

MAINE STATE LEGISLATURE

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131st MAINE LEGISLATURE

FIRST SPECIAL SESSION-2023

Legislative Document

No. 1699

H.P. 1088

House of Representatives, April 18, 2023

An Act to Amend the Freedom of Access Act and Related Provisions

Reference to the Committee on State and Local Government suggested and ordered printed.

Robert B. Hunt
ROBERT B. HUNT
Clerk

Presented by Representative ANDREWS of Paris.

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

2 **Sec. 1. 1 MRSA §402, sub-§2, ¶H** is enacted to read:

3 H. The board of directors of a nonprofit organization that qualifies as a tax-exempt
4 organization under 26 United States Code, Section 501(c)(3) if the organization
5 receives more than 50% of its annual revenue from federal, state or municipal funding
6 sources.

7 **Sec. 2. 1 MRSA §402, sub-§3**, as amended by PL 2019, c. 667, Pt. A, §§1 to 3 and
8 Pt. B, §§1 to 4, is further amended to read:

9 **3. Public records.** The term "public records" means any written, printed or graphic
10 matter or any mechanical or electronic data compilation from which information can be
11 obtained, directly or after translation into a form susceptible of visual or aural
12 comprehension, that is in the possession or custody of a nonprofit organization described
13 in subsection 2, paragraph H and has been received or prepared for use in connection with
14 the transaction of that organization's activities or contains information relating to the
15 transaction of that organization's activities; is in the possession or custody of an agency or
16 public official of this State or any of its political subdivisions; and has been received or
17 prepared for use in connection with the transaction of public or governmental business or
18 contains information relating to the transaction of public or governmental business; or is in
19 the possession or custody of an association, the membership of which is composed
20 exclusively of one or more of any of these entities, and has been received or prepared for
21 use in connection with the transaction of public or governmental business or contains
22 information relating to the transaction of public or governmental business, except that the
23 following are not considered public records:

24 A. Records that have been designated confidential by statute;

25 B. Records that would be within the scope of a privilege against discovery or use as
26 evidence recognized by the courts of this State in civil or criminal trials if the records
27 or inspection thereof were sought in the course of a court proceeding;

28 C. Legislative papers and reports until signed and publicly distributed in accordance
29 with legislative rules, and records, working papers, drafts and interoffice and
30 intraoffice memoranda used or maintained by any Legislator, legislative agency or
31 legislative employee to prepare proposed Senate or House papers or reports for
32 consideration by the Legislature or any of its committees during the legislative session
33 or sessions in which the papers or reports are prepared or considered or to which the
34 paper or report is carried over;

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

37 (1) Is of a personal nature, consisting of:

38 (a) An individual's medical information of any kind, including information
39 pertaining to diagnosis or treatment of mental or emotional disorders;

40 (b) Credit or financial information;

41 (c) Information pertaining to the personal history, general character or conduct
42 of the constituent or any member of the constituent's immediate family; or

1 (d) Complaints, charges of misconduct, replies to complaints or charges of
2 misconduct or memoranda or other materials pertaining to disciplinary action;
3 or

4 (2) Would be confidential if it were in the possession of another public agency or
5 official;

6 D. Material prepared for and used specifically and exclusively in preparation for
7 negotiations, including the development of bargaining proposals to be made and the
8 analysis of proposals received, by a public employer in collective bargaining with its
9 employees and their designated representatives;

10 E. Records, working papers, interoffice and intraoffice memoranda used by or
11 prepared for faculty and administrative committees of the Maine Maritime Academy,
12 the Maine Community College System and the University of Maine System when the
13 subject matter is confidential or otherwise protected from disclosure by statute, other
14 law, legal precedent or privilege recognized by the courts of this State. The provisions
15 of this paragraph do not apply to the boards of trustees and the committees and
16 subcommittees of those boards, which are referred to in subsection 2, paragraph B;

17 F. Records that would be confidential if they were in the possession or custody of an
18 agency or public official of the State or any of its political or administrative
19 subdivisions are confidential if those records are in the possession of an association,
20 the membership of which is composed exclusively of one or more political or
21 administrative subdivisions of the State; of boards, commissions, agencies or
22 authorities of any such subdivisions; of a nonprofit organization described in
23 subsection 2, paragraph H; or of any combination of any of these entities;

24 G. Materials related to the development of positions on legislation or materials that
25 are related to insurance or insurance-like protection or services which are in the
26 possession of an association, the membership of which is composed exclusively of one
27 or more political or administrative subdivisions of the State; of boards, commissions,
28 agencies or authorities of any such subdivisions; or of any combination of any of these
29 entities;

30 H. Medical records and reports of municipal ambulance and rescue units and other
31 emergency medical service units, except that such records and reports must be available
32 upon request to law enforcement officers investigating criminal conduct;

33 I. Juvenile records and reports of municipal fire departments regarding the
34 investigation and family background of a juvenile fire setter;

35 J. Working papers, including records, drafts and interoffice and intraoffice
36 memoranda, used or maintained by any advisory organization covered by subsection
37 2, paragraph F, or any member or staff of that organization during the existence of the
38 advisory organization. Working papers are public records if distributed in a public
39 meeting of the advisory organization;

40 K. Personally identifying information concerning minors that is obtained or
41 maintained by a municipality in providing recreational or nonmandatory educational
42 programs or services. This paragraph does not apply to records governed by Title
43 20-A, section 6001 and does not supersede Title 20-A, section 6001-A;

1 L. Records describing security plans, security procedures or risk assessments prepared
2 specifically for the purpose of preventing or preparing for acts of terrorism, but only to
3 the extent that release of information contained in the record could reasonably be
4 expected to jeopardize the physical safety of government personnel or the public.
5 Information contained in records covered by this paragraph may be disclosed to the
6 Legislature or, in the case of a political or administrative subdivision, to municipal
7 officials or board members under conditions that protect the information from further
8 disclosure. For purposes of this paragraph, "terrorism" means conduct that is designed
9 to cause serious bodily injury or substantial risk of bodily injury to multiple persons,
10 substantial damage to multiple structures whether occupied or unoccupied or
11 substantial physical damage sufficient to disrupt the normal functioning of a critical
12 infrastructure;

13 M. Records or information describing the architecture, design, access authentication,
14 encryption or security of information technology infrastructure, systems and software,
15 including records or information maintained to ensure government operations and
16 technology continuity and to facilitate disaster recovery. Records or information
17 covered by this paragraph may be disclosed to the Legislature or, in the case of a
18 political or administrative subdivision, to municipal officials or board members under
19 conditions that protect the information from further disclosure;

20 N. Social security numbers;

21 O. Personal contact information concerning public employees or concerning the
22 officers, directors or employees of a nonprofit organization described in subsection 2,
23 paragraph H, except when that information is public pursuant to other law. For the
24 purposes of this paragraph:

25 (1) "Personal contact information" means personal address, telephone number,
26 facsimile number, e-mail address, cellular telephone number, pager number and
27 username, password and uniform resource locator for a personal social media
28 account as defined in Title 26, section 615, subsection 4; and

29 (2) "Public employee" means an employee as defined in Title 14, section 8102,
30 subsection 1, except that "public employee" does not include elected officials;

31 P. Geographic information regarding recreational trails that are located on private land
32 that are authorized voluntarily as such by the landowner with no public deed or
33 guaranteed right of public access, unless the landowner authorizes the release of the
34 information;

35 Q. Security plans, staffing plans, security procedures, architectural drawings or risk
36 assessments prepared for emergency events that are prepared for or by or kept in the
37 custody of the Department of Corrections or a county jail if there is a reasonable
38 possibility that public release or inspection of the records would endanger the life or
39 physical safety of any individual or disclose security plans and procedures not
40 generally known by the general public. Information contained in records covered by
41 this paragraph may be disclosed to state and county officials if necessary to carry out
42 the duties of the officials or the Department of Corrections under conditions that protect
43 the information from further disclosure;

1 S. E-mail addresses obtained by a political subdivision of the State for the sole purpose
2 of disseminating noninteractive notifications, updates and cancellations that are issued
3 from the political subdivision or its elected officers to an individual or individuals that
4 request or regularly accept these noninteractive communications;

5 T. Records describing research for the development of processing techniques for
6 fisheries, aquaculture and seafood processing or the design and operation of a
7 depuration plant in the possession of the Department of Marine Resources;

8 U. Records provided by a railroad company describing hazardous materials
9 transported by the railroad company in this State, the routes of hazardous materials
10 shipments and the frequency of hazardous materials operations on those routes that are
11 in the possession of a state or local emergency management entity or law enforcement
12 agency, fire department or other first responder, except that records related to a
13 discharge of hazardous materials transported by a railroad company that poses a threat
14 to public health, safety and welfare are subject to public disclosure after that discharge.
15 For the purposes of this paragraph, "hazardous material" has the same meaning as set
16 forth in 49 Code of Federal Regulations, Section 105.5; and

17 V. Participant application materials and other personal information obtained or
18 maintained by a municipality or other public entity in administering a community well-
19 being check program, except that a participant's personal information, including health
20 information, may be made available to first responders only as necessary to implement
21 the program. For the purposes of this paragraph, "community well-being check
22 program" means a voluntary program that involves daily, or regular, contact with a
23 participant and, when contact cannot be established, sends first responders to the
24 participant's residence to check on the participant's well-being.

25 **Sec. 3. 1 MRSA §402, sub-§5-A** is enacted to read:

26 **5-A. Public Access Ombudsman.** "Public Access Ombudsman" means the Public
27 Access Ombudsman appointed by the Attorney General pursuant to Title 5, section 200-I,
28 subsection 1.

29 **Sec. 4. 1 MRSA §408-A, sub-§3**, as amended by PL 2015, c. 317, §1, is further
30 amended to read:

31 **3. Acknowledgment; clarification; time estimate and compliance deadline; cost**
32 **estimate.** The agency or official having custody or control of a public record shall
33 acknowledge receipt of a request made according to this section within 5 working days of
34 receiving the request and may request clarification concerning which public record or
35 public records are being requested. Within a reasonable time of receiving the request, the
36 agency or official shall provide a good faith, nonbinding estimate of the time, which may
37 not exceed 60 days unless an extension of time has been granted under subsection 3-A,
38 within which the agency or official will comply with the request, as well as a cost estimate
39 as provided in subsection 9. The agency or official shall make a good faith effort to fully
40 respond to the request within the estimated time. For purposes of this subsection, the date
41 a request is received is the date a sufficient description of the public record is received by
42 the agency or official at the office responsible for maintaining the public record. An agency
43 or official that receives a request for a public record that is maintained by that agency but
44 is not maintained by the office that received the request shall forward the request to the
45 office of the agency or official that maintains the record, without willful delay, and shall

1 notify the requester that the request has been forwarded and that the office to which the
2 request has been forwarded will acknowledge receipt and provide the time and cost
3 estimates required by this subsection within 5 working days of receiving the request.

4 **Sec. 5. 1 MRSA §408-A, sub-§3-A** is enacted to read:

5 **3-A. Deadline to fully respond; extension.** A body or an agency or an official having
6 custody or control of a public record shall fully respond to a request made according to this
7 section within 60 days of the date the request is received unless the Public Access
8 Ombudsman grants an extension of the deadline under this subsection, an action for
9 protection is pending under subsection 4-A or the court has established a date by which the
10 records must be provided to the requesting party under subsection 4-A. For purposes of
11 this subsection, the date a request is received is the date a sufficient description of the public
12 record is received by the body, agency or official at the office responsible for maintaining
13 the public record as described in subsection 3. If a body or an agency or official having
14 custody or control of any public record does not in good faith believe that it can fully
15 respond to the request within 60 days, it must file a request for extension with the Public
16 Access Ombudsman within 30 working days of receiving the request.

17 A. The request for extension must include the following information:

18 (1) The terms of the request for a public record and any modifications agreed to by
19 the party requesting the public record;

20 (2) A statement of facts that demonstrates why the body, agency or official is not
21 able to fully respond to the request for a public record within 60 days and a
22 proposed timeline for fully responding to the request;

23 (3) A description of the efforts made by the body, agency or official to discuss
24 possible modifications of the request for a public record that would reduce the time
25 it would take to fully respond to the request; and

26 (4) A statement that the body, agency or official has provided by mail a copy of
27 the request for an extension under this subsection to the party requesting the public
28 record.

29 B. If the Public Access Ombudsman finds that the body, agency or official has
30 demonstrated good cause to extend the deadline for fully responding to the request for
31 a public record, the Public Access Ombudsman shall issue a written decision
32 establishing the date by which the records must be provided to the requesting party. If
33 the Public Access Ombudsman finds that the body, agency or official has not
34 demonstrated good cause to extend the deadline for fully responding to the request, the
35 Public Access Ombudsman shall issue a written decision directing the body, agency or
36 official to fully respond to the request within 60 days of the date the request was
37 received.

38 C. A written decision of the Public Access Ombudsman under this subsection is final
39 and may not be appealed.

40 **Sec. 6. 1 MRSA §408-A, sub-§7, ¶C** is enacted to read:

41 C. In responding to a request under this section, an agency or official in the executive
42 branch or legislative branch shall comply with the requirements of Title 5, section
43 1985.

1 **Sec. 7. 1 MRSA §408-A, sub-§8, ¶G** is enacted to read:

2 G. The total fee charged by an agency or official other than a school administrative
3 unit in response to a single request for a public record under this section may not exceed
4 \$500. The total fee charged by a school administrative unit in response to all requests
5 for public records submitted by the same person in a single calendar year may not
6 exceed \$100.

7 **Sec. 8. 1 MRSA §409**, as amended by PL 2015, c. 249, §2, is further amended to
8 read:

9 **§409. Appeals**

10 **1. Records.** Any person aggrieved by a refusal or denial to inspect or copy a record
11 ~~or~~, the failure to allow the inspection or copying of a record under section 408-A or the
12 failure to fully respond to a record request within the time required under section 408-A,
13 subsection 3-A may appeal the refusal, denial or failure within 30 calendar days of the
14 receipt of the written notice of refusal, denial or failure to the Superior Court within the
15 State for the county where the person resides or the agency has its principal office. The
16 agency or official shall file a statement of position explaining the basis for refusal, failure
17 or denial within 14 calendar days of service of the appeal. If a court, after a review, with
18 taking of testimony and other evidence as determined necessary, determines such refusal,
19 denial or failure was not for just and proper cause, the court shall enter an order for
20 disclosure. Appeals may be advanced on the docket and receive priority over other cases
21 when the court determines that the interests of justice so require.

22 **2. Actions.** If any body or agency approves any ordinances, orders, rules, resolutions,
23 regulations, contracts, appointments or other official action in an executive session, this
24 action is illegal and the officials responsible are subject to the penalties hereinafter
25 provided. Upon learning of any such action, any person may appeal to any Superior Court
26 in the State. If a court, after a trial de novo, determines this action was taken illegally in
27 an executive session, it shall enter an order providing for the action to be null and void.
28 Appeals may be advanced on the docket and receive priority over other cases when the
29 court determines that the interests of justice so require.

30 **3. Proceedings not exclusive.** The proceedings authorized by this section are not
31 exclusive of any other civil remedy provided by law.

32 **4. Attorney's fees.** In an appeal under subsection 1 or 2, the court may award
33 reasonable attorney's fees and litigation ~~expenses~~ costs to the substantially prevailing
34 plaintiff who appealed the refusal, denial or failure under subsection 1 or the illegal action
35 under subsection 2 if the court determines that the refusal, denial or failure or the illegal
36 action was committed in bad faith. Attorney's fees and litigation costs may not be awarded
37 to or against a federally recognized Indian tribe.

38 ~~This subsection applies to appeals under subsection 1 or 2 filed on or after January 1, 2010.~~

39 **Sec. 9. 5 MRSA §200-I, sub-§2, ¶E**, as amended by PL 2013, c. 229, §1, is further
40 amended to read:

41 E. Make recommendations concerning ways to improve public access to public records
42 and proceedings; ~~and~~

1 record that is an electronic communication stored on a state-owned computer system. The
2 office is required to search for and identify each electronic communication stored on the
3 computer system that is responsive to the request and compile those electronic
4 communications for the agency or official that received the request.

5 4. It provides that the total fee charged by an agency or official other than a school
6 administrative unit in response to a single public records request may not exceed \$500 and
7 that the total fee charged by a school administrative unit in response to all requests for
8 public records submitted by the same person in a single calendar year may not exceed \$100.