

MAINE STATE LEGISLATURE

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H.P. 1579

House of Representatives, February 13, 2008

An Act Concerning Public Records Exceptions

Reported by Representative SIMPSON of Auburn for the Joint Standing Committee on Judiciary pursuant to the Maine Revised Statutes, Title 1, section 432, subsection 1.

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

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

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

2 **Sec. 1. 1 MRSA §402, sub-§3, ¶O,** as enacted by PL 2005, c. 381, §3, is
3 amended to read:

4 O. Personal contact information concerning public employees, except when that
5 information is public pursuant to other law. For the purposes of this paragraph:

6 (1) "Personal contact information" means home address, home telephone
7 number, home facsimile number, home e-mail address and personal cellular
8 telephone number and personal pager number; and

9 (2) "Public employee" means an employee ~~of a governmental entity~~, as defined
10 in Title 14, section 8102, subsection 2 1, except that "public employee" does not
11 include elected officials.

12 **Sec. 2. 3 MRSA §997,** as amended by PL 2003, c. 673, Pt. GGGG, §9, is further
13 amended to read:

14 **§997. Conduct and issuance of program evaluation reports**

15 The director and the office shall adhere to the following provisions relative to
16 conducting and issuing program evaluation reports under this chapter.

17 **1. Review and response.** Prior to the presentation of a program evaluation under
18 this chapter to the committee by the office, the director of the evaluated state agency or
19 other entity must have an opportunity to review a draft of the program evaluation report.
20 Within 15 calendar days of receipt of the draft report, the director of the evaluated state
21 agency or other entity may provide to the office comments on the draft report. If
22 provided to the office by the comment deadline, the comments must be included in the
23 final report when it is presented to the committee. Failure by the director of an evaluated
24 agency or other entity to submit its comments on the draft report by the comment
25 deadline may not delay the submission of a report to the committee or its release to the
26 public.

27 All documents, writings, drafts, electronic communications and information transmitted
28 pursuant to this subsection are confidential and may not be released to the public prior to
29 the time the office issues its program evaluation report pursuant to subsection 3 3-A. A
30 person violating the provisions of this subsection regarding confidentiality is guilty of a
31 Class E crime.

32 **2. Submission of final report to committee.** The director shall issue program
33 evaluation reports, favorable or unfavorable, of any state agency or other entity, and these
34 reports are public records. The director shall notify the committee when each final
35 program evaluation report under this chapter is completed. The report must then be
36 placed on the agenda for a future committee meeting. At the meeting where a report
37 appears on the agenda for the first time, the director will release that report to the
38 committee and to the public simultaneously. The committee, at its discretion, may vote
39 to endorse, to endorse in part or to decline to endorse the report submitted by the director.
40 If the committee determines it is necessary, the committee may report out to the

1 Legislature legislation to implement the findings and recommendations of any program
2 evaluation report presented to it by the office.

3 **3. Confidentiality.** ~~The director shall issue program evaluation reports, favorable or~~
4 ~~unfavorable, of any state agency or other entity, and these reports are public records,~~
5 ~~except that, prior to the release of a program evaluation report pursuant to subsection 2 or~~
6 ~~the point at which a program evaluation is no longer being actively pursued, all papers,~~
7 ~~physical and electronic records and correspondence and other supporting materials~~
8 ~~comprising the working papers in the possession of the director or other entity charged~~
9 ~~with the preparation of a program evaluation report are confidential and exempt from~~
10 ~~disclosure pursuant to Title 1, chapter 13. All other records or materials in the possession~~
11 ~~of the director or other entity charged with the preparation of a program evaluation report~~
12 ~~under this chapter that would otherwise be confidential or exempt from disclosure are~~
13 ~~exempt from disclosure pursuant to the provisions of Title 1, chapter 13. Prior to the~~
14 ~~release of a program evaluation report pursuant to subsection 2 or the point at which a~~
15 ~~program evaluation is no longer being actively pursued, all papers, physical and~~
16 ~~electronic records and correspondence and other supporting materials comprising the~~
17 ~~working papers in the possession of the director or other entity charged with the~~
18 ~~preparation of a program evaluation report are confidential and may not be released or~~
19 ~~disclosed by the director to the Legislative Council or an agent or representative of the~~
20 ~~Legislative Council. This subsection may not be construed to prohibit or prevent public~~
21 ~~access to the records of a state agency or other entity in the possession of the director that~~
22 ~~would otherwise be subject to disclosure pursuant to the provisions of Title 1, chapter 13.~~
23 ~~The director shall refer requests for access to those records directly to the state agency or~~
24 ~~other entity that is the official custodian of the requested records, which shall respond to~~
25 ~~the request for public records.~~

26 **3-A. Confidentiality of working papers.** Except as provided in this subsection,
27 working papers that support reports released pursuant to subsection 2, or that are related
28 to any program evaluation no longer being actively pursued, are confidential and exempt
29 from disclosure pursuant to Title 1, chapter 13. Working papers may not be disclosed to
30 any person, including the Legislative Council or an agent or representative of the
31 Legislative Council. For the purposes of this subsection, "working papers" means all
32 papers, physical and electronic records and correspondence and other supporting
33 materials comprising the working papers in the possession of the director or other entity
34 charged with the preparation of a program evaluation report. In accordance with
35 subsection 4, all records or materials in the possession of the director or other entity
36 charged with the preparation of a program evaluation report under this chapter that would
37 otherwise be confidential or exempt from disclosure also remain exempt from disclosure
38 pursuant to the provisions of Title 1, chapter 13. Prior to the release of the final program
39 evaluation report, the director has sole discretion to disclose working papers to the state
40 agency or other entity subject to the program evaluation as long as disclosure will not
41 prejudice the program evaluation and the working papers remain confidential in the hands
42 of the receiving entity. After the release of the final program evaluation report, the
43 director has sole discretion to release working papers, as long as they remain confidential
44 in the hands of the receiving entity, as necessary to:

- 1 A. The department, commission or agency that was subject to the audit or
2 investigation;
- 3 B. Federal agencies providing grants to the audited entity under paragraph A;
- 4 C. Law enforcement agencies for the purpose of criminal law enforcement or
5 investigations;
- 6 D. Other auditors in their work reviewing the office; or
- 7 E. Other departments of audit existing within State Government.

8 This subsection may not be construed to prohibit or prevent public access to the records
9 of a state agency or other entity in the possession of the director that would otherwise be
10 subject to disclosure pursuant to the provisions of Title 1, chapter 13. The director shall
11 refer requests for access to those records directly to the state agency or other entity that is
12 the official custodian of the requested records, which shall respond to the request for
13 public records.

14 **4. Information available to office.** Upon request of the office and consistent with
15 the conditions and procedures set forth in this section, state agencies or other entities
16 subject to program evaluation must provide the office access to information that is
17 privileged or confidential as defined by Title 1, chapter 13, which governs public records
18 and proceedings.

19 A. Before beginning a program evaluation under this chapter that may require
20 access to records containing confidential or privileged information, the office shall
21 furnish a written statement of its determination that it is necessary for the office to
22 access such records and consult with representatives of the state agency or other
23 entity to discuss methods of identifying and protecting privileged or confidential
24 information in those records. During that consultation, the state agency or other
25 entity shall inform the office of all standards and procedures set forth in its policies or
26 agreements to protect information considered to be confidential or privileged. The
27 office shall limit its access to information that is privileged or confidential by
28 appropriate methods, which may include examining records without copying or
29 removing them from the source.

30 B. Documentary or other information obtained by the office during the course of a
31 program evaluation under this chapter is privileged or confidential to the same extent
32 under law that that information would be privileged or confidential in the possession
33 of the state agency or other entity providing the information. Any privilege or
34 statutory provision, including penalties, concerning the confidentiality or obligation
35 not to disclose information in the possession of a state agency or other entity or its
36 officers or employees applies equally to the office. Privileged or confidential
37 information obtained by the office during the course of a program evaluation may be
38 disclosed only as provided by law and with the agreement of the state agency or other
39 entity subject to the program evaluation that provided the information.

40 C. If the office accesses information classified as privileged or confidential
41 pursuant to state agency or other entity policy or procedures or by agreement, the
42 office shall comply with the state agency's or other entity's standards or procedures
43 for handling that information. The office may include in its working papers the

1 excerpts from information classified as confidential or privileged as may be necessary
2 to complete the program evaluation under this chapter, as long as the use does not
3 infringe on department policies or procedures applicable to the original provision of
4 information.

5 ~~**5. Confidentiality of working papers.** Except as provided in this subsection,~~
6 ~~working papers are confidential and may not be disclosed to any person. Prior to the~~
7 ~~release of the final program evaluation report, the director has sole discretion to disclose~~
8 ~~working papers to the state agency or other entity subject to the program evaluation when~~
9 ~~disclosure will not prejudice the program evaluation. After release of the final program~~
10 ~~evaluation report, working papers may be released as necessary to the state agency or~~
11 ~~other entity that was subject to the program evaluation under this chapter.~~

12 **6. Confidential sources.** If data supplied by an individual are needed to initiate,
13 continue or complete a program evaluation under this chapter, the director may, by
14 written memorandum to the file, provide that the individual's identity will remain
15 confidential and exempt from disclosure under Title 1, chapter 13, and this written
16 memorandum protects the identity of the person from disclosure under Title 1, chapter
17 13, notwithstanding any other provision of law to the contrary.

18 **7. Disposition of final report.** A final copy of a program evaluation report under
19 subsection 2, including recommendations and the evaluated state agency's or other
20 entity's comments, must be submitted to the commissioner or director of the state agency
21 or other entity examined at least one day prior to the report's public release, and must be
22 made available to each member of the Legislature no later than one day following the
23 report's receipt by the committee. The office may satisfy the requirement to provide each
24 Legislator a copy of the report by furnishing the report directly by electronic means or by
25 providing notice to each Legislator of the availability of the report on the office's publicly
26 accessible site on the Internet.

27 **Sec. 3. 4 MRSA §17, sub-§3,** as amended by PL 1987, c. 776, §1, is further
28 amended to read:

29 **3. Investigate complaints.** Investigate complaints with respect to the operation of
30 the courts and relating to court and judicial security. Notwithstanding any other provision
31 of law, such complaints and investigative files that relate to court and judicial security are
32 confidential. Nothing in this section precludes dissemination of such information to
33 another criminal justice agency;

34 **Sec. 4. 4 MRSA §809,** as amended by PL 1977, c. 696, §27, is repealed.

35 **Sec. 5. 5 MRSA §7070, sub-§1, ¶A,** as enacted by PL 1989, c. 402, §1, is
36 amended to read:

37 A. Notwithstanding any confidentiality provision other than this subsection,
38 applications, resumes and letters and notes of reference, other than those letters and
39 notes of reference expressly submitted in confidence, pertaining to the applicant hired
40 are public records after the applicant is hired, except that personal contact

1 information is not a public record as provided in Title 1, section 402, subsection 3,
2 paragraph O.

3 **Sec. 6. 5 MRSA §7070, sub-§2, ¶D-1,** as enacted by PL 1997, c. 124, §2, is
4 amended to read:

5 D-1. Personal information pertaining to the employee's race, color, religion, sex,
6 national origin, ancestry, age, physical disability, mental disability and marital status;
7 social security number; ~~home telephone number and home address~~ personal contact
8 information as provided in Title 1, section 402, subsection 3, paragraph O; and
9 personal employment choices pertaining to elected payroll deductions, deferred
10 compensation, savings plans, pension plans, health insurance and life insurance.
11 When there is a work requirement for public access to personal information under
12 this paragraph that is not otherwise protected by law, that information may be made
13 public. The Director of the Bureau of Human Resources, upon the request of the
14 employing agency, shall make the determination that the release of certain personal
15 information not otherwise protected by law is allowed; and

16 **Sec. 7. 5 MRSA §15321, sub-§3, ¶D,** as amended by PL 2005, c. 19, §4, is
17 further amended to read:

18 D. The records and proceedings of the technology centers are ~~not considered~~ public
19 for the purposes of Title 1, chapter 13: except that the following records are
20 designated as confidential for the purposes of Title 1, section 402, subsection 3,
21 paragraph A:

22 (1) A record obtained or developed by a technology center prior to receipt of a
23 written application or proposal in a form acceptable to the technology center for
24 assistance from the technology center. After receipt by the technology center of
25 the application or proposal, a record pertaining to the application or proposal may
26 not be considered confidential unless it is confidential under another provision of
27 this paragraph;

28 (2) A peer review or analysis or other document related to the evaluation of a
29 grant application or proposal;

30 (3) A record that the person, including the technology center, to whom the record
31 belongs or pertains has requested be designated confidential and that the
32 technology center has determined contains proprietary information, trade secrets
33 or commercial or financial information, the release of which could be
34 competitively harmful to the submitter of the information, could impair the
35 technology center's ability in the future to obtain similar necessary information
36 solely through the voluntary provision of such information and could affect other
37 technology center interests, such as program effectiveness and compliance. For
38 purposes of this subparagraph, the following terms have the following meanings.

39 (a) "Commercial or financial information" means information related to
40 businesses, commerce, trade, employment, profits or finances, including
41 personal finances.

1 (b) "Trade secret" means a secret, commercially valuable plan, formula,
2 process or device that is used for the making, preparing, compounding or
3 processing of trade commodities and that can be said to be the end product of
4 either innovation or substantial effort. There must be a direct relationship
5 between the trade secret and the productive process;

6 (4) A financial statement, credit report or tax return of an individual or other
7 record obtained or developed by the technology center, the disclosure of which
8 would constitute an invasion of personal privacy as determined by the technology
9 center;

10 (5) A record, including a financial statement or tax return obtained or developed
11 by the technology center in connection with a monitoring or servicing activity of
12 the technology center, pertaining to financial assistance provided or to be
13 provided by or with the assistance of the technology center;

14 (6) A record obtained or developed by the technology center that contains an
15 assessment by a person who is not employed by the technology center of the
16 creditworthiness or financial condition of a person or project;

17 (7) A financial statement or business and marketing plan in connection with a
18 project receiving or to receive financial or other assistance from the technology
19 center, if the person to whom the statement or plan belongs or pertains has
20 requested that the record be designated confidential; and

21 (8) Those employee personnel records made confidential pursuant to section 957,
22 subsection 5 and section 17057.

23 **Sec. 8. 7 MRSA §2992-A, sub-§1, ¶C,** as corrected by RR 1997, c. 2, §30, is
24 amended to read:

25 C. Notwithstanding paragraphs A and B:

26 (1) Employees of the board, including employees hired after July 1, 1996, are
27 state employees for the purposes of the state retirement provisions of Title 5, Part
28 20 and the state employee health insurance program under Title 5, chapter 13,
29 subchapter H 2;

30 (2) All meetings and records of the board are subject to the provisions of Title 1,
31 chapter 13, subchapter F 1, except that, by majority vote of those members
32 present recorded in a public session, records and meetings of the board may be
33 closed to the public when public disclosure of the subject matter of the records or
34 meetings would adversely affect the competitive position of the milk industry of
35 the State or segments of that industry. The Commissioner of Agriculture, Food
36 and Rural Resources and those members of the Legislature appointed to serve on
37 the joint standing committee of the Legislature having jurisdiction over
38 agricultural, conservation and forestry matters have access to all material
39 designated confidential by the board;

40 (3) For the purposes of the Maine Tort Claims Act, the board is a governmental
41 entity and its employees are employees as those terms are defined in Title 14,
42 section 8102;

1 (4) Funds received by the board pursuant to chapter 611 must be allocated to the
2 board by the Legislature in accordance with Title 5, section 1673; and

3 (5) Except for representation of specific interests required by subsection 2,
4 members of the board are governed by the conflict of interest provisions set forth
5 in Title 5, section 18.

6 **Sec. 9. 7 MRSA §2998-B, sub-§1, ¶C**, as corrected by RR 1997, c. 2, §31, is
7 amended to read:

8 C. Notwithstanding paragraphs A and B:

9 (1) Employees of the council, including employees hired after July 1, 1996, are
10 state employees for the purposes of the state retirement provisions of Title 5, Part
11 20 and the state employee health insurance program under Title 5, chapter 13,
12 subchapter H 2;

13 (2) All meetings and records of the council are subject to the provisions of Title
14 1, chapter 13, subchapter I 1, except that, by majority vote of those members
15 present recorded in a public session, records and meetings of the ~~board~~ council
16 may be closed to the public when public disclosure of the subject matter of the
17 records or meetings would adversely affect the competitive position of the milk
18 industry of the State or segments of that industry. The Commissioner of
19 Agriculture, Food and Rural Resources and those members of the Legislature
20 appointed to serve on the joint standing committee of the Legislature having
21 jurisdiction over agricultural, conservation and forestry matters have access to all
22 material designated confidential by the council;

23 (3) For the purposes of the Maine Tort Claims Act, the council is a
24 governmental entity and its employees are employees as those terms are defined
25 in Title 14, section 8102;

26 (4) Funds received by the council pursuant to chapters 603 and 611 must be
27 allocated to the board by the Legislature in accordance with Title 5, section 1673;
28 and

29 (5) Except for representation of specific interests required by subsection 2,
30 members of the council are governed by the conflict of interest provisions set
31 forth in Title 5, section 18.

32 **Sec. 10. Review and recommendations concerning specific statutory**
33 **provisions.** Pursuant to the Maine Revised Statutes, Title 1, section 432, subsection 1,
34 the Joint Standing Committee on Judiciary shall review the recommendations of the Right
35 To Know Advisory Committee established in Title 1, section 411 concerning the
36 following statutes and by December 1, 2008 shall develop recommendations to continue,
37 modify or repeal each public record exception or to revise language to clarify the existing
38 public record exceptions:

39 1. Title 1, section 402, subsection 3, paragraph B;

40 2. Title 1, section 402, subsection 3, paragraph N;

41 3. Title 5, section 1545;

- 1 4. Title 5, section 1976, subsection 2;
- 2 5. Title 5, section 22009, subsection 2;
- 3 6. Title 7, section 607, subsection 5-A, as applied to Title 7, section 607, subsection
- 4 4;
- 5 7. Title 7, section 1052;
- 6 8. Title 7, sections 4204 and 4205;
- 7 9. Title 9-B, section 226; and
- 8 10. Title 9-B, section 252.

9 **SUMMARY**

10 This bill implements the recommendations of the Right To Know Advisory
11 Committee regarding statutory changes to existing public records exceptions.

12 Under current law, personal contact information concerning public employees is not a
13 public record. This bill clarifies that the exception also applies to personal contact
14 information of voluntary appointees serving in State Government positions without
15 compensation by cross-referencing the definition of "employee" in the Maine Tort Claims
16 Act. The bill also addresses a potential conflict with this exception and the law governing
17 state employee personnel records to clarify that personal contact information of state
18 employees and applicants for state employment is not a public record.

19 The bill clarifies the law governing the confidentiality of reports, records and
20 working papers of the Office of Program Evaluation and Government Accountability.
21 The bill clarifies that final program evaluation reports are public records and subject to
22 disclosure. With regard to other records and working papers, the bill provides that those
23 working papers and records that support reports or are related to any program evaluation
24 are confidential and may not be disclosed except at the discretion of the Director of the
25 Office of Program Evaluation and Government Accountability in certain circumstances.
26 Prior to the release of a program evaluation report, the bill gives the director discretion to
27 disclose working papers to the agency subject to the evaluation when disclosure will not
28 prejudice the program evaluation and the agency agrees to keep the working papers
29 confidential. After the release of a program evaluation report, the bill gives the director
30 discretion to disclose working papers as necessary and as long as the working papers
31 remain confidential to the state agency subject to the program evaluation or any federal
32 agency providing funding to that agency, to law enforcement agencies for the purposes of
33 criminal investigation, to other state audit agencies and to other auditors reviewing the
34 work of the office.

35 The bill narrows the current exception providing confidentiality to complaint and
36 investigative files maintained by the State Court Administrator to only those complaints
37 and investigations that are related to court and judicial security.

38 The bill repeals the exception making confidential any investigations by the Attorney
39 General of the unauthorized practice of law. Title 16, section 614 addresses when

1 investigative records or information held by the Attorney General for any type of
2 investigation may be disclosed to the public. The bill repeals Title 4, section 809, dealing
3 with investigations by the Attorney General, since it is not necessary.

4 The bill amends the provisions concerning confidential information within state
5 employee personnel records to make the provisions consistent with the Title 1 language
6 designating personal contact information of employees as not public records.

7 The bill narrows the exception in current law that designates the records and
8 proceedings of technology centers as not public for the purposes of the freedom of access
9 laws. The bill provides that the records and proceedings are public except for certain
10 records designated as confidential, including records that are confidential by other
11 provisions of law, financial statements, credit reports, tax returns and records that contain
12 proprietary information or trade secrets. The approach taken in the bill is modeled on a
13 similar exception in current law for records of the Maine Technology Institute.

14 The bill requires that the Maine Dairy Promotion Board and the Maine Dairy and
15 Nutrition Council take a publicly recorded vote supported by a majority of the members
16 before closing meetings or records to the public as allowed under current law when public
17 disclosure of the subject matter would adversely affect the competitive position of the
18 milk industry of the State or segments of that industry.

19 The bill directs the Joint Standing Committee on Judiciary to review the
20 recommendations of the Right To Know Advisory Committee about specific statutory
21 provisions and make recommendations about whether the public record exceptions
22 contained in those provisions should be maintained, modified, repealed or clarified. These
23 provisions were identified in the second annual report of the Right To Know Advisory
24 Committee as raising issues for which more information should be provided by interested
25 parties before final recommendations can be made.