

MAINE STATE LEGISLATURE

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125th MAINE LEGISLATURE

SECOND REGULAR SESSION-2012

Legislative Document

No. 1804

H.P. 1330

House of Representatives, February 2, 2012

**An Act To Implement Recommendations of the Right To Know
Advisory Committee Concerning Public Records Exceptions**

Reported by Representative NASS of Acton for the Joint Standing Committee on Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph G.

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

A handwritten signature in cursive script that reads "Heather J.R. Priest".

HEATHER J.R. PRIEST
Clerk

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

2 **Sec. 1. 22 MRSA §1555-D, sub-§1**, as enacted by PL 2003, c. 444, §2, is
3 repealed.

4 **Sec. 2. 22 MRSA §3034, sub-§2**, as enacted by PL 1991, c. 339, §5, is amended
5 to read:

6 **2. Confidentiality; disclosure.** ~~All~~ Except as provided in subsection 5, all
7 information and materials gathered and retained pursuant to this section must be used
8 solely for the purposes of identification of deceased persons and persons found alive who
9 are unable to identify themselves because of mental or physical impairment. The files
10 and materials are confidential, except that compiled data that does not identify specific
11 individuals may be disclosed to the public. Upon the identification of a deceased person,
12 those records and materials used for the identification may become part of the records of
13 the Office of Chief Medical Examiner and may then be subject to public disclosure as
14 pertinent law provides.

15 **Sec. 3. 22 MRSA §3034, sub-§5** is enacted to read:

16 **5. Release to assist in search.** The Office of Chief Medical Examiner may release
17 confidential information and materials about a missing person that are gathered and
18 retained pursuant to this section if the Chief Medical Examiner determines that such
19 release may assist in the search for the missing person.

20 **Sec. 4. 22 MRSA §8707, sub-§4**, as amended by PL 2007, c. 466, Pt. A, §44, is
21 further amended to read:

22 **4. Certain confidential information.** ~~The rules must determine to be confidential~~
23 ~~or privileged information all data designated or treated as confidential or privileged by~~
24 ~~the former Maine Health Care Finance Commission. Information regarding discounts off~~
25 ~~charges, including capitation and other similar agreements, negotiated between a payor or~~
26 ~~purchaser and a provider of health care that was designated as confidential only for a~~
27 ~~limited time under the rules of the former Maine Health Care Finance Commission is~~
28 ~~confidential to the organization, notwithstanding the termination date for that designation~~
29 ~~specified under the prior rules. The board may determine financial data submitted to the~~
30 ~~organization under section 8709 to be confidential information if the public disclosure of~~
31 ~~the data will directly result in the provider of the data being placed in a competitive~~
32 ~~economic disadvantage. This section may not be construed to relieve the provider of the~~
33 ~~data of the requirement to disclose such information to the organization in accordance~~
34 ~~with this chapter and rules adopted by the board.~~

35 **Sec. 5. 23 MRSA §63**, as repealed and replaced by PL 2001, c. 158, §1, is
36 repealed and the following enacted in its place:

1 **§63. Confidentiality of records held by the department and the Maine Turnpike**
2 **Authority**

3 **1. Confidential records.** The following records in the possession of the department
4 **and the Maine Turnpike Authority are confidential and may not be disclosed, except as**
5 **provided in this section:**

6 **A. Records and correspondence relating to negotiations for and appraisals of**
7 **property; and**

8 **B. Records and data relating to engineering estimates of costs on projects to be put**
9 **out to bid.**

10 **2. Engineering estimates.** Engineering estimates of total project costs are public
11 **records after the execution of project contracts.**

12 **3. Records relating to negotiations and appraisals.** The records and
13 **correspondence relating to negotiations for and appraisals of property are public records**
14 **beginning 9 months after the completion date of the project according to the record of the**
15 **department or Maine Turnpike Authority, except that records of claims that have been**
16 **appealed to the Superior Court are public records following the award of the court.**

17 **Sec. 6. 23 MRSA §8115,** as amended by PL 2005, c. 312, §9, is further amended
18 to read:

19 **§8115. Obligations of authority**

20 All expenses incurred in carrying out this chapter must be paid solely from funds
21 provided to or obtained by the authority pursuant to this chapter. Any notes, obligations
22 or liabilities under this chapter may not be deemed to be a debt of the State or a pledge of
23 the faith and credit of the State; but those notes, obligations and liabilities are payable
24 exclusively from funds provided to or obtained by the authority pursuant to this chapter.
25 Pecuniary liability of any kind may not be imposed upon the State or any locality, town
26 or landowner in the State because of any act, agreement, contract, tort, malfeasance,
27 misfeasance or nonfeasance by or on the part of the authority or its agents, servants or
28 employees. ~~The records and correspondence relating to negotiations, trade secrets~~
29 ~~received by the authority, estimates of costs on projects to be put out to bid and any~~
30 ~~documents or records solicited or prepared in connection with employment applications~~
31 ~~are confidential. The authority is deemed to have a lawyer-client privilege.~~

32 **Sec. 7. 23 MRSA §8115-A** is enacted to read:

33 **§8115-A. Authority records**

34 **1. Confidential records.** The following records of the authority are confidential:

35 **A. Records and correspondence relating to negotiations of agreements to which the**
36 **authority is a party or in which the authority has a financial or other interest. Once**
37 **entered into, an agreement is not confidential;**

38 **B. Trade secrets;**

1 C. Estimates prepared by or at the direction of the authority of the costs of goods or
2 services to be procured by or at the expense of the authority; and

3 D. Any documents or records solicited or prepared in connection with employment
4 applications, except that applications, resumes and letters and notes of reference,
5 other than those letters and notes of reference expressly submitted in confidence,
6 pertaining to the applicant hired are public records after the applicant is hired, except
7 that personal contact information is not a public record as provided in Title 1, section
8 402, subsection 3, paragraph O.

9 2. Lawyer-client privilege. The authority may claim the lawyer-client privilege in
10 the same manner and circumstances as a corporation is authorized to do so.

11 **Sec. 8. 24 MRSA §2505**, as amended by PL 2007, c. 380, §1, is further amended
12 to read:

13 **§2505. Committee and other reports**

14 Any professional competence committee within this State and any physician licensed
15 to practice or otherwise lawfully practicing within this State shall, and any other person
16 may, report the relevant facts to the appropriate board relating to the acts of any physician
17 in this State if, in the opinion of the committee, physician or other person, the committee
18 or individual has reasonable knowledge of acts of the physician amounting to gross or
19 repeated medical malpractice, habitual drunkenness, addiction to the use of drugs,
20 professional incompetence, unprofessional conduct or sexual misconduct identified by
21 board rule. The failure of any such professional competence committee or any such
22 physician to report as required is a civil violation for which a fine of not more than
23 \$1,000 may be adjudged.

24 Except for specific protocols developed by a board pursuant to Title 32, section 1073,
25 2596-A or 3298, a physician, dentist or committee is not responsible for reporting misuse
26 of alcohol or drugs or professional incompetence or malpractice as a result of physical or
27 mental infirmity or by the misuse of alcohol or drugs discovered by the physician, dentist
28 or committee as a result of participation or membership in a professional review
29 committee or with respect to any information acquired concerning misuse of alcohol or
30 drugs or professional incompetence or malpractice as a result of physical or mental
31 infirmity or by the misuse of alcohol or drugs, as long as that information is reported to
32 the professional review committee. Nothing in this section may prohibit an impaired
33 physician or dentist from seeking alternative forms of treatment.

34 The confidentiality of reports made to a board under this section is governed by this
35 chapter.

36 **Sec. 9. 24 MRSA §2510, sub-§1, ¶¶D and E**, as enacted by PL 1977, c. 492,
37 §3, are amended to read:

38 D. Pursuant to an order of a court of competent jurisdiction; ør

1 E. To qualified personnel for bona fide research or educational purposes, if
2 personally identifiable information relating to any patient or physician is first
3 deleted; or

4 **Sec. 10. 24 MRSA §2510, sub-§1, ¶F** is enacted to read:

5 F. To other state or federal agencies when the information contains evidence of
6 possible violations of laws enforced by those agencies.

7 **Sec. 11. 24-A MRSA §2393, sub-§2, ¶D**, as corrected by RR 1995, c. 2, §52, is
8 amended to read:

9 D. The initial surcharges must be paid in accordance with the following provisions.

10 (1) Beginning July 1, 1995 every insurer writing workers' compensation
11 insurance in the State shall collect from workers' compensation insurance
12 policyholders and pay to the pool a surcharge on all surchargeable premiums
13 received by the insurer for those policies. During the initial surcharge period, the
14 surcharge is at a fixed rate of 6.32% of the surchargeable premium. The
15 surcharge may be applied only to policies with an effective date on or after 12:01
16 a.m., July 1, 1995. All surcharges received by each insurer during the preceding
17 calendar quarter must be remitted to the pool within 15 days following the end of
18 each calendar quarter, except that servicing carriers shall remit on February 15th,
19 May 15th, August 15th and November 15th of each year. Any surcharge
20 proceeds not remitted on a timely basis accrue interest at the rate of 10% per
21 annum from the due date until paid in full. The pool is entitled to reimbursement
22 from any insurer failing to remit surcharge proceeds on a timely basis for the
23 pool's costs of collection of those amounts, including all collection costs and fees,
24 reasonable attorney's and paralegal's fees and any other professional fees and
25 expenses associated with the pool's collection efforts. The surcharges described
26 in this subparagraph do not apply to reinsurance recognized by the superintendent
27 pursuant to ~~chapter~~ Chapter 250, section 2, paragraph G or section 3, paragraph
28 G, procured by an individual self-insured employer or a self-insured employer
29 group.

30 (2) Self-insured employers that secured their obligation to provide workers'
31 compensation benefits under the Workers' Compensation Act through issuance or
32 renewal at any point during the fresh start period of an insurance policy for any
33 portion of any of the policy years 1988 to 1992 are subject to a surcharge as
34 provided in the following.

35 (a) During the initial surcharge period the rate of surcharge is 6.32% of the
36 surchargeable premium as adjusted pursuant to this paragraph for the self-
37 insured employer's current plan year utilizing estimated payroll as submitted
38 with the self-insured employer's renewal application for authority to self-
39 insure, in accordance with Chapter 250, section 2, paragraph C, subparagraph
40 1, division c or Chapter 250, section 3, paragraph C, subparagraph 1, division
41 g as applicable, subject to audit pursuant to division (d), subdivision (iii). If
42 the plan year in which a surcharge is collected or a credit is distributed is
43 shorter than 12 months, due to a change in accounting period or termination

1 of self-insurance authorization, the surcharge or credit for that plan year must
2 be based upon the final audited payroll for the short plan year.

3 (b) All surcharges must be collected or distributed on a plan year basis. In
4 each plan year, the percentage of the surchargeable premium to be
5 surcharged is the same percentage as is applied to an insured employer whose
6 policy period coincided with the plan year.

7 (c) Except for a successor self-insured employer, each self-insured employer
8 shall pay surcharges relating to only that portion of the policy years 1988 to
9 1992 in which the self-insured employer insured its workers' compensation
10 obligations. The surcharge factor, as determined by the board under this
11 chapter, must be adjusted to take into consideration the policy years or
12 portions of policy years 1988 to 1992 in which a self-insured employer was
13 self-insured.

14 The self-insured employer adjustment is determined as follows. The
15 surcharge factor must be multiplied by the factor attributed to each of the
16 years 1988 to 1992, as set forth in the table below. If a self-insured employer
17 was insured only during a portion of a policy year, then the factor for that
18 year is prorated based on the ratio of the number of days in the policy year
19 during which the self-insured employer was insured to 365 days.

20	Policy Year	Factor
21	1988	28.48%
22	1989	30.70%
23	1990	23.26%
24	1991	11.55%
25	1992	6.01%

26 (d) The board shall administer the surcharges on self-insured employers as
27 follows.

28 (i) The board shall issue surcharge billings to self-insured employers,
29 pursue collection of all invoiced surcharges, initiate legal proceedings as
30 necessary to collect surcharges and maintain records adequate to
31 administer the surcharge process. The records of the board and of the
32 bureau form the basis for identifying self-insured employers who are
33 subject to this paragraph.

34 (ii) Annual surcharges may be paid in a single lump sum within 30 days
35 of the receipt of the pool's invoice or in quarterly installments at the self-
36 insured employer's option. The board shall issue a yearly invoice as soon
37 as practicable after the self-insured employer's plan approval or renewal
38 date and receipt of all necessary supporting information from the
39 superintendent. Each invoice must contain a schedule of dates when
40 quarterly installments are due and clearly state the policy year or years
41 for which the surcharge is imposed, the surcharge percentage multiplied
42 by the factor applicable to each policy year and the amount of the
43 surchargeable premium.

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(iii) Each individual self-insured employer shall report final audited payrolls to the pool not later than 60 days after the end of each plan year and each self-insured employer that is a member of a self-insured group or the group's administrator, as the group may select, shall report final audited payrolls to the pool not later than 120 days after the end of each plan year and shall remit with the audit information any additional surcharges resulting from the audit.

(iv) Upon the request of a self-insured employer, including a successor self-insured employer or an administrator of a self-insurance group, the board may determine whether there was a factual inaccuracy in the information underlying a surcharge billing issued by the board for the fresh start period or whether the surcharge calculated by the board is consistent with the provisions of this subparagraph. The request must be filed within 180 days from the date on which the final payment is due and must be in writing, including a statement of the reason for the request and the amount, if known, of the alleged overcharge. If an appeal based upon an alleged overcharge is sustained, the board shall refund the overcharge, together with any investment earnings on those amounts. If a self-insured employer is aggrieved by the final action or decision of the board, or if the board does not act on the written request within 60 days, the self-insured employer may appeal to the superintendent within 60 days of such action or decision of the board. Notwithstanding a pending appeal, a self-insured employer must pay any surcharge billing issued by the board.

(e) Self-insured employers have the following obligations with respect to the surcharge process.

(i) As a condition of continuing authorization to self-insure, each self-insured employer and each group self-insurance administrator shall assist the board and the superintendent in the calculation, billing and collection of any applicable surcharge. The required assistance includes maintaining and providing, upon request of the board or the superintendent, actual premium history and all payroll and experience information necessary to calculate self-insured employer premiums, as specified in this subparagraph. Information provided by the self-insured employer is subject to audit by the pool and the superintendent at any time and self-insured employers shall provide to the pool, or its designee, and to the superintendent full and complete access to all books and records relating in any way to the audit. Group self-insurance administrators shall give prompt notice to the superintendent of any changes in group membership.

(ii) Information provided by self-insured employers to the board pursuant to this paragraph is confidential. The board shall protect the confidentiality of all self-insured employer information in its possession, whether the information is obtained directly from the self-insured employer or from the superintendent or a group administrator. All information relating to a self-insured employer provided pursuant to this

1 paragraph and in the possession of the board or superintendent continues
2 to be confidential until that information is destroyed.

3 (iii) A self-insurance group may act as the collection agent for its
4 members. Any group so electing shall notify the board. The board shall
5 bill the group on a consolidated basis. The group shall remit its entire
6 quarterly payment to the board within 30 days after receiving the invoice,
7 whether or not any members remain in default and notify the board and
8 the superintendent of any delinquency.

9 (iv) Each self-insured employer shall make provisions for possible
10 surcharges in the normal course of operations and pay the full amount of
11 any surcharge installment within 30 days after receiving an invoice from
12 the board or the self-insured employer's self-insurance group. Late
13 payments are subject to interest at the rate of 10% per annum.

14 (v) The failure of any self-insured employer or self-insurance group to
15 comply with its duties under this paragraph constitutes grounds for
16 suspension, revocation, termination of the option to self-insure, expulsion
17 from a self-insurance group or other appropriate sanctions authorized
18 under section 12-A, in addition to all procedures for the collection of
19 past-due accounts otherwise available by law to the board or the
20 governing body of the self-insurance group.

21 (f) The superintendent has the following responsibilities with respect to the
22 surcharge process.

23 (i) The superintendent shall furnish to the board, on a monthly basis, a
24 list of all self-insurance plan approvals, renewals and anniversaries that
25 have occurred since the last report or for any other reason were not
26 included in any previous report, including all approvals, terminations and
27 membership changes for group self-insurers. For each employer listed,
28 the superintendent shall provide all available information necessary for
29 the board's imputed calculations under this paragraph, including: the date
30 the new plan year began; the self-insurance group, if any, to which the
31 self-insured employer belongs; the dates of coverage under each policy
32 issued or renewed in policy years 1988 to 1992; the rating information
33 for the current plan year, including estimated payroll by classification,
34 premium rate for each classification, experience modification and other
35 applicable rating adjustments; information relating to changes of
36 ownership or control, changes of operations, changes of name or
37 organizational structure; and other information necessary to determine
38 successorship.

39 (ii) The superintendent shall supplement promptly the initial report as
40 necessary, including any revision to the self-insured employer's rating
41 information on audit, any other additions or corrections to incomplete or
42 inaccurate information provided in the initial report and the length of the
43 plan year, if shorter than 12 months.

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(g) A successor self-insured employer is subject to surcharge on the same basis as the predecessor employer would be if still actively doing business and self-insured. If a self-insured employer is the successor to more than one employer, then the successor employer's self-insured employer adjustment is the sum of each predecessor employer's self-insured employer adjustment multiplied by the ratio of the employer's surchargeable premium for the 12-month period immediately preceding the succession transaction to the combined surchargeable premium of all predecessor employers for that 12-month period.

(i) If one or more of the predecessor employers was insured at the time of the succession transaction, its self-insured employer adjustment is calculated pursuant to division (c), (h) or (i) as if it had become self-insured at the time of the succession transaction.

(ii) If business operations that were covered under a single workers' compensation policy or certificate of self-insurance authority are subsequently separately owned by virtue of any succession transaction, dissolution, reincorporation or other transaction or series of transactions, for purposes of this subparagraph each business is treated as a distinct employer, subject to surcharge as either an insured employer or a self-insured employer.

(iii) If substantial changes in operations during the 12-month period immediately preceding the succession transaction make the 12-month surchargeable premium an inappropriate measure of a predecessor employer's workers' compensation exposure prior to the transaction, the board may adopt procedures for calculating an annualized premium in a manner consistent with the intent of this subparagraph.

(h) A self-insured employer that secured its obligation to provide workers' compensation benefits under the Workers' Compensation Act through a self-insurance program approved by the superintendent for the entirety of that self-insured employer's policy years 1988 to 1992, in which the self-insured employer actually had an obligation to secure benefits under the Workers' Compensation Act is not subject to the surcharge.

(i) Except for any successor self-insured employer, self-insured employers that commence operations in the State on or after July 1, 1995 are subject to surcharge under this subparagraph on the same basis as self-insured employers that secured compensation under the Workers' Compensation Act by the purchase of an insurance policy throughout the entire fresh start period.

(3) An employer may, as specified in this subparagraph, prepay all of its surcharges for a period of 10 consecutive policy years or plan years. The 10-year period starts with the employer's first renewal date or plan year following July 1, 1995. Within 30 days after the inception of the first plan year or first policy renewal date following July 1, 1995, if the employer intends to exercise this option, the employer must file with the pool written notice electing to make a lump-sum payment of surcharges and shall include with the notice the employer's

1 full lump-sum payment. If the election is not made within 30 days after the first
2 day of the first plan year or policy year following July 1, 1995, the option expires
3 and is no longer available. The pool shall implement such procedures for
4 administering this option as the board determines necessary. An employer that
5 elects this option shall reimburse the pool for its expenses of administering this
6 option for that employer, including the cost of individually allocating those costs
7 to individual employers, in accordance with billing procedures developed and
8 implemented by the board. This subparagraph does not eliminate or limit the
9 employer's liability to pay adjusted surcharges or supplemental surcharges
10 pursuant to paragraph E or section 2394.

11 For purposes of this subparagraph, "lump-sum payment" is the surcharge for the
12 first year multiplied by 10 and discounted to net present value using:

- 13 (a) A 5% discount rate;
- 14 (b) The first day of the first plan year or policy year starting on or after July
15 1, 1995; and
- 16 (c) An assumption that the surcharge for each of the 10 plan years or policy
17 years would have been paid on the first day of each subsequent plan year or
18 policy year.

19 SUMMARY

20 This bill is reported out by the Joint Standing Committee on Judiciary pursuant to the
21 Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph G. This bill
22 incorporates recommendations of the Right To Know Advisory Committee.

23 The Joint Standing Committee on Judiciary has not taken a position on the substance
24 of the recommendations or the bill, and by, reporting out this bill, the committee is not
25 suggesting and does not intend to suggest that it agrees or disagrees with any aspect of the
26 Right To Know Advisory Committee's recommendations or this bill. The committee is
27 reporting the bill out for the sole purpose of turning the Right To Know Advisory
28 Committee's proposal into a printed bill that can be referred to the committee for a public
29 hearing and subsequent processing. The committee is taking this action to ensure clarity
30 and transparency in the legislative review of the Right To Know Advisory Committee's
31 proposal.

32 This bill incorporates recommendations of the Right To Know Advisory Committee
33 relating to its review of existing public records exceptions in the Maine Revised Statutes,
34 Titles 22 to 25. The bill does the following.

35 It repeals the provision that designates as confidential lists maintained by the
36 Attorney General's office of known unlicensed tobacco retailers. The Attorney General no
37 longer maintains such lists as a result of a United States Supreme Court decision that state
38 law is preempted by federal law.

39 It gives the Department of the Attorney General, Office of Chief Medical Examiner
40 the discretion to release confidential information and materials about a missing person if

1 the Chief Medical Examiner determines that releasing the information or materials may
2 assist in the search for the missing person.

3 It removes language related to confidentiality of data held by the former Maine
4 Health Care Finance Commission. The bill retains language authorizing the Board of
5 Directors of the Maine Health Data Organization to determine certain financial data
6 submitted to the organization by health care providers to be confidential if disclosure of
7 the data will place the provider at a competitive economic disadvantage.

8 It provides that engineering estimates are public after the execution of project
9 contracts and applies the public records provisions to all Department of Transportation
10 and Maine Turnpike Authority records.

11 It removes the confidentiality provisions in current law that apply to the records of
12 the Northern New England Passenger Rail Authority. It places the confidentiality
13 provisions applying to the records of the Northern New England Passenger Rail Authority
14 in a new section and clarifies what records are not subject to public access. The bill
15 provides that records and correspondence relating to negotiations of agreements are
16 confidential, although the final agreements are not designated confidential by this
17 language. The bill also clarifies that estimates of costs of goods or services to be
18 procured by or at the expense of the authority are confidential if the estimates are
19 prepared by the authority or at the direction of the authority. The bill also revises the
20 employment application confidentiality to be consistent with that of state, county and
21 municipal employee applicants. All documents relating to applicants are confidential,
22 except for records pertaining to the applicant who is hired, most of which become public.
23 Personal contact information of a public employee is not a public record. The bill also
24 clarifies the language concerning the lawyer-client privilege; it allows the authority to
25 claim the lawyer-client privilege in the same manner and circumstances as a corporation
26 is authorized to do so.

27 It amends current law to clarify that the confidentiality provisions of the Maine
28 Health Security Act govern the confidentiality of reports to appropriate medical licensing
29 boards.

30 It amends current law to authorize medical licensing boards to share confidential
31 information with state and federal agencies when the information contains evidence of
32 possible violations of laws enforced by those agencies.

33 It clarifies that information provided by self-insurers to the governing board of the
34 Maine Workers' Compensation Residual Market Pool or the Superintendent of Insurance
35 related to payment of workers' compensation residual market surcharges continues to be
36 confidential until that information is destroyed.