

MAINE STATE LEGISLATURE

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130th MAINE LEGISLATURE

SECOND REGULAR SESSION-2022

Legislative Document

No. 1946

H.P. 1451

House of Representatives, January 26, 2022

An Act To Ensure Constitutionally Adequate Contact with Counsel

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 203.

Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "R B. Hunt".

ROBERT B. HUNT
Clerk

Presented by Representative HARNETT of Gardiner.
Cosponsored by Senator CARNEY of Cumberland and
Representatives: DODGE of Belfast, GROHOSKI of Ellsworth, LOOKNER of Portland,
MADIGAN of Waterville, MORIARTY of Cumberland, PEBWORTH of Blue Hill,
PLUECKER of Warren, TALBOT ROSS of Portland.

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

2 **PART A**

3 **Sec. A-1. 34-A MRSA §3015** is enacted to read:

4 **§3015. Confidential communications**

5 A chief administrative officer shall make available to a resident and the resident's
6 counsel a means to engage in confidential communications as required by section 3031,
7 subsection 11 and in accordance with this section.

8 **1. Definitions.** As used in this section, unless the context otherwise indicates, the
9 following terms have the following meanings.

10 A. "Commission" means the Maine Commission on Indigent Legal Services
11 established by Title 5, section 12004-G, subsection 25-A.

12 B. "Facility" means a correctional facility or a detention facility.

13 C. "Resident" means a person who resides in a facility.

14 **2. Access.** A facility shall provide a means to engage in confidential communications
15 between a resident and the resident's counsel in person in space within the facility or by
16 telephone, video or other electronic means without charge to the resident or the resident's
17 counsel.

18 **3. Prohibited conduct.** A facility may not intercept, record, monitor, disseminate or
19 otherwise divulge any oral, written, telephone, video or electronic communication between
20 a resident and the resident's counsel. The provisions of this subsection apply to any
21 employee of a facility and to any agent, employee, contractor or vendor of communication
22 services that provides services to a facility or works with the facility in any capacity. A
23 violation of this subsection by an agent, employee, contractor or vendor of communication
24 services that provides services to a facility or works with the facility in any capacity is
25 deemed a violation by the facility.

26 **4. Logs.** A facility and any contractor or vendor that provides communication services
27 subject to this section shall create and maintain for a minimum of 7 years logs of all
28 confidential communications to or from the facility to which a resident is a party, including
29 but not limited to the date and time of the telephone call or video or electronic
30 communication, the telephone number or electronic address involved, the duration of the
31 telephone call or video or electronic communication and the name of the resident. All logs
32 of communications related to a resident and the resident's counsel must be released upon
33 request within 30 days to the resident or the resident's authorized representative or counsel
34 requesting the logs and to the commission.

35 **5. Audit.** Every 90 days, a facility shall audit its logs of telephone, video and
36 electronic communications to or from telephone numbers and electronic addresses listed as
37 belonging to counsel for a resident and shall, upon completion of the audit, provide that
38 audit to the commission. If an audit concludes that a recording of a telephone call or video
39 or electronic communication exists or that information was obtained or gathered in
40 violation of this section, the chief administrative officer shall inform counsel, the resident
41 and the commission within 3 business days.

1 **6. Policy.** A chief administrative officer shall adopt policies providing access to
2 communications as required by this section and forbidding conduct prohibited by this
3 section, shall review and update the policies annually and shall publish the policies on the
4 facility's publicly accessible website and provide copies to the commission.

5 **Sec. A-2. 34-A MRSA §3031, sub-§9,** as amended by PL 2021, c. 263, §4, is
6 further amended to read:

7 **9. Menstrual products.** Comprehensive access to menstrual products, including, but
8 not limited to, sanitary pads and tampons, provided and available at all times and without
9 inconvenience or charge to a person who menstruates who resides in a correctional or
10 detention facility; ~~and~~

11 **Sec. A-3. 34-A MRSA §3031, sub-§10,** as enacted by PL 2021, c. 263, §5, is
12 amended to read:

13 **10. Gender affirmation.** Have the person's consistently held gender identity
14 respected and acknowledged, irrespective of anatomy or physique. Housing placements
15 and search practices must be consistent with the person's consistently held gender identity
16 except when such placement or search would present significant management or security
17 problems to the correctional or detention facility or threaten the health and safety of the
18 person. A person must have access to commissary items, clothing, personal property,
19 programming and educational materials that are consistent with the person's consistently
20 held gender identity. Correctional or detention facility staff shall address a person in a
21 manner that is consistent with the person's consistently held gender identity; and

22 **Sec. A-4. 34-A MRSA §3031, sub-§11** is enacted to read:

23 **11. Confidential communications.** A means to engage in confidential
24 communications as follows:

25 A. Confidential communications with counsel by telephone, video or electronic
26 communication at a minimum twice a day and at all other necessary times by means
27 that ensure that the communications are confidential to the person and the person's
28 counsel and cannot be monitored, recorded or overheard by any other person;

29 B. Written notice that the person's counsel has contacted the facility to request that the
30 person call or contact the person's counsel. The facility shall keep a written record of
31 the contact by the person's counsel and the notice to the person from the facility.
32 Failure of the facility to maintain a copy of the notice to the person is prima facie
33 evidence that notice was not provided; and

34 C. An opportunity to receive from and review with counsel all documents sent to the
35 person by counsel, including but not limited to letters, pleadings and discovery in any
36 format or form, and to send documents to counsel without interception, monitoring,
37 copying, redaction or other action or review by the facility or anyone acting on behalf
38 of the facility or the State.

39 **Sec. A-5. Communications policy.** Within 90 days of the effective date of this
40 Act, the chief administrative officer of each Department of Corrections correctional facility
41 or detention facility shall adopt a policy providing each resident of the correctional facility
42 or detention facility a means to engage in confidential communications as required by the
43 Maine Revised Statutes, Title 34-A, section 3015 and section 3031, subsection 11 and shall

1 publish the policy on the facility's publicly accessible website and provide a copy to the
2 Maine Commission on Indigent Legal Services established in Title 5, section 12004-G,
3 subsection 25-A.

4 PART B

5 **Sec. B-1. 30-A MRSA §1566** is enacted to read:

6 **§1566. Confidential communications**

7 A person who is incarcerated in a jail has a right to a means to engage in confidential
8 communications with the person's counsel as required by section 1663 and in accordance
9 with this section.

10 **1. Definitions.** As used in this section, unless the context otherwise indicates, the
11 following terms have the following meanings.

12 A. "Commission" means the Maine Commission on Indigent Legal Services
13 established by Title 5, section 12004-G, subsection 25-A.

14 B. "Jail" means a jail or other county correctional facility or a regional correctional
15 facility operated pursuant to this chapter.

16 C. "Person" means a person who is incarcerated in a jail.

17 **2. Access.** A jail shall provide a means to engage in confidential communications
18 between a person and the person's counsel in person in space within the jail or by telephone,
19 video or electronic communication without charge to the person or that person's counsel.

20 **3. Prohibited conduct.** A jail may not intercept, record, monitor, disseminate or
21 otherwise divulge an oral, written, telephone, video or electronic communication between
22 a person and the person's counsel. The provisions of this subsection also apply to any
23 agent, employee, contractor or vendor of communication services that provides services to
24 a jail or works with a jail in any capacity. A violation of this subsection by an agent,
25 employee, contractor or vendor of communication services that provides services to a jail
26 or works with a jail in any capacity is deemed a violation by the jail.

27 **4. Logs.** A jail and any contractor or vendor that provides communication services
28 subject to this section shall create and maintain for a minimum of 7 years logs of all
29 confidential communications to or from the jail to which a person incarcerated in the jail is
30 a party, including but not limited to the date and time of the telephone call or video or
31 electronic communication, the telephone number or electronic address involved, the
32 duration of the telephone call or video or electronic communication and the name of the
33 person. All logs of confidential communications related to a person and the person's
34 counsel must be released upon request within 30 days to the person or that person's
35 authorized representative or counsel requesting the logs and to the commission.

36 **5. Audit.** Every 90 days, a jail shall audit its logs of telephone, video and electronic
37 communications to or from telephone numbers and electronic addresses listed as belonging
38 to counsel for a person and shall, upon completion of the audit, provide that audit to the
39 commission. If an audit concludes that a recording of a telephone call or video or electronic
40 communication exists or that information was obtained or gathered in violation of this
41 section, the administrator of the jail shall inform counsel, the person and the commission
42 within 3 business days.

1 **2. Prohibited use of documents and information in court.** With respect to a
2 document or information of any kind and in any format or form that was obtained in
3 violation of Title 30-A, section 1566, subsection 3 or Title 34-A, section 3015, subsection
4 3, all information and materials derived from the document or information are inadmissible
5 in any court proceeding. The doctrines of inevitable discovery and exigency do not apply
6 to evidence that is inadmissible in court pursuant to this subsection. A claim of
7 inadvertence, negligence, recklessness or mistake does not render admissible a document
8 or information that is inadmissible under this subsection.

9 **3. Prohibited participation in court.** Except as provided in this subsection, a person
10 who has accessed or received any document, recording or information of any type in
11 violation of Title 30-A, section 1566 or Title 34-A, section 3015, whether or not the person
12 has reviewed the substance of the document, recording or information, may not participate
13 in any investigation, prosecution, mental health or child protective proceeding or any other
14 matter before a court in this State, including through formal or informal communications.
15 A person is not prohibited from participation under this subsection if the person has the
16 exclusive ability to provide relevant factual information and a judicial officer other than
17 the presiding officer has reviewed the facts regarding the participation of the person and
18 has issued findings and a ruling on the scope and exclusivity of the testimony that the
19 person may provide.

20 **4. Additional post-conviction review.** In addition to any other post-conviction
21 remedy provided to a person convicted of a crime in this State pursuant to chapter 305-A,
22 a person whose confidential communications with counsel have been intercepted in
23 violation of Title 30-A, section 1566 or Title 34-A, section 3015 or in any other way by the
24 State, a prosecutor or a law enforcement agency may file a petition for post-conviction
25 review up to 2 years from the date that the person is notified by the person's counsel of the
26 interception of the communication.

27 **5. Civil remedies.** A person who, without permission from all parties to a
28 conversation or oral communication, knowingly eavesdrops on, records or transmits the
29 conversation or oral communication or any portion thereof between a person who is in the
30 physical custody of a law enforcement officer or other public officer and the person's
31 counsel or between a person who is on the property of a law enforcement agency or other
32 public agency and the person's counsel is subject to a civil action in Superior Court and a
33 civil penalty of not more than \$10,000 per occurrence, payable to the Maine Commission
34 on Indigent Legal Services, established in Title 5, section 12004-G, subsection 25-A, to be
35 applied by the commission to noncounsel costs associated with promoting effective
36 representation of indigent clients.

37 **6. Private cause of action.** A person who is aggrieved by the action of another
38 individual who, without permission from all parties to a conversation or oral
39 communication, knowingly eavesdrops on, records or transmits the conversation or oral
40 communication or any portion thereof between a person who is in the physical custody of
41 a law enforcement officer or other public officer and the person's counsel or between a
42 person who is on the property of a law enforcement agency or other public agency and that
43 person's counsel has a private cause of action against that individual in Superior Court for
44 which the aggrieved person may be awarded by the court actual damages, restitution,
45 attorney's fees and costs and such other equitable relief as the court determines to be
46 necessary and proper.

1 communication and person-to-person contact. The bill prohibits intercepting, recording,
2 monitoring, disseminating or otherwise divulging any oral, written, telephone, video or
3 electronic communication between clients and their counsel. The bill requires facilities to
4 maintain logs of telephone calls and communications between clients and their counsel and
5 requires periodic auditing of logs. The bill requires a facility to provide written notice to a
6 client when the client's counsel contacts the facility and asks for the client to contact
7 counsel. The bill requires a facility to provide an opportunity to review documents with
8 counsel. The bill requires periodic audits and requires the adoption of policies that are
9 published publicly and submitted to the Maine Commission on Indigent Legal Services.
10 For violations of the law, the bill establishes civil penalties, a private cause of action and
11 post-conviction review in addition to review provided pursuant to the Maine Revised
12 Statutes, Title 15, chapter 305-A. The bill prohibits use of illegally obtained information
13 in court and prohibits participation in court by a person who has accessed or received a
14 document, recording or information in violation of the law. The bill creates a new Class C
15 crime of unauthorized eavesdropping. The bill requires the Maine Commission on Indigent
16 Legal Services, the Department of Corrections and the county jails and other county
17 correctional facilities to conduct a retrospective review of telephone calls and electronic
18 communications between clients and their counsel, who are required to provide notice to
19 their clients affected by prohibited recordings.