

# MAINE STATE LEGISLATURE

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**STATE OF MAINE  
129TH LEGISLATURE  
FIRST REGULAR SESSION**

**Thirteenth Annual Report  
of the  
Right to Know Advisory Committee  
  
January 2019**

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**Members:**

**Sen. Lisa Keim, Chair  
Rep. Christopher W. Babbidge  
Amy Beveridge  
Elaine Clark  
James Campbell  
Suzanne Goucher  
Stephanie Grinnell  
Richard LaHaye  
Mary-Anne LaMarre  
Judy Meyer  
Paul Nicklas  
Christopher Parr  
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William D. Shorey  
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## EXECUTIVE SUMMARY

This is the thirteenth 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 members are appointed by the Governor, the Chief Justice of the Supreme Judicial Court, the Attorney General, the President of the Senate and the Speaker of the House of Representatives.

As in previous annual reports, this report includes a brief summary of the legislative actions taken in response to the Advisory Committee's January 2018 recommendations and a summary of relevant Maine court decisions from 2018 on the freedom of access laws. This report also summarizes several topics discussed by the Advisory Committee that did not result in a recommendation or further action.

For its thirteenth annual report, the Advisory Committee makes the following recommendations:

- Enact legislation to require municipal officials to complete Freedom of Access Act training when appointed to offices for which training is required if elected to those offices;**
- Amend certain provisions of law in Titles 1 through 7-A relating to previously-enacted public records exceptions;**
- Enact legislation to establish a tiered schedule of fines for repeated willful violations of the Freedom of Access Act within a four-year period; and**
- Establish a legislative study on remote participation.**

In 2019, the Right to Know Advisory Committee will continue to discuss the unresolved issues identified in this report, including its discussion of the establishment of a joint select committee of the Legislature on government transparency and data privacy policy issues and the public availability of information contained in electronic databases. The Advisory Committee will also continue to provide assistance to the Joint Standing Committee on Judiciary relating to proposed legislation affecting public access. The FOAA Remedies Subcommittee will meet with the expectation to make recommendations concerning alternatives to enforcement of the FOAA through the court process to the Advisory Committee. The Advisory Committee looks forward to another year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

## I. INTRODUCTION

This is the thirteenth 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**.

More information on the Advisory Committee, including meeting agendas, meeting materials and summaries of meetings and its previous annual reports can be found on the Advisory Committee's webpage at <http://legislature.maine.gov/legis/opla/righttoknow.htm>. The Office of Policy and Legal Analysis provides staffing to the Advisory Committee when the Legislature is not in regular or special session.

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:

Senator Lisa Keim Chair	<i>Senate member of Judiciary Committee, appointed by the President of the Senate</i>
Representative Christopher Babbidge	<i>House member of Judiciary Committee, appointed by the Speaker of the House</i>
James Campbell	<i>Representing a statewide coalition of advocates of freedom of access, 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>
Amy Beveridge	<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-Anne LaMarre	<i>Representing school interests, appointed by the Governor</i>
Elaine Clark	<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>

Paul Nicklas	<i>Representing municipal interests, appointed by the Governor</i>
Christopher Parr	<i>Representing state government interests, appointed by the Governor</i>
Linda Pistner	<i>Attorney General's designee</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>
Vacant	<i>Representing the public, appointed by the Speaker of the House</i>

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

By law, the Advisory Committee must meet at least four times per year. During 2018, the Advisory Committee met four times: on September 13, October 2, November 19 and December 3. Each meeting was open to the public and was also accessible through the audio link on the Legislature's webpage.

## **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.

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

*Dubois v. Office of the Attorney General*, 2018 ME 67: The Maine Supreme Judicial Court upheld the Superior Court decision finding that drafts of a letter sent by the Maine Department of Agriculture, Conservation and Forestry to Dubois Livestock, Inc. were not subject to disclosure pursuant to the Freedom of Access Act because they were created in anticipation of litigation. Rule 26(b)(3) of the Maine Rules of Civil Procedure protects from discovery records created in anticipation of litigation because they contain attorneys’ mental impressions, conclusions, opinions or legal theories concerning the prospective litigation. The Freedom of Access Act, Title 1, §402, sub-§3, ¶B provides an exception from the definition of public records for records that would be within the scope of a privilege against discovery.

In the same case, the Supreme Judicial Court reversed the Superior Court’s decision to provide access to a series of emails that involved planning for a strategy meeting. The Law Court found these also fell within the work product privilege.

In a companion case, *Dubois v. Department of Agriculture, Conservation and Forestry*, 2018 ME 68, the Supreme Judicial Court upheld the privilege exception (Title 1, section 402, subsection 3, paragraph B) for those portions of records containing the names of people who had complained to the DACF about odors from the Dubois composting facility. The “informant identity privilege” of Rule 509(a)(1) of the Maine Rules of Evidence provides that a State agency has a privilege to refuse to disclose the identity of an informant.

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

##### **Public Records Exception Subcommittee**

The focus of the Public Records Exceptions Subcommittee, created in 2017, 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 in Titles 1 to 7-A no later than 2019. In accordance with Title 1, §433, sub-§2-A, the Advisory Committee is charged with the review of more than 90 exceptions in Titles 1 to 7-A. As a first step, 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. The Subcommittee met three times in 2018 to review the responses, discuss whether each public record exception was appropriate or should be amended or repealed and submitted all its recommendations to the Advisory Committee at the December 3, 2018 meeting.

Representative Babbidge, Elaine Clark, Stephanie Grinnell, Paul Nicklas, Christopher Parr, Luke Rossignol and Eric Stout serve as members of the Subcommittee.

The Advisory Committee reviewed the recommendations of the Subcommittee and, after revising wording for a couple of sections, approved all the proposed changes. The Subcommittee identified several sections for which the members were not ready to make a recommendation, postponing a decision until further review and discussion, perhaps with additional public input, can be completed in 2019.

##### **Remedies Subcommittee (formerly Penalties and Enforcement Subcommittee)**

The Right to Know Advisory Committee in 2017 created a Penalties and Enforcement Subcommittee, subsequently known as the Remedies Subcommittee, to review the penalty and enforcement provisions in the Freedom of Access Act. The Advisory Committee named Judy Meyer chair of the Subcommittee; Representative Babbidge, Eric Stout, Chris Parr, Linda Pistner and Luke Rossignol were named as members of the subcommittee.

The Remedies Subcommittee met twice during the legislative session and was staffed by Adam Bohanan, the Maine School of Law extern for the Public Access Ombudsman. The Subcommittee looked at the existing penalties and the enforcement process included in the Freedom of Access Act in Title 1, sections 409 and 410. The Subcommittee reviewed extensive

materials on penalties, attorney's fees and processes in other states. The Subcommittee recommended that the full Advisory Committee consider adopting changes, including:

- Increasing the fine, which is currently \$500, maybe as a tiered schedule;
- Requiring the individual public actor to be responsible for paying the fine, rather than the employing governmental agency;
- Directing that the fine go to the person aggrieved, not the General Fund;
- Removing the "bad faith" standard for attorney's fees, and requiring the court to award reasonable attorney's fees and litigation expenses to the party who substantially prevails;
- Providing an alternative dispute resolution (ADR) option before filing a court action to enforce the law; and
- Aligning the language concerning the protection of public access to public records and public proceedings.

The Advisory Committee agreed to look at changing the penalties; it focused on increasing the amount of the fine for subsequent violations. Current law provides for a fine of up to \$500 to be paid by the state government agency or the local government entity when an officer or employee willfully violates the Freedom of Access Act. The Advisory Committee considered maintaining the \$500 fine for the first willful violation, but establishing a fine of up to \$1,000 for the second willful violation within a four-year period and a fine of up to \$2,000 for a third or subsequent willful violation within the four-year period.

Public Access Ombudsman Brenda Kielty reminded the Advisory Committee that the FOAA is remedial, not punitive, and that her role is generally to help figure out what the process is for individual situations and help the parties sort out what the law requires. Putting more emphasis on the penalty will push the statute to being focused more on punishment.

Members expressed interest in developing an alternative dispute option as a remedy before filing an action in court, noting that different entities have an appeals or fair hearing process in effect now. Court litigation is long and complicated and can be prohibitively expensive. The parties may want an opportunity to be heard by another group or person, rather than the formal court-based ADR. Ms. Kielty pointed out that when the Legislature created the Public Access Ombudsman position, it intentionally put resources toward preventing and facilitating the resolution of disputes by focusing on communication and education, rather than on enforcement and punitive measures. Ms. Kielty works with agencies to determine what can and should be released, which is prior to a denial; it becomes much more difficult for the ombudsman once a denial of a public record request has occurred. Establishing a hearing step would formalize what is now an informal process undertaken by the ombudsman, but would seem to require the ombudsman to exercise more powers than actually exist in that position. Once there is a violation and the court clock is ticking, it is not a good situation for the Ombudsman; the Ombudsman cannot stop the clock. Plus, the ADR process should not slow down the resolution of the request. Sometimes agencies do not know how to efficiently extract information, resulting in an expensive estimate, which can operate as a constructive denial.

Recognizing that there was no consensus, the Advisory Committee agreed to extending the life of the Subcommittee and changing its direction to focus more on examining whether an administrative appeal process or other alternative dispute resolution method would be feasible to implement before the requestor files an action in court.

The Subcommittee did not meet before the final meeting of the Advisory Committee, but will convene as soon as possible in 2019.

## **V. COMMITTEE PROCESS**

The Right to Know Advisory Committee did not schedule meetings until the final day of the Second Special Session of the 128th Legislature, leaving very little time to meet and make recommendations before the new 129th Legislature convened on December 5, 2018. The Advisory Committee was able to hold four meetings and the Public Records Exceptions Subcommittee met three times (rescheduling the final meeting due to weather). The Advisory Committee engaged in robust discussions about several topics, and the members agreed to add a few of the areas to the agenda for 2019 because of the lack of time to thoroughly research and discuss the issues involved.

### **FOAA training for public officials**

Under current law, 1 MRSA §412 requires officials elected to certain public offices to complete training on the Freedom of Access Act. The law requires public access officers and the following elected officials to be trained: the Governor; the Attorney General, Secretary of State, Treasurer of State and State Auditor; members of the Legislature elected after November 1, 2008; commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments; municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments; officials of school administrative units; and officials of a regional or other political subdivision who, as part of the duties of their offices, exercise executive or legislative powers.

Brenda Kielty, the Public Access Ombudsman, noted in her 2017 update to the Advisory Committee that section 412's application to only elected officials in the listed positions may create some disparity among trained officials simply because some officials are elected to those positions while others are appointed. By unanimous vote, the Advisory Committee recommended in its Twelfth Annual Report that section 412 be amended to require that officials appointed to the same elected positions listed also be required to complete the training.

The Joint Standing Committee on Judiciary directed that a bill be printed to carry out the recommendations: LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Freedom of Access Training for Public Officials. Because the bill was interpreted as requiring a local unit of government to expand or modify that unit's activity so as to necessitate additional expenditures from that unit's local revenues, the bill was identified as imposing a local government mandate under the Constitution of Maine, Article IX, Section 21. To avoid having to provide funding for what was determined to be an "insignificant"

cost, a majority of the Judiciary Committee included a mandate preamble in the Committee Amendment to exempt the bill from the funding requirement. Legislation that includes a mandate preamble requires a two-thirds vote of the elected members of the House and Senate. Although a majority of the House voted in favor of the bill as amended, the affirmative votes did not reach the two-thirds threshold and the bill was not enacted. (Ten members of the Joint Standing Committee on Judiciary voted Ought to Pass as Amended while three members voted Ought Not to Pass; the Senate enacted the bill with a two-thirds majority; the House failed to enact with the required two-thirds vote, with 80 voting in favor and 68 against.)

The Right to Know Advisory Committee continues to unanimously support the requirement that the specified municipal officials receive FOAA training, regardless of whether they are elected or appointed, and therefore once again recommends the enactment of legislation to implement that requirement.

### **Remote participation**

The question of whether it is legal or appropriate for a member of a public body to participate and vote in proceedings of that public body when not physically in attendance has been explored in depth by the Advisory Committee over the past several years. The Attorney General's Office advises state agencies that remote participation is not permitted under current law unless specifically authorized (there are several examples in the law that specifically authorize participation in public proceedings by telephone or other electronic communication). However, it has been widely acknowledged that because FOAA is silent with regard to remote participation generally, there is ambiguity because there has been no litigation or court decision to provide other legal guidance.

In its Twelfth Annual Report, the Advisory Committee recommended legislation to prohibit remote participation in public proceedings by a member of a public body unless the body has established a policy for remote participation that meets certain requirements. Although the Judiciary Committee directed that the Advisory Committee's recommendations be printed as a bill (LD 1832, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation), a majority of the Judiciary Committee ended up opposing the legislation, and separate proposed legislation focused on remote participation similarly failed passage in the Legislature (LD 70, An Act To Allow Municipal Governing Boards of 3 Members To Perform Official Duties via Technology; and LD 1831, An Act Concerning Remote Participation in Public Proceedings).

The Advisory Committee discussed the fact that the Legislature over the course of several years has not addressed the absence of statutory directives on remote participation, even though transparency and accountability are potentially put in jeopardy by the apparently unrestricted participation in meetings by members who are not physically in attendance. The Advisory Committee concluded that the best way to ensure the shaping of a statutory framework for remote participation is to develop a process that includes more legislators. Before legislation can move forward, the Advisory Committee believes that a broad cross-section of legislators needs to understand the dangers of the status quo, and be part of the crafting of an appropriate structure that supports governmental transparency and public participation.

With that in mind, the Advisory Committee recommends that the Legislature create a legislative study commission on remote participation. The study commission will have the benefit of years of the Advisory Committee's research, deliberations and legislative options on remote participation, as well as all the detailed input of agencies and interested parties. The Advisory Committee suggests that a good starting place for the study is the legislation introduced in 2018, LD 1832.

### **Public records exceptions review**

The Public Records Exceptions Subcommittee presented its report to the full Advisory Committee during the December 3rd meeting. The report included three categories of proposals: Exceptions for which the Subcommittee recommended no changes; exceptions for which the Subcommittee recommended amendments; and exceptions for which the Subcommittee recommended continuing review and discussion, including inviting additional public input as part of the discussion. Most of the 90 or so existing public records exceptions that were reviewed were determined by the Subcommittee to appropriately balance the public's interest with the interests addressed by the specific provision and are tailored as narrowly as possible. The Subcommittee recommended amending several sections to delete redundant language or clarify terminology. Substantial rewording was recommended for the Office of Program Evaluation and Government Accountability (OPEGA) confidentiality provisions in Title 3, section 997, the gist of which is to clarify with whom OPEGA can share working papers, and that the working papers remain confidential even when the final report is released. In a separate provision, the Subcommittee recommended deleting the requirement that a municipality adopt an ordinance protecting information about minors participating in recreational or nonmandatory education programs provided by the municipality (Title 1, section 402, subsection 3, paragraph K). The Subcommittee also recommended amending the language that designates as not a public record information and records about information technology infrastructure, systems and software (Title 1, section 403, subsection 3, paragraph M) to specifically include "records or information maintained to ensure business continuity and enable disaster recovery." Several Advisory Committee members were concerned about the vagueness and breadth of the proposed language. After discussion, the Advisory Committee agreed to include the following language, "including records or information maintained to ensure government operations and technology continuity and enable disaster recovery." The Advisory Committee voted unanimously to support the recommendations of the Subcommittee, with the revision of the information technology language.

The specific recommendations for legislation are included in Appendix D, and the list of public records exceptions for which no amendments are recommended, as well as those that should continue to be reviewed in 2019, are provided in Appendix F.

### **Remedies**

The Advisory Committee discussed the recommendations of the Penalties and Enforcement Subcommittee. There was significant interest in revising the penalties section of the FOAA to

provide for tiered schedule of fines to increase the sanction for willfully violating the law repeatedly. Among the variables to consider are whether the individual officer or employee should be personally liable for the fine, what is the appropriate time period in which to sanction repeated willful violations and should the agency or entity be subject to the tiered fine schedule only if it is the same officer or employee who is violating the law.

The Advisory Committee suggested draft legislation amending the current penalties section (1 MRSA §410) to provide for a tiered schedule of fines, based on whether there had been a previous adjudication for a willful violation of the FOAA. The members voted to go forward with a revised draft, with Elaine Clark abstaining. The approved draft establishes maximum fines of \$500 for a willful violation of the FOAA, \$1,000 for a second willful violation within four years and \$2,000 for a third or subsequent willful violation within four years. A willful violation is considered subsequent only if it has been committed by the same agency after an adjudication within the previous four years. The members discussed whether the increased fine should be based on the same official's or employee's repeated violations, but agreed that because the agency or local government entity is always ultimately responsible for violations, the fines should not be based on any particular official or employee. The members also agreed that there is nothing special about four years, but that it is a reasonable starting point for the consideration of repeated willful violations.

The Advisory Committee agreed to continue the work of the Penalties and Enforcement Subcommittee to focus on exploring one or more processes to provide an alternative or at least an intervening step before a person files an action in court against a public entity to enforce the FOAA. The newly-named Remedies Subcommittee is chaired by Judy Meyer, with initial volunteers of Representative Babbidge, Amy Beveridge, Chris Parr, Luke Rossignol and Eric Stout, although participation may change when the Subcommittee convenes in 2019.

## **Electronic databases**

Public access to government databases was raised as a topic for the Advisory Committee by two different sources. The Joint Standing Committee on Judiciary requested the Advisory Committee to consider the issues and underlying concerns raised by LD 1658, An Act To Make Criminal History Record Information Maintained in a Database Confidential, introduced by the State Bureau of Identification (SBI) in the Second Regular Session of the 128th Legislature. Also during 2018, the Advisory Committee received an email from a member of the public requesting assistance in making available the public information that is contained in databases maintained by governmental entities.

LD 1658 was introduced partly in anticipation of requests, already received by similar agencies in other states, for all the content of the criminal history database. Current law directs the SBI to provide public criminal history record information about a specific person upon receiving a request identifying that person's name and date of birth and for a small fee. The bill would have prohibited the bulk transfer of the public data in the database. Supporters of the bill were concerned that certain information in the database loses its public nature and becomes confidential after the passage of time. A one-time transfer of data that is then sold or posted online will not be accurate, and could harm those whose information is then permanently

released. The Judiciary Committee did not pass the bill, but requested that the Advisory Committee review the concerns and make recommendations back to the Judiciary Committee.

Approaching from the opposite direction, an email asked the Advisory Committee to address the difficulty that members of the public face when requesting information that is maintained in a government database that also contains personally-identifying information or other confidential information, such as proprietary information or programming directions. Because the Freedom of Access Act does not require a public entity to create a new record in response to a public records request (1 MRSA §408-A, subsection 6), and many public entities have difficulty extracting the public information in the database, requests for such information are often denied.

The Freedom of Access Act requires agencies to consider, in the purchase of and contracting for computer software and other information technology resources, the extent to which the software or technology will maximize public access to public records, and maximize the exportability of public records while protecting confidential information that may be part of public records (1 MRSA §413). Some states have adopted statutory language to specifically provide for the extraction of public information.

The Advisory Committee discussed the difficulties in responding to public records requests seeking the public elements of government databases. John Pelletier, Chair of the Criminal Law Advisory Commission (CLAC), shared CLAC's discussion about the concerns leading to the introduction of LD 1658. CLAC reached no consensus and thus is making no recommendations to the Joint Standing Committee on Judiciary; the members understand the dangers of releasing information whose accuracy may change over time, as well as the fact that very little information cannot be discovered through diligent searching on the Internet.

Members of the Advisory Committee were uncomfortable with making records that are public individually not public when they are in bulk. Concerns were raised that it is not appropriate to make money off the taxpayer's investment in building the databases and that care should be taken to ensure that data is accurate and not stale. Part of the stewardship of a government agency is to ensure the accuracy and validity of records; the rights of the individual must be balanced with the rights of the public and the First Amendment. The Advisory Committee did not make specific recommendations concerning databases due to time constraints, although there was interest in making progress on the issue. The Advisory Committee recognized the tension between protecting personally-identifiable information while still retaining statistically useful data. The Advisory Committee agreed to further investigate in 2019.

### **School surveillance records**

Ms. LaMarre brought a recently decided case from Pennsylvania regarding public access to school surveillance videos to the Advisory Committee's attention. In that case, a school surveillance video was determined to be a public record because it was not protected by the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"). The Advisory Committee discussed its concerns with allowing video of schoolchildren to become public, as well as the countervailing public interest in ensuring the accountability of school staff and the safety of children by allowing at least some access to those videos.

The Advisory Committee considered the protections afforded by FERPA, which provides that “educational records” are not accessible by the public; whether a record – or surveillance video – is considered an “educational record,” however, depends upon whether the record is: (1) maintained by a school; and (2) directly related to a student. The cases that have interpreted FERPA in the context of surveillance videos have produced unpredictable results and minimal guidance. Currently there is no Maine law that would affect the availability of school surveillance videos to the public.

The Advisory Committee further discussed the safety and privacy issues associated with school surveillance videos. There is a concern that security or other recorded videos could be accessed by potential stalkers or other people with bad intent. On the other hand, there is potential value to the public in ensuring that schools do not overreach in their surveillance or keep damaging footage from public scrutiny. Mr. Campbell expressed his desire to regulate video and other, non-video, types of information collected by schools about children that could be disseminated in innumerable ways.

Ultimately, the Advisory Committee felt that the issue required more consideration than its time would allow but recognizes that this is an important topic for consideration and is available to assist the Joint Standing Committee on Judiciary in whatever capacity necessary during the 129th Legislature.

### **Joint select committee on government transparency and data privacy policy issues**

The Advisory Committee discussed the proposal, offered by Mr. Parr, to suggest to the Legislative Council that a joint select committee on government transparency and data privacy policy issues be created. Creating such a committee, which perhaps might work at times with the Advisory Committee, would ensure that more legislators are able to directly work on, more thoroughly discuss and more fully appreciate the very often complex public policy issues about which the Advisory Committee frequently deliberates in its work. One idea is that the joint select committee could investigate privacy concerns while the Right to Know Advisory Committee focuses more on access to government information. There was a concern that such a joint select committee would look like an end-run around the Joint Standing Committee on Judiciary, but a benefit would be that it could work during the legislative session. The Advisory Committee members agreed that the idea was worthy of further discussion and agreed to add it to the Advisory Committee’s 2019 agenda.

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

The Right to Know Advisory Committee made the following recommendations in its Twelfth Annual Report. The legislative actions taken in 2018 as a result of those recommendations are summarized below.

<p><b>Recommendation:</b></p> <p>Enact legislation to prohibit remote participation in public proceedings by a member of a public body unless the body establishes a policy for remote participation that meets certain requirements</p>	<p><b>Action:</b></p> <p>The Joint Standing Committee on Judiciary directed that two bills be printed, one to carry out the recommendation of the Right to Know Advisory Committee (LD 1832, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation) and the other (LD 1831, An Act Concerning Remote Participation in Public Proceedings) to prohibit remote participating and phase out authorization of remote participation by the seven specific bodies that are currently statutorily authorized to conduct proceedings with one or more members participating from a remote location.</p> <p>LD 1832 was reported out of committee with a majority Ought Not To Pass report, and a minority report of Ought To Pass As Amended. The amendment included the prohibition on executive sessions being conducted with remote participation, giving public bodies of three or fewer members more flexibility and requiring the approval of a remote participation policy by the constituents of a public body before remote participation could be used. The Senate and House of Representatives accepted the Ought Not To Pass report.</p> <p>LD 1831 was reported out of committee with a majority Ought Not To Pass report, and a minority report of Ought To Pass. The Senate and the House of Representatives accepted the Ought Not To Pass report.</p>
<p><b>Recommendation:</b></p> <p>Enact legislation to amend 1 MRSA §412 to require municipal officials to complete Freedom of Access Act training when appointed to offices for which training is required if</p>	<p><b>Action:</b></p> <p>The Judiciary Committee directed that a bill be printed to carry out the recommendations of the Right to Know Advisory Committee. LD 1821, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Freedom of Access Training for Public Officials, was reported out with a majority Ought To Pass As Amended report, the amendment adding a Mandate Preamble to exempt the requirement that the State fund a local government mandate, identified for this bill as “insignificant costs” on a statewide basis. The minority report was Ought Not To</p>

elected to those offices	Pass. Although the Senate voted to accept the majority report by at least a two-thirds vote, required for bills containing a mandate preamble, the majority report was not approved by the required two-thirds in the House of Representatives and LD 1821 was not enacted.
<b>Recommendation:</b>  Establish a subcommittee to review the penalty and enforcement provisions in the Freedom of Access Act	<b>Action:</b>  The Right to Know Advisory Committee established the Penalties and Enforcement Subcommittee, chaired by Judy Meyer and including Representative Chris Babbidge, Chris Parr, Linda Pistner, Luke Rossignol and Eric Stout. The Subcommittee was staffed by Adam Bohannon, the Maine Law School extern working with Public Access Ombudsman Brenda Kielty. The Subcommittee met twice and presented recommendations to the Right to Know Advisory Committee at the September 13, 2018 meeting.

## VII. RECOMMENDATIONS

The Advisory Committee makes the following recommendations.

- Enact legislation to require municipal officials to complete Freedom of Access Act training when appointed to offices for which training is required if elected to those offices

The Advisory Committee continues to support requiring municipal officials receive FOAA training regardless of whether they are appointed or elected. Current law applies to only elected officials, which creates disparity from town to town and within municipal governments. The distinction does not make much sense with regard to who is responsible for responding to public records requests and requests for access to public proceedings. Although LD 1821 failed passage in the 128th Legislature, the Advisory Committee believes that a training requirement is important and is worth pursuing.

*See recommended legislation in Appendix C.*

- Amend certain existing public records exceptions as recommended by the Public Records Exceptions Subcommittee
  - 1 MRSA §402, sub-§3, ¶C-1, sub-¶(1) (amend to remove the listing of Social Security numbers as to what is confidential in communications with constituents because SSNs are already not public records) (Ref #4)
  - 1 MRSA §402, sub-§3, ¶ K (amend to delete requirement that a municipality adopt an ordinance in order to protect personally identifying information about minors that is obtained and maintained in the process of providing recreational or nonmandatory recreational programs or services) (Ref #12)

- 1 MRSA §402, sub-§3, ¶M (amend to add “including records or information maintained to ensure government operations and technology continuity and disaster recovery”; ¶M provides a public records exception for records and information about public agency technology infrastructure, systems and software) (Ref #14)
- 3 MRSA §997 (amend to remove duplicative language from draft provided; OPEGA confidentiality of working papers) (Ref ##30-34)
- 5 MRSA §4572, sub-§2, ¶C, sub-¶(2) (amend to clarify terminology about medical and disability information; Maine Human Rights Act description of unlawful employment discrimination against a qualified individual with a disability) (Ref #48)
- 5 MRSA §4572, sub-§2, ¶E (amend to clarify terminology about medical and disability information; Maine Human Rights Act description of unlawful employment discrimination against a qualified individual with a disability) (Ref #48)
- 5 MRSA §4573, sub-§2 (amend to clarify terminology about describing physical or mental disabilities; Maine Human Rights Act description of employer actions that are not unlawful employment discrimination) (Ref # 49)

*See recommended legislation in **Appendix D**, and the list of public records exceptions for which no amendments are recommended, as well as those that should continue to be reviewed in 2019 in **Appendix F**.*

- Amend the Freedom of Access Act to establish a tiered schedule of fines for repeated willful violations within a four-year period

The Advisory Committee recommends establishing a tiered schedule of fines for willful violations of the Freedom of Access Act, increasing the maximum fine from \$500 to \$1,000 for a second willful violation and up to \$2,000 for a third or subsequent violation by an agency or entity within four years.

*See recommended legislation in **Appendix E**.*

- Enact legislation that creates a legislative study on the use of remote participation by public bodies at the state, regional and local level

The Advisory Committee believes that the multiple issues surrounding remote participation, especially the overriding principle of government transparency, need to be the subject of a rigorous and thorough analysis involving multiple legislators and including the input of members of public bodies as well as the public. The Advisory Committee is not proposing specific language for consideration but is instead relying on the Joint Standing Committee on Judiciary to develop the appropriate vehicle to implement the study.

## **VIII. FUTURE PLANS**

In 2019, the Right to Know Advisory Committee will continue to discuss the unresolved issues identified in this report, including its discussion of the establishment of a joint select committee of the Legislature on government transparency and data privacy policy issues and the public availability of information contained in electronic databases. The Advisory Committee will also continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access. The FOAA Remedies Subcommittee will meet with the expectation to make recommendations concerning alternatives to enforcement of the FOAA through the court process to the Advisory Committee. The Advisory Committee looks forward to another year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

**APPENDIX A**

**Authorizing Legislation: 1 MRSA §411**

## **1 MRS §411. Right To Know Advisory Committee**

**1. Advisory committee established.** The Right To Know Advisory Committee, referred to in this chapter as "the advisory committee," is established to serve as a resource for ensuring compliance with this chapter and upholding the integrity of the purposes underlying this chapter as it applies to all public entities in the conduct of the public's business.

**2. Membership.** The advisory committee consists of the following members:

- A. One Senator who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the President of the Senate;
- B. One member of the House of Representatives who is a member of the joint standing committee of the Legislature having jurisdiction over judiciary matters, appointed by the Speaker of the House;
- C. One representative of municipal interests, appointed by the Governor;
- D. One representative of county or regional interests, appointed by the President of the Senate;
- E. One representative of school interests, appointed by the Governor;
- F. One representative of law enforcement interests, appointed by the President of the Senate;
- G. One representative of the interests of State Government, appointed by the Governor;
- H. One representative of a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House;
- I. One representative of newspaper and other press interests, appointed by the President of the Senate;
- J. One representative of newspaper publishers, appointed by the Speaker of the House;
- K. Two representatives of broadcasting interests, one appointed by the President of the Senate and one appointed by the Speaker of the House;
- L. Two representatives of the public, one appointed by the President of the Senate and one appointed by the Speaker of the House;
- M. The Attorney General or the Attorney General's designee; and
- N. One member with broad experience in and understanding of issues and costs in multiple areas of information technology, including practical applications concerning creation, storage, retrieval and accessibility of electronic records; use of communication technologies to support meetings, including teleconferencing and Internet-based conferencing; databases for records management and reporting; and information technology system development and support, appointed by the Governor.

The advisory committee shall invite the Chief Justice of the Supreme Judicial Court to designate a member of the judicial branch to serve as a member of the committee.

**3. Terms of appointment.** The terms of appointment are as follows.

- A. Except as provided in paragraph B, members are appointed for terms of 3 years.
- B. Members who are Legislators are appointed for the duration of the legislative terms of office in which they were appointed.

C. Members may serve beyond their designated terms until their successors are appointed.

**4. First meeting; chair.** The Executive Director of the Legislative Council shall call the first meeting of the advisory committee as soon as funding permits. At the first meeting, the advisory committee shall select a chair from among its members and may select a new chair annually.

**5. Meetings.** The advisory committee may meet as often as necessary but not fewer than 4 times a year. A meeting may be called by the chair or by any 4 members.

**6. Duties and powers.** The advisory committee:

A. Shall provide guidance in ensuring access to public records and proceedings and help to establish an effective process to address general compliance issues and respond to requests for interpretation and clarification of the laws;

B. Shall serve as the central source and coordinator of information about the freedom of access laws and the people's right to know. The advisory committee shall provide the basic information about the requirements of the law and the best practices for agencies and public officials. The advisory committee shall also provide general information about the freedom of access laws for a wider and deeper understanding of citizens' rights and their role in open government. The advisory committee shall coordinate the education efforts by providing information about the freedom of access laws and whom to contact for specific inquiries;

C. Shall serve as a resource to support the establishment and maintenance of a central publicly accessible website that provides the text of the freedom of access laws and provides specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. The website must include the contact information for agencies, as well as whom to contact with complaints and concerns. The website must also include, or contain a link to, a list of statutory exceptions to the public records laws;

D. Shall serve as a resource to support training and education about the freedom of access laws. Although each agency is responsible for training for the specific records and meetings pertaining to that agency's mission, the advisory committee shall provide core resources for the training, share best practices experiences and support the establishment and maintenance of online training as well as written question-and-answer summaries about specific topics. The advisory committee shall recommend a process for collecting the training completion records required under section 412, subsection 3 and for making that information publicly available;

E. Shall serve as a resource for the review committee under subchapter 1-A in examining public records exceptions in both existing laws and in proposed legislation;

F. Shall examine inconsistencies in statutory language and may recommend standardized language in the statutes to clearly delineate what information is not public and the circumstances under which that information may appropriately be released;

G. May make recommendations for changes in the 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 regional 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 and their underlying principles. The joint standing committee of the Legislature having jurisdiction over judiciary matters may report out legislation based on the advisory committee's recommendations;

H. Shall serve as an adviser to the Legislature when legislation affecting public access is considered;

I. May conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records;

J. Shall review 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; and

K. May undertake other activities consistent with its listed responsibilities.

**7. Outside funding for advisory committee activities.** The advisory committee may seek outside funds to fund the cost of public hearings, conferences, workshops, other meetings, other activities of the advisory committee and educational and training materials. Contributions to support the work of the advisory committee may not be accepted from any party having a pecuniary or other vested interest in the outcome of the matters being studied. Any person, other than a state agency, desiring to make a financial or in-kind contribution shall certify to the Legislative Council that it has no pecuniary or other vested interest in the outcome of the advisory committee's activities. Such a certification must be made in the manner prescribed by the Legislative Council. All contributions are subject to approval by the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council along with an accounting record that includes the amount of funds, the date the funds were received, from whom the funds were received and the purpose of and any limitation on the use of those funds. The Executive Director of the Legislative Council shall administer any funds received by the advisory committee.

**8. Compensation.** Legislative members of the advisory committee are entitled to receive the legislative per diem, as defined in Title 3, section 2, and reimbursement for travel and other necessary expenses for their attendance at authorized meetings of the advisory committee. Public members not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses and, upon a demonstration of financial hardship, a per diem equal to the legislative per diem for their attendance at authorized meetings of the advisory committee.

**9. Staffing.** The Legislative Council shall provide staff support for the operation of the advisory committee, except that the Legislative Council staff support is not authorized when the Legislature is in regular or special session. In addition, the advisory committee may contract for administrative, professional and clerical services if funding permits.

**10. Report.** By January 15, 2007 and at least annually thereafter, the advisory committee shall report to the Governor, the Legislative Council, the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Chief Justice of the Supreme Judicial Court about the state of the freedom of access laws and the public's access to public proceedings and records.

**APPENDIX B**

**Membership List**

**Right to Know Advisory Committee  
Membership List**

**Appointments by the Governor**

**Christopher Parr**  
Department of Public Safety  
State of Maine  
104 State House Station  
Augusta, ME 04333

Representing state government interests

**Mary-Anne LaMarre**  
406 East Side Trail  
Oakland, ME 04963

Representing school interests

**Paul Nicklas**  
67 Pine Street, Apt. 2  
Bangor, ME 04401

Representing municipal interests

**Eric Stout**  
Office of Information Technology  
State of Maine  
145 State House Station  
Augusta, ME 04333

A member with broad experience in  
information technology

**Appointments by the President of the Senate**

**Senator Lisa Keim**  
1505 Main Street  
Dixfield, ME 04224

Senate member of the Judiciary Committee

**Richard LaHaye**  
Chief, Searsport Police Department  
3 Union Street  
Searsport, ME 04974

Representing law enforcement interests

**Stephanie Grinnell**  
The Republican Journal  
156 High Street  
Belfast, ME 04915

Representing the press

**Luke Rossignol**  
Bemis & Rossignol  
1019 State Road  
Mapleton, ME 04757

Representing the public

**William D. Shorey**  
Board of Waldo County Commissioners  
39-B Spring Street  
Belfast, ME 04915

Representing county or regional interests

**Amy Beveridge**  
News Director,  
WMTW-TV - Hearst Television Inc.  
4 Ledgeview Dr.  
Westbrook, ME 04092

Representing broadcasting interests

**Appointments by the Speaker of the House**

**Representative Christopher Babbidge**  
84 Stratford Place  
Kennebunk, ME 04043

House member of the Judiciary Committee

**[Vacant]**

Representing the public

**Suzanne Goucher**  
Maine Association of Broadcasters  
69 Sewall Street, Suite 2  
Augusta, ME 04330

Representing broadcasting interests

**Judy Meyer**  
Lewiston Sun Journal  
104 Park Street  
Lewiston, ME 04243-4400

Representing newspaper publishers

**James Campbell**  
Maine Freedom of Information Coalition  
48 Monroe Road  
Searsport, ME 04974

Representing a statewide coalition of advocates  
of freedom of access

**Attorney General's Designee**

**Linda Pistner**  
Chief Deputy Attorney General  
6 State House Station  
Augusta, ME 04333-0006

Designee of the Attorney General

**Chief Justice of the Supreme Judicial Court's Designee**

**Elaine Clark**  
Director of Court Communications Government  
and Media Counsel  
Administrative Office of the Courts  
Maine Judicial Branch  
P.O. Box 4820  
Portland, ME 04112-4820

Member of the Judicial Branch

## **APPENDIX C**

**Recommended legislation to require municipal officials to complete Freedom of Access Act training when appointed to offices for which training is required if elected to those offices**

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

**Sec. 1.** 1 MRSA §412 is amended to read:

**§412. Public records and proceedings training for certain ~~elected~~ officials and public access officers**

**1. Training required.** A public access officer and an ~~elected~~ official subject to this section shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The official or public access officer shall complete the training not later than the 120th day after the date the ~~elected~~ official takes the oath of office to assume the person's duties as an ~~elected~~ official or the person is designated as a public access officer pursuant to section 413, subsection 1.

**2. Training course; minimum requirements.** The training course under subsection 1 must be designed to be completed by an official or a public access officer in less than 2 hours. At a minimum, the training must include instruction in:

- A. The general legal requirements of this chapter regarding public records and public proceedings;
- B. Procedures and requirements regarding complying with a request for a public record under this chapter; and
- C. Penalties and other consequences for failure to comply with this chapter.

An ~~elected~~ official or a public access officer meets the training requirements of this section by conducting a thorough review of all the information made available by the State on a publicly accessible website pursuant to section 411, subsection 6, paragraph C regarding specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. To meet the requirements of this subsection, any other training course must include all of this information and may include additional information.

**3. Certification of completion.** Upon completion of the training course required under subsection 1, the ~~elected~~ official or public access officer shall make a written or an electronic record attesting to the fact that the training has been completed. The record must identify the training completed and the date of completion. The ~~elected~~ official shall keep the record or file it with the public entity to which the official was elected or appointed. A public access officer shall file the record with the agency or official that designated the public access officer.

**4. Application.** This section applies to a public access officer and the following elected and appointed officials:

- A. The Governor;

- B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;
- C. Members of the Legislature elected after November 1, 2008;
- D.
- E. Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of county governments;
- F. Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments;
- G. Officials of school administrative units; and
- H. Officials of a regional or other political subdivision who, as part of the duties of their offices, exercise executive or legislative powers. For the purposes of this paragraph, "regional or other political subdivision" means an administrative entity or instrumentality created pursuant to Title 30-A, chapter 115 or 119 or a quasi-municipal corporation or special purpose district, including, but not limited to, a water district, sanitary district, hospital district, school district of any type, transit district as defined in Title 30-A, section 3501, subsection 1 or regional transportation corporation as defined in Title 30-A, section 3501, subsection 2.

### **SUMMARY**

Current law requires public officials elected to certain positions to complete a training on the requirements of the Freedom of Access Act. This bill implements the recommendation of the Right to Know Advisory Committee that officials appointed to those same positions also be required to complete the training.

**APPENDIX D**

**Recommended legislation to amend certain provisions of law in Titles 1 through 7-A  
relating to previously-enacted public records exceptions**

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**REF #4**

**Sec. 1. 1 MRSA §402, sub-§3, ¶C-1** is amended as follows:

C-1. Information contained in a communication between a constituent and an elected official if the information:

- (1) Is of a personal nature, consisting of:
  - (a) An individual's medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders;
  - (b) Credit or financial information;
  - (c) Information pertaining to the personal history, general character or conduct of the constituent or any member of the constituent's immediate family; or
  - (d) Complaints, charges of misconduct, replies to complaints or charges of misconduct or memoranda or other materials pertaining to disciplinary action; or
  - ~~(e) An individual's social security number; or~~
- (2) Would be confidential if it were in the possession of another public agency or official;

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**REF #12**

**Sec. 2. 1 MRSA §402, sub-§3, ¶K** is amended to read:

K. Personally identifying information concerning minors that is obtained or maintained by a municipality in providing recreational or nonmandatory educational programs or services, ~~if the municipality has enacted an ordinance that specifies the circumstances in which the information will be withheld from disclosure.~~ This paragraph does not apply to records governed by Title 20-A, section 6001 and does not supersede Title 20-A, section 6001-A;

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**REF #14**

**Sec. 3. 1 MRSA §402, sub-§3, ¶M** is amended to read:

M. Records or information describing the architecture, design, access authentication, encryption or security of information technology infrastructure, systems and software,

including records or information maintained to ensure government operations and technology continuity and enable disaster recovery. Records or information covered by this paragraph may be disclosed to the Legislature or, in the case of a political or administrative subdivision, to municipal officials or board members under conditions that protect the information from further disclosure;

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**REF ## 30-34**

**Sec. 4. 3 MRSA §997** is amended to read:

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

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

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

**2. Submission of final report to committee.** The director shall notify the committee when each final program evaluation report under this chapter is completed. The report must then be placed on the agenda for a future committee meeting. At the meeting where a report appears on the agenda for the first time, the director will release that report to the committee and to the public simultaneously. The committee, at its discretion, may vote to endorse, to endorse in part or to decline to endorse the report submitted by the director. If the committee determines it is necessary, the committee may report out to the Legislature legislation to implement the findings and recommendations of any program evaluation report presented to it by the office.

**3. Confidentiality.** ~~The director shall issue program evaluation reports, favorable or unfavorable, of any state agency or other entity, and these reports are public records, except that, prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working~~ Working papers in the possession of the director or other entity charged with the preparation of a program evaluation report a private individual or entity with which the director has contracted for the conduct of program evaluations pursuant to section 995, subsection 2 are confidential and

exempt from disclosure pursuant to Title 1, chapter 13, including to the Legislative Council or an agent or representative of the Legislative Council. All other records or materials in the possession of the director or ~~other entity charged with the preparation of a program evaluation report~~ a private individual or entity with which the director has contracted for the conduct of program evaluations pursuant to section 995, subsection 2 that would otherwise be confidential or exempt from disclosure are exempt from disclosure pursuant to the provisions of Title 1, chapter 13. ~~Prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and may not be released or disclosed by the director to the Legislative Council or an agent or representative of the Legislative Council.~~ This subsection may not be construed to prohibit or prevent public access to the records of a state agency or other entity in the possession of the director that would otherwise be subject to disclosure pursuant to the provisions of Title 1, chapter 13. The director shall refer requests for access to those records directly to the state agency or other entity that is the official custodian of the requested records, which shall respond to the request for public records.

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

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

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

C. If the office accesses information classified as privileged or confidential pursuant to state agency or other entity policy or procedures or by agreement, the office shall comply with the state agency's or other entity's standards or procedures for handling that information. The office may include in its working papers the excerpts from information classified as confidential or privileged as may be necessary to complete the program evaluation under this chapter, as long as the use does not infringe on department policies or procedures applicable to the original provision of information.

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

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

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

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**REF #48**

**Sec. 5. 5 MRS §4572, sub-§2, ¶C, sub-¶(2)** is amended to read:

(2) Information obtained regarding the medical ~~condition or~~ and disability information and history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that:

**Sec. 6. 5 MRS §4572, sub-2, ¶E** is amended to read:

E. A covered entity may conduct voluntary medical examinations, including voluntary medical and disability information and history ~~histories~~, that are part of an employee

health or wellness program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions. Information obtained under this paragraph regarding the medical condition or history of an employee is subject to the requirements of paragraph C, subparagraphs (2) and (3).

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**REF #49**

**Sec. 7. 5 MRSA §4573, sub-§2** is amended to read:

**2. Records.** After employment or admission to membership, to make a record of such features of an individual as are needed in good faith for the purpose of identifying them, provided the record is intended and used in good faith solely for identification, and not for the purpose of discrimination in violation of this Act. Records of ~~features~~ regarding physical or mental disability that are collected must be collected and maintained on separate forms and in separate files and be treated as confidential records;

## **APPENDIX E**

**Recommended legislation to establish a tiered schedule of fines for repeated willful violations of the Freedom of Access Act**

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

**Sec. 1. 1 MRSA §410** is repealed and the following enacted in its place:

**§410. Violations**

**1. Civil violation.** An officer or employee of a state government agency or local government entity who willfully violates this subchapter commits a civil violation.

**2. Penalties.** A state government agency or local government entity whose officer or employee commits a civil violation described in subsection 1 is subject to:

A. A fine of not more than \$500;

B. A fine of not more than \$1,000 for a civil violation described in subsection 1 that was committed not more than 4 years after a previous adjudication of a civil violation described in subsection 1 by an officer or employee of the same state government agency or local government agency; or

C. A fine of note more than \$2,000 for a civil violation described in subsection 1 that was committed not more than 4 years after 2 or more previous adjudications of a civil violation described in subsection 1 by an officer or employee of the same state government agency or local government agency.

**SUMMARY**

This bill replaces the existing penalty provision of the Freedom of Access Act to establish a tiered schedule of fines for the civil violation of willfully violating the Freedom of Access Act.

A state government agency or local government entity will be subject to fine of up to \$500 for a first violation, a fine of up to \$1,000 for a second willful violation and a fine of up to \$2,000 for third and subsequent violations committed within 4 years of an adjudication for a willful violation. The willful violation can be committed by any employee of the agency or entity to subject the agency or entity to the tiered fines.

## **APPENDIX F**

**Public records exceptions reviewed in 2017-2018 for which no statutory change is recommended, including those recommended for further review in 2019**

**Public records exceptions reviewed in 2017-2018 for which no statutory change is recommended, including those recommended for further review in 2019**

The following public records exceptions should be retained without change:

- Title 1, section 402, subsection 3, paragraph A: Records that have been designated confidential by statute
- Title 1, section 402, subsection 3, paragraph B: Records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding
- Title 1, section 402, subsection 3, paragraph C: Legislative papers and reports until signed and publicly distributed in accordance with legislative rules, and records, working papers, drafts and interoffice and intraoffice memoranda used or maintained by any Legislator, legislative agency or legislative employee to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees during the legislative session or sessions in which the papers or reports are prepared or considered or to which the paper or report is carried over
- Title 1, section 402, subsection 3, paragraph D: Material prepared for and used specifically and exclusively in preparation for negotiations, including the development of bargaining proposals to be made and the analysis of proposals received, by a public employer in collective bargaining with its employees and their designated representatives
- Title 1, section 402, subsection 3, paragraph F, relating to records that would be confidential if they were in the possession or custody of an agency or public official of the State or any of its political or administrative subdivisions and are in the possession of an association, the membership of which is composed exclusively of one or more political or administrative subdivisions of the State; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of any of these entities
- Title 1, section 402, subsection 3, paragraph G, relating to materials related to the development of positions on legislation or materials that are related to insurance or insurance-like protection or services which are in the possession of an association, the membership of which is composed exclusively of one or more political or administrative subdivisions of the State; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of any of these entities
- Title 1, section 402, subsection 3, paragraph H, relating to medical records and reports of municipal ambulance and rescue units and other emergency medical service units
- Title 1, section 402, subsection 3, paragraph I, relating to juvenile records and reports of municipal fire departments regarding the investigation and family background of a juvenile fire setter
- Title 1, section 402, subsection 3, paragraph L, relating to records describing security plans, security procedures or risk assessments prepared specifically for the purpose of preventing or preparing for acts of terrorism

- Title 1, section 402, subsection 3, paragraph N, relating to social security numbers in possession of the Department of Inland Fisheries and Wildlife
- Title 1, section 402, subsection 3, paragraph P, relating to geographic information regarding recreational trails that are located on private land
- 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 that are prepared for or by or kept in the custody of the Department of Corrections or a county jail
- Title 1, section 402, subsection 3, paragraph S, relating to e-mail addresses obtained by a political subdivision of the State for the sole purpose of disseminating noninteractive notifications, updates and cancellations that are issued from the political subdivision or its elected officers to an individual or individuals that request or regularly accept these noninteractive communications
- Title 1, section 402, subsection 3, paragraph T, relating to records describing research for the development of processing techniques for fisheries, aquaculture and seafood processing or the design and operation of a depuration plant in the possession of the Department of Marine Resources
- Title 1, section 402, subsection 3, paragraph U, relating to records provided by a railroad company describing hazardous materials transported by the railroad company in this State
- Title 1, section 402, subsection 3, paragraph V, relating to participant application materials and other personal information obtained or maintained by a municipality or other public entity in administering a community well-being check program
- Title 1, section 402, subsection 3-A, paragraph A, relating to prisoner furloughs to the extent they pertain to a prisoner's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, address of furlough and dates of furlough
- Title 1, section 402, subsection 3-A, paragraph B, relating to out-of-state adult probationer or parolee supervision to the extent they pertain to a probationer's or parolee's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, address of residence and dates of supervision
- Title 1, section 402, subsection 3-A, paragraph C, relating to a prisoner's, adult probationer's or parolee's identity, public criminal history record information, as defined in Title 16, section 703, subsection 8, and current address or location, unless the Commissioner of Corrections determines that it would be detrimental to the welfare of a client to disclose the information
- Title 1, section 1013, subsection 4, relating to investigative records relating to complaints that the Commission on Governmental Ethics and Election Practices has voted to pursue
- Title 3, section 156, relating to prehearing conference materials for legislative confirmations of gubernatorial appointments
- Title 3, section 159, relating to prehearing conference materials for legislative confirmations of gubernatorial appointments
- Title 4, section 17, subsection 3, relating to State Court Administrator complaints and investigative files

- Title 4, section 1806, subsection 2, relating to records in the possession of the Maine Commission on Indigent Legal Services, including: individual client information; information subject to the lawyer-client privilege; personal contact information of a commission-rostered attorney; personal contact information of a member of the commission or a commission staff member; a request for funds for expert or investigative assistance that is submitted by an indigent party; any information obtained or gathered by the commission when performing an evaluation or investigation of an attorney
- Title 5, section 95, subsection 11, relating to state records maintained by the state archivist that contain information related to the identity of an archives patron relative to the patron's use of materials at the archives are confidential
- Title 5, section 211, subsection 4, relating to nondisclosure of information produced in connection with an investigation under the Attorney General's Unfair Trade Practices authority
- Title 5, section 791, relating to certain records and correspondence utilized by state agencies in the certification of minority business enterprises, women's business enterprises and disadvantaged business enterprises
- Title 5, section 957, subsection 5, relating to State Employee Assistance Program client records
- Title 5, section 1541, subsection 10-B, relating to internal audit working papers of the State Auditor
- Title 5, section 1545, relating to outstanding unpaid checks issued by the State
- Title 5, section 1743, subsection 5, paragraph A, relating to public improvements construction contracts concerning evaluations of proposals
- Title 5, section 1747, subsection 3, relating to public improvement contracts concerning prebid qualifications
- Title 5, section 1976, subsection 1, relating to the State Government computer system
- Title 5, section 4612, subsection 1, paragraph B, relating to information possessed by the Maine Human Rights Commission relating to an investigation
- Title 5, section 4612, subsection 1, paragraph A, relating to evidence of conduct or statements made in compromise settlement negotiations, offers of settlement and any final agreement
- Title 5, section 4612, subsection 3, relating to anything said or done as part of an endeavor to eliminate discrimination in response to a complaint
- Title 5, section 4612, subsection 5, relating to data reflecting the identity of a party to a complaint
- Title 5, section 7070, subsection 1, relating to state employee applicants
- Title 5, section 7070, subsection 4, relating to state employees' personal information
- Title 5, section 15322, subsection 3, relating to certain records of technology centers
- Title 5, section 17057, subsection 1, relating to medical information held by MePERS

- Title 5, section 17057, subsection 2, relating to private financial and personal information of members, beneficiaries or participants in any of the programs of MePERS
- Title 5, section 17057, subsection 3, relating to home contact information of Maine State Retirement System members, benefit recipients and staff
- Title 5, section 17057, subsection 4, relating to certain investment activity information
- Title 5, section 17057, subsection 5, relating to home contact information of Maine State Retirement System members, benefit recipients and staff
- Title 5, section 19203, relating to the disclosure of the results of an HIV test.
- Title 5, section 19507, relating to the disclosure of information, materials and records of the DHHS Office of Advocacy
- Title 5, section 20047, subsection 1, relating to Department of Health and Human Services, Office of Substance Abuse records concerning patients
- Title 5, section 13119-A, relating to economic and community development activities of the Department of Economic and Community Development and municipalities
- Title 5, section 13120-M, subsection 2, relating to Maine Rural Development Authority activities
- Title 5, section 15302-A, subsection 2, relating to Maine Technology Institute activities
- Title 5, section 19203-D, subsection 1, relating to the disclosure of medical records containing information regarding a person's HIV status.
- Title 5, section 19203-D, subsection 2, relating to the disclosure of medical records containing information regarding a person's HIV status.
- Title 5, section 200-H, relating to the Office of the Attorney General, Maine Elder Death Analysis Review Team
- Title 5, section 244-C, subsection 2, relating to the Department of Audit activities and working papers
- Title 5, section 244-C, subsection 3, relating to the Department of Audit activities and working papers
- Title 5, section 244-E, subsection 1, relating to the identity of a person making a complaint alleging fraud, waste, inefficiency or abuse
- Title 5, section 3360-D, subsection 4, relating to the Victims' Compensation Fund concerning applications and awards
- Title 7, section 90-B, subsection 7, relating to a State Address Confidentiality Program participant's application, supporting materials and the program's state e-mail account
- Title 7, section 20, subsection 1, relating to information reported to the Department of Agriculture, Food and Rural Resources
- Title 7, section 607, subsection 5-A, relating to pesticide data determined confidential by the US EPA administrator
- Title 7, section 1052, subsection 2, relating to growers of genetically engineered plants and seeds

- Title 7, section 1052, subsection 2-A, relating to planting density of genetically modified crops
- Title 7, section 2226, subsection 1, relating to ginseng license applications, licensees and locations of ginseng plantings
- Title 7, section 3909, subsection 6, relating to the names of and other identifying information about persons providing information pertaining to criminal or civil cruelty to animals to the department
- Title 7, section 2103-A, subsection 4, relating to patented and nonreleased potato varieties

Continue review and evaluation of the following existing public records exceptions:

- (Ref #6) 1 MRSA section 402, subsection 3, paragraph E (records used by or prepared for committees of the Maine Maritime Academy, the Maine Community College System and the University of Maine System: could exception be more narrowly tailored?)
- (Ref #11) Title 1, section 402, subsection 3, paragraph J (records used by an advisory organization: how broad is the application?)
- (Ref #16) 1 MRSA section 402, subsection 3, paragraph O (personal contact information of public employees other than elected officials: concern about use personal information in agency social media)
- (Ref # 24) 1 MRSA section 538, subsection 3 (InforME subscriber information: needs more review because not sure of application)
- (Ref #27) 1 MRSA section 1013, subsection 3-A (complaints alleging a violation of legislative ethics: should complaints be confidential indefinitely?)
- (Ref #35A) 4 MRSA section 17, subsection 15, ¶C (court security records: inadvertently omitted from review list)
- (Ref #53) 5 MRSA section 7070, subsection 2 (state employee's personal information: possibly expand to include gender orientation and genetic information?)
- (Ref #73) 5 MRSA section 244-E, subsection 2 (contents of a complaint to the State Auditor alleging fraud, waste, inefficiency or abuse: Auditor's recommended amendment)
- (Ref ## 85 and 86) 7 MRSA section 4204, subsection 10 and section 4205, subsection 2 (nutrient management plans filed with DACF)
- (Ref #88) 7 MRSA section 2992-A, subsection 1 (Maine Dairy Promotion Board: too broad?)
- (Ref #89) 7 MRSA section 2998-B, subsection 1 (Maine Dairy and Nutrition Council: too broad?)
- (Ref #90) 7 MRSA section 306-A, subsection 3 (agricultural development grant program, market research or development activities: concerned about enduring confidentiality)
- (Ref #92) 7 MRSA section 951-A (minimum standards for planting potatoes: concerned about enduring confidentiality)