendants argue this was a judicious response in accordance with 15 M.R.S. § 3307 and 16 M.R.S. § 704.

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<sup>9</sup> Police reports and investigative materials collected by a criminal justice agency while performing the administration of juvenile justice is "juvenile intelligence and investigative record information," which are confidential pursuant to 15 M.R.S. § 3308-A.

Having reviewed the documents submitted for *in camera* review, and evaluated Defendants arguments in favor of non-disclosure, the Court concludes the denials were for just and proper cause. This decision is also consistent with the strong public policy in Maine that juvenile crime information is generally not publicly available. For example, dissemination of such information as it pertains to non-public juvenile proceedings is not even permitted to be made to a sentencing court where the court is sentencing an adult who has prior non-public juvenile criminal history. *See, e.g., State v. Brockelbank II*, 33 A.3d 925, 2011 ME 118, ¶¶ 16-18 (overview of statute and underlying policy; Brockelbank waived protection by voluntarily introducing information related to otherwise confidential juvenile adjudication).

12. **“Information relating to the investigation and indictment against Christopher Lowell for the Class C crime of “Theft by unauthorized Taking or Transfer.”**”

Christopher Lowell is one of the victims of Flanders’ past crimes. (Exs. 1, 2.) In response to this request, Ruchlau informed Flanders on March 31, 2015, that the Knox County District Attorney’s Office did not have information on a case responsive to the request, but that there was a Waldo County case involving Christopher Lowell that was dismissed in April 2009 after the subject’s death. (Ex. 32.)

The general rule is that confidential criminal history record information may not be released to members of the public. *See* 16 M.R.S. § 705. Confidential criminal history record information includes “[i]nformation disclosing that a criminal charge has been dismissed by a court with prejudice or dismissed with finality by a prosecutor other than as part of a plea agreement.” 16 M.R.S. § 703(2)(G). The Defendants argue, and the Court agrees, the information responsive to this request falls within this definition.

However, an exception to the general rule provides that information may be released to a person who has made "a specific inquiry to the criminal justice agency as to whether a named individual was summonsed, arrested or detained or had formal criminal charges initiated on a specific date." 16 M.R.S. § 705(1)(E). If the Court were to interpret FOAA request # 12 as such an inquiry, it appears the Defendants complied when Rushlau informed Flanders that the specific crime about which Flanders inquired had been dismissed upon the death of the person charged.

Defendants argue its denial of the request to the extent it seeks confidential intelligence and investigative information is proper pursuant to 16 M.R.S. § 803(3), (7), (9) and Public Information and Confidentiality, Me. Admin. Order JB-05-20 (as amended by A. 1-15) (effective Jan. 14, 2015). Having reviewed the record and submissions of the parties, the Court concludes the denial is proper for the grounds cited by Defendants.

### **III. Flanders' Remaining Allegations of Misconduct and Request for Litigation Costs**

Flanders requests litigation expenses because he claims Defendants violated FOAA and acted in bad faith. FOAA authorizes an award of litigation expenses only to "the substantially prevailing plaintiff," and only "if the court determines that the refusal or illegal action was committed in bad faith." 1 M.R.S. § 409(4). The Court concludes litigation expenses are not warranted because although there was some conduct by Defendants not in strict compliance with FOAA, the overall actions of Defendants do not constitute bad faith and Flanders is not a substantially prevailing party.

Flanders argues Defendant Maine State Police violated FOAA by requiring him to pay ten dollars in advance for copies of the documents that were mailed to him in redacted form on February 2, 2015. (*See Stips.* ¶¶ 18-19.)

The relevant portion of FOAA on requiring payment in advance provides:

The agency or official having custody or control of a public record subject to a request under this section may require a requester to pay all or a portion of the estimated costs to complete the request prior to the search, retrieval, compiling, conversion and copying of the public record if:

- A. The estimated total cost exceeds \$100; or
- B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.

1 M.R.S. § 408-A(10). The Court agrees with Flanders that Defendants actions do not strictly comply with 1 M.R.S. § 408-A(10). As noted by the plain language above, Defendants were not permitted to require payment before mailing the documents after they search, retrieved, and compiled the documents requested. The Court finds Flanders' remaining arguments of bad faith unpersuasive.

Flanders is not a substantially prevailing plaintiff. The Court has upheld the majority of the denials and the violation of 1 M.R.S. § 408-A(10) was minor and not committed in bad faith. In this case, the Maine State Police did not require payment before taking these steps; they simply required payment before mailing the documents to Flanders. (*See* Exs. 20, 21.) Defendants' characterization of this as a prudent step to ensure receipt of payment is reasonable, even if ultimately wrong. Beyond this error, the Maine State Police adhered to the statutory requirements of FOAA by promptly acknowledging receipt of Plaintiff's request, (Ex. 17A), and advising him of the scope and grounds for partial denial as well as the estimated cost of producing the limited materials that could be disclosed. (Ex. 17B.) Indeed, review of the correspondence from general counsel for the Maine State Police to Plaintiff reveals that the Defendants took prompt action and provided extremely thorough responses to all of Plaintiff's

FOAA requests. (*See, e.g.*, Exs. 17A, 17B, 19A, 19B, 20, 21, 23A, 23B.)<sup>10</sup> Flanders' request for litigation expenses is denied.

Despite the one instance of a technical violation noted above, the Court concludes that Flanders is not a substantially prevailing plaintiff and the Defendants did not act in bad faith.

### CONCLUSION

Defendants have judiciously applied the proscriptions of the Criminal History Record Information Act, the Intelligence and Investigative Record Information Act, and the Juvenile Code to make available to Flanders those records that are publicly accessible under Maine's Freedom of Access Act. They have done so in response to repeated and repetitive requests from Flanders, in what the Court agrees appears to be a prolonged attempt to relitigate matters that should have been, and in many cases were, addressed in pre-trial motions in the criminal prosecutions against Flanders and in post-conviction review proceedings. Maine's FOAA is designed to ensure citizens access to public proceedings and records of those proceedings. 1 M.R.S. § 401. Flanders' use of it to relitigate matters long-since resolved in previous court proceedings is beyond the broad purpose of FOAA.

The Entry is:

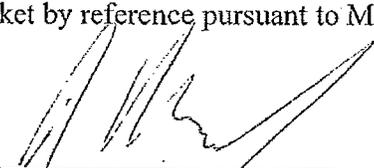
1. The Court **DENIES** Plaintiff's appeal as it relates to Defendants denials of FOAA requests ## 1, 2, 5, 6, 7, 8, 9, 10 and 12.
2. Plaintiff's appeal is **GRANTED** in regards to Plaintiff's FOAA requests ## 3, 4, 11, and 13. The Court orders Defendants **DISCLOSE** documents already provided to Plaintiff that are responsive to current FOAA requests ## 3, 4, 11, and 13.

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<sup>10</sup> Given the duplicative and repetitive nature of Plaintiff's FOAA request, the District Attorney's delayed response to Plaintiff's November 27, 2014 FOAA request is understandable, and likewise does not reflect any lack of good faith. (*See* Stips. ¶¶ 16, 24-26 & 29; Exs. 32, 19C, 28, 29A-29H.)

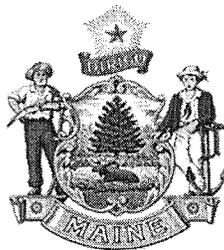
3. The Court DENIES Plaintiff's request for litigation fees.
4. This Order shall be incorporated into the docket by reference pursuant to M.R. Civ. P. 79.

Dated: August 17, 2016



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Robert Murray  
Justice, Maine Superior Court



**STATE OF MAINE  
128th LEGISLATURE  
FIRST REGULAR SESSION**

**Eleventh Annual Report  
of the  
Right to Know Advisory Committee**

**January 2017**

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Helen Rankin  
Luke Rossignol  
William Shorey  
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**DRAFT**

**EXECUTIVE SUMMARY**

*[to be added]*

DRAFT

## I. INTRODUCTION

This is the eleventh annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The Advisory Committee's authorizing legislation, located at Title 1, section 411, is included in **Appendix A**. Previous annual reports of the Advisory Committee can be found on the Advisory Committee's webpage at [www.maine.gov/legis/opla/righttoknowreports.htm](http://www.maine.gov/legis/opla/righttoknowreports.htm).

The Right to Know Advisory Committee has 17 members. The chair of the Advisory Committee is elected annually by the members. Current Advisory Committee members are:

Sen. David C. Burns Chair	<i>Senate member of Judiciary Committee, appointed by the President of the Senate</i>
Rep. Kimberly Monaghan	<i>House member of Judiciary Committee, appointed by the Speaker of the House</i>
Suzanne Goucher	<i>Representing broadcasting interests, appointed by the Speaker of the House</i>
Stephanie Grinnell	<i>Representing newspaper and other press interests, appointed by the President of the Senate</i>
A.J. Higgins	<i>Representing broadcasting interests, appointed by the President of the Senate</i>
Richard LaHaye	<i>Representing law enforcement interests, appointed by the President of the Senate</i>
Mary Ann Lynch	<i>Representing the Judicial Branch, designated by the Chief Justice of the Supreme Judicial Court</i>
Judy Meyer	<i>Representing newspaper publishers, appointed by the Speaker of the House</i>
Kelly Morgan	<i>Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House</i>
Paul Nicklas	<i>Representing municipal interests, appointed by the Governor [appointed effective September 15, 2016]</i>
Christopher Parr	<i>Representing state government interests, appointed by the Governor</i>

Linda Pistner	<i>Attorney General's designee</i>
Harry Pringle	<i>Representing school interests, appointed by the Governor</i>
Helen Rankin	<i>Representing the public, appointed by the Speaker of the House</i>
Luke Rossignol	<i>Representing the public, appointed by the President of the Senate</i>
William Shorey	<i>Representing county or regional interests, appointed by the President of the Senate</i>
Eric Stout	<i>A member with broad experience in and understanding of issues and costs in multiple areas of information technology, appointed by the Governor</i>

The complete membership list of the Advisory Committee, including contact information, is included in **Appendix B**.

## II. COMMITTEE DUTIES

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

- Providing guidance in ensuring access to public records and public proceedings;
- Serving as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know;
- Supporting the provision of information about public access to records and proceedings via the Internet;
- Serving as a resource to support training and education about Maine's freedom of access laws;
- Reporting annually to the Governor, the Legislative Council, the Joint Standing Committee on Judiciary and the Chief Justice of the Supreme Judicial Court about the state of Maine's freedom of access laws and the public's access to public proceedings and records;
- Participating in the review and evaluation of public records exceptions, both existing and those proposed in new legislation;

- ❑ Examining inconsistencies in statutory language and proposing clarifying standard language; and
- ❑ Reviewing the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public.

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

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

By law, the Advisory Committee must meet at least four times per year. During 2016, the Advisory Committee met on June 22, July 20, August 17, September 14 and October \_\_\_\_\_. On September 14, 2016, the Advisory Committee held a public hearing to take comments and suggestions about how the Freedom of Access Act is working and how it might be improved, consistent with its goals of giving citizens adequate access to records and meetings of decision making bodies of government. The Advisory Committee specifically requested testimony on the following topic: *Considering the sensitive nature of certain information held by government entities, how could public access to government meetings and records be improved?*

Each meeting was open to the public and was also accessible through the audio link on the Legislature's webpage.

The Advisory Committee has also established a webpage, which can be found at [www.maine.gov/legis/opla/righttoknow.htm](http://www.maine.gov/legis/opla/righttoknow.htm). Agendas, meeting materials and summaries of the meetings are available on the webpage.

### **III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES**

By law, the Advisory Committee serves as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know. In carrying out this duty, the Advisory Committee believes it is useful to include in its annual reports a digest of recent developments in case law relating to Maine's freedom of access laws. For its eleventh annual report, the Advisory Committee has identified and summarized the following Maine Supreme Judicial Court decision related to freedom of access issues.

#### **Hughes Bros. v. Town of Eddington**

In *Hughes Bros. v. Town of Eddington*, 2016 ME 13, 130 A.3d 978, Hughes Bros., Inc., a landowner seeking a permit to create a quarry, appealed a Superior Court decision determining that the Town of Eddington conducted a valid executive session for the purpose of consulting with counsel. The landowner sought an injunction directing the town to cease and desist from holding a public vote on proposed moratorium on quarries, and a declaration that any moratorium that might be approved was void because town violated open meeting requirements of Freedom of Access Act (FOAA) by holding a joint executive session of the board of selectmen and planning board. The Law Court held that the boards conducted a valid executive session, invoked for purpose of consulting with legal counsel regarding wording in proposed moratorium ordinance, and that FOAA does not prohibit municipal boards from holding executive sessions jointly in order to meet with legal counsel about how to comply with the law in carrying out their prospective duties.

In order for an executive session to be valid under FOAA, the following elements must be present: the executive session must be publicly announced; the purpose of the executive session must be permitted by law and described clearly; the executive session must be confined to statutorily authorized matters; it may not include any final approval of any official action; and records must be kept that are adequate for purposes of judicial review if an action is challenged. In this case, the administrative record demonstrated that the Town met its burden to show that all of these elements were present. The executive session was held for the limited and authorized purpose of consulting with counsel to draft a legally sound proposed ordinance for consideration at a later public meeting and the municipal ordinance was approved after consultation with counsel and public deliberation and vote in a meeting open to the public. And further, the Law Court stated that FOAA contains no prohibition against municipal boards holding joint executive sessions and the mere fact that boards share in the advice of counsel in a combined executive session is not a violation of FOAA.

#### **IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEE**

In prior years, the Right to Know Advisory Committee has divided its workload among various subcommittees that have reported recommendations back to the full Advisory Committee for consideration and action. In 2016, the Advisory Committee chose to appoint one subcommittee: the Public Records Exceptions Subcommittee. The Public Records Exceptions Subcommittee's focus is to review and evaluate public records exceptions as required of the Advisory Committee pursuant to 1 MRSA §433, sub-§2-A. The guidelines in the law require the Advisory Committee to review all public records exceptions enacted after 2004 and before 2013 no later than 2017.

As part of its review, the Subcommittee reached out to state and local bodies for information, comments and suggestions with respect to the relevant public records exceptions administered by that body. All inquiries to the public bodies were coupled with an invitation for a representative of the public body to attend the Subcommittee meeting to provide any additional information or answer questions from the Subcommittee. Review was undertaken in light of the criteria codified at 1 MRSA §434, and, after discussion and a vote, recommendations for either keeping a provision with no modification or otherwise striking or amending the provision were passed along to the full Advisory Committee for a final vote. Representative Monaghan was the chair of the Subcommittee and A.J. Higgins, Mary Ann Lynch, Chris Parr, Linda Pistner, Helen

Rankin and Eric Stout served as members. As a legislator and the Advisory Committee chair, Senator Burns was an ex officio member.

**Exceptions reviewed by the Subcommittee in 2015, but considered by the full Advisory Committee in 2016:** The following exceptions were reviewed by the Subcommittee at its December 1, 2015 meeting, but were not able to be considered by the full Advisory Committee until 2016. The recommendations are summarized below.

*Note: Reference numbers below are based on a spreadsheet of public records exceptions created by staff to facilitate the review. The spreadsheet is available on the Right to Advisory Committee's website, [www.maine.gov/legis/opla/righttoknow.htm](http://www.maine.gov/legis/opla/righttoknow.htm).*

Ref# 4: 1 M.R.S. §402, Sub-§3, ¶O, relating to personal contact information concerning public employees other than elected officials

The Subcommittee voted 4-0 to recommend no modification.

Ref# 9: 1 M.R.S. §1013, Sub-§2, relating to the identity of a requestor of Commission on Governmental Ethics and Election Practices opinions

The Subcommittee voted 3-0 to recommend no modification. According to the Ethics Commission this exception has not been used in the last 13 years, so they believe the exception is clear. The exception is important due to the sensitive nature of this information.

Ref# 10: 1 M.R.S. §1013, Sub-§4, relating to Commission on Governmental Ethics and Election Practices records other than complaints

The Subcommittee voted 3-0 to recommend no modification.

Ref# 11: 1 M.R.S. §1013, Sub-§3-A, relating to complaint alleging a violation of legislative ethics

The Subcommittee voted 3-0 to recommend no modification.

Ref# 38: 12 MRSA §10110, relating to a person's e-mail address submitted as part of the application process for a hunting or fishing license

The Subcommittee voted to table this item.

Ref# 44: 21-A M.R.S. §1003, Sub-§3-A, relating to investigative working papers of the Commission on Governmental Ethics and Election Practices

The Subcommittee voted 4-0 to recommend no modification.

Ref# 45: 21-A M.R.S. §1125, Sub-§3, relating to records of individuals who made Clean Elections qualifying contributions over the Internet

The Subcommittee voted 4-0 to recommend no modification. The exception involves financial information not ordinarily available to the public.

Ref# 46: 21-A M.R.S. §1125, Sub-§2-B, relating to records of individuals who made Clean Elections gubernatorial seed money contributions over the Internet

The Subcommittee voted 4-0 to indefinitely postpone this item, as a recently passed citizen initiative repeals this provision.

Ref# 47: 21-A M.R.S. §196-A, relating to information contained electronically in the central voter registration system

The Subcommittee voted 4-0 to recommend no modification. A representative of the Department of the Secretary of State appeared before the Subcommittee and explained the need for the continuation of this exception for central voter registration system data. The Department had asked the Legislature for this provision because FOAA is intended to illuminate the activities of government – this data only pertains to personal information of voters. This policy reason still holds today. Releasing this data would raise issues of voter fraud and identity theft. A bill that would narrow this exception is heading to the Veterans and Legal Affairs Committee for the upcoming legislative session.

Ref# 49: 22 M.R.S. §2425, Sub-§8, relating to medical marijuana registry identification cards

The Subcommittee voted 3-0 to recommend no modification.

Ref# 52: 22 M.R.S. §4087-A, Sub-§6, relating to information held by or records or case-specific reports maintained by the Child Welfare Ombudsman

The Subcommittee voted 3-0 to recommend no modification.

Ref# 55: 29-A M.R.S. §1301, Sub-§6-A, relating to the social security number of an applicant for a driver's license or non-driver identification card

The Subcommittee voted 3-0 to recommend no modification. The agency survey response indicated concern about a conflict with this exception to the public records covered under FOAA with a provision of Maine's motor vehicle laws that permits disclosure of Social Security Numbers pursuant to the federal Driver Privacy Protection Act, 18 U.S.C. §2721(a)(2). The group discussed this concern and concluded there was no conflict, because the public records exception allows, but does not require, nondisclosure of the SSNs (i.e., they are not designated as "confidential").

Ref# 63: 30-A M.R.S. §4706, Sub-§1, relating to municipal housing authorities

The Subcommittee voted 3-0 to recommend no modification

Ref# 68: 35-A M.R.S. §122, Sub-§1-B, ¶G, relating to information, as it pertains to the sale, lease or use of state-owned land or assets under the provisions of this subsection or activities in preparation for such sale, lease or use in the context of energy infrastructure corridors

The Subcommittee voted 3-0 to recommend no modification

Ref# 69: 35-A M.R.S. §10106, relating to records of the Efficiency Maine Trust and its board

The Subcommittee voted 3-0 to table this item. The Subcommittee received comments from Efficiency Maine Trust that the word “and” at the end of subsection 1, paragraph 3 of this section should instead be an “or.” The Subcommittee was reluctant to make a change without seeing the proposed amendment in formally.

Ref# 70: 36 M.R.S. §6271, Sub-§2, relating to an application, information submitted in support of an application and files and communications in relation to a municipal property tax deferral program for senior citizens

The Subcommittee voted 3-0 to recommend no modification

Ref# 71: 38 M.R.S. §1310-B, Sub-§2, relating to hazardous waste information, information on mercury-added products and electronic devices and mercury reduction plans

The Subcommittee voted 3-0 to recommend no modification

Ref# 72: 38 M.R.S. §580-B, Sub-§11, relating to records held by the Department of Environmental Protection or its agents regarding individual auctions administered under the carbon dioxide cap-and-trade program

The Subcommittee voted 3-0 to recommend no modification

***Exceptions reviewed by the Subcommittee in 2016:*** During 2016, the Public Records Exception Subcommittee held four meetings. The Subcommittee’s recommendation on each exception is summarized below.

Ref# 1: 1 M.R.S. §402, Sub-§2, ¶G, relating to committee meetings pertaining to interscholastic sports

The Subcommittee voted 4-0 to indefinitely postpone this item. The Maine Principals Association responded to the request for information that it is not a public body; the exception also pertains to meetings, not public records. The Subcommittee interpreted the public records exceptions review requirement in the Freedom of Access Act to require only a review of

exceptions to the definition of “public records.” The Subcommittee discussed the possibility of further deliberation on this point with the full Advisory Committee.

Ref# 2: 1 M.R.S. §402, Sub-§3, ¶C-1, relating to communications between a constituent and an elected official

The Subcommittee spent considerable time discussing this exception. Several members expressed support for continuation of the exception with no modifications as it is narrowly tailored to protect private constituent information.

Mr. Parr noted that this is another example of information being designated confidential as opposed to the entire record that contains that information being designated confidential, and that this creates a burden on the agencies and public bodies because of increased time required for searching for and redacting the confidential information. He expressed that this was his general problem with these types of public records exceptions and his being in favor of a broader “records” standard for this confidentiality provision.

After some further discussion in the Subcommittee, Mr. Parr made a motion, seconded by Mr. Stout, that the Subcommittee recommend that this public records exception be amended to apply more broadly to the entire record of constituent communication if it contains any of the types of information listed in the current exception. However, the amendment would also require the agency to provide the record with such information redacted, if it did not constitute an undue burden on the agency. The vote was unanimous of those present. This proposed amendment will be put on the agenda for the next full Advisory Committee meeting.

Sen. Burns stated that it was time for the Legislature to have a better disclaimer to make it clearer to the public that constituent communications with legislators may become public record.

Mr. Stout made another motion, proposing that the subcommittee recommend creating a new public records exception along similar lines to the proposed amendment. The new public records exception would exempt from the definition of “public records” any records containing the information described in 1 M.R.S. §402(3)(C-1)(1) and (2) (e.g., an individual’s medical information, credit or financial information, etc.). Sen. Burns expressed discomfort with applying such a broadly applicable public records exception, and wondered about the unintended consequences of such a change. Rep. Monaghan shared this concern, but stated her support for the motion for the purpose of having a discussion of the proposal in the full Advisory Committee. The vote in favor of the motion was 5-1.

This item was referred to the full Advisory Committee for discussion.

Ref# 6: 1 M.R.S. §402, Sub-§3, ¶Q, relating to security plans, staffing plans, security procedures, architectural drawings or risk assessments prepared for emergency events for Department of Corrections or county jail

The Subcommittee voted 6-0 to recommend no modification to the current exception.

Ref# 7: 1 M.R.S. §402, Sub-§3, ¶R, relating to social numbers in the possession of the Secretary of State

Robert O'Connell, of the Bureau of Motor Vehicles (BMV) within the Department of the Secretary of the State, assisted the Subcommittee with its review. Mr. O'Connell stated that his agency did not object to the repeal of the exception, given the broader exception for Social Security Numbers in paragraph N of the same subsection of the statute, and also given the confidentiality provision in 29-A MRSA §1301 (Advisory Committee reference number 55) applicable to the Social Security Number of an applicant for a driver's license or non-driver identification card. Mr. O'Connell told the Subcommittee that the Secretary of State's Office will propose draft legislation to amend the confidentiality provision in Title 29-A, section 1301 by eliminating the discretionary sharing of Social Security Numbers as permitted by federal law and instead allowing the sharing of this information only as required by federal law, specifically 18 United States Code, section 2721(b).

Ms. Lynch made a motion to repeal 1 MRSA §402(3)(R). Mr. O'Connell notified the Subcommittee that the BMV, through the Secretary of State would be submitting a bill to accomplish this to the next Legislature, but that his office appreciated the Subcommittee's support. In response, Ms. Lynch modified her motion to recommend repeal of 1 MRSA §402(3)(R) and to endorse the BMV proposed amendment without recommending that the full Advisory Committee put forward any legislation. The motion was seconded by Mr. Stout and the motion carried by a vote of 5-0.

Ref# 13: 5 M.R.S. §1541, Sub-§10-B, relating to internal audit working papers of the State Controller

The Subcommittee discussed this item at more than one meeting in and also sought feedback from the The Office of the State Controller regarding this exception. The office provided a survey response, in which the agency recommended keeping the exception unmodified because it is critical to ensuring that ongoing audits and investigations are not jeopardized and because the protection of confidentiality encourages individuals to provide data and candid information during audits and investigations of their agencies.

The Subcommittee voted 4-0 unanimously to recommend no modification to the current exception.

Ref# 35: 12 M.R.S. §8005, Sub-§1, relating to Social Security numbers, addresses, telephone numbers, electronic mail addresses of forest landowners owning less than 1,000 acres

This item was previously tabled in order for staff to solicit stakeholder input. The one stakeholder group that responded stated that it had no problem with the current exception. The Subcommittee voted 6-0 to recommend no modification to the current exception.

Ref# 36: 12 M.R.S. §8005, Sub-§2, relating to Social Security numbers, forest management plans and supporting documents of activities for administering landowner assistance programs

This item was previously tabled in order for staff to solicit stakeholder input. The one stakeholder group that responded stated that it had no problem with the current exception. The Subcommittee voted 6-0 to recommend no modification to the current exception.

Ref# 37: 12 M.R.S. §8005, Sub-§4, relating to forest management information designated confidential by agency furnishing the information

This item was previously tabled in order for staff to solicit input from the stakeholders identified in the Department of Agriculture, Conservation and Forestry's survey response. No recommended changes were received from stakeholders and the agency itself had recommended no changes in its original response.

Mr. Parr objected to this provision on the basis that it was another example of information being designated confidential as opposed to the entire record itself being confidential, creating a burden on the agency or public body to search for and redact such information.

Ms. Lynch made a motion to recommend no modification to the current exception, reasoning that this exception was involving proprietary and competitive information and that the agency had recommended its continuation. The Subcommittee voted 5-0, with one abstention, to recommend no modification to the current exception.

Ref# 38: 12 M.R.S. §10110, relating to a person's e-mail address submitted as part of the application process for a hunting or fishing license

This item was previously tabled in order for staff to gather additional information from the Department of Inland Fisheries and Wildlife regarding how a member of the public signified their wish for the department to keep the individual's email address confidential, whether this was treated as an opt-in or opt-out type of system.

The department provided draft legislation expanding the exception to individual's applying for permits and registrations as well, and designating this information as confidential. Under the proposal, the commissioner would be permitted to allow a member of the public to clearly indicate that the individual's email address not be kept confidential (an opt-in system). The proposal included additional exceptions to the confidentiality to allow the department to disclose these email addresses to a contractor or state agency for marketing or wildlife management purposes.

Mr. Stout explained the origin of the current public records exception, being aware of the agency responding to a FOAA request for all email addresses contained in the department's electronic licensing system for commercial purposes. He noted that the term "contractor" in the proposed exception to the confidentiality requirement should be clarified.

Mr. Parr made a motion, seconded by Sen. Burns, to 1) recommend no modification to the current public records exception and 2) ask the full Advisory Committee to review the department's proposed legislation for possible action. Ms. Lynch expressed her lack of support for the second part of the motion, noting that the proposed legislation would be more appropriately vetted through the Legislature's Inland Fisheries and Wildlife Committee. Sen. Burns agreed and the motion was withdrawn.

Mr. Parr expressed his support for the draft legislation's opt-in approach and broader application, but echoed concerns about allowing the use of this information by contractors. Rep. Monaghan expressed some concern about the patchwork of public records exceptions regarding this type of personal information.

Mr. Parr made a motion, seconded by Ms. Lynch, to recommend no modification to the current public records exception. The motion was amended at the suggestion of Mr. Stout, to send a letter to the Department of Inland Fisheries and Wildlife to relay the Subcommittee's concerns regarding the draft legislation's allowing the department to use otherwise confidential email addresses for marketing purposes without permission. The Subcommittee voted in favor of the motion, 6-0.

Staff reviewed a draft letter to Chandler Woodcock, Commissioner of Inland Fisheries and Wildlife relaying the Subcommittee's decision to recommend no modification to the current exception, but encouraging the Department to submit its proposed legislation to the 128th Legislature. By consensus the Subcommittee approved of the letter.

Ref# 39: 12 M.R.S. §12551-A, Sub-§10, relating to smelt dealers reports, including name, location, gear and catch

This item was previously tabled. Staff reviewed the agency response, recommending no changes to current law. Ms. Lynch moved to recommend no modification, noting that this exception goes to the competitive nature of the fishery.

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 40: 14 M.R.S. §6321-A, Sub-§4, relating to the financial information disclosed in the course of mediation under the foreclosure mediation program

Ms. Lynch spoke to the importance of this confidentiality provision to the process of foreclosure mediation, with much of this information being personal financial information.

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 41: 17-A M.R.S. §1176, Sub-§1, relating to information that pertains to current address or location of crime victims

Mr. Parr made a motion, seconded by Mr. Stout, to recommend no modification to the current exception. The motion carried, 5-0.

Ref# 42: 17-A M.R.S. §1176, Sub-§5, relating to request by crime victim for notice of release of defendant

Mr. Parr made a motion, seconded by Ms. Lynch, to recommend no modification to the current exception. The motion carried, 5-0.

Ref# 50: 22 M.R.S. §1711-C, Sub-§20, ¶N, relating to hospital records concerning an individual's health care information

The Subcommittee spent considerable time and voted 4-0 to recommend repealing this exception, provided the statute was explicitly clear that all other federal laws concerning confidentiality and privacy applied. HealthInfoNet, the custodian of the records subject to this exception, responded to the request for information that it is not a public body subject to FOAA. Staff reviewed case law regarding how to determine if a body is a public body subject to FOAA; the Subcommittee determined that HealthInfoNet is not a public body. Because the exception is inoperative, the Subcommittee recommended its repeal.

Ref# 51: 22 M.R.S. §2153-A, relating to information provided to the Department of Health and Human Services by the U.S. Department of Agriculture and the U.S. Food and Drug Administration that is confidential under federal law

Staff related the Department of Health and Human Services (DHHS) survey response, where the agency had responded that the Department of Agriculture, Conservation and Forestry (ACF) was the custodian of these records because 22 M.R.S. §2153 gives that department the power to promulgate appropriate regulations. ACF provided no response to staff questions.

Mr. Parr noted that this was an example of a specific public records exception for information that is already made confidential under another statute, in this case a federal statute. Ms. Lynch made a motion to recommend no modification to the current exception, but the motion failed. Mr. Parr asked staff to attempt to gather more information from the agencies to determine where the records actually are.

At a subsequent meeting, the Subcommittee discussed this item after asking staff to contact the Department of Agriculture, Conservation and Forestry (DACF) again for feedback regarding which agency is the custodian of these records and, if DACF is the custodian, input on its experience and recommendations with respect to the exception. The agency responded that it did not recommend any changes to the current exception, and that it is important for the agency to follow federal requirements and federal confidentiality agreements with respect to this information.

Staff suggested that the statute could be clarified to indicate that DACF is the official custodian of these records instead of the Department of Health and Human Services. Staff added that,

however, practically speaking, the departments already have an understanding of how the law is administered and neither indicated that the language has caused any problem.

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 54: 25 M.R.S. §4202, relating to records and information connected in any way with the work of a critical incident stress management team for law enforcement personnel

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 55: 29-A M.R.S. §1301, relating to the social security number of an applicant for a driver's license or non-driver identification card

Robert O'Connell, of the Bureau of Motor Vehicles (BMV) within the Department of the Secretary of the State, assisted the Subcommittee with its review. Mr. O'Connell informed the Subcommittee that the Secretary of State's Office has prepared proposed draft legislation that would amend the confidentiality provision in Title 29-A, section 1301 by eliminating the discretionary sharing of Social Security Numbers as permitted by federal law and instead allowing the sharing of this information only as required by federal law, specifically 18 United States Code, section 2721(b).

Mr. O'Connell notified the Subcommittee that the BMV, through the Secretary of State would be submitting a bill to accomplish this to the next Legislature, but that his office appreciated the Subcommittee's support. The Subcommittee recommended by a vote of 5-0 that no change be made to the current exception, but expressed their support for the proposed amendment suggested by the BMV.

Ref# 56: 29-A M.R.S. §2251, sub-§7-A, relating to personally identifying accident report data contained in an accident report database

There was some discussion in the Subcommittee about whether this information should be kept confidential, given that it is potentially important for individuals seeking necessary information about the other party in an automobile accident. During the course of the discussion it was clarified that this exception applied only to bulk data transfers from the accident database, not to requests for individual accident reports. Mr. Stout explained that the provision was originally enacted to limit the information released in bulk data requests from law firms seeking personal information by which to contact potential clients.

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 57: 29-A M.R.S. §2117-A, relating to data collected or retained through the use of an automated license plate recognition system

Mr. Stout explained the current automated license plate recognition system by which license plate data is collected by Turnpike Authority scanners at toll booths and the plate number is

electronically checked against a national database of commercial truck safety violations. Ms. Lynch expressed concern about continuing this public records exception when the Department of Public Safety did not express an opinion on whether it should be retained. Rep. Monaghan expressed concern that the Subcommittee had not heard input from the Department of Transportation, Bureau of Motor Vehicles or truckers associations. Staff agreed to gather input from these entities and report back at the next Subcommittee meeting.

The Subcommittee voted to table discussion on this exception by a vote of 5-0.

Ref# 58: 32 M.R.S. §91-B, sub-§1, relating to quality assurance activities of an emergency medical services quality assurance committee

Subcommittee members expressed concern for the breadth of this confidentiality provision. In particular, there was concern about the confidentiality of the “quality assurance activities” of an emergency medical services quality assurance committee approved by the Emergency Medical Services Board. Members expressed understanding of the need for personally identifiable information to be confidential, but confusion about why the proceedings and activities of this public body should be confidential.

The Subcommittee voted to table discussion on this exception by a vote of 5-0.

Ref# 59: 32 M.R.S. §91-B, sub-§1, ¶A, relating to personal contact information and personal health information of applicant for credentialing by Emergency Medical Services Board

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 60: 32 M.R.S. §91-B, sub-§1, ¶B, relating to information about a person receiving emergency medical services as part of an application for credentialing by Emergency Medical Services Board

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 61: 32 M.R.S. §91-B, sub-§1, ¶C, relating to information submitted to the Emergency Medical Services Board for its statewide trauma-incidence registry under section 87-B

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 62: 32 M.R.S. §91-B, sub-§1, ¶D, relating to examination questions used for credentialing by Emergency Medical Services Board

Ms. Lynch expressed some concern about this provision, noting that the Board of Overseers of the Bar, for example, makes public the bar examination questions from prior years so that those planning to take the exam can better understand the scope of the test and prepare for it. She noted that this confidentiality provision is qualitatively different than the other related provisions

in this section. Ms. Lynch stated that she understood the reason for wanting to protect the questions for upcoming examinations, but not the questions for prior examinations.

The Subcommittee voted to table discussion on this exception by a vote of 5-0.

Ref# 64: Title 34-A, section 11221, subsection 13, relating to disclosure by the Bureau of Investigation and law enforcement agencies of certain sex offender registry information in electronic form

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 65: Title 34-A, section 11221, subsection 9-A, relating to certain sex offender registry information collected by the Bureau of Investigation, including information relating to the identity of persons accessing the sex offender registry

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 66: Title 34-B, section 1931, subsection 6, relating to the records of the Mental Health Homicide, Suicide and Aggravated Assault Review Board

Staff related its efforts to gather information about and from the Mental Health Homicide, Suicide and Aggravated Assault Review Board. The only information staff could ascertain was that the Board appears to have been inactive since at least 2011.

Ms. Lynch noted that there is currently a Homicide Review Board that is active. Sen. Burns asked staff to continue seeking information about the Board from the Attorney General's Office, including information about the Board's status and whether its charge is currently being carried out by the Homicide Review Board. Ms. Lynch also suggested following up with Lisa Marchese, Criminal Division Chief of the Attorney General's Office, Cumberland County District Attorney Stephanie Anderson and the National Alliance on Mental Illness (NAMI) in Maine.

The Subcommittee voted to table discussion on this exception by a vote of 5-0.

Ref# 67: Title 34-B, section 3864, subsection 12, relating to abstract of involuntary commitment order provided to State Bureau of Identification

Ms. Lynch noted that these records contained very confidential mental health information used for purposes of firearm background checks.

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 69: Title 35-A, section 10106 relating to records of the Efficiency Maine Trust and its board

This item was previously tabled by the Subcommittee in order to request a proposed amendment from the Executive Director of the Efficiency Maine Trust in writing. Staff reviewed the proposed amendment, which would move the authority to determine whether records of the trust were business sensitive, and therefore confidential, from the board to the director. The amendment also gives authority to the director, as opposed to the board, in making the determination of what information that would be otherwise confidential may be released. According to the Efficiency Maine Trust Executive Director, Michael Stoddard, this change is needed because these decisions must be made quickly, in the ordinary course of business, and are therefore better suited to being made by the executive director than the board, which only meets once per month. Additionally, the amendment would replace an “and” with an “or,” so that any of the criteria for confidential trust records may be present instead of all criteria needing to be met in order for the records to be determined confidential.

The Subcommittee voted 5-0 to amend the current provision with the language submitted by Mr. Stoddard of the Efficiency Maine Trust.

## V. COMMITTEE PROCESS

This year, the Right to Know Advisory Committee held five committee meetings, which are summarized below.

### Summary of June 22, 2016 meeting

#### Summary of the Right To Know Advisory Committee duties and powers

Staff reviewed the Advisory Committee’s duties as set forth in Maine’s Freedom of Access Act (FOAA) at 1 MRSA §411, sub-§6.

#### Summary of actions of the 12<sup>th</sup> Legislature, Second Regular Session, affecting FOAA: RTKAC recommendations

Staff reviewed the legislative outcome of the recommendations included in the Advisory Committee’s January 2016 report. The 2016 report included proposed legislation regarding remote participation by members of public bodies; in response to Advisory Committee’s recommendation, the Judiciary Committee created LD 1586, “An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation in Public Proceedings.” A majority of the Judiciary Committee voted “Ought Not to Pass” on LD 1586, however a minority of the Judiciary Committee proposed an amendment that would have required a governmental entity to adopt a written policy governing remote participation by members that also describes how the policy meets the principles of FOAA. The bill and the amendment were not enacted.

The Judiciary Committee considered another remote participation bill, LD 1241, “An Act To Increase Government Efficiency,” which was carried over from the First Regular Session to the Second Regular Session. As finally enacted, LD 1241 permits the board or commission of each of four State bonding authorities (the Maine Governmental Facilities Authority, the Maine Health and Higher Educational Facilities Authority, the Maine State Housing Authority and the Maine

Municipal Bond Bank) to conduct public proceedings with members participating via remote access technology in certain circumstances (i.e., the member is needed for a quorum, illness of the member, weather that makes driving hazardous, or unexpected traffic delays or vehicle breakdowns when the commissioner is traveling to the meeting). LD 1241 was finally enacted as Public Law 2016, chapter 449.

Mr. Parr asked what should be inferred from this legislation regarding what authority is needed in law before a body may allow remote participation by its members at public proceedings. Staff noted that there still seem to be two approaches clarifying remote participation in public meetings: 1) specifying broad authority for remote participation in FOAA itself, and 2) providing specific authority for a governmental entity in its statutes. Staff also noted the Governor's position that remote participation is already permitted under FOAA as long as all FOAA requirements are otherwise met, as stated in the veto message to LD 1809, "An Act Concerning Meetings of Boards of Trustees and Governing Bodies of Quasi-municipal Corporations and Districts That Provide Water, Sewer and Sanitary Services"; that veto was not overridden by the 126th Legislature.

Ms. Goucher stated that she would like to see the Advisory Committee attempt another recommendation in this area, because the issue is not going away until there is some guidance and clarity given. The Advisory Committee did not take a formal action on this request.

Summary of actions of the 127th Legislature, Second Regular Session, affecting FOAA:  
Proposed public records exceptions reviewed by Judiciary Committee

Staff summarized several bills containing proposed public records exceptions referred from policy committees to the Judiciary Committee for review in the Second Regular Session: LD 466, "An Act To Increase Competition and Ensure a Robust Information and Telecommunications Market," which was referred by the Energy, Utilities and Technology Committee; LD 1467, "An Act Regarding Maine Spirits," which was referred by the Veterans and Legal Affairs Committee; LD 1498, "An Act To Clarify Medicaid Managed Care Ombudsman Services," which was referred by the Health and Human Services Committee; LD 1499, "An Act To Increase the Safety of Social Workers"; LD 1578, "An Act To Update Maine's Solid Waste Management Laws," which was referred by the Environment and Natural Resources Committee;

Review of public records exceptions enacted from 2005- 2012 pursuant to 1 MRSA §433

Staff reviewed the status of the Advisory Committee's review of existing public records exceptions, which the Advisory Committee began last year and is due by 2017. The Public Records Exceptions Review Subcommittee reviewed a number of exceptions after the Advisory Committee's last meeting in 2015 that will be presented for final action by the full committee in 2016. Next year, the Advisory Committee will begin reviewing all existing public records exceptions found in Titles 1 through 7-A. That review will be due by 2019.

Staff provided an update on a potential issue identified in 2015 involving the Department of Education's ability to share teacher disciplinary information with other states because of the

breadth of confidentiality provided at 20-A MRSA §13004, sub-§2-A. In 2015 the Subcommittee recommended to the full Advisory Committee that it draft legislation, with direction from the Department of Education, to address the issue. The Advisory Committee decided not to recommend a change to the statute, and instead notified the Education and Cultural Affairs Committee about this issue and the issue of teacher discipline confidentiality more generally. The Education and Cultural Affairs Committee determined that the Department does not seek to share confidential disciplinary information with other states. It seems this issue is resolved for both the Right to Know Advisory Committee and the Education Committee.

Potential topics and projects for 2016

- *Confidentiality of hazardous material transfer by railroads*

Staff related a request from the Judiciary Committee for the Advisory Committee to include in its public records exceptions review a provision enacted by LD 484 in 2015 and now codified at 1 MRSA §402(3)(U), which makes information held by the Department of Environmental Protection relating to the transfer of hazardous material by railroads confidential. Mr. Pringle moved for the Advisory Committee to take action on this item. The vote was unanimous of those present that the full Advisory Committee discuss the issue.

- *Confidentiality of personal contact information for professions and occupations regulated by the State*

Staff related a request from the Judiciary Committee for the Advisory Committee to develop comprehensive recommendations for the treatment of personal contact information for professions and occupations regulated by the State. In the Second Regular Session of the 127th Legislature, LD 1499 enacted a new confidentiality provision for social worker licensees' and license applicants' addresses and telephone numbers; in connection, the Judiciary Committee sought a uniform policy for all licensing information. Staff noted that some licensing boards do make certain licensee information confidential in statute already. The Advisory Committee discussed how a uniform policy would need to balance the safety interests of the public in having access to licensee information with the privacy interests of licensees and license applicants.

After conversation on the topic, Mr. Parr moved for the full Advisory Committee to take up this topic in its business this year. All present were in agreement except for Mr. Higgins and Ms. Goucher. Mr. Higgins stated that his reluctance was due to concern with how far this would go toward confidentiality, and concern with expanding confidentiality even when licensees are not requesting it. Ms. Goucher stated that her opposition to the vote was because we already have a uniform policy – that these records are public – and any deviation from that requires a group to come before the Legislature to make its case and seek an exception. Mr. Higgins noted that it seemed we are trying to turn current policy on its head. Sen. Burns stated that it would be good for the Judiciary Committee to have guidelines to help in its considerations of future confidentiality proposals in the licensing area. Rep. Monaghan agreed it is important to have a uniform policy as new requests for confidentiality are inevitable. Ms. Pistner stated there were obviously some competing concerns, but expressed that she thought a compromise could be

reached (for example, if a personal phone number is to be confidential, the licensee would have to provide a work number that would be open to the public).

Sen. Burns reiterated that the Judiciary Committee was not looking to change policy, but wanted to establish factors to consider when making decisions about new confidential licensing provisions. He requested staff provide some written material before the next meeting regarding this licensee confidentiality topic.

- *FOAA assistance for indigent members of the public*

The Advisory Committee next considered the request of Ken Capron for the development of a mechanism to help provide funds for indigent complainants to bring forward FOAA cases and the possibility of developing a standard court form to help pro se indigent complainants. The Advisory Committee took no action on this topic.

- *FOAA agency time and cost estimates, fee waiver policies and remedies for requesters*

Jack Comart of Maine Equal Justice Partners emailed the group in April with 5 suggestions: 1) require agencies to provide an estimate of time and cost for each separate component of a request for information; 2) require agencies to publically post and make available their fee waiver policy; 3) require that agencies grant fee waiver requests based upon reasonable standards; 4) clarify when estimates of time and cost must be provided by the agency; and 5) provide some recourse for requesters of information for agency action that may be arbitrary or capricious.

Staff reviewed current agency FOAA response time requirements, and also noted that while FOAA allows an agency to waive fees under FOAA, there is no requirement that the agency have a fee waiver policy or publicly post such policy. The Advisory Committee took no action on this topic.

#### *Discussion of any additional topics and projects for 2016*

Sen. Burns gave the group notice that there would be an agenda item relating to a potential issue involving executive sessions for the Committee's consideration at the next meeting. The discussion was opened up to the group regarding any other items of concern for potential consideration this year.

- *Criminal History Record Information Act (CHRIA) and the Judicial Branch*

Ms. Meyer raised a possible topic for future Advisory Committee discussion regarding the Judicial Branch's recent reversal of an October decision to make case files for dismissed cases confidential within 30 days of judgement. The prior policy had been based on an interpretation of the Criminal History Record Information Act (CHRIA) and an administrative order, which the media challenged. There may be a need to clarify some statutory ambiguity. Ms. Meyer suggested that this discussion should not happen without Ms. Lynch from the Court System being present. Sen. Burns moved to include this item in the next agenda and it was agreed by unanimous consent.

- *Social Security Numbers in medical files held by the Dept. of Health and Human Services*

Ms. Morgan asked if former Rep. Bradley Moulton could address the group about a concern he had based on his dealings with the Department of Health and Human Services in his capacity as a private attorney; Sen. Burns welcomed Rep. Moulton to the microphone.

Rep. Moulton explained that those who bring complaints before the medical boards make their records public information. His client had to file FOAA requests with the Department of Health and Human Services to access her medical review records. His and his client's chief concern was that these records included his client's social security number, and that this sensitive information was being treated as a public record. The Advisory Committee took no action on this topic.

- *Warden's Service FOAA requests*

Rep. Monaghan asked to discuss the issue of the Warden's Service FOAA requests about which the Advisory Committee had been asked to hold a public meeting. Sen. Burns gave the Advisory Committee an update, stating that he, Rep. Monaghan, the Presiding Officers of the Legislature and a representative of the Attorney General's Office were to have a meeting later that day to discuss the best way to proceed. Mr. Higgins moved to include an agenda item for the next meeting to discuss the outcome of this meeting; it was agreed by unanimous consent.

#### *Discussion of Subcommittees*

The Advisory Committee agreed that there would be one Subcommittee--Public Records Exceptions Review Subcommittee. Sen. Burns, Rep. Monaghan, Ms. Pistner, Ms. Lynch will continue to serve as members with the addition of Mr. Stout and Mr. Parr this year.

#### **Summary of July 20, 2016 meeting**

##### *Hazardous material transported by railroads*

Staff reviewed the request from the Legislature's Judiciary Committee to examine the public records exception to Maine's Freedom of Access Act (FOAA) recently enacted in LD 484 (Public Law 2015, chapter 161), relating to hazardous material transported by railroads. Staff reviewed the packet of documents provided to the Advisory Committee, including the statutory criteria for review of public records exceptions and information supplied by the Department of Environmental Protection regarding this public records exception in response to a survey questionnaire sent by staff.

Mr. Parr noted that the intent of the exception seems aimed at preventing acts of terrorism, but that there are already a number of other FOAA exceptions for sensitive information related to potential terrorist attacks. For example, 1 MRSA §402(3)(L) is an exception for records describing security plans, security procedures or risk assessments prepared specifically for the purpose of preventing or preparing for acts of terrorism, and Title 16 would seem to provide alternate means of protecting this kind of information as well. Mr. Parr asked staff if these

exceptions were taken into account in the Judiciary Committee's deliberations on this exception. Staff replied that the Committee was aware of the existing security plan exception. This new exception may go beyond that. Railroad companies were concerned that this preexisting security plan exception was not adequate to protect the records they were concerned with. It was noted that the Judiciary Committee never received any testimony on the bill with concerns about these records not being public.

Rep. Monaghan, who is also a member of the Judiciary Committee, did not recall if a side-by-side comparison of similar state laws had been provided during the Judiciary Committee's consideration of the bill. Staff replied that the only comparable state law provided to that committee was a Massachusetts law that was broad enough to cover hazardous material shipped by rail; this law is not specific to railroads, unlike the Maine law.

The Advisory Committee discussed whether the Judiciary Committee had reviewed the bill against the criteria in 1 MRSA §432(2) as the Judiciary Committee typically does, and whether there has been any change in circumstances relative to the criteria for this exception since that Committee's original review. Although members of the Judiciary Committee believed they had reviewed the proposed exception in light of the statutory criteria, the review had not been documented with a review checklist. Staff and Advisory Committee members noted that there does not appear to have been any changes in circumstances, for example in federal law, since the bill was passed, except for increased public interest likely generated by media reports.

Mr. Pringle noted that the current language of the exception is broad and causes the Department of Environmental Protection (DEP) to wonder to what extent the exception applies to their records. He also remarked that it seemed odd that Maine citizens should know nothing about hazardous material transported across the state and expressed concern with the sheer number of materials covered by this broad exception – the “hazardous material” definition comprises approximately 200 pages in federal regulations – and suggested that at least some of these materials probably don't need to be kept confidential.

The Advisory Committee discussed the issue of the broad “hazardous material” definition, and the best way to determine how to narrow it, if at all. There was doubt expressed about whether this may be an issue any more, since the DEP has recently resumed releasing summaries of rail shipments of crude oil, albeit after the date of shipment.

Ms. Pistner noted that there are several issues involved with this topic: how to address the public concern that has arisen since the bill's enactment; whether the problem is fixed now that the DEP is providing a summary list of railroad crude oil shipments; whether the scope of hazardous materials should be narrowed in the exception; and finally, if the summary DEP is currently releasing should be required by statute.

In response to the Advisory Committee's discussion, staff noted that related issues that may need to be resolved are whether the public have access to this information, whether there is a need to make more information public than DEP is currently releasing in its post-shipment summaries, and whether DEP has concerns with the current statutory language.

Mr. Parr introduced the idea of sending a letter to the Judiciary Committee recommending that it revisit this topic, potentially narrowing the scope of the exception and providing the public another opportunity to comment on the provision. Sen. Burns added that the letter should request that the Committee create a committee bill as a vehicle for this reconsideration.

Peggy Reinsch, nonpartisan staff for the Judiciary Committee and former staff for the Advisory Committee, addressed the committee at the chair's invitation. She offered that it would be helpful for the Judiciary Committee if the Advisory Committee's letter outlined exactly what the questions or issues are.

The Advisory Committee decided to go through the checklist of public records exception review criteria (1 MRSA §432(2)) to better focus its request to the Judiciary Committee. The group highlighted the areas of greatest concern, including: paragraph G – whether public disclosure jeopardizes the public and if so, whether that safety interest substantially outweighs the public interest in the disclosure of the records; paragraph H – whether the proposed exception is as narrowly tailored as possible; and paragraph E – whether the public disclosure puts a business at a competitive disadvantage and, if so, whether that interest substantially outweighs the public interest in the disclosure of records.

Advisory Committee members also voiced concern about whether the information should only be made available retrospectively, or whether the public should have a right to the information prospectively.

On Mr. Parr's motion, and Ms. Goucher's second, the group unanimously approved sending a letter to the Judiciary Committee on this issue. Staff agreed to draft the letter, outlining the issues raised by the Advisory Committee, for review at the next meeting.

#### Personal contact information for professions and occupations licensed by the State

Staff reviewed the background documents provided to the Advisory Committee, including the recently enacted bill providing a public records exception for the addresses and telephone numbers of licensees and license applicants in the possession of the State Board of Social Worker Licensure. Staff also reviewed a list of occupations and professions licensed in Maine. Staff informed the group that in terms of licensing information, generally the protected information is an individual's Social Security Number, unless a specific law is enacted to protect particular information for a particular licensing category.

Mr. Pringle mentioned the example of nurses, physicians and osteopaths, where there is a separation of personal private information on licensees from the public information, and wondered how well this has worked in practice. Staff replied they would need to reach out for further information, but shared a letter submitted by Planned Parenthood to the Advisory Committee stating that information about licensees that is supposed to be private was released to the public in response to at least one FOAA request.

The Chair invited Nicole Clegg, Vice President of Public Policy for Planned Parenthood of Northern New England, to comment. Ms. Clegg related her organization's experience with

FOAA requests to the State Board of Nursing. Ms. Clegg stated that although the Board's redaction of non-public, personal information has gotten better, there is still a significant amount of information released, including photographs of licensed nurses, in response to anonymous email requests for public records. The release of this information in this manner is distressing to employees of Planned Parenthood.

Mr. Parr noted that the Advisory Committee has previously discussed whether anonymous FOAA requests should be permitted. He noted that the purpose of FOAA is to provide the public information about what the government does. He asked Ms. Clegg whether she saw any value in sharing this amount of information to the public under FOAA. Ms. Clegg replied that she struggled to find a reason that the public should have a right to know this amount of information about a private citizen.

Ms. Pistner noted the tension between the safety and privacy of licensees with the public need to know who is actually licensed, and asked Ms. Clegg to clarify the scope of her request for increased privacy. Ms. Clegg acknowledged the public interest, but iterated that she didn't see the need for the public to have access to the entire license application file – the wealth of information available to the public is significant, even if the applicant's address is redacted.

Ms. Meyer mentioned recent legislation limiting the scope of the Maine Human Rights Commission's investigation records that would be subject to FOAA requests, noting that the compromise struck by this exception could be a useful model. Sen. Burns noted it would be helpful to have more information on this, to inform the group's efforts in finding the balance between public and private information.

Mr. LaHaye questioned the propriety of anonymous FOAA requests. Mr. Parr weighed in, noting his belief that when citizens are required to provide private personal information to government, the government has a duty to safeguard that information, except when release of the information furthers the underlying purpose of FOAA. Mr. Parr offered that an opt-in or opt-out system might be one model to look at in trying to strike the appropriate balance.

Mr. Stout shared his familiarity with the federal Privacy Act, which acts to counterbalance the federal Freedom of Information Act. Under the federal system, personally identifiable information (PII) is only permitted to be collected and used for certain purposes, and is not permitted to be publicly disclosed.

Ms. Clegg of Planned Parenthood noted that the Maine Gambling Control Board protections for PII are a good example. Mr. Pringle suggested using as a template the exceptions we already have, for example the protections around public employee personal information, and looking at what information the public really should know about a person licensed by the State.

Anne Head, Commissioner of the Department of Professional and Financial Regulation, was invited to address the group. Commissioner Head acknowledged that the Advisory Committee was faced with an interesting and tough decision involving personal privacy interests and public oversight of agency actions. She reminded the Advisory Committee that licensees put their information on record with agencies in order to receive permission from the State to do certain

things. However, she also recognized that while there is a need for public oversight over government decision making, there may be legitimate personal safety and privacy interests that can be served through some middle ground. She then encouraged the Committee to consider what they are trying to achieve with this potential change. Mr. Parr asked if the group could focus its work on protecting certain classes of personal information. Comm. Head answered in the affirmative and noted that there may be more information collected by boards and agencies than is necessary for licensing purposes: agencies have a responsibility not to over-collect.

Staff agreed to put together templates of examples of personal information that is currently protected.

Ms. Pistner noted that the public needs access to licensing information to make sure the Board acting appropriately. For example, access to this information allows the public to know the basis for the grant or denial of a license application. However, access to this information can also be abused, she noted.

Sen. Burns remarked that this was a balancing act, but the bottom line should be protecting people's safety. Just because one seeks a professional license does not mean the person needs to put his or her life in danger. He also voiced support for developing a uniform policy for the treatment of licensing information.

Mr. Parr made a motion, seconded by Mr. LaHaye, that the group look at existing examples of policies and law that focus on personal contact information to develop a uniform policy regarding personal information in licensing records.

Rep. Monaghan stated that before individuals provide their information for licensure, there should be a disclosure from the agency as to what portion of that information will be public and what will be kept private.

Ms. Meyer noted that the Planned Parenthood letter was disturbing, but the flip side is that making PII available to the public can protect the public in ways that are more beneficial than protecting a particular licensee. For example, having access to a plumber's home address can allow members of the public to determine if he or she is a registered sex offender. Mr. Shorey stated his view that too much licensing information is publicly available, that the availability of that information can cause harm, and that it is time the group tried to do something to protect some of that information, even if the proposed solution isn't right the first time. Ms. Goucher opined that with modern technology, and Google searches, the public already has access to an incredible amount of personal information – keeping government records confidential is only putting a finger in the dike. Sen. Burns agreed that private information was readily available with modern technology, but stated that people place a lot of trust in government and expect a certain level of prudence and accountability.

The group agreed to place this item on the next meeting agenda. The Committee asked Planned Parenthood to reach out to its national organization for additional policy guidance. Advisory Committee staff agreed to search for examples from other states of protections for personal

information in licensing records. The committee voted unanimously in favor of this course of action.

Maine Warden Service FOAA requests; Advisory Committee request to Colin Woodard and Sigmund Schutz for input and suggestions for changes in policy or law

Staff reviewed correspondence provided to the Advisory Committee regarding the ongoing dispute between the Portland Press Herald/Maine Sunday Telegram and the Maine Warden Service over the agency's response to the paper's FOAA requests. This included a letter dated June 24<sup>th</sup> from Sen. Burns and Rep. Monaghan to Colin Woodard of the Portland Press Herald and the paper's attorney, Sigmund Schutz. The letter stated that despite recent requests for a public hearing regarding the issues between the paper and the agency, the Advisory Committee was not a fact-finder or arbitrator of disputes and was better suited to discussing and considering policy solutions to problems concerning access to public records. Accordingly, the letter invited input or suggestions for changes in policy or law based on the paper's recent experiences with the Maine Warden Service.

The Advisory Committee was copied on a July 1<sup>st</sup> letter from Mr. Schutz to the Warden Service and the Attorney General's Office summarizing the paper's dissatisfaction with the agency response as being untimely and incomplete, as well as conditioned on an unreasonable fee.

The Warden Service responded to Mr. Schutz's letter on July 15, and copied Advisory Committee staff. This letter disputes the characterization of the agency's response.

On July 18<sup>th</sup>, Mr. Schutz responded to the Sen. Burns and Rep. Monaghan request letter on behalf of the paper, declining to offer suggestions for changes in the law because the paper does not engage in legislative advocacy. The letter noted that if the Advisory Committee focuses only on changes in the law, it may overlook related issues of compliance with and enforcement of current law.

Sen. Burns recapped the meeting that he, Rep. Monaghan, the Presiding Officers of the Legislature and the Office of the Attorney General had after the last Advisory Committee's meeting, at which it was decided that Sen Burns and Rep. Monaghan would send the June 24<sup>th</sup> letter.

Rep. Monaghan suggested that the Advisory Committee should have a discussion about State agencies' compliance with FOAA to prevent similar disputes from arising again. Sen. Burns disagreed, noting that the law enables aggrieved parties to use the Superior Court to force compliance. Ms. Pistner pointed to the "10 Factors for Estimating Time" document Eric Stout had put together as a helpful development for understanding agencies' response time. Also, she pointed to upcoming training for agencies presented by Brenda Kielty, the Public Access Ombudsman.

Ms. Kielty was invited to address the group. She discussed an upcoming training she is providing for all Executive Branch agency public access officers. This will be the first time all agency public access officers will receive training at the same time. The format will be a round

table discussion, focused on two topics: 1) providing a cost estimate for FOAA responses, and 2) conducting searches. Regarding the cost estimate, she noted that it is not an easy determination. She worked with Mr. Stout to develop standards to apply to the estimate process, and finds the rubric developed by Mr. Stout as a helpful way for agencies to approach the estimate process. Regarding the search topic, Ms. Kielty noted that FOAA doesn't tell an agency how to search for documents and there is currently no common methodology for searching electronic records, specifically emails. After the training, Ms. Kielty plans to continue dialogue with the public access officers. Ms. Kielty agreed to attend the next meeting and present a preliminary Public Access Ombudsman report as well as an update after the public access officer training.

Ms. Meyer raised the idea of the Advisory Committee having a public hearing, not to delve into the specifics of any dispute, but to look at the bigger picture of how FOAA is working for the public. She noted that the Advisory Committee has been around for 10 years and has not held a public hearing yet. The Advisory Committee discussed this notion of a public hearing, and how it might work. Members raised questions about what the Advisory Committee would seek to do with the information gained from the public hearing, how the meeting would be run in order to elicit the most useful testimony and concerns that the viewpoint of agencies may not be fairly represented. Ms. Kielty weighed in that the idea of the public providing input on FOAA in the larger sense is very timely. FOAA is a dynamic statute and this would be a valuable opportunity to hear how it is working. Ms. Kielty also offered the idea of a summit format, where specific parties would be invited to provide input to help the focus be more clearly on ways to improve the law and less on the details of individual cases. The Advisory Committee favored providing broader public input.

Sen. Burns offered that before the next meeting the chairs would seek input from the Attorney General's Office and the Director of the Office of Program Evaluation and Government Accountability, Beth Ashcroft, for additional ideas about organizing the public hearing. Discussion on a potential public hearing will be added to the next meeting's agenda. This discussion will be held after the feedback from Ms. Kielty on the results and agency perspectives from her public access officer training.

Review subcommittee recommendations relating to existing public records exceptions enacted from 2005- 2012, pursuant to 1 MRSA §433

Staff presented the recommendations of the Public Records Exceptions Review Subcommittee from its December 2015 meeting. The Advisory Committee tentatively agreed to support the recommendations of the Subcommittee, but reserved the opportunity to raise any questions or concerns at the next meeting.

Potential topic for future discussion- Consider legislation requiring local boards and committees to record their executive sessions and to preserve these records so that they may be legally discoverable if there is a later dispute about either the content or propriety of the discussion held during these sessions

Mr. Pringle expressed doubt about taking up this topic given the amount of business already before the Advisory Committee and because this is an issue that largely arises in the municipal

context but there is no municipal interest representative yet appointed to the Advisory Committee to provide that municipal perspective. The municipal interest member should be seated before the Advisory Committee takes up this issue. Mr. Pringle suggested checking on the status of this appointment.

Ms. Pistner pointed out that besides checking on the status of the municipal member of the Advisory Committee, the group should be sure to give adequate public notice to municipal interests so that they may attend and provide feedback.

The Advisory Committee decided that this topic would be tabled until the next meeting, at which staff will present information on the statutory requirements around meeting minutes and executive sessions. Sen. Burns will formally encourage the appointment of the municipal member of the Advisory Committee.

*Review of 10 factors for estimating time to respond to a request under the Freedom of Access Act suggested by Eric Stout*

Mr. Stout gave a brief presentation to the group on his document, "Freedom of Access Act (FOAA) Email Searches: 10 Factors for Estimating Time."

Mr. Stout began with a FOAA request metaphor: When one goes to the mechanic to get an estimate for repairs to a broken automobile, it is difficult for the mechanic without first lifting up the hood and taking a look at the engine.

Mr. Stout relayed his experience assisting agencies with searches, noting that requestors usually believe the search is going to be easier and cheaper than it ends up being. He also noted the amount of difficulty for agencies to put together a good faith estimate, owed largely to the agencies not knowing from the beginning what the volume of search results will be. At the current time, it is necessary to search each individual State employee's email account. In the future, the current email system may be replaced with an email system that has an "immutable archive" that can be searched centrally. A computer is fast, but a computer can't tell whether search results returned are really relevant to a FOAA requestor's request – this takes staff time to search through the initially returned records. Mr. Stout emphasized the importance of establishing a relationship of trust between the agency and the requestor and maintaining a conversation between the parties to be sure that the agency is spending its time producing the records the requestor is truly seeking.

*Maine Center for Disease Control and Prevention*

Although not on the agenda, Ms. Meyer raised an issue about a recent Maine Center for Disease Control and Prevention rulemaking that would create new public records exceptions from FOAA, rendering information about disease outbreaks not public records unless they affected more than 2,000 people. She wondered how this could be accomplished in rulemaking. Staff agreed to look further into the issue for the group.

*Anonymous FOAA requests*

A topic that briefly arose earlier in the meeting was revisited by Mr. Parr, who inquired whether there was any interest by the Advisory Committee in taking up the topic at its next meeting. This would include a discussion of the extent to which, if at all, an agency can ask for the purpose of a FOIA requestor's request. Staff will provide more information on this topic, and will provide documents by email prior to the group's next meeting.

### **Summary of August 17, 2016 meeting**

#### *Hazardous material transported by railroads*

Staff discussed a draft letter from the Advisory Committee to the Legislature's Judiciary Committee, in response to the Judiciary Committee's request for the committee to review the public records exception at 1 MRSA §402, sub-§3, ¶U. The Advisory Committee's letter recommends that the Judiciary Committee consider submitting a committee bill to the Legislature so that the current exception may be fully vetted by the Legislature in a manner that allows the most meaningful participation from stakeholders and other members of the public, and from state and local government entities. The letter iterates the Advisory Committee's interpretation of the current law, that it is not intended to prevent public access to summary or aggregate information about the transportation of hazardous materials by rail in the State, particularly crude oil, or to prohibit disclosure of information about spills or accidental discharge of hazardous materials.

The Advisory Committee laid out a number of questions and concerns that may help guide the Judiciary Committee's formation of a committee bill, including whether disclosure of the information sufficiently jeopardizes public safety to outweigh the public interest in disclosure, whether disclosure disadvantages a business interest sufficiently to outweigh the public interest in disclosure and whether the language of the current exception is as narrowly tailored as possible.

After the summary, Mr. Pringle made a motion, seconded by Mr. Parr, to send the letter as written to the Judiciary Committee. Mr. Stout pointed out that the federal regulations cited in this public records exception for the definition of "hazardous materials" do not point directly to the 150-plus pages of materials in 49 Code of Federal Regulations § 172.101, which should be clarified. He also wanted mention of the extensive record keeping and retention requirements in Part 172 of the federal regulations. The motion was amended to include Mr. Stout's suggested change and was voted unanimously.

#### *Personal contact information for professions and occupations licensed by the State*

Staff summarized their research into examples of models that could guide the formation of policy recommendations for a more consistent approach to adding protections for the personal information of professional and occupation licensees and license applicants. Research was condensed into a chart distributed to the Advisory Committee, and Staff reviewed this document outlining examples of policy options. The examples drew from various public records exceptions from Maine law, e.g., those protecting the residential address and telephone numbers

of emergency medical services, nursing, osteopathic and medicine licensees and applicants when professional contact information has been provided. Examples from other states were also included in the document, including personal information protections for licensees in California, Indiana, Missouri and North Dakota.

Staff provided information on LD 1171 from the 127<sup>th</sup> Legislature. At the last meeting, a member had pointed to the amended version of this bill as providing an example of a reasonable compromise between privacy interests of individuals and the public interest of the public. This bill dealt with the confidentiality of the investigative records of the Maine Human Rights Commission, and the majority amendment of the Judiciary Committee would have designated certain information confidential, including medical records, the identity of a minor, personnel records, personal telephone numbers and home addresses.

The Advisory Committee invited up Nicole Clegg, Vice President of Public Policy for Planned Parenthood of Northern New England. Ms. Clegg, who had been asked by the Committee for more information at its prior meeting, distributed a number of handouts: a memo from Planned Parenthood, a report from the National Abortion Federation on violence and disruption against abortion providers, a statement filed in Superior Court in the State of Washington by the National Director for Affiliate Security at Planned Parenthood Federation of America outlining the history of violence and harassment against abortion providers and abortion-providing facilities, and a copy of Maryland law (MD Code, General Provisions, §4-333) making all licensing records confidential except for certain specified categories of information.

Ms. Clegg reiterated that the only non-public information in Maine licensing records is an individual's Social Security Number. She pointed out that even a licensee's federal Drug Enforcement Administration (DEA) drug authorization card is released pursuant to public records request, creating a security risk in itself. She noted that sometimes home addresses are redacted.

Mr. Pringle expressed his view that it would be better to say what isn't public than to specify what is public. Otherwise, he noted, the Advisory Committee would have to look through entire licensing files deciding what was useful to the public and what should be confidential. He stated his belief that home address, home phone and fax numbers and personal cellphone numbers should be confidential. He opined that 1 MRSA §402(3)(O) should be used as a starting place for designating what should be designated confidential in licensing records. Mr. Parr suggested an opt-in type of system, where certain licensing information would be confidential unless the subject of the records affirmatively allowed public disclosure.

Ms. Pistner voiced concern that increased agency costs to redact new categories of information in licensing records would create a fiscal note, likely dooming any bill seeking this increased confidentiality. To reduce agency time and costs, Ms. Pistner suggested perhaps developing a certain document containing information most valuable to the public that did not include private information, and then making that document a public record while the rest of the licensing files would be confidential. Mr. Parr reminded the Committee that there were other categories of licenses regulated by other departments, including 3 by the Department of Public Safety.

Ms. Clegg from Planned Parenthood asked the Advisory Committee to consider a notification system that would notify licensees if their file was requested by a member of the public.

Ms. Meyer, Rep. Monaghan and other Committee members noted that the Committee should keep in mind that there are many categories of licenses other than those commonly subject to harassment as illustrated by Planned Parenthood, expressing hesitancy at applying the same level of confidentiality to all license categories. Mr. Higgins, Ms. Meyer and Ms. Morgan variously expressed the idea that in general, the more the public knows about licensees the better, except in certain circumstances of concern, and that it was important that the public be able to verify the address of a licensee. Several members voiced support for the earlier idea of a form that would be public that contained certain licensee contact information as a solution to the potential harassment issues facing certain licensees.

Mr. Parr asked staff to review what the original request from the Judiciary Committee was on this topic. Staff replied that the Advisory Committee had been asked to develop guidance to assist the Judiciary Committee when it considered proposed confidentiality provisions for licensing information. Sen. Burns stated that the clearer the guidelines, the better, and that the Advisory Committee should err on the side of transparency.

Ms. Clegg from Planned Parenthood suggested that photographs and DEA authorization cards be kept confidential. She noted that DEA cards contain the licensee's name, address, drugs that can be prescribed, date of card issue, expiration date and DEA number.

Ms. Lynch expressed interest in communicating to other license categories to see if there were other concerns with DEA authorization information being released as public records.

Mr. Parr made a motion, seconded by Mr. Pringle, that the Advisory Committee send a letter to the Judiciary Committee with guidance for considering proposed confidentiality provisions applicable to licensing records. The letter would support the general principle that personal contact information should not be public, similar to the criteria at 1 MRSA §402(3)(O) for protecting public employee personal information, except for cases in which the licensee or license applicant has only provided a personal address and not a public business address. Licensees and license applicants must either be presented with an opt-in approach to personal contact information disclosure, or else the regulating body should have a form that would be public but would exclude non-public private information about the individual.

The Committee voted in favor of the motion, 11-2.

#### Public Access Ombudsman update & recap of Public Access Officer training

Brenda Kielty, Public Access Ombudsman, addressed the Advisory Committee, beginning with a summary of the preliminary report distributed to members. Ms. Kielty noted that the upward trend for number of contacts from the public since 2013 has continued. Of the contacts, most are inquiries about Maine's Freedom of Access Act (FOAA) as opposed to complaints. When she receives suggestions for FOAA improvements, which happens seldom, she said that she refers

these suggestions on to the Advisory Committee. Most contacts, she noted, are from private citizens as opposed to government officials.

Ms. Kielty suggested that issues of perceived delay in FOAA response time by public bodies is often due to the expectations of the public requestors not aligning with reality. Executive sessions seem to create the most FOAA inquiries and complaints. Another popular topic is what constitutes a public meeting, especially in the context of remote participation.

Mr. LaHaye asked if Ms. Kielty contacts an agency when a member of the public complains about the agency. She replied that her goal is conflict resolution, and her intervention all depends on the particular case. She may encourage the requestor to work with the agency, as her intervention may sometimes escalate a conflict.

Ms. Kielty next discussed the recent Public Access Officer training she had given. The focus of the training was on the process of searching for records. She noted that this is an area in which FOAA is silent, and that searches for electronic records are much different than searches for paper record. The procedure begins with proper record retention, actually searching the records, assembling the records, reviewing the records and finally providing access to the requestor. Ms. Kielty noted that Advisory Committee member Mr. Stout provided assistance with the email search portion of the training, which will be offered to each State agency as a follow-on to the initial group meeting.

Ms. Meyer asked if this information was also being provided to the Maine Municipal Association and the Maine School Management Association, and Ms. Kielty replied that she does do outreach to those organizations and will continue to do so. The information from the training will need to be customized somewhat to better address the needs of the other public bodies which these organizations represent.

Sen. Burns asked about records retention training, to which Ms. Kielty replied that the Maine State Archives provides such training. She acknowledged that more can be done in the area of records retention, and must be done.

#### Right to Know Advisory Committee public hearing

Staff distributed and reviewed the draft public hearing notice for the potential upcoming Advisory Committee public hearing about how FOAA is working and how it might be improved. Staff pointed out that the notice specifically states that the hearing is not a forum for the resolution of specific complaints about meetings or records.

Mr. Higgins wondered if the Advisory Committee or specific members had received any requests from the public to hold a public hearing. Several members noted that they had. Ms. Lynch noted that government officials are feeling some FOAA requests are burdensome and she expect to hear from these officials who bear the burden of responding to FOAA requests as well as from members of the general public.

Ms. Lynch suggested that staff be ready to take up the Advisory Committee's normal business in case there is little testimony provided at the public hearing.

Mr. LaHaye made a motion, seconded by Ms. Lynch, that the public hearing be held, set for September 14<sup>th</sup>. Sen. Burns added that the public hearing should take place at 1:00 p.m. while the subcommittee could meet at 10:00 a.m. The vote was unanimous.

*Subcommittee recommendations relating to review of existing public records exceptions enacted from 2005- 2012, pursuant to 1 MRSA §433*

Staff presented the recommendations of the Public Records Exceptions Review Subcommittee, including recommendations from its December 2015 meeting and its July 20<sup>th</sup> meeting. The Committee approved of the Subcommittee's recommendations in all instances, except for the following.

With respect to the public records exception at 1 MRSA §402(3)(R) (Advisory Committee reference number 7), relating to Social Security numbers in possession of the Secretary of State, the Advisory Committee moved to set aside the item until further information could be gathered from the Secretary of State's Office by staff regarding why this public records exception was needed given that paragraph N of the same statute already exempts all Social Security Numbers from the definition of public records under FOAA.

Regarding 22 MRSA §1711-C(20) (Advisory Committee reference number 50), relating to the names and other identifying information of individuals in a state-designated statewide health information exchange, the Advisory Committee hesitated to take the recommendation of the subcommittee to repeal the provision. Staff provided an explanation of Maine's statewide health information exchange, which serves as a hub for connecting healthcare providers with electronic patient medical records from participating healthcare providers. HealthInfoNet is the state-designated organization managing this exchange. Staff relayed that through contacts with this organization they had expressed the belief that this public records exception had no effect because they were not a public body that falls within the requirements of FOAA. Additionally, HealthInfoNet communicated that it had never received a request for information from the public and saw no value in maintaining this public records exception. Staff offered that according to the criteria currently used by the Maine Supreme Court to determine whether an organization is a public body subject to FOAA, HealthInfoNet would very likely not be considered subject to FOAA. This organization is a private non-profit company established independently from any State action, the organization does not receive State funding and the State have any involvement or control over the exchange besides imposing certain security and confidentiality provisions. Staff offered that HealthInfoNet as a health information exchange is covered by two federal confidentiality laws, the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act.

Mr. Pringle expressed his concern about repealing this provision, citing the law of unintended consequences. Other members echoed this concern over unintended consequences and being uncomfortable with repealing the provision unless it was certain that this information could never be released under FOAA. Several members were of a contrary position, taking the view

that if the public records exception was not needed then it should be eliminated. The Advisory Committee voted to table this item and staff agreed to gather further information.

With respect to the public records exception found at 29-A MRSA §1301 (Advisory Committee reference number 55), relating to the social security number of an applicant for a driver's license or non-driver identification card, this provision is similar to the other tabled item relating to Social Security Numbers in the possession of the Secretary of State. The Advisory Committee voted to also table this item in order for staff to get further information from the Secretary of State's Office.

*Proposal to require local boards and committees to record and retain the recordings of executive sessions*

Staff reviewed current Maine law regarding open meetings and executive sessions, 1 MRSA §§403, 405, 407. Staff pointed out additionally that the Maine Supreme Court has held that when the propriety of an executive session is challenged, the burden is on the public body to establish that the executive session was proper.

The Advisory Committee invited Rep. Hubbell to explain his proposal. Rep. Hubbell's described his proposal, which is to require local boards and committees to record executive sessions and preserve those records so that they may be legally discoverable in case of a dispute about the content or propriety of the discussion held during these executive sessions. Rep. Hubbell then suggested the Advisory Committee hear from his constituent, Robert Garland, former Town Councilor for Bar Harbor, who had brought the issue to his attention. The Advisory Committee then invited up Mr. Garland, who explained his experience with executive sessions and a personnel matter in Bar Harbor. During litigation involving the matter, Mr. Garland noted that what had transpired during the executive sessions was recalled much differently than how he had remembered it.

Mr. Higgins asked if an attorney can be present during an executive session and whether they can request that a transcript be made. Mr. Pringle addressed the question, stating that an individual who is the subject of an executive session has the right to request to be present, have their attorney present and can request that the meeting be public. This also includes the right to have a court reporter be present to take a transcript of the proceeding, he said. Mr. Higgins asked if the transcript would then be considered a public record, to which Mr. Pringle replied that it would not be, as it would be in the possession of that person and their attorney, though it could always be released at the prerogative of that individual.

Mr. Pringle acknowledged the concern prompting the proposal, but stated that he would be extremely reluctant to have executive sessions recorded. He stated that in his view, coming from his experience in the school board context, the administrative burden of recording and indefinitely keeping these recordings and ensuring their confidentiality into perpetuity outweighed the potential for abuse of executive sessions. He reiterated that the courts place the burden on the agency or public body holding an executive session to justify the propriety of that executive session if there is a legal challenge. A judge would make the determination regarding truthfulness and reliability of participants' recollections.

The Advisory Committee invited up a representative from the Maine Municipal Association, Garrett Corbin, to provide a municipal perspective on the issue. Mr. Corbin posited that it is important to balance the law so that the public interest does not outweigh privacy interests. This proposal, he noted, would discriminate against municipalities and local government in a way that is not done elsewhere in FOAA. He referred to the portion of the executive session statute that details what constitutes proper subject matter for an executive session, 1 MRSA §405(6-A)(1), noting that an executive session is only held if an individual's right to privacy or potential damage to reputation is involved. Mr. Corbin stated that making and keeping records of these executive sessions increases the likelihood of inadvertent disclosure of this sensitive information. He added that the law as it currently stands provides a remedy through the court system.

Ms. Lynch noted that executive sessions involve much more than just personnel matters, which seems to be the focus of the discussion. She asked Mr. Corbin whether, in these other contexts, were executive sessions to be recorded and legally discoverable, would that chill the candor of these municipal discussions? Mr. Corbin agreed that it would, relating feedback from some municipal representatives that had told him they would not hold executive sessions if this proposal went through.

After a bit more discussion, Mr. Higgins made a motion, seconded by Mr. Pringle, that the Advisory Committee not move forward to recommend any changes to the current law around executive sessions. The vote was unanimous.

#### *The Criminal History Record Information Act (CHRIA) and the Judicial Branch*

The Advisory Committee opened up discussion on a topic raised at earlier meetings, regarding the Criminal History Record Information Act (CHRIA) and the Judicial Branch's recent reversal of its policy of making confidential case files for dismissed cases. Ms. Meyer stated that she was satisfied with the Judiciary's current policy. There was no interest by members in having any further discussion.

#### *Anonymous FOAA requests*

In response to the Advisory Committee's request at its prior meeting for more information on the extent to which, if any, an agency may ask for the purpose of a FOAA requestor's request, staff began by reviewing current Maine law. Staff related that 1 MRSA §408-A provides the general principle that "a person has the right to inspect and copy any public record", and subsection 3 of that section provides that an agency or official "may request clarification concerning which public record or public records are being requested." Staff continued that an individual may be required to clarify their public records request by an agency, and that while nothing in FOAA prohibits an agency or public body from asking additional questions to a requestor, the requestor is not obligated to provide any other information to the agency and the agency may not discriminate in its response to the request regardless. Staff then directed the Advisory Committee to a handout with a comparison of other states' public records laws in regard to how they handle requestor identity and purpose.

Mr. Stout noted that often in the context of email requests, a requestor is anonymous by sheer virtue of their obscure email address and not by any intention of anonymity by the requestor. Mr. Pringle offered his opinion that a requestor should not be required to give their name or purpose when making a request for public records. Sen. Burns wondered if members thought a change should be made to FOAA to prohibit agencies from asking a requestor's name or purpose, with several members disagreeing that this was needed. Mr. LaHaye posed to the group whether there should be a distinction between commercial and non-commercial purposes of requestors. Mr. Higgins shared his view that if a record is open, it should be allowed to be used for whatever purpose the requestor wants. Mr. Pringle shared that the Advisory Committee has wrestled with the commercial/non-commercial distinction in the past, and could never work out how to precisely define the difference between the two. Mr. Parr noted that as a practical matter, even if there were a distinction made, a person can have someone else request a public record for them, in order to get around the restriction. He also wondered what the State's policy would be for what to do with requestor information if collected.

The Advisory Committee voted unanimously to take no action on this topic. Rep. Moraghan noted that if there were major concerns regarding anonymous FOAA requests, such as voiced by Planned Parenthood, then those parties could raise this with their legislators to bring legislation forward in the next legislative session.

### **Summary of September 14, 2016 meeting**

#### **Public Hearing – Maine's Freedom of Access Act**

The Advisory Committee held a public hearing to gather public input on how Maine's Freedom of Access Act (FOAA) is working, inviting testimony from any interested parties that wished to address the group. The testimony and discussion is summarized below.

Dr. Dwight Hines stated that there were no incentives for a public agency to keep an information inventory, resulting in unreasonable delays in providing information in response to public records requests that should be reasonably anticipated and to which the agency should be able to easily respond.

Dr. Hines also stated his view that it is a problem that the court system is not covered by FOAA. He testified that public officials were too often turning FOAA requests over to attorneys, causing delays and making it more difficult for the requestor to communicate about the request. He noted that meetings that should be public are not being properly noticed, and that at noticed meetings it is apparent that the public body has already privately had their discussion and made their decision. He opined that the value of the open records law is to get people involved in their government and that he has noticed that community cohesiveness has become a problem in recent decades. After 1975, he noted, there was a decline in community engagement with town government and town councils not acting openly and not creating an inclusive atmosphere. Dr. Hines noted that he has observed public bodies causing unnecessary delays in court proceedings in which a requestor is challenging the public body's response to a public records request under FOAA, with these delays having the effect of running up legal costs for the requestor mounting the challenge. He stated his desire that the medical examiner share data. He stated that the

State's administrative courts are a dark place regarding governmental transparency. Dr. Hines stated that the public is not currently getting the "sunlight," i.e. government transparency, it deserves. He noted that civilian review boards of police departments are a positive thing, although they are expensive. Dr. Hines stated that nothing in FOAA requires quality of information. He noted that there was not a spirit of open government, even on the Advisory Committee.

Sen. Burns thanked Dr. Hines for his comments and asked if he would mind providing written comments, to which Dr. Hines agreed. Mr. Stout asked Dr. Hines about agency delays in responding to FOAA requests and their use of technology; Dr. Hines stated that agencies appeared to be afraid of providing information, so they delay, and wondered why it would take so long for agencies to access a database. Dr. Hines cited a "computer mendacity."

Sen. Burns asked if Dr. Hines thought there may be a problem with agency access to technology, to which Dr. Hines replied there was not and that agencies seemed to currently have more than they can actually use. Dr. Hines lamented that there were not incentives to use modern technology such as email, due to public officials' fear of FOAA.

Rep. Monaghan and Sen. Burns acknowledged this concern, each noting that given modern technology and how easy it is to communicate via emails and text messages, it is unfortunate that fear of FOAA is putting some in the position of not being able to efficiently use this technology.

Sen. Burns then asked staff to provide information from the two pieces of written testimony, submitted prior to the public hearing. Staff first related comments received from Lt. Gerald Congdon of the Wells Police Department, who expressed frustration with the difficulty in navigating what can be released in a FOAA request. Lt. Congdon recommended a flowchart be created to provide an easy to follow reference for public officials in responding to FOAA requests. Staff next related the comments received from Robin Hadlock Seeley of Pembroke. Ms. Seeley suggested that the law provide guidelines for a reasonable response time for agencies and other public bodies responding to FOAA requests. She also expressed concern that town officials, both elected and unelected, are unfamiliar with FOAA, including understanding which records are public and what notice is required before a public meeting.

Rep. Monaghan inquired from Ms. Kielty whether or not there is an existing flowchart type of summary of FOAA obligations of public officials and bodies. Brenda Kielty, Public Access Ombudsman, replied that there was not one currently, but that she would produce one and distribute it. Sen. Burns asked Ms. Kielty if she had any recommendations regarding FOAA and possible improvements to the law. Ms. Kielty stated that FOAA is a balancing statute, and thus needs to be evolving and dynamic. She agreed to provide written comments for the Advisory Committee's consideration.

Mr. Pringle stated that he was in favor of having a flowchart developed, but noted the problem with this type of summary is that it will inevitably vary depending on the type of specific information being sought. Ms. Kielty acknowledged this concern and stated that she would follow up with Lt. Congdon to determine his needs.

Garrett Corbin of the Maine Municipal Association (MMA) next addressed the group. With respect to the flowchart, Mr. Corbin noted that this suggestion came about due to outreach efforts by MMA. Having discussed with attorneys in the legal department at MMA, who regularly provide information to municipal members in response to legal questions that include FOAA questions, Mr. Corbin relayed concerns with the fee amount that can be charged by the municipality or other public body for responding to FOAA requests. The current \$15 per hour rate that can be charged for time spent past the first hour of responding to a FOAA request is very low, especially given that responding to such requests often requires paying for the services of attorneys. Mr. Corbin recommended a fee standard that permitted actual costs to be assessed to a requestor, perhaps with some sort of balancing mechanism.

Sen. Burns asked about issues with timeliness of FOAA responses, and Mr. Corbin replied that no concerns had been relayed to him. Rep. Monaghan asked if Mr. Corbin could provide written testimony for the Advisory Committee, to which he agreed. She then asked him what he thought of the issue raised by Ms. Seeley in her testimony, regarding inadequate FOAA training for municipal officials. Mr. Corbin replied that FOAA places responsibility for training on the municipalities. MMA tries to help, he stated, but it is ultimately up to the municipality. He expressed doubt about how widespread the issue is. Mr. Stout asked Mr. Corbin about his thoughts and perspective on electronic data retrieval by municipalities in the FOAA context. Mr. Corbin stated that he was unsure, but noted that municipalities face pressures with available staff time due to the tightening of municipal funding. Mr. Parr asked what Mr. Corbin took, if anything, from the low turnout at the public hearing, to which Mr. Corbin speculated that FOAA issues tend to be small and discrete, except for certain issues that get large press coverage, and perhaps there was a lack of media coverage about the public hearing. Mr. Parr noted his surprise that more input was not being provided from the public on how FOAA might work better, given the large media interest in FOAA issues this summer.

Sen. Burns suggested that one shouldn't read too much into the low attendance at the public hearing. He stated his desire for an additional meeting for the Advisory Committee, in order to complete unfinished business and to see if there may be a consensus with regard to taking action in response to comments received. There were no objections, and the next meeting of the Advisory Committee was scheduled for October 5th.

#### *Hazardous material transported by railroads*

Staff provided copies of the final draft letter from the Advisory Committee to the Legislature's Judiciary Committee regarding the public records exception at 1 MRSA §402, sub-§3, ¶U, which makes confidential records provided by a railroad company describing hazardous materials transported by the railroad company that are in the possession of a state or local emergency management agency or law enforcement agency, fire department or other first responder. The Advisory Committee approved the letter, which staff will send to the Judiciary Committee and which will also be included in the Advisory Committee's annual report.

#### *Personal contact information for professions and occupations licensed by the State*

Staff reviewed another draft letter from the Advisory Committee to the Judiciary Committee, this one regarding public access to personal contact information for individuals licensed or applying for licensure with the State. The letter reflected the recommendations made by the Advisory Committee on this issue at its August 17th meeting. There was a minor change made from a draft of the letter circulated to Advisory Committee members prior to the meeting, based on recommendations from Sen. Burns and Mr. Parr, so that the letter references the need to balance the privacy interests of the licensees against the “consumer interests” of the public, as opposed to the “public safety interests” of the public. The Advisory Committee approved the letter, which staff will send out to the Judiciary Committee and which will also be included in the Advisory Committee’s annual report.

Annual Report – preliminary draft

Staff reviewed a preliminary draft of the annual report with the Advisory Committee. A more complete draft will be presented for review at the next meeting.

Public Records Exceptions Subcommittee recommendations relating to review of existing public records exceptions enacted from 2005- 2012, pursuant to 1 MRSA §433

After an introduction by Rep. Monaghan, staff presented the recommendations of the Public Records Exceptions Review Subcommittee. For most of the reviewed public records exceptions, after staff described the exception and the Subcommittee’s recommendation, the Advisory Committee adopted the Subcommittee’s recommendation of continuing the exception with no modification. The Advisory Committee recommends no modification to the following exceptions, identified by reference number as listed on the chart prepared by staff: 6, 13, 36, 37, 39, 40, 41, 42, 51, 54, 56, 59, 60, 61, 62, 64, 65, 67. The following items resulted in notable discussion or disagreement with the Subcommittee’s recommendation.

With respect to the public records exception at 1 MRSA §402, sub-§3, ¶C-1 (Advisory Committee reference number 2), relating to certain personal information contained in communications between an elected official and a constituent, staff reviewed proposed legislation based on the recommendation of the Subcommittee that the exception apply to the entire record of the communication, as opposed to certain types of information found within the record of the communication. The legislation would provide, however, that such records must be public if the specified categories of information contained within the communication can be easily redacted, and that such redaction must occur before release of the records.

Mr. Pringle stated that this legislation would turn the presumption that a record is public on its head. He noted that the public seeking information about a communication between an elected official and constituent would either receive a redacted copy or not receive anything. He also pointed out that the “significant effort” standard by which the record would be determined to be public is unclear and would constitute a new judicial standard.

Mr. Parr acknowledged Mr. Pringle’s points, but noted that one could approach this from another perspective. The problem with the current statute, he noted, is that public records are defined in law but FOAA is often focused on information within records, as opposed to the records

themselves. Mr. Parr explained that this creates a burden on the agency to identify information excepted from FOAA and to redact if appropriate. He noted that it can be very challenging for a public official to make the determination whether or not certain information falls within a public records exception, and that this puts a lot of responsibility and risk on the public officials who need to decide whether or not to redact. Mr. Parr also stated that this burdensome process can lead to perceived delay in providing records pursuant to FOAA request. Mr. Parr agreed with Mr. Pringle's point about the judicial standard in the language, and suggested that perhaps "unduly burdensome" would be a better test because it would be more familiar in the context of FOAA.

Mr. Stout echoed that non-public information embedded in records that are otherwise public is an example of why responding to FOAA requests can be a lengthy process. He noted that in the context of constituent communications, communication is easy via email and sensitive information may be easily shared. He also noted that technology makes the expectations around producing records and information to requestors an ever-changing challenge.

Rep. Monaghan stated that she tries to not let constituents provide too much personal information in their emails, and that the public needs to understand what information in a communication with an elected official will be considered public. Mr. Burns shared her concerns, stating that there should be a disclaimer and a link to the FOAA law on every legislator's email. He also noted, however, that quite often constituents send very personal information before they would have a chance to see a disclaimer on the legislator's email.

Mr. Pringle acknowledged that there is a struggle associated with redacting, but that this is the price the government must pay to ensure openness. He also noted that the Advisory Committee has tried to accommodate agencies in this regard by recommending legislation allowing them to charge the requestor a fee.

Ms. Pistner expressed her discomfort with the reference to redacting in the proposed legislation, noting this would be a unique reference in FOAA and wondering what this would tell the courts about when redaction is or is not required. Ms. Lynch suggested that this should go back to the Subcommittee for review, because Subcommittee members had not seen this draft since making their original recommendation. Mr. Parr suggested that language be added to have a standard disclaimer regarding FOAA and constituent emails for elected officials and perhaps getting rid of the exception altogether. Mr. Burns expressed interest in Mr. Parr's suggestion about the email disclaimer, and wondered if perhaps this could be accomplished with a policy of the Legislature instead of a statute.

Mr. Parr made a motion, seconded by Mr. Stout, to send this issue back to the Subcommittee for further discussion.

Mr. Stout stated that the word "redaction" was introducing a new term to the law, and that redaction is becoming more and more of an issue that agencies are faced with when dealing with electronic records, particularly emails. Mr. Parr echoed Ms. Pistner's concern about using the term redaction, but noted that it was also used in FOAA at 1 MRSA §480-A. Mr. Parr closed the

conversation noting that this issue was also representative of his broader frustrations with FOAA – when you make specific information confidential it will require redaction.

The Advisory Committee approved the motion by a unanimous vote of those present.

With respect to the public records exception at 1 MRSA §402, sub-§3, ¶R, (Advisory Committee reference number 7), relating to Social Security numbers in possession of the Secretary of State, staff related the information gathered from the Secretary of State's Office and Bureau of Motor Vehicles (BMV) in response to the Advisory Committee's questions about this exception at its September meeting. The agencies did not object to the repeal of the exception, given the broader exception for Social Security Numbers in paragraph N of the same subsection of the statute. A representative of the BMV, Robert O'Connell, appeared before the Subcommittee earlier in the day to discuss this item as well as item number 55, discussed below.

Regarding the confidentiality provision at 29-A MRSA §1301 (Advisory Committee reference number 55), staff related that the BMV had shared draft legislation with the Subcommittee that would amend this confidentiality provision by eliminating the discretionary sharing of Social Security Numbers as permitted by federal law and instead allowing the sharing of this information only as required by federal law, specifically 18 United States Code, Section 2721(b). Mr. O'Connell had notified the Subcommittee that the Secretary of State would be submitting a bill to accomplish this to the next Legislature. Staff passed along the Subcommittee's recommendation that the Advisory Committee indicate endorsement of this change but not recommend legislation because the Secretary of State will submit the bill. Mr. Parr made a motion, seconded by Ms. Lynch, that the Advisory Committee endorse the Secretary of State's proposal but not recommend any modification to this confidentiality provision. The motion passed with a unanimous vote of those present.

With respect to 12 M.R.S. §10110 (Advisory Committee reference number 38), relating to a person's e-mail address submitted as part of the application process for a hunting or fishing license, staff reviewed a draft letter from the Advisory Committee to Chandler Woodcock, Commissioner of Inland Fisheries and Wildlife, based on the recommendations of the Subcommittee. Staff explained that in response to inquiries on this exception, the Department of Inland Fisheries and Wildlife had proposed an amendment that would expand the exception to make the email addresses of individuals applying for permits and registrations as well as hunting licenses confidential. Under the proposal, the commissioner would also be permitted to allow a member of the public to clearly indicate that the individual's email address not be kept confidential. The proposal included additional exceptions to confidentiality to allow the department to disclose email addresses to a contractor or state agency for marketing or wildlife management purposes. The draft letter expresses that while the group is supportive of a default confidentiality of this information, it does not have sufficient information or understanding of the scope of the proposed exception to recommend the legislation, and encourages the Commissioner to submit the Department's proposal as a bill to the next Legislature. The Advisory Committee approved of the letter unanimously.

With respect to 22 MRSA §1711-C, sub-§20 (Advisory Committee reference number 50), relating to the names and other identifying information of individuals in a state-designated

statewide health information exchange, the Advisory Committee had tabled this item at its last meeting after several members hesitated to endorse the recommendation of the Subcommittee to repeal this provision as unnecessary. At the Advisory Committee's August meeting, Mr. Parr had asked staff whether the confidentiality protections of the federal Health Insurance Portability and Accountability Act (HIPAA) applied to these records. Staff discussed the public records exception in FOAA at 1 MRSA §402, sub-§3, ¶A that excludes from the definition of public records any records designated confidential by another statute, noting that though the courts in the State of Washington had interpreted a nearly identical provision as including the statutes of other states and the Federal Government, it was unclear what breadth the Maine courts would attribute to this provision of FOAA. Staff advised that regardless, the confidentiality provisions under HIPAA and its associated regulations very likely apply to Maine HealthInfo Net as a "business associate" of a "covered entity," and indeed HealthInfoNet considers itself bound by HIPAA. Staff stated that HIPAA explicitly preempts state law that is less protective of private health information and therefore would apply as a minimum regardless of any conflicting provisions of State law. Staff counseled that their analysis was based on the organization of the current state-designated statewide health information exchange in Maine, and that it was possible that changes to the health information exchange system or provider could change the analysis. The Advisory Committee voted to continue the current confidentiality provision without any modification.

With respect to the public records exception at 35-A MRSA §10106 (Advisory Committee reference number 69), relating to records of the Efficiency Maine Trust and its board, staff related the Subcommittee's recommendation of proposed legislation provided by the Executive Director of the Efficiency Maine Trust, Michael Stoddard. Staff reviewed the proposed amendment, which would move the authority to determine whether records of the trust were business sensitive, and therefore confidential, from the board to the director. It also gives authority to the director, as opposed to the board, in making the determination of what information that would be otherwise confidential may be released. Additionally, the amendment would replace an "and" with an "or," so that any of the criteria for confidential trust records may be present instead of all criteria needing to be met in order for the records to be determined confidential.

Ms. Lynch stated that although she had voted in favor of this amendment at the Subcommittee meeting, after re-reading it she had concerns about the language, particularly the implications of the new "or" with the application to entire "records," which would broaden the current confidentiality provision more than originally intended. Ms. Lynch made a motion, seconded by Mr. LaHaye, to refer this item back to the Subcommittee for additional review. The motion passed with a unanimous vote of those present.

#### Other issues or questions

At the invitation of Sen. Burns for Advisory Committee members to suggest additional issues for discussion, Mr. Parr raised an issue posed by a recent court holding that under FOAA an agency cannot require payment of a fee from a requestor before providing documents pursuant to a FOAA request once the agency's work of searching and compiling documents has already been completed. Mr. Parr asked that the next meeting agenda include an item to discuss modifying

the advance payment provision of FOAA at 1 MRSA §408-A. Additionally, Mr. Parr wanted the group to discuss whether FOAA should allow for litigation over records that have previously already been provided to an individual. Ms. Lynch noted that she would be abstaining from any discussion on this topic. By consensus, the group agreed to place this item on the next agenda.

Mr. Stout made a motion, seconded by Mr. Parr, for an item to be added to the next meeting agenda to discuss the Advisory Committee forming a subcommittee on technology. The motion passed with a unanimous vote of all present.

**Summary of October 5, 2016 meeting**

*[to be added]*

**VI. ACTIONS RELATED TO COMMITTEE RECOMMENDATIONS CONTAINED IN TENTH ANNUAL REPORT**

The Right to Know Advisory Committee made two recommendations in its tenth annual report. The legislative actions taken in 2016 as a result of those recommendations are summarized below.

<p><b>Recommendation:</b> Enact legislation authorizing the use of technology to permit remote participation in public proceedings by non-elected members of public bodies</p>	<p><b>Action:</b> A majority of the Judiciary Committee voted “Ought Not to Pass” on the recommendations of the Advisory Committee to authorize the use of technology to permit remote participation in public proceedings contained in LD 1586, <i>Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation in Public Proceeding</i>; however, a minority of the Judiciary Committee proposed an amendment that would have required a governmental entity to adopt a written policy governing remote participation by members that also describes how the policy meets the principles of FOAA. The bill and the amendmer were not enacted.</p> <p>The Judiciary Committee also considered another bill related to remote participation in public proceedings, LD 1241, <i>An Act To Increase Government Efficiency</i>, which was carried over from the First Regular Session to the Second Regular Session. As finally enacted, LD 1241 permits the board or commission of each of four State bonding authorities (the Maine Governmental Facilities Authority, the Maine Health and Higher Educational Facilities Authority, the Maine State Housing Authority and the Maine Municipal Bond Bank) to conduct public proceedings with members participating via remote access technology in certain circumstances. LD 1241 was finally enacted as Public Law 2016, chapter 449.</p>
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<p><b>Recommendation:</b> Continue without modification 24 of the existing public records exceptions enacted after 2004 and before 2013</p>	<p><b>Action:</b> No action by the Legislature was necessary since the Advisory Committee recommended no changes to the existing public records exceptions that were reviewed.</p>
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## VII. RECOMMENDATIONS

Arising from its activities and discussions in 2016, the Advisory Committee makes the following recommendations in this, its eleventh annual report.

- Encourage the Judiciary Committee to consider proposed legislation to review the current public records exception that protects as confidential records provided by a railroad company describing hazardous materials transported by rail in the State**

At the Judiciary Committee's request, the Advisory Committee reviewed the public records exception in current law that protects as confidential records provided by a railroad company describing hazardous materials transported by the railroad company that are in the possession of a state or local emergency management agency or law enforcement agency, a fire department or other first responder. See 1 MRSA §402, sub-§3, ¶U. The Judiciary Committee's request was prompted by media articles following enactment of the exception indicating that the public's access to information about the transportation of crude oil through the State may be limited and your interest in ensuring that the public have an additional opportunity to comment and, if necessary, to recommend changes to current law.

The Advisory Committee discussed the public records exception and agreed that the exception may benefit from additional consideration. The Advisory Committee recommends that the Judiciary Committee consider submitting a committee bill to the First Regular Session of the 128<sup>th</sup> Legislature so that the current exception may be fully vetted by the Legislature in a manner that allows the most meaningful participation by stakeholders, state and local government entities and other members of the public. The Advisory Committee believes that the current exception is not intended to prevent public access to summary or aggregate information about the transportation of hazardous materials by rail in the State, particularly crude oil, or to prohibit disclosure of information about spills or discharges of hazardous materials. The Advisory Committee also expressed the concerns about the current exception as written.

*See correspondence in Appendix \_\_\_.*

- Advise the Judiciary Committee about guidelines for considering proposed legislation relating to the confidentiality of personal information about professional and occupational licensees and applicants** *{finally approved and recommended at September 14<sup>th</sup> meeting}*

During the Second Regular Session, the Legislature enacted LD 1499, An Act to Increase the Safety of Social Workers”, which created a new confidentiality provision for social worker licensees’ and license applicants’ addresses and telephone numbers. In response to suggestions to include other types of licensed professionals in the scope of the confidentiality exception, the Judiciary Committee asked for the Advisory Committee’s assistance in developing a uniform policy for all professions and occupations. Under current law, some licensing boards, e.g., nurses, physicians and osteopaths, make certain licensee information confidential already. The Advisory Committee had extensive discussions about the request to develop comprehensive recommendations for the treatment of personal contact information for professions and occupations regulated by the State.

The Advisory Committee agreed that any uniform policy needs to balance the consumer interests of the public in having access to licensee information with the privacy interests of licensees and license applicants. The public has a legitimate need for access to licensing information to ensure that individuals employed in certain professions and occupations are adequately trained and competent, but licensed professionals also have an interest in privacy and personal safety.

The Advisory Committee recommends *(by a vote of 11-2)* that the Judiciary Committee adhere to an approach that focuses on what categories of personal information about licensees should not be accessible to the public, rather than specifying what licensing information should be public. The Advisory Committee supports the general principle that personal contact information should not be public, similar to the criteria at 1 MRSA §402, sub-§3, ¶O for protecting public employee personal information. Pursuant to 1 MRSA §402, sub-§3, ¶O, the home addresses, home phone and fax numbers, personal cellphone numbers and home email addresses are confidential. The Advisory Committee recognizes that, in cases in which the licensee or license applicant has only provided a personal address and not a public business address to a licensing board, the personal address should not be kept confidential. The Advisory Committee also discussed the merits of providing licensees and license applicants an approach that would permit individuals to opt-in or affirmatively approve the disclosure of personal contact information or developing a form for use by the licensing entity that would make public certain information, but would exclude personal information about the individual from being disclosed to the public.

*See correspondence in Appendix \_\_\_.*

- Continue without modification, amend or repeal certain existing public records exceptions enacted after 2004 and before 2013** *{ reflects Subcommittee recommendations adopted before and during September 14<sup>th</sup> meeting; additional recommendations to be added if further recommendations are adopted }*

The Advisory Committee recommends that the following exceptions enacted after 2004 and before 2013 be continued without modification.

- ◆ Title 1, section 402, subsection 3, paragraph N, relating to social security numbers;
- ◆ Title 1, section 402, subsection 3, paragraph O, relating to personal contact information concerning public employees other than elected officials;

- ◆ Title 1, section 402, subsection 3, paragraph Q, relating to security plans, staffing plans, security procedures, architectural drawings or risk assessments prepared for emergency events for Department of Corrections or county jail;
- ◆ Title 1, section 1013, subsection 2, relating to the identity of a requestor of Commission on Governmental Ethics and Election Practices opinions;
- ◆ Title 1, section 1013, subsection 3-A, relating to complaint alleging a violation of legislative ethics;
- ◆ Title 1, section 1013, subsection 4, relating to Commission on Governmental Ethics and Election Practices records other than complaints;
- ◆ Title 5, section 1541, subsection 10-B, relating to internal audit working papers of the State Controller;
- ◆ Title 12, section 8005, subsection 1, relating to social security number, addresses, phone numbers, email addresses of forest landowners owning less than 1,000 acres;
- ◆ Title 12, section 8005, subsection 2, relating to social security numbers, forest management plans and supporting documents of activities for administering landowner assistance programs;
- ◆ Title 12, section 8005, subsection 4, relating to forest management information designated confidential by agency furnishing information;
- ◆ Title 12, section 10110, relating to a person's email address submitted as part of the application process for a hunting or fishing license;
- ◆ Title 12, section 12551-A, subsection 10, relating to smelt dealers reports, including name, location, gear and catch;
- ◆ Title 14, section 6321-A, subsection 4, relating to the financial information disclosed in the course of mediation under the foreclosure mediation program;
- ◆ Title 17-A, section 1176, subsection 1, relating to information that pertains to current address or location of crime victims;
- ◆ Title 17-A, section 1176, subsection 5, relating to request by crime victim for notice of release of defendant;
- ◆ Title 21-A, section 196-A, relating to information contained electronically in the central voter registration system;

- ◆ Title 21-A, section 1003, subsection 3-A, relating to investigative working papers of the Commission on Governmental Ethics and Election Practices;
- ◆ Title 21-A, section 1125, subsection 3, relating to records of individuals who made Clean Elections qualifying contributions over the Internet;
- ◆ Title 22, section 1711-C, subsection 20, relating to hospital records concerning health care information pertaining to an individual;
- ◆ Title 22, section 2153-A, relating to information provided to the Department of Health and Human Services by the U.S. Department of Agriculture and the U.S. Food and Drug Administration that is confidential under federal law;
- ◆ Title 22, section 2425, subsection 8, relating to medical marijuana registry identification cards;
- ◆ Title 22, section 4087-A, subsection 6, relating to information held by or records or case-specific reports maintained by the Child Welfare Ombudsman;
- ◆ Title 25, section 4202, relating to records and information connected in any way with the work of a critical incident stress management team for law enforcement personnel;
- ◆ Title 29-A, section 1301, subsection 6-A, relating to the social security number of an applicant for a drivers' license or non-driver identification card;
- ◆ Title 29-A, section 2251, subsection 7-A, relating to personally identifying accident report data contained in an accident report database;
- ◆ Title 30-A, section 4706, subsection 1, relating to municipal housing authorities;
- ◆ Title 32, section 91-B, subsection 1, paragraph A, relating to personal contact information and personal health information of applicant for credentialing by Emergency Medical Services Board;
- ◆ Title 32, section 91-B, subsection 1, paragraph B, relating to information about a person receiving emergency medical services as part of an application for credentialing by Emergency Medical Services Board;
- ◆ Title 32, section 91-B, subsection 1, paragraph C, relating to information submitted to trauma incidence registry program under Title 32, section 87-B;
- ◆ Title 32, section 91-B, subsection 1, paragraph D, relating to examination questions used for credentialing by Emergency Medical Services Board;

- ◆ Title 34-A, section 11221, subsection 9-A, relating to disclosure of certain sex offender registry information;
- ◆ Title 34-A, section 11221, subsection 13, relating to disclosure of certain sex offender registry information;
- ◆ Title 34-B, section 3864, subsection 12, relating to abstract of involuntary commitment order provided to State Bureau of Identification;
- ◆ Title 35-A, section 122, subsection 1-B, paragraph G, relating to information, as it pertains to the sale, lease or use of state-owned land or assets under the provisions of this section or activities in preparation for such sale, lease or use in the context of energy infrastructure corridors;
- ◆ Title 36, section 6271, subsection 2, relating to an application, information submitted in support of an application and files and communications in relation to a municipal property tax deferral program for senior citizens;
- ◆ Title 38, section 580-B, subsection 11, relating to records held by the Department of Environmental Protection or its agents regarding individual auctions administered under the carbon dioxide cap-and-trade program; and
- ◆ Title 38, section 1310-B, subsection 2, relating to hazardous waste information, information on mercury-added products and electronic devices and mercury reduction plans.

The Advisory Committee recommends that the following exception be repealed.

- ◆ Title 1, section 402, subsection 2, paragraph R, relating to social security numbers in possession of Secretary of State (*exception is redundant since social security numbers are not a public record under Title 1, section 402, subsection 2, paragraph N*).

The Advisory Committee recommends that the following exceptions be indefinitely postponed and removed from the review process.

- ◆ Title 1, section 402, subsection 2, paragraph G, relating to committee meetings pertaining to interscholastic sports (*review not necessary because exception is not related to a public record and is not required by law*);
- ◆ Title 7, section 2321, subsection 3, relating to criminal history records provided by the Commissioner of Agriculture, Conservation and Forestry as part of an application to grow industrial hemp for commercial purposes (*provision repealed by Public Law 2009, chapter 320, section 1*);

- ◆ Title 21-A, section 1125, subsection 2-B, relating to records of individuals who made Clean Elections gubernatorial seed money contributions over the Internet (*provision repealed by Citizen's Initiative*); and
- ◆ Title 24-A, section 2736, subsection 2, relating to insurer rate filings on individual health insurance policies and supporting information in regards to protected health information and descriptions of the amount or terms or conditions or reimbursement in a contract between an insurer and a 3<sup>rd</sup>-party (*review not necessary*).

### VIII. FUTURE PLANS

In 2016, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions enacted after 2004 and before 2013. The Advisory Committee looks forward to a full year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

**DRAFT**

**APPENDIX A**

**Authorizing Legislation: 1 MRSA §411**

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**APPENDIX B**

**Membership List**

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**APPENDIX C**

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**APPENDIX D**

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APPENDIX E

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**APPENDIX F**

**PUBLIC RECORDS EXCEPTIONS SUBCOMMITTEE**

**Maine Freedom of Access Act - public records exceptions**

**Enacted 2005 - 2012**

(Revised 9/14/2016)

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
1	1	402	2	Title 1, section 402, subsection 2, paragraph G, relating to committee meetings pertaining to interscholastic sports	Maine Principal's Association - Interscholastic Management Committee	Indefinitely postpone because this is a public meetings exception	Accepted Subcommittee recommendation
2	1	402	3	Title 1, section 402, subsection 3, paragraph C-1, relating to legislative working papers	Legislative Council, Executive Director	Amend to apply to records instead of information	Tabled; review again in Subcommittee
3	1	402	3	Title 1, section 402, subsection 3, paragraph N, relating to Social Security Numbers	Administrative and Financial Services - Bureau of Human Resources; Legislative Council, Executive	No Modification	Accepted Subcommittee recommendation
4	1	402	3	Title 1, section 402, subsection 3, paragraph O, relating to personal contact information concerning public employees other than elected officials	Department of Administrative and Financial Services - Bureau of Human Resources; Legislative Council, Executive Director; Administrative Office of the Courts	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	A.C. RECOMMENDATION
5	1	402	3	Title 1, section 402, subsection 3, paragraph P, relating to geographic information regarding recreational trails on private land	Department of Inland Fisheries and Wildlife; Department of Agriculture, Conservation and Forestry	No Modification	Accepted Subcommittee recommendation
6	1	402	3	Title 1, section 402, subsection 3, paragraph Q, relating to security plans, staffing plans, security procedures, architectural drawings or risk assessments prepared for emergency events for Department of Corrections or county jail	Department of Corrections	No Modification	Accepted Subcommittee recommendation
7	1	402	3	Title 1, section 402, subsection 3, paragraph R, relating to Social Security numbers in possession of the Secretary of State	Secretary of State	Repeal (reconsidered at 9/14/16 meeting)	Accepted Subcommittee recommendation to repeal

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
8	1	538	3	Title 1, section 538, subsection 3, relating to InforME subscriber information	Information Resources of Maine (InforME)	No Modification	Accepted Subcommittee recommendation
9	1	1013	2	Title 1, section 1013, subsection 2, relating to the identity of a requestor of Commission on Governmental Ethics and Election Practices opinions	Commission on Governmental Ethics and Election Practices	No Modification	Accepted Subcommittee recommendation
10	1	1013	4	Title 1, section 1013, subsection 4, relating to Commission on Governmental Ethics and Election Practices records other than complaints	Commission on Governmental Ethics and Election Practices	No Modification	Accepted Subcommittee recommendation
11	1	1013	3-A	Title 1, section 1013, subsection 3-A, relating to complaint alleging a violation of legislative ethics	Commission on Governmental Ethics and Election Practices	No Modification	Accepted Subcommittee recommendation
12	4	1806		Title 4, section 1806, relating to certain information and records in the possession of the Maine Commission on Indigent Legal Services	Maine Commission on Indigent Legal Services	No Modification	Accepted Subcommittee recommendation
13	5	1541	10-B	Title 5, section 1541, subsection 10-B, relating to internal audit working papers of the State Controller	Department of Administrative and Financial Services - Office of the State Controller	No modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
14	5	17057	3	Title 5, section 17057, subsection 3, relating to home contact information of Maine Public Employees Retirement System members, benefit recipients and staff	Maine Public Employees Retirement System	No Modification	Accepted Subcommittee recommendation
15	5	17057	4	Title 5, section 17057, subsection 4, relating to Maine Public Employees Retirement System private market investment activity	Maine Public Employees Retirement System	No Modification	Accepted Subcommittee recommendation
16	5	17057	5	Title 5, section 17057, subsection 3, relating to Maine Public Employees Retirement System employees personal and complaint and disciplinary information	Maine Public Employees Retirement System	No Modification	Accepted Subcommittee recommendation
17	5	90-B	7	Title 5, section 90-B, subsection 7, relating to the Address Confidentiality Program	Secretary of State	No Modification	Accepted Subcommittee recommendation
18	7	1052	2-A	Title 7, section 1052, subsection 2-A, relating to total potential acreage of genetically modified crops reported by individual manufacturers	Department of Agriculture, Conservation and Forestry	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
19	7	2231	3	Title 7, section 2231, subsection 3, relating to criminal history records provided to the Commissioner of Agriculture, Conservation and Forestry as part of an application to grow industrial hemp for commercial purposes	Department of Agriculture, Conservation and Forestry	Repealed by PL 2009, ch. 320, section 1	Accepted Subcommittee recommendation
20	8	1006	1	Title 8, section 1006, subsection 1, paragraph A, relating to information or records required by the Gambling Control Board for licensure: trade secrets and proprietary information	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
21	8	1006	1	Title 8, section 1006, subsection 1, paragraph B, relating to information or records required by the Gambling Control Board for licensure: would be unwarranted invasion of privacy of key executive, gaming employee or another person	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
22	8	1006	1	Title 8, section 1006, subsection 1, paragraph C, relating to information or records required by the Gambling Control Board for licensure: key executive or gaming employee compensation	Department of Public Safety	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
23	8	1006	1	Title 8, section 1006, subsection 1, paragraph D, relating to information or records required by the Gambling Control Board for licensure: financial, statistical and surveillance information related to the applicant	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
24	8	1006	1	Title 8, section 1006, subsection 1, paragraph E, relating to information or records required by the Gambling Control Board for licensure: creditworthiness, credit rating or financial condition of person or project	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
25	8	1006	1	Title 8, section 1006, subsection 1, paragraph F, relating to information or records required by the Gambling Control Board for licensure: information from other jurisdictions conditioned on remaining confidential	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
26	8	1006	1	Title 8, section 1006, subsection 1, paragraph G, relating to information or records required by the Gambling Control Board for licensure: information designated confidential under federal law	Department of Public Safety	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
27	8	1006	1	Title 8, section 1006, subsection 1, paragraph H, relating to information or records required by the Gambling Control Board for licensure: specific personal information, including Social Security number, of any individual	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
28	8	1006	3	Title 8, section 1006, subsection 3, relating to records and information developed as part of suitability requirement to select operator of central site monitoring system, held by Gambling Control Board and Dept. of Public Safety	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
29	8	1006	4	Title 8, section 1006, subsection 4, relating to financial, statistical and surveillance information from the central site monitoring system held by the Gambling Control Board and the Dept. of Public Safety	Department of Public Safety	No Modification	Accepted Subcommittee recommendation

Ref #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
30	8	1007	2	Title 8, section 1007, subsection 2, relating to information or records received by the Gambling Control Board or Department of Public Safety from another agency pursuant to agreement	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
31	8	1008		Title 8, section 1008, relating to information or records used or produced by the Gambling Control Board or Department of Public Safety in connection with hearings, proceedings or appeals pursuant to Title 8, section 1052	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
32	8	1052		Title 8, section 1052, relating to reports, information or records compiled by the Gambling Control Board and Dept. of Public Safety concerning noncompliance with or violation of the chapter by an applicant, licensee, owner or key executive	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
33	8	270-A		Title 8, section 270-A, relating to records and information included in application or materials required for issuance of commercial track license	Department of Agriculture, Conservation and Forestry	No Modification	Accepted Subcommittee recommendation

Ref #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
34	9-A	6-105-A		Title 9-A, section 6-105-A, last paragraph, relating to information concerning uniform multistate licensing system provided to Consumer Credit Protection by other jurisdictions	Department of Professional and Financial Regulation - Bureau of Consumer Credit Protection	No Modification	Accepted Subcommittee recommendation
35	12	8005	1	Title 12, section 8005, subsection 1, relating to Social Security numbers, addresses, telephone numbers, electronic mail addresses of forest landowners owning less than 1,000 acres	Department of Agriculture, Conservation and Forestry	No Modification	Accepted Subcommittee recommendation
36	12	8005	2	Title 12, section 8005, subsection 2, relating to Social Security numbers, forest management plans and supporting documents of activities for administering landowner assistance programs	Department of Agriculture, Conservation and Forestry	No Modification	Accepted Subcommittee recommendation
37	12	8005	4	Title 12, section 8005, subsection 4, relating to forest management information designated confidential by agency furnishing the information	Department of Agriculture, Conservation and Forestry	5-1 No Modification	Accepted Subcommittee recommendation

Ref #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
38	12	10110		Title 12, section 10110, relating to a person's e-mail address submitted as part of the application process for a hunting or fishing license	Department of Inland Fisheries and Wildlife	No Modification; Send letter to IFW Committee expressing approval of opt-in language from DIFW but concern about marketing and contractors language	Accepted Subcommittee recommendation; send letter
39	12	12551-A	10	Title 12, section 12551-A, subsection 10, relating to smelt dealers reports, including name, location, gear and catch	Department of Inland Fisheries and Wildlife	No Modification	Accepted Subcommittee recommendation
40	14	6321-A	4	Title 14, section 6321-A, subsection 4, relating to the financial information disclosed in the course of mediation under the foreclosure mediation program	Administrative Office of the Courts	No Modification	Accepted Subcommittee recommendation
41	17-A	1176	1	Title 17-A, section 1176, subsection 1, relating to information that pertains to current address or location of crime victims	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
42	17-A	1176	5	Title 17-A, section 1176, subsection 5, relating to request by crime victim for notice of release of defendant	Department of Corrections	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
43	20-A	13004	2-A	Title 20-A, section 13004, subsection 2-A, relating to complaints, charges and accusations concerning certification and registration of educational personnel	Department of Education	Review with full Advisory Committee	No modification
44	21-A	1003	3-A	Title 21-A, section 1003, subsection 3-A, relating to investigative working papers of the Commission on Governmental Ethics and Election Practices	Maine Commission on Governmental Ethics and Election Practices	No Modification	Accepted Subcommittee recommendation
45	21-A	1125	3	Title 21-A, section 1125, subsection 3, relating to records of individuals who made Clean Elections qualifying contributions over the Internet	Maine Commission on Governmental Ethics and Election Practices	No Modification	Accepted Subcommittee recommendation
46	21-A	1125	2-B	Title 21-A, section 1125, subsection 2-B, relating to records of individuals who made Clean Elections gubernatorial seed money contributions over the Internet	Maine Commission on Governmental Ethics and Election Practices	Indefinitely postpone because citizen's initiation repeals this exception	Accepted Subcommittee recommendation
47	21-A	196-A		Title 21-A, section 196-A, relating to information contained electronically in the central voter registration system	Secretary of State	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
48	22	1494		Title 22, section 1494, relating to occupational disease reporting	Department of Health and Human Services	No Modification	Accepted Subcommittee recommendation
49	22	2425	8	Title 22, section 2425, subsection 8, relating to medical marijuana registry identification cards	Department of Health and Human Services	No Modification	Accepted Subcommittee recommendation
50	22	1711-C	20	Title 22, section 1711-C, subsection 20, relating to hospital records concerning health care information pertaining to an individual	HealthInfoNet	Repeal because information is already adequately protected and FOAA doesn't apply to HealthInfoNet	Did not accept Subcommittee recommendation; Unanimous vote to continue exception without modification
51	22	2153-A		Title 22, section 2153-A, relating to information provided to the Department of Health and Human Services by the U.S. Department of Agriculture and the U.S. Food and Drug Administration that is confidential under federal law	Department of Health and Human Services	No modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
52	22	4087-A	6	Title 22, section 4087-A, subsection 6, relating to information held by or records or case-specific reports maintained by the Child Welfare Ombudsman	Child Welfare Ombudsman	No Modification	Accepted Subcommittee recommendation
53	24-A	2736	2	Title 24-A, section 2736, subsection 2, relating to insurer rate filings on individual health insurance policies and supporting information, in regards to protected health information and descriptions of the amount and terms or conditions or reimbursement in a contract between an insurer and a 3rd party	Department of Professional and Financial Regulation - Bureau of Insurance	No review. Not a new PR exception.	Accepted Subcommittee recommendation
54	25	4202		Title 25, section 4202, relating to records and information connected in any way with the work of a critical incident stress management team for law enforcement personnel	Department of Public Safety	No modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
55	29-A	1301	6-A	Title 29-A, section 1301, relating to the social security number of an applicant for a driver's license or nondriver identification card	Secretary of State	No modification	Approve of language recommended by SOS but understand SOS will submit legislation to effect the change
56	29-A	2251	7-A	Title 29-A, section 2251, subsection 7-A, relating to personally identifying accident report data contained in an accident report database	Department of Public Safety		Accepted Subcommittee recommendation
57	29-A	2117-A	4	Title 29-A, section 2117-A, relating to data collected or retained through the use of an automated license plate recognition system	Department of Public Safety; Department of Transportation	Tabled. Reach out to DOT, Me. St. Police, BMV and trucking interests	
58	32	91-B	1	Title 32, section 91-B, subsection 1, relating to quality assurance activities of an emergency medical services quality assurance committee	Department of Public Safety	Tabled. Follow up re: first sentence	

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
59	32	91-B	1	Title 32, section 91-B, subsection 1, paragraph A, relating to personal contact information and personal health information of applicant for credentialing by Emergency Medical Services Board	Department of Public Safety	No modification	Accepted Subcommittee recommendation
60	32	91-B	1	Title 32, section 91-B, subsection 1, paragraph B, relating to information about a person receiving emergency medical services as part of an application for credentialing by Emergency Medical Services Board	Department of Public Safety	No modification	Accepted Subcommittee recommendation
61	32	91-B	1	Title 32, section 91-B, subsection 1, paragraph C, relating to information submitted to the trauma incidence registry under section 87-B	Department of Public Safety	No modification	Accepted Subcommittee recommendation
62	32	91-B	1	Title 32, section 91-B, subsection 1, paragraph D, relating to examination questions used for credentialing by Emergency Medical Services Board	Department of Public Safety	Tabled. Follow up re: need for exam questions to be confidential	

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
63	30-A	4706	1	Title 30-A, section 4706, subsection 1, relating to municipal housing authorities	Maine State Housing Authority (MaineHousing)	No modification	Accepted Subcommittee recommendation
64	34-A	11221	13	Title 34-A, section 11221, subsection 13, relating to disclosure of certain sex offender registry information	Department of Public Safety	No modification	Accepted Subcommittee recommendation
65	34-A	11221	9-A	Title 34-A, section 11221, subsection 9-A, relating to certain sex offender registry information	Department of Public Safety	No modification	Accepted Subcommittee recommendation
66	34-B	1931	6	Title 34-B, section 1931, subsection 6, relating to the records of the Mental Health Homicide, Suicide and Aggravated Assault Review Board	Mental Health Homicide, Suicide, and Aggravated Assault Review Board (MHHSAAARB)	Tabled. Check if Homicide Review Board has replaced this board.	

Ref. #	M.R.S TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
67	34-B	3864	12	Title 34-B, section 3864, subsection 12, relating to abstract of involuntary commitment order provided to State Bureau of Identification	Department of Public Safety	No modification	Accepted Subcommittee recommendation
68	35-A	122	1-B	Title 35-A, section 122, subsection 1-B, paragraph G, relating to information, as it pertains to the sale, lease or use of state-owned land or assets under the provisions of this subsection or activities in preparation for such sale, lease or use in the context of energy infrastructure corridors	Interagency Review Panel (Governor's Energy Office)	No Modification	Accepted Subcommittee recommendation
69	35-A	10106		Title 35-A, section 10106 relating to records of the Efficiency Maine Trust and its board	Efficiency Maine	Voted no modification but needs to re-review to consider effect of making entire record confidential when it includes only SSN/address/email/telephone	Sent back to Subcommittee

Ref #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
70	36	6271	2	Title 36, section 6271, subsection 2, relating to an application, information submitted in support of an application and files and communications in relation to a municipal property tax deferral program for senior citizens	Maine Municipal Association	No Modification	Accepted Subcommittee recommendation
71	38	1310-B	2	Title 38, section 1310-B, subsection 2, relating to hazardous waste information, information on mercury-added products and electronic devices and mercury reduction plans	Department of Environmental Protection	No Modification	Accepted Subcommittee recommendation
72	38	580-B	11	Title 38, section 580-B, subsection 11, relating to records held by the Department of Environmental Protection or its agents regarding individual auctions administered under the carbon dioxide cap-and-trade program	Department of Environmental Protection	No Modification	Accepted Subcommittee recommendation