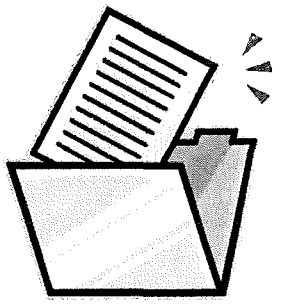
OFFICE OF THE MAINE ATTORNEY GENERAL

CONTINUING LEGAL EDUCATION
PRESENTATION

FREEDOM OF ACCESS LAW



SEPTEMBER 30, 2005
VA, TOGUS

Presenters:

Linda Pistner
Chief Deputy Attorney General
Moderator

Thomas Sturtevant
Assistant Attorney General

Leanne Robbin
Assistant Attorney General

Diane Sleek
Assistant Attorney General

Janine Massey
Assistant Attorney General

PROGRAM SCHEDULE

1:00 Introductions

1:15 Overview of the Freedom of Access Statute
Thomas Sturtevant, Assistant Attorney General

1:30 What is a Public Record?
Janine Massey, Assistant Attorney General

2:15 Break

2:30 Freedom of Access Law Exceptions
Thomas Sturtevant, Assistant Attorney General
Leanne Robbin, Assistant Attorney General

3:30 Break

3:45 Responses to Freedom of Access Requests
Diane Sleek, Assistant Attorney General

Enforcement Proceedings
Leanne Robbin, Assistant Attorney General

New Developments in FOA Law
Linda Pistner, Chief Deputy Attorney General

4:30 Adjourn

TABLE OF CONTENTS

MAINE FREEDOM OF ACCESS LAWS

1 M.R.S.A. §§ 401 - 410

Title 1: GENERAL PROVISIONS

Chapter 13: PUBLIC RECORDS AND PROCEEDINGS

Subchapter 1: FREEDOM OF ACCESS

Subchapter 1-A: EXCEPTIONS TO PUBLIC RECORDS

Subchapter 2: DESTRUCTION OR MISUSE OF RECORDS

Subchapter 3: PRINTING AND PURCHASE OF DOCUMENTS AND LAWS

Subchapter 4: EXECUTIVE ORDERS (HEADING: PL 1975, c. 360 (new))

Chapter 13: PUBLIC RECORDS AND PROCEEDINGS (HEADING: PL 1975, c. 758 (rpr))

Subchapter 1: FREEDOM OF ACCESS (HEADING: PL 1975, c. 758 (rpr))

§401. Declaration of public policy; rules of construction

The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter. [1975, c. 758 (rpr).]

This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent. [1975, c. 758 (rpr).]

PL 1975, Ch. 483, §1 (AMD).
PL 1975, Ch. 758, § (RPR).

§402. Definitions

1. Conditional approval. Approval of an application or granting of a license, certificate or any other type of permit upon conditions not otherwise specifically required by the statute, ordinance or regulation pursuant to which the approval or granting is issued. [1975, c. 758 (new).]

1-A. Legislative subcommittee. "Legislative subcommittee" means 3 or more Legislators from a legislative committee appointed for the purpose of conducting legislative business on behalf of the committee. [1991, c. 773, §1 (new).]

2. Public proceedings. The term "public proceedings" as used in this subchapter means the transactions of any functions affecting any or all citizens of the State by any of the following: [1995, c. 608, §§1-3 (amd); 2003, c. 20, Pt. OO, §2 (amd); §4 (aff).]

A. The Legislature of Maine and its committees and subcommittees;

[1975, c. 758 (new).]

B. Any board or commission of any state agency or authority, the Board of Trustees of the University of Maine System and any of its committees and subcommittees, the Board of Trustees of the Maine Maritime Academy and any of its committees and subcommittees, the Board of Trustees of the Maine Community College System and any of its committees and subcommittees;

[1989, c. 358, §1 (amd); c. 443, §1 (amd); c. 878, Pt. A, §1 (rpr); 2003, c. 20, Pt. OO, §2 (amd); §4 (aff).]

C. Any board, commission, agency or authority of any county, municipality, school district or any regional or other political or administrative subdivision;

[1991, c. 848, §1 (amd).]

D. The full membership meetings of any association, the membership of which is composed exclusively of counties, municipalities, school administrative units or other political or administrative subdivisions; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of any of these entities;

[1995, c. 608, §1 (amd).]

E. The board of directors of a nonprofit, nonstock private corporation that provides statewide noncommercial public broadcasting services and any of its committees and subcommittees; and

[1995, c. 608, §2 (amd).]

F. Any advisory organization, including any authority, board, commission, committee, council, task force or similar organization of an advisory nature, established, authorized or organized by law or resolve or by Executive Order issued by the Governor and not otherwise covered by this subsection, unless the law, resolve or Executive Order establishing, authorizing or organizing the advisory organization specifically exempts the organization from the application of this subchapter.

[1995, c. 608, §3 (new).]

3. Public records. The term "public records" means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except: [2003, c. 614, §§1-3 (amd).]

A. Records that have been designated confidential by statute;

[1975, c. 758 (new).]

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;

[1975, c. 758 (new).]

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;

[1991, c. 773, §2 (amd).]

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;

[1989, c. 358, §4 (amd).]

E. Records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Community College System and the University of Maine System. The provisions of this paragraph do not apply to the boards of trustees and the committees and subcommittees of those boards, which are referred to in subsection 2, paragraph B;

[1989, c. 358, §4 (amd); c. 443, §2 (amd); c. 878, Pt. A, §2 (rpr); 2003, c. 20, Pt. OO, §2 (amd); §4 (aff).]

F. 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 are confidential if those records 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;

[1991, c. 448, §1 (amd).]

G. 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;

[1991, c. 448, §1 (amd).]

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

[1995, c. 608, §4 (amd).]

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

[1999, c. 96, §1 (amd).]

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

[2001, c. 675, §1 (amd).]

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;

[2003, c. 392, §1 (amd).]

L. Records describing security plans, security procedures or risk assessments prepared specifically for the purpose of preventing or preparing for acts of terrorism, but only to the extent that release of information contained in the record could reasonably be expected to jeopardize the physical safety of government personnel or the public. Information contained in records 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. For purposes of this paragraph, "terrorism" means conduct that is designed to cause serious bodily injury or substantial risk of bodily injury to multiple persons, substantial damage to multiple structures whether occupied or unoccupied or substantial physical damage sufficient to disrupt the normal functioning of a critical infrastructure;

[2003, c. 614, §1 (amd).]

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

[2003, c. 614, §2 (amd).]

N. Social security numbers in the possession of the Department of Inland Fisheries and Wildlife.

[2003, c. 614, §3 (new).]

3-A. Public records further defined. "Public records" also includes the following criminal justice agency records: [2001, c. 477, §1 (amd).]

A. Records relating to prisoner furloughs to the extent they pertain to a prisoner's identity, conviction data, address of furlough and dates of furlough;

[1997, c. 714, §1 (new).]

B. Records relating to out-of-state adult probationer or parolee supervision to the extent they pertain to a probationer's or parolee's identity, conviction data, address of residence and dates of supervision; and

[2001, c. 477, §1 (amd).]

C. Records to the extent they pertain to a prisoner's, adult probationer's or parolee's identity, conviction data 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.

[2001, c. 477, §1 (amd).]

PL 1973, Ch. 433, §1 (AMD).
PL 1975, Ch. 243, § (RPR).
PL 1975, Ch. 483, §2 (AMD).
PL 1975, Ch. 758, § (RPR).
PL 1977, Ch. 164, §1,2 (AMD).
PL 1977, Ch. 696, §9 (AMD).
PL 1985, Ch. 695, §1,2 (AMD).
PL 1985, Ch. 779, §1,2 (AMD).
PL 1987, Ch. 20, §1 (AMD).
PL 1987, Ch. 402, §A1 (AMD).
PL 1987, Ch. 477, §1 (AMD).
PL 1989, Ch. 358, §1-4 (AMD).
PL 1989, Ch. 443, §1,2 (AMD).

PL 1989, Ch. 878, §A1,2 (AMD).
PL 1991, Ch. 448, §1,2 (AMD).
PL 1991, Ch. 773, §1,2 (AMD).
PL 1991, Ch. 848, §1 (AMD).
PL 1995, Ch. 608, §1-5 (AMD).
PL 1997, Ch. 714, §1 (AMD).
PL 1999, Ch. 96, §1-3 (AMD).
PL 2001, Ch. 477, §1 (AMD).
PL 2001, Ch. 675, §1-3 (AMD).
PL 2003, Ch. 20, §OO2 (AMD).
PL 2003, Ch. 20, §OO4 (AFF).
PL 2003, Ch. 392, §1-3 (AMD).
PL 2003, Ch. 614, §1-3 (AMD).

§402-A. Public records defined (REPEALED)

PL 1975, Ch. 483, §3 (NEW).
PL 1975, Ch. 623, §1 (RPR).
PL 1975, Ch. 758, § (RP).

§403. Meetings to be open to public

Except as otherwise provided by statute or by section 405, all public proceedings shall be open to the public, any person shall be permitted to attend any public proceeding and any record or minutes of such proceedings that is required by law shall be made promptly and shall be open to public inspection. [1975, c. 758 (rpr).]

PL 1969, Ch. 293, § (AMD).
PL 1975, Ch. 422, §1 (AMD).
PL 1975, Ch. 758, § (RPR).

§404. Recorded or live broadcasts authorized

In order to facilitate the public policy so declared by the Legislature of opening the public's business to public scrutiny, all persons shall be entitled to attend public proceedings and to make written, taped or filmed records of the proceedings, or to live broadcast the same, provided the writing, taping, filming or broadcasting does not interfere with the orderly conduct of proceedings. The body or agency holding the public proceedings may make reasonable rules and regulations governing these activities, so long as these rules or regulations do not defeat the purpose of this subchapter. [1975, c. 758 (rpr).]

PL 1975, Ch. 422, §2 (RPR).
PL 1975, Ch. 483, §4 (AMD).
PL 1975, Ch. 758, § (RPR).

§404-A. Decisions (REPEALED)

PL 1973, Ch. 433, §2 (NEW).
PL 1973, Ch. 704, §1,2 (AMD).
PL 1975, Ch. 758, § (RP).

§405. Executive sessions

Those bodies or agencies falling within this subchapter may hold executive sessions subject to the following conditions. [1975, c. 758 (new).]

1. Not to defeat purposes of subchapter. These sessions shall not be used to defeat the purposes of this subchapter as stated in section 401. [1975, c. 758 (new).]

2. Final approval of certain items prohibited. No ordinances, orders, rules, resolutions, regulations, contracts, appointments or

other official actions shall be finally approved at executive sessions. [1975, c. 758 (new).]

3. Procedure for calling of executive sessions. Executive sessions may be called only by a public, recorded vote of 3/5 of the members, present and voting, of such bodies or agencies. [1975, c. 758 (new).]

4. Motion contents. A motion to go into executive session must indicate the precise nature of the business of the executive session and include a citation of one or more sources of statutory or other authority that permits an executive session for that business. Failure to state all authorities justifying the executive session does not constitute a violation of this subchapter if one or more of the authorities are accurately cited in the motion. An inaccurate citation of authority for an executive session does not violate this subchapter if valid authority that permits the executive session exists and the failure to cite the valid authority was inadvertent. [2003, c. 709, §1 (amd).]

5. Matters not contained in motion prohibited. No other matters may be considered in that particular executive session. [1975, c. 758 (new).]

6. Permitted deliberation. Deliberations may be conducted in executive sessions on the following matters and no others: [1999, c. 144, §1 (amd); c. 180, §§1-3 (amd).]

A. Discussion or consideration of the employment, appointment, assignment, duties, promotion, demotion, compensation, evaluation, disciplining, resignation or dismissal of an individual or group of public officials, appointees or employees of the body or agency or the investigation or hearing of charges or complaints against a person or persons subject to the following conditions:

(1) An executive session may be held only if public discussion could be reasonably expected to cause damage to the reputation or the individual's right to privacy would be violated;

(2) Any person charged or investigated shall be permitted to be present at an executive session if he so desires;

(3) Any person charged or investigated may request in writing that the investigation or hearing of charges or complaints against him be conducted in open session. A request, if made to the agency, must be honored; and

(4) Any person bringing charges, complaints or allegations of misconduct against the individual under discussion shall be permitted to be present.

This paragraph does not apply to discussion of a budget or budget proposal;

[1987, c. 769, Pt. A, §1 (rpr).]

B. Discussion or consideration by a school board of suspension or expulsion of a public school student or a student at a private school, the cost of whose education is paid from public funds, provided that:

(1) The student and legal counsel and, if the student be a minor, the student's parents or legal guardians shall be permitted to be present at an executive session if the student, parents or guardians so desire.

[1979, c. 541, Pt.A, §3 (amd).]

C. Discussion or consideration of the condition, acquisition or the use of real or personal property permanently attached to real property or interests therein or disposition of publicly held property or economic development only if premature disclosures of the information would prejudice the competitive or bargaining position of the body or agency;

[1987, c. 477, §3 (amd).]

D. Discussion of labor contracts and proposals and meetings between a public agency and its negotiators. The parties must be named before the body or agency may go into executive session. Negotiations between the representatives of a public employer and public employees may be open to the public if both parties agree to conduct negotiations in open sessions;

[1999, c. 144, §1 (rpr).]

E. Consultations between a body or agency and its attorney concerning the legal rights and duties of the body or agency, pending or contemplated litigation, settlement offers and matters where the duties of the public body's counsel to his client pursuant to the code of professional responsibility clearly conflict with this subchapter or where premature general public knowledge would clearly place the State, municipality or other public agency or person at a substantial disadvantage.

[1975, c. 758 (new).]

F. Discussions of information contained in records made, maintained or received by a body or agency when access by the general public to those records is prohibited by statute;

[1999, c. 180, §1 (amd).]

G. Discussion or approval of the content of examinations administered by a body or agency for licensing, permitting or employment purposes; consultation between a body or agency and any entity that provides examination services to that body or agency regarding

the content of an examination; and review of examinations with the person examined; and

[1999, c. 180, §2 (amd).]

H. Consultations between municipal officers and a code enforcement officer representing the municipality pursuant to Title 30-A, section 4452, subsection 1, paragraph C in the prosecution of an enforcement matter pending in District Court when the consultation relates to that pending enforcement matter.

[1999, c. 180, §3 (new).]

PL 1975, Ch. 758, § (RPR).
PL 1979, Ch. 541, §A3 (AMD).
PL 1987, Ch. 477, §2,3 (AMD).
PL 1987, Ch. 769, §A1 (AMD).
PL 1999, Ch. 40, §1,2 (AMD).
PL 1999, Ch. 144, §1 (AMD).
PL 1999, Ch. 180, §1-3 (AMD).
PL 2003, Ch. 709, §1 (AMD).

§405-A. Recorded or live broadcasts authorized (REPEALED)

PL 1975, Ch. 483, §5 (NEW).
PL 1975, Ch. 758, § (RP).

§405-B. Appeals (REPEALED)

PL 1975, Ch. 483, §5 (NEW).
PL 1975, Ch. 758, § (RP).

§405-C. Appeals from actions (REPEALED)

PL 1975, Ch. 483, §5 (NEW).
PL 1975, Ch. 758, § (RP).

§406. Public notice

Public notice shall be given for all public proceedings as defined in section 402, if these proceedings are a meeting of a body or agency consisting of 3 or more persons. This notice shall be given in ample time to allow public attendance and shall be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned. In the event of an emergency meeting, local representatives of the media shall be notified of the meeting, whenever practical, the notification to include time and location, by the same or faster means used to notify the members of the agency conducting the public proceeding. [1987, c. 477, § 4 (amd).]

PL 1975, Ch. 483, §6 (AMD).
PL 1975, Ch. 758, § (RPR).
PL 1987, Ch. 477, §4 (AMD).

§407. Decisions

1. Conditional approval or denial. Every agency shall make a written record of every decision involving the conditional approval or denial of an application, license, certificate or any other type of permit. The agency shall set forth in the record the reason or reasons for its decision and make finding of the fact, in writing, sufficient to appraise the applicant and any interested member of the public of the basis for the decision. A written record or a copy thereof shall be kept by the agency and made available to any interested member of the public who may wish to review it. [1975, c. 758 (new).]

2. Dismissal or refusal to renew contract. Every agency shall make a written record of every decision involving the dismissal or the refusal to renew the contract of any public official, employee or appointee. The agency shall, except in case of probationary employees, set forth in the record the reason or reasons for its decision and make findings of fact, in writing, sufficient to appraise the

individual concerned and any interested member of the public of the basis for the decision. A written record or a copy thereof shall be kept by the agency and made available to any interested member of the public who may wish to review it. [1975, c. 758 (new).]

PL 1975, Ch. 758, § (NEW).

§408. Public records available for public inspection and copying

1. Right to inspect and copy. Except as otherwise provided by statute, every person has the right to inspect and copy any public record during the regular business hours of the agency or official having custody of the public record within a reasonable period of time after making a request to inspect or copy the public record. [2003, c. 709, §2 (new).]

2. Inspection, translation and copying scheduled. Inspection, translation and copying may be scheduled to occur at such time as will not delay or inconvenience the regular activities of the agency or official having custody of the public record sought. [2003, c. 709, §2 (new).]

3. Payment of costs. Except as otherwise specifically provided by law or court order, an agency or official having custody of a public record may charge fees as follows. [2003, c. 709, §2 (new).]

A. The agency or official may charge a reasonable fee to cover the cost of copying.

[2003, c. 709, §2 (new).]

B. The agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record of not more than $10 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.

[2003, c. 709, §2 (new).]

C. If translation is necessary, the agency or official may charge a fee to cover the actual cost of translation.

[2003, c. 709, §2 (new).]

D. An agency or official may not charge for inspection.

[2003, c. 709, §2 (new).]

4. Estimate. The agency or official shall provide to the requester an estimate of the time necessary to complete the request and of the total cost. If the estimate of the total cost is greater than $20, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than $100, subsection 5 applies. [2003, c. 709, §2 (new).]

5. Payment in advance. The agency or official may require a requester to pay all or a portion of the estimated costs to complete the request prior to the translation, search, retrieval, compiling and copying of the public record if: [2003, c. 709, §2 (new).]

A. The estimated total cost exceeds $100; or

[2003, c. 709, §2 (new).]

B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.

[2003, c. 709, §2 (new).]

6. Waivers. The agency or official may waive part or all of the total fee if: [2003, c. 709, §2 (new).]

A. The requester is indigent; or

[2003, c. 709, §2 (new).]

B. Release of the public record requested is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

[2003, c. 709, §2 (new).]

PL 1975, Ch. 758, § (NEW).
PL 2003, Ch. 709, §2 (RPR).

§409. Appeals

1. Records. If any body or agency or official, who has custody or control of any public record, shall refuse permission to so inspect or copy or abstract a public record, this denial shall be made by the body or agency or official in writing, stating the reason for the denial, within 5 working days of the request for inspection by any person. Any person aggrieved by denial may appeal therefrom, within 5 working days of the receipt of the written notice of denial, to any Superior Court within the State. If a court, after a trial de novo, determines such denial was not for just and proper cause, it shall enter an order for disclosure. Appeals shall be privileged in respect to

their assignment for trial over all other actions except writs of habeas corpus and actions brought by the State against individuals. [1987, c. 477, § 5 (amd).]

2. Actions. If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action shall be illegal and the officials responsibile shall be subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for the action to be null and void. Appeals shall be privileged in respect to their assignment for trial over all other actions except writs of habeas corpus or actions brought by the State against individuals. [1975, c. 758 (new).]

3. Proceedings not exclusive. The proceedings authorized by this section shall not be exclusive of any other civil remedy provided by law. [1975, c. 758 (new).]

PL 1975, Ch. 758, § (NEW).
PL 1987, Ch. 477, §5 (AMD).

§410. Violations

For every willful violation of this subchapter, the state government agency or local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture of not more than $500 may be adjudged. [1987, c. 477, § 6 (rpr).]

PL 1975, Ch. 758, § (NEW).
PL 1987, Ch. 477, §6 (RPR).

p.105 - only AG can enforce
- individual can seek civil damages

Subchapter 1-A: EXCEPTIONS TO PUBLIC RECORDS (HEADING: PL 2003, c. 709, @3 (new))

§431. Definitions

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings. [2003, c. 709, §3 (new).]

1. Public records exception. "Public records exception" or "exception" means a provision in a statute or a proposed statute that declares a record or a category of records to be confidential or otherwise not a public record for purposes of subchapter 1. [2003, c. 709, §3 (new).]

2. Review committee. "Review committee" means the joint standing committee of the Legislature having jurisdiction over judiciary matters. [2003, c. 709, §3 (new).]

PL 2003, Ch. 709, §3 (NEW).

§432. Exceptions to public records; review

1. Recommendations. During the second regular session of each Legislature, the review committee shall report out legislation containing its recommendations concerning the repeal, modification and continuation of public records exceptions and any recommendations concerning the exception review process. [2003, c. 709, §3 (new).]

2. Process of evaluation. According to the schedule in section 434, the review committee shall evaluate each public records exception that is scheduled for review that biennium. The review committee shall use the following criteria to determine whether each exception scheduled for review should be repealed, modified or remain unchanged: [2003, c. 709, §3 (new).]

A. Whether a record protected by the exception still needs to be collected and maintained;

[2003, c. 709, §3 (new).]

B. The value to the agency or official or to the public in maintaining a record protected by the exception;

[2003, c. 709, §3 (new).]

C. Whether federal law requires a record to be confidential;

[2003, c. 709, §3 (new).]

D. Whether the exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records;

[2003, c. 709, §3 (new).]

E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially

outweighs the public interest in the disclosure of records;

[2003, c. 709, §3 (new).]

F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records;

[2003, c. 709, §3 (new).]

G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records;

[2003, c. 709, §3 (new).]

H. Whether the exception is as narrowly tailored as possible; and

[2003, c. 709, §3 (new).]

I. Any other criteria that assist the review committee in determining the value of the exception as compared to the public's interest in the record protected by the exception.

[2003, c. 709, §3 (new).]

3. Assistance from committees of jurisdiction. The review committee shall seek assistance in evaluating public records exceptions from the joint standing committees of the Legislature having jurisdiction over the subject matter related to the exceptions being reviewed. The review committee may hold joint public hearings with the appropriate committees of jurisdiction. The review committee shall notify the appropriate committees of jurisdiction concerning work sessions and shall allow members of the appropriate committees of jurisdiction to participate in work sessions. [2003, c. 709, §3 (new).]

PL 2003, Ch. 709, §3 (NEW).

§433. Schedule for review of exceptions to public records

1. Scheduling guidelines. The joint standing committee of the Legislature having jurisdiction over judiciary matters shall review public records exceptions as follows. [2003, c. 709, §3 (new).]

A. In 2006 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 1;

(2) Title 2;

(3) Title 3;

(4) Title 4; and

(5) Title 5.

[2003, c. 709, §3 (new).]

B. In 2008 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 6;

(2) Title 7;

(3) Title 8;

(4) Title 9;

(5) Title 9-A;

(6) Title 9-B;

(7) Title 10;

(8) Title 11;

(9) Title 12;

(10) Title 13;

(11) Title 13-B;

(12) Title 13-C;

(13) Title 14; and

(14) Title 15.

[2003, c. 709, §3 (new).]

C. In 2010 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 16;

(2) Title 17;

(3) Title 17-A;

(4) Title 18-A;

(5) Title 19-A;

(6) Title 20;

(7) Title 20-A;

(8) Title 21-A; and

(9) Title 22.

[2003, c. 709, §3 (new).]

D. In 2012 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 23;

(2) Title 24;

(3) Title 24-A;

(4) Title 25;

(5) Title 26;

(6) Title 27;

(7) Title 28-A; and

(8) Title 29-A.

[2003, c. 709, §3 (new).]

E. In 2014 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 30;

(2) Title 30-A;

(3) Title 31;

(4) Title 32;

(5) Title 33;

(6) Title 34-A;

(7) Title 34-B;

(8) Title 35-A;

(9) Title 36;

(10) Title 37;

(11) Title 37-A;

(12) Title 38; and

(13) Title 39-A.

[2003, c. 709, §3 (new).]

PL 2003, Ch. 709, §3 (NEW).

§434. Review of proposed exceptions to public records

1. Procedures before legislative committees. Whenever a legislative measure containing a new public records exception is proposed, the joint standing committee of the Legislature having jurisdiction over the proposal shall hold a public hearing and determine the level of support for the proposal among the members of the committee. If there is support for the proposal among a majority of the members of the committee, the committee shall request the review committee to review and evaluate the proposal pursuant to subsection 2 and to report back to the committee of jurisdiction. A proposed exception may not be enacted into law unless review and evaluation pursuant to subsection 2 have been completed. [2003, c. 709, §3 (new).]

2. Review and evaluation. Upon referral of a proposed public records exception from the joint standing committee of the Legislature having jurisdiction over the proposal, the review committee shall conduct a review and evaluation of the proposal and shall report in a timely manner to the committee to which the proposal was referred. The review committee shall use the following criteria to determine whether the proposed exception should be enacted: [2003, c. 709, §3 (new).]

A. Whether a record protected by the proposed exception needs to be collected and maintained;

[2003, c. 709, §3 (new).]

B. The value to the agency or official or to the public in maintaining a record protected by the proposed exception;

[2003, c. 709, §3 (new).]

C. Whether federal law requires a record covered by the proposed exception to be confidential;

[2003, c. 709, §3 (new).]

D. Whether the proposed exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records;

[2003, c. 709, §3 (new).]

E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records;

[2003, c. 709, §3 (new).]

F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records;

[2003, c. 709, §3 (new).]

G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records;

[2003, c. 709, §3 (new).]

H. Whether the proposed exception is as narrowly tailored as possible; and

[2003, c. 709, §3 (new).]

I. Any other criteria that assist the review committee in determining the value of the proposed exception as compared to the public's interest in the record protected by the proposed exception.

[2003, c. 709, §3 (new).]

3. Report. The review committee shall report its findings and recommendations on whether the proposed exception should be enacted to the joint standing committee of the Legislature having jurisdiction over the proposal. [2003, c. 709, §3 (new).]

PL 2003, Ch. 709, §3 (NEW).

Subchapter 2: DESTRUCTION OR MISUSE OF RECORDS

§451. Lawful destruction of records (REPEALED)

PL 1965, Ch. 441, §2 (RP).

§452. Removal, secretion, mutilation or refusal to return state documents

Whoever intentionally removes any book, record, document or instrument belonging to or kept in any state office, except books and documents kept and deposited in the State Library, or intentionally secretes, alters, multilates, defaces or destroys any such book, record, document or instrument, or, having any such book, record, document or instrument in his possession, or under his control, intentionally fails or refuses to return the same to that state office, or to deliver the same to the person in lawful charge of the office where the same was

kept or deposited, shall be guilty of a Class D crime. [1977, c. 696, § 10 (rpr).]

PL 1969, Ch. 318, §1 (RPR).
PL 1977, Ch. 696, §10 (RPR).

Subchapter 3: PRINTING AND PURCHASE OF DOCUMENTS AND LAWS

§501. State agency defined

As used in this subchapter, the word "agency" shall mean a state department, agency, office, board, commission; or quasi-independent agency, board, commission, authority or institution. [1975, c. 436, § 1 (rpr).]

PL 1975, Ch. 436, §1 (RPR).

§501-A. Publications of state agencies

1. Definitions. As used in this section, the term "publications" includes periodicals; newsletters; bulletins; pamphlets; leaflets; directories; bibliographies; statistical reports; brochures; plan drafts; planning documents; reports; special reports; committee and commission minutes; informational handouts; and rules and compilations of rules, regardless of number of pages, number of copies ordered, physical size, publication medium or intended audience inside or outside the agency. [1997, c. 299, §1 (new).]

2. Production and distribution. The publications of all agencies, the University of Maine System and the Maine Maritime Academy may be printed, bound and distributed, subject to Title 5, sections 43 to 46. The State Purchasing Agent may determine the style in which publications may be printed and bound, with the approval of the Governor. [1997, c. 299, §1 (new).]

3. Annual or biennial reports. Immediately upon receipt of any annual or biennial report that is not included in the Maine State Government Annual Report provided for in Title 5, sections 43 to 46, the State Purchasing Agent shall deliver at least 55 copies of that annual or biennial report to the State Librarian for exchange and library use. The State Purchasing Agent shall deliver the balance of the number of each such report to the agency that prepared the report. [1997, c. 299, §1 (new).]

4. State agency and legislative committee publications. Except as provided in subsection 5, any agency or legislative committee issuing publications, including publications in an electronic format, shall deliver 18 copies of the publications in the published format to the State Librarian. These copies must be furnished at the expense of the issuing agency. Publications not furnished upon request will be reproduced at the expense of the issuing agency. The agency or committee preparing a publication may determine the date on which a publication may be released, except as otherwise provided by law. [1997, c. 299, §1 (new).]

5. Electronic publishing. An agency or committee that electronically publishes information to the public is only required to provide the State Librarian with one printed copy of an electronically published publication. An electronically published publication is not required to be provided to the State Librarian if the publication is also published in print or in an electronic format and is provided to the State Librarian in compliance with subsection 4 or the publication is: [1997, c. 299, §1 (new).]

A. Designed to provide the public with current information and is subject to frequent additions and deletions, such as current lists of certified professionals, daily updates of weather conditions or fire hazards; or

[1997, c. 299, §1 (new).]

B. Designed to promote the agency's services or assist citizens in use of the agency's services, such as job advertisements, application forms, advertising brochures, letters and memos.

[1997, c. 299, §1 (new).]

6. Forwarding of requisitions. The State Purchasing Agent, Central Printing and all other printing operations within State Government shall forward to the State Librarian upon receipt one copy of all requisitions for publications to be printed. [1997, c. 299, §1 (new).]

PL 1975, Ch. 436, §2 (NEW).
PL 1975, Ch. 746, §1 (AMD).
PL 1985, Ch. 584, § (AMD).
PL 1985, Ch. 779, §3 (AMD).
PL 1987, Ch. 402, §A2 (RPR).
PL 1997, Ch. 299, §1 (RPR).

§502. Property of State

All Maine reports, digests, statutes, codes and laws, printed or purchased by the State and previously distributed by law to the several

towns and plantations within the State, shall be and remain the property of the State and shall be held in trust by such towns or plantations for the sole use of the inhabitants thereof.

§503. Delivery to successor in office

All revisions of the statutes, and supplements thereto, the session laws and the Maine Reports sold or furnished to any state, county or municipal officer, shall be held in trust by said officer for the sole use of his office; and at the expiration of his term of office or on his removal therefrom by death, resignation or other cause, such officer, or if he is dead, his legal representatives, shall turn them over to his successor in office. If there is no successor to his office, such officer, or his legal representatives, shall turn over all of said publications to the State, county or municipal unit which purchased the same. [1981, c. 48, § 1 (amd).]

PL 1965, Ch. 425, §2 (RPR).
PL 1981, Ch. 48, §1 (AMD).

§504. Source of authority to be shown

All publications printed or published by the State as a requirement of law shall set forth the authority for the same at an appropriate place on each copy printed or published. Publications printed or published by the State which are not required by law shall set forth the source of funds by which the publication is printed or published at an appropriate place on each copy. This section shall not apply to publications paid for out of the legislative appropriation.

§505. Mailing lists

All addressees on mailing lists used for the distribution of all matters printed or distributed at state expense by dedicated or undedicated revenues shall at least once in every 12-month period be contacted in writing to inquire if continuance of delivery to said addressees is desired. Failure of the addressee to affirmatively reply within 30 days of the written inquiry shall cause such addressees to be removed from said mailing list. However, nothing in this section shall prevent any printed matter being distributed where otherwise required by law. [1973, c. 331 (new).]

PL 1973, Ch. 331, § (NEW).

Subchapter 4: EXECUTIVE ORDERS (HEADING: PL 1975, c. 360 (new))

§521. Executive orders

1. Available to public. The Governor shall maintain in his office a file containing a copy of every executive order issued by him or by previous governors, which is currently in effect. This file shall be open to public inspection at reasonable hours. [1975, c. 360 (new).]

2. Dissemination. A copy of every executive order shall be filed with the Legislative Council, the Law and Legislative Reference Library and every county law library in this State within one week after the Governor has issued that order. [1977, c. 696, § 11 (amd).]

PL 1975, Ch. 360, § (NEW).
PL 1977, Ch. 696, §11 (AMD).



What is a Public Record under the Maine Freedom of Access Act?

Janine Keck Massey, AAG
September 30, 2005



The Archives statute defines "record" (5 M.R.S.A. § 92-A(5))

- "Record" means all documentary material, regardless of media or characteristics, made or received and maintained by an agency in accordance with law or rule or in the transaction of its official business. "Record" does not include extra copies of printed or processed material of which official or record copies have been retained, stocks of publications and processed documents intended for distribution or use or records relating to personal matters that may have been kept in an office for convenience.

The FOAA defines "public record" (1 M.R.S.A. § 403)

- The term "public records" means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained . . . that is in the possession or custody of an agency or public official of this State or any of its political subdivisions . . . and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business.

she thinks any/my production on office equipment subject to FOAA

Some common exceptions to the FOAA definition of public records:

- Records that have been designated confidential by statute http://www.state.me.us/legis/opla/reports2.htm
- Records that would be within the scope of a privilege against discovery recognized by courts of this State (but don't count on it)
- Records detailing the architecture, design, access or security of information technology systems
- Requests for information or created records

no FOAA requirement that a summary be produced just what you have

Non-Written Records

- These records were not the focus of the FOAA (paper driven)
- The FOAA provides for payment of actual cost of translation of such records
- Such records present challenges not often present with written records (size, location, accessibility, duplicates, more)
- Make IT your best friend

can charge actual cost of producing, translating doc from old format to new format (e.g. Old Wang docs)

Some possible sources of non-written records

- Electronic documents
  - Desktop computers
  - Laptop computers
  - PDAs
  - Portable data storage
  - CD/DVD/disks
  - Servers
  - Back up tapes?
  - Forensic examination? retrieving deleted docs
- Others
  - Voice mail
  - Audio tapes
  - Video tapes
  - CD/DVD/other media storage

The FOAA and records retention schedules

- Each agency has a records retention schedule (usually geared toward paper)
  www.state.me.us/sos/arc/records/schedules/agency.htm
- The State has guidance regarding Electronic and Voice Mail retention
  http://www.state.me.us/sos/arc/general/admin/email.htm

The FOAA and records retention schedules (con't)

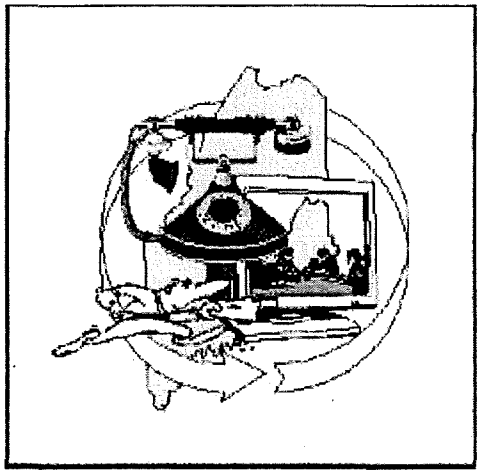
- The FOAA does not mandate that records be retained
- Follow your retention policy – be sure you are retaining what you should
- Failing to follow your retention policy will inhibit your ability to comply with the FOAA
- Issues posed by drafts/working documents

question unresolved under FOAA: print out of electronic doc suff? in civil cases discovery there have been rulings that electronic docs have meta-doc info. that needs to be provided in electronic format - printout not suff.

when litigation reasonably anticipated - doc. retention should be instituted ("litigation hold")

Electronic and Voice Mail 2.0

A Management Guide for Maine State Government



This document provides guidance to agencies regarding the record status of, and management approaches to, e-mail in Maine state government. It outlines legal requirements, types of records, and practical management options.

The transition from binding retention schedules adopted by the Archives to effective records management in the office is difficult enough with paper. In the electronic world, the challenge is often greater. This Guide is intended to ease that transition from formal mandate to practical application.

CONTENTS

What Is E-Mail?

E-mail is just another form that state records come in these days: paper, microform, photographic, audio/video tapes, motion picture film, and, yes, computer files. Formally, it is a document created or received on an electronic mail system including brief notes, more formal or substantive narrative documents, and any attachments, such as word processing and other electronic documents, which may be transmitted with the message.

E-mail received or created (incoming or outgoing) in the course of state business is an official *public record.* Depending on the topic, it may or may not be a *confidential* record under the Freedom of Access Act (FOAA). In any event, since no official public records may be destroyed unless authorized, clear authorization and a practical management system are essential to insure the proper disposition of official e-mail records. Some e-mail (personal messages, junk mail, publications) are not records and may be deleted at any time.

How Long Should I Keep E-Mail?

Just as long as you would keep any other mail! E-mail is subject to the same retention requirements as is paper correspondence. The Archives' General Schedule (covering records in all agencies) establishes retention periods for correspondence, regardless of media.

While destruction is strongly recommended at the end of the retention period, each agency may determine when actual destruction is appropriate after the expiration of the retention period. These policies are no different from what has been in place for years. What is new is our attempt to properly manage one segment of the new electronic records environment.

Non-permanent retention is based completely on the record's time-value to the business functions of the agency, including audit or other statutory requirements, and reasonable access by interested parties. *Permanent* retention is based on the record's value after it no longer serves the agency's business.

Generally, senior administrators through the division director level have a greater proportion of permanently valuable e-mail, given its greater degree of policy content. The vast majority of state employees will have little, if any, e-mail requiring permanent retention.

Why Should I Care How Long I Keep It?

To make your life easier!

If you can delete unneeded e-mail with a clear conscience, you can more easily find what you're looking for, especially if you have popped the keepers in convenient folders or mailboxes.

Organizing and managing e-mail (and other files) will save space, provide more efficient access, maintain confidentiality where needed, reduce legal exposure in "discovery" proceedings on records that

properly should have been destroyed.

It also limits your own liability for deleting records you shouldn't, and gives you authority to delete those files you should delete. **NOTE: When an employee leaves a position, computer files, including e-mail, may NOT be automatically deleted!**

Since deletion must follow the applicable retention schedules, proper management of files will make this task easier. (Be sure the user's password - for local files as well as network access - is deposited and updated with your systems administrator or other designated person.)

Not all e-mail systems provide automatic backup of your correspondence. Those that do are not substitutes for the user's file management, since backups are destroyed periodically and they do not distinguish topics or retention periods.

What About Voice Mail?

In a sense, voice mail (including answering machine messages) is a type of e-mail. In this case, the electronic system produces the messages in an audible, rather than in a visual, form.

Overwhelmingly, voice mail messages meet the test of non-record material and may be legally deleted at will.

However, keep in mind the possibility that special circumstances may apply requiring some limited retention. Some examples include the following: potential evidence in legal proceedings (bomb threats, reports of illegal activities); customer complaints about agency policy or service; oral authority by a supervisor to take certain action, with no written back-up, which may be important to retain.

Any uncertainties should be reviewed with supervisors, Records Management Services staff, or other appropriate authorities. In most cases, certified transcription to a readable format would allow deletion of the voice message. These are, of course, very special circumstances, mentioned here only to alert you to their possible occurrence.

O.K. What do I do?

Follow the advice in the rest of this *Guide*. Then, if you have any questions about the retention requirements of specific records, contact the Archives' Records Management Services Division at 287-5798 for help.

Basically, it's pretty simple. The easiest way to manage the retention and deletion of e-mail is to separate it as much as possible by broad category, by topic and then by year. When the witching hour arrives, simply delete the mailbox or folder containing the outdated records. You can have as many subdivisions as suits your workstyle, but at least separate the major categories and attach a year to them.

As outlined below, first figure out what in your e-mail are non-record materials; create special mailboxes for them; then delete them any time you want.

Second, identify how long you should keep *non-permanent* records. Finally, identify those records that should be retained *permanently*; when they are due to go to the Archives, follow the recommended guidelines.

Non-Record materials-Delete at Will!

The following are materials (not records) that may be deleted at any time, unless they become part of some official record as a result of special circumstances.

Personal Correspondence

Any e-mail not received or created in the course of state business, may be deleted immediately, since it is not an official record: the "Let's do lunch" (not a State-business lunch) or "Can I catch a ride home" type of note.

Notices Not Maintained

Since a document must be maintained by, or in the custody of, an agency to be an official record, notices with no business value after receipt and review, which are routinely discarded, are **non-record material**. These include the following:

- incoming transmittal messages (like cover letters): "enclosed (attached) find copies of . . ."
- internal office announcements: "Ms. Jones is here to see you, boss", "Joe Smith called, please call back", "Is this afternoon's meeting still on?"

Publications

Publications, promotional material from vendors, and similar materials that are "publicly available" to anyone, are not official records unless specifically incorporated into other official records. In the electronic world, this includes listserve messages (other than those you post in your official capacity),

unsolicited promotional material ("spam"), files copied or downloaded from Internet sites, etc.

These items may be immediately deleted, or maintained in a "Non-Record" mail box and deleted later, just as you might trash the unwanted publication or promotional flyer.

However, if you justify the purchase of a Zippo Filing System by incorporating the reviews you saved (from the File Manager Listserve) in your proposal to your boss, those listserve messages become official records and must be retained in accordance with the retention schedule for purchasing proposals.

Nevertheless, the vast majority of items one stores in the 'Non-record" mailbox never become official records and may be destroyed at will.

Official Records - Retain as Required

Non-Permanent Retention

Short-Term Retention - Retain for 60 days, then Delete

This transitory correspondence, while part of state government business, is purely informational with a very short time value, and includes the following:

Employee Activities
- notices of employee activities: holiday parties, softball games, etc.
- invitations and responses to invitations to work-related events

Routine Business Activities

- thank-you's: "thanks for the copy of ..."
- requests for information from the public
- *outgoing* transmittal messages (like cover letters): "enclosed (attached) find copies of . . ."
- replies to questions: "we're open 8 to 5", "our address is . . .", "the deadline is . . "

Intermediate Retention - Retain According to Schedule

These records are specified either in the "General Schedule" for all agencies, or the agency's specific retention schedules. (See examples in Appendix II and Appendix III.)

If they are not clearly specified, consult your agency Records Officer for clarification; obtain further guidance from the State Archives' Records Management Services Division: 287-5798 or Barry.Marshall@maine.gov.

Permanent Retention

Retain until Archival Copies are Made

E-mail documenting state policy or the policy process is a prime candidate for permanent retention. Check your official retention schedules or contact the Archives' Records Management Services Division.

Records with permanent value include but are not limited to the following: 1) documentation of state policy (laws, rules, court decisions), 2) documentation of the policy process (minutes of meetings, transcripts of selected hearings), 3) protection of vital public information (births, deaths, marriages; corporate charters; critical environmental data and reports).

An E-Mail Management System

Mailboxes

In addition to the IN and OUT boxes which come with your mail system, you have the option of creating other "mailboxes" or "folders". After brief periods in your IN-OUT boxes, messages should be transferred to other boxes, based on business and retention requirements. Here are some mailbox suggestions:

- **Personal E-Mail** [Delete at will]
- **Non-Record Material** [Delete at will]
- **Transitory E-Mail** [Delete after 60 days]
- **Intermediate E-Mail** [Delete by schedule]
- **Permanent E-Mail** [Delete only when permanent copy is made]

Examples

The examples in Appendixes II and III refer to correspondence-like electronic communications only: that is, e-mail that functions like letters, memos, notices, etc. As other business is performed electronically (purchase orders, time slips), refer to specific records retention schedules for guidance. Ask your Records Officer for the details or consult the listing of all agency retention schedules on the Archives' Internet Web site at the following location:

http://www.state.me.us/sos/arc/guide/guidintr.htm

Distribution Lists

If you send to a "distribution list" (not a listserve, but a specified list of individuals), you must also keep a copy of the members of that list for as long as you are required to keep the message itself. It is of little value to know that the "Security Alert!" notice went to "Swat Team 7", without knowing whether Arnold S. received the message. Nicknames present a similar problem.

Subject Lines

Fill in the Subject line on your e-mail both to help your recipient identify and file messages, and to help you file your OUT box messages that must be retained for some period.

Frequently Asked Questions . . . . .
About E-Mail Retention

Can I Print Messages, then Delete Them?

Yes, provided you print the following information with the message: name of sender, name of recipient, date and time of transmission and/or receipt. You then retain the printed message according to the appropriate records retention schedule, file them as suits your business needs, and destroy or transfer them to the Archives, depending on the schedule.

What about draft documents that undergo several revisions?

Draft documents or working papers that are circulated via e-mail, that propose or evaluate high-level policies or decisions and provide unique information that contributes to the understanding of major decisions of the agency should be preserved permanently.

Other drafts circulated for comment, which demonstrate significant revisions in the view of the author, should be scheduled as is the final product. Uncirculated drafts may be destroyed at will by the author.

What do I do with attachments I receive with e-mail?

File them with other electronic documents on your PC or network and apply the appropriate retention schedule. The principles of directory and file organization used in e-mail should be followed for content files (documents, databases, spreadsheets). If you have a PROJECTS\WORKFLOW\2000 folder in your e-mail system, you probably should have a similar one for related PC files. Attachments relevant to that project can be transferred to that directory.

What about multiple copies of the same document?

If another agency has responsibility for keeping a record copy, and if you have no business need to retain it, the document is simply a duplicate copy and subject to deletion/destruction at will. However, if the minutes of a meeting provide you with the authority to travel to Tahiti for a special seminar, definitely incorporate it into your "Effects of Sun on New Englanders" project files. You may need it.
So, minutes of meetings you attend may be destroyed at will. The secretary or other responsible person in the organization, committee or task force must retain the minutes permanently.

Where can I get help to organize my e-mail mailboxes & folders?

The Archives Records Management Services Division will offer general training as part of its

ongoing Records Officer training workshops. Our Records Management Analyst will also respond to particular requests for assistance in organizing your electronic files - PC-based as well as e-mail.

Functional Requirements for Recordkeeping Systems

These general guidelines should be considered by state agencies as they approach the management of automated office records, including e-mail:

1. Recordkeeping systems must allow for the grouping of related records, to insure their proper context.

2. Recordkeeping systems must make records accessible to authorized staff, to insure their usefulness to the agency.

3. Recordkeeping systems must preserve records for their authorized retention period, to insure their availability for agency use, to preserve the rights of the government and citizens, and to allow agencies to be held accountable for their actions.

Implementation Schedule

This statement of policy reflects current retention requirements. Users of e-mail systems should have a management system in place to insure against inadvertent violations of records retention requirements.

Appendix I

Definitions

Electronic information system
A system that contains and provides access to computerized records and other information.

Electronic mail system
A computer application used to create, receive, and transmit messages and other documents. Excluded from this definition are file transfer utilities, databases and word processing documents not transmitted on an e-mail system.

Electronic mail message
A document created or received on an electronic mail system including brief notes, more formal or substantive narrative documents, and any attachments, such as word processing and other electronic documents, which may be transmitted with the

message.

Electronic recordkeeping system
An electronic system in which records are collected, organized, and categorized to facilitate their preservation, retrieval, use, and disposition.

Record
All documentary material, regardless of media or characteristics, made or received and maintained by a state or local government agency in accordance with law and rule or in the transaction of its official business.

Record Copy
A single copy of a record retained by its custodian as the official record of a government transaction and in accordance with the appropriate records schedule. All other copies are duplicate copies, held for convenience, and may be destroyed.

Records Schedule
A listing of records retention periods formally adopted by the Archives Advisory Board and binding on all government employees.

Transmission and receipt data

1. *Transmission data*. Information in electronic mail systems regarding the identities of sender and addressee(s), and the date and time messages were sent.
2. *Receipt data.* Information in electronic mail systems regarding date and time of receipt of a message, and/or acknowledgment of receipt or access by addressee(s).

Appendix II

Bureau Director's Mailboxes

Example . . . . . .

Personal E-Mail
Family
1996 [Delete at will]
1997 [Delete at will]
Colleagues
1996 [Delete at will]
1997 [Delete at will]

Non-Record Material
Filing System Ideas, Reviews
1996 [Delete at will]
1997 [Delete at will]
National Association of Bureaucrats Newsletter
Meeting Notices
1996 [Delete at will]
1997 [Delete at will]
Position Announcements
1996 [Delete at will]

1997 [Delete at will]
Frequently Used E-Mail Addresses
[Delete at will]

Transitory E-Mail
[Delete messages after 60 days or the whole annual mailbox 60 days after the new year (March 2nd)]
Employee Activities
Bureau Employees
1996
1997
All State Employees
1996
1997
Routine Business
Transmittal of Attachments
1996
1997
Requests/Replies: Standard Information
1996
1997
Requests/Replies: Widget License Applications
1996
1997
Intermediate E-Mail
Inter-Department Correspondence [2years]
1996 [Delete 1/1/99]
1997 [Delete 1/1/00]

Appendix III

Other Correspondence Schedules

Intermediate - General Schedule

Vendor Series [GS#1, item 7, 3 years]
FY 1997 [Delete 7/1/00]
FY 1998 [Delete 7/1/01]
Accounting Series [GS#2, item 9, 3 years]
FY 1997 [Delete 7/1/00]
FY 1998 [Delete 7/1/01]
Payroll Series [GS#3, item 7, 3 years]
FY 1997 [Delete 7/1/00]
FY 1998 [Delete 7/1/01]
Income Series [GS#4, item 7, 3 years]
FY 1997 [Delete 7/1/00]
FY 1998 [Delete 7/1/01]
Budget Series [GS#5, item 3, 4 years]
FY 1997 [Delete 7/1/00]

FY 1998 [Delete 7/1/01]
Inventory Series [GS#8, item 6, 5 years]
FY 1997 [Delete 7/1/00]
FY 1998 [Delete 7/1/01]

Intermediate Agency Schedules - Examples

Department of Agriculture, Food and Rural Resources
Agricultural Marketing
General Correspondence Regarding Promotions [3 years]
1997 [Delete 1/1/01]
1998 [Delete 1/1/02]
Agricultural Production
General Correspondence Regarding Promotions [3 years]
1997 [Delete 1/1/01]
1998 [Delete 1/1/02]
Animal Industry General Correspondence [3 years]
1997 [Delete 1/1/01]
1998 [Delete 1/1/02]

Professional and Financial Regulation
Banking Bureau
Financial Institution Correspondence [6 months]
[Delete as convenient, items over 6 months old]
Inter-Department Correspondence [2 years]
1997 [Delete 1/1/00]
1998 [Delete 1/1/01]

Most agencies keep these records by fiscal year as shown in the example. Calendar year retention is fine if the required period is met.

End Note

A major element in the definition of a public record is that it **documents an official transaction**. The Freedom of Access Act defines a *public record* as "any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained . . . that is in the possession or custody of an agency or public official of this State or any of its political subdivisions . . . " with specific exceptions for confidentiality purposes. [1 MRSA 402 (3)]

The Archives and Records Management law [5 MRSA 92-A (5)] has similar language, defining a record as meeting the same criteria, without regard to confidentiality. Another section [95 (10-B)] authorizes the establishment of standards "concerning computerized and auxiliary automated information handling" necessary to the preservation of essential records.

Administrative rules affecting all state and local government agencies, adopted by the Archives, define records as "all documentary material, regardless of media or characteristics, made or received and maintained by a [state or local] government agency in

accordance with law and rule or in the transaction of its official business".

Thus, e-mail sent or received and kept for official business is a record, and must be retained for periods established by the State Archives, in cooperation with government agencies.

Final Comments

This Guide will be updated periodically to reflect changes in the State's e-mail capabilities" (including possible automatic central storage through true "electronic recordkeeping systems"), and to clarify questions posed by users.

Send questions and comments to Records Management Services, Analysis Section, 84 State House Station, Augusta, ME 04333. Phone: 287-5799; FAX: 287-5739; E-Mail: Nina Osier or contact her at 287-5799.

Go to Archives Homepage.

Page Updated May 13, 2003

United States Department of JUSTICE

FOIA

- Making a FOIA Request
- Reading Rooms
- Reference Guide
- Department Components
- Principal FOIA Contacts at Federal Agencies
- Other Federal Agencies' FOIA Web Sites
- Annual FOIA Reports
- Reference Materials

About DOJ
Publications & Documents
Press Room
Employment
Doing Business with DOJ
FOIA
Grants
Fugitives & Missing Persons
Other Federal Sites

Last Updated: 7/6/05

Freedom of Information Act (FOIA)

Like all federal agencies, the Department of Justice (DOJ) generally is required under the Freedom of Information Act (FOIA) to disclose records requested in writing by any person. However, agencies may withhold information pursuant to nine exemptions and three exclusions contained in the statute. The FOIA applies only to federal agencies and does not create a right of access to records held by Congress, the courts, or by state or local government agencies. Each state has its own public access laws that should be consulted for access to state and local records.

Each federal agency is responsible for meeting its FOIA responsibilities for its own records. A list of Principal FOIA Contacts At Federal Agencies is available from this site. Likewise, each Department of Justice component is responsible for processing FOIA requests for the records that it maintains. Consult the DOJ FOIA Reference Guide and the List of Individual DOJ Components and FOIA Contacts if you plan to make a FOIA request to the Department of Justice. Before making a FOIA request, you should first browse About DOJ, Press Room, Publications & Documents, and Reading Rooms, which contain information already available to the public. If you are not familiar with this Web site, please refer to How to Use This Home Page for more specific guidance.

United States Department of JUSTICE

FOIA

- Making a FOIA Request
- Reading Rooms
- Reference Guide
- Department Components
- Principal FOIA Contacts at Federal Agencies
- Other Federal Agencies' FOIA Web Sites
- Annual FOIA Reports
- Reference Materials

About DOJ
Publications & Documents
Press Room
Employment
Doing Business with DOJ
FOIA
Grants
Fugitives & Missing Persons
Other Federal Sites

Last Updated: 11/26/04

FOIA Reference Materials

Some of these documents are in an Adobe Acrobat (PDF) file which requires the Adobe Acrobat Reader software. Download the Reader.

- DOJ FOIA Guide (May 2004)
  The "FOIA Guide" is an extensive discussion of the Act's exemptions and its procedural aspects that is prepared by the Department of Justice's Office of Information and Privacy every two years.
  HTML or WordPerfect

- DOJ Privacy Act Overview (May 2004)
  The "Overview of the Privacy Act of 1974" is a discussion of the Privacy Act's disclosure prohibition, its access and amendment provisions, and its agency recordkeeping requirements.
  HTML or WordPerfect

- Freedom of Information Case List (May 2002)
  A compilation of judicial decisions, both published and unpublished, under the Freedom of Information Act, the Privacy Act of 1974, the Government in the Sunshine Act, and the Federal Advisory Committee Act.

- FOIA Post
  A Web-based replacement for *FOIA Update,* established by the Office of Information and Privacy in 2001.

- FOIA Update
  A newsletter containing FOIA information and guidance for federal agencies that was published by the Office of Information and Privacy from 1979-2000 (all issues compiled and keyword searchable).

- Text of the FOIA (as amended in 2002)

- Text of the Privacy Act

- Your Right to Federal Records (2004)
  This pamphlet is a joint publication of the Department of Justice and the General Services Administration concerning both the FOIA and the Privacy Act.
  HTML or PDF

- A Citizen's Guide to the FOIA (2003)
  A guide to both the Freedom of Information Act and the Privacy Act

prepared by the House Committee on Government Reform.

- Basic FOIA Training Manual
- Department of Justice FOIA Implementation Advice to Other Nations, December 12, 2002
- Guidance on Homeland Security Information, March 19, 2002
- Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the FOIA, October 12, 2001
- Presidential Memorandum for Heads of Departments and Agencies Regarding the FOIA, October 4, 1993
- Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act
- Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act
- Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June 1967

United States Department of JUSTICE

Freedom of Information Act Guide, May 2004

The "Justice Department Guide to the Freedom of Information Act" is an overview discussion of the FOIA's exemptions, its law enforcement record exclusions, and its most important procedural aspects. Prepared by the attorney and law clerk staff of the Office of Information and Privacy, it is updated and revised biennially. Any inquiry about the points addressed below, or regarding matters of FOIA administration or interpretation, should be made to the Office of Information and Privacy through its FOIA Counselor service, at (202) 514-3642 (514-FOIA), ordinarily after initial consultation with an agency FOIA officer.

TABLE OF CONTENTS

THE FREEDOM OF INFORMATION ACT

5 U.S.C. § 552

As Amended in 2002

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of an index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an

agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a

representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in

which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court other wise directs for good cause is shown.

(D) Repealed by Pub. L. 98-620, Title IV, 402(2), Nov. 8, 1984, 98 Stat. 3335, 3357.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency

proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

> (i) determine within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and
>
> (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

> (ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).
>
> (iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--
>
> > (I) the need to search for and collect the requested records from field facilities or other

establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing the request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor

in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have

jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the

records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize the withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests;

(F) the total amount of fees collected by the agency for processing requests; and

(G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.

(3) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(4) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(5) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information

from the agency pursuant to chapter 35 of title 44, and under this section.

Go to: DOJ FOIA Page // Justice Department Home Page

Last Updated December 23, 2002
usdoj/jmd/ls/caf

STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. CUM-04-371

MEDICAL MUTUAL INSURANCE
COMPANY OF MAINE, et al.

Petitioners-Appellants

v.

MAINE BUREAU OF INSURANCE and
ALESSANDRO A. IUPPA, in his capacity as
Superintendent of Insurance

Respondents-Appellees

ON APPEAL FROM CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF RESPONDENTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

STATUTES

REGULATIONS

RULES

LEGISLATIVE MATERIALS

INTRODUCTION

This case is not the typical appeal from the denial of a Freedom of Access request but, instead, is an appeal from the *grant* of a request. In this circumstance, the Court's review is governed by the Maine Administrative Procedure Act ("APA") for a determination of whether the decision was "in violation of statutory provisions," "affected by error of law," or "unsupported by substantial evidence on the whole record." 5 M.R.S.A. § 11007(4)(C) (2002). Plaintiffs do not have the right to a *de novo* review by the Court under section 409(1) of the Freedom of Access Act ("FOAA").[1] 1 M.R.S.A. § 409(1) (Supp. 2003). That section only applies to the denial of a request. *Id.*

Here, a policyholder requested a document from the Superintendent of Insurance ("Superintendent") containing salaries of highly-compensated employees that had been filed by Medical Mutual Insurance Company of Maine ("Medical Mutual.") This document is called the "Supplemental Compensation Exhibit," which is a standard form filed by insurers with their annual statement. At the time of filing, Medical Mutual asserted confidentiality for the document. Following the access request, the Superintendent allowed Medical Mutual and the requestor to present their positions as to why the Exhibit should or should not be released.

Medical Mutual argued that the Exhibit was exempt under the "confidential records" and "privileged records" exceptions of the FOAA. 1 M.R.S.A. §§ 402(3)(A) & (B) (Supp. 2003). Specifically, Medical Mutual argued "confidentiality" under the Maine Business Corporation Act ("MBCA"), and "privilege" under M.R. Evid. 507 (trade secrets) or M.R. Civ. P. 26(c)(7) (protective orders). Notwithstanding these arguments, the Superintendent granted the request. That decision was affirmed by the Superior Court.

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[1] The relevant provisions of the FOAA to this case are at 1 M.R.S.A. §§ 401-410 (1989 & Supp. 2003, *as amended, repealed, and/or enacted by* P.L. 2003, ch. 709, §§ 1, 2, and 3 (eff. July 30, 2004)). A copy of

STATEMENT OF FACTS

Insurers are required to disclose to the Superintendent the salaries of their highest-paid employees. 24-A M.R.S.A § 423(1) (2000). By Memorandum dated October 25, 2002, and incorporated instructions, the Superintendent directed insurers to file the Supplemental Compensation Exhibit with the Bureau. (App. at 68-72.)[2] Prior to this time, the Superintendent permitted insurers to maintain the completed form on site at corporate headquarters available for review by Bureau representatives rather than being filed with the agency. (App. at 48.)

On or about February 28, 2003, Medical Mutual filed its 2002 Supplemental Compensation Exhibit and requested that it be maintained as a confidential document. (App. at 40.) At that time, Medical Mutual made no showing in support of its claim of confidentiality. *Id.* The Superintendent took no action on the claim of confidentiality when initially made, and was not required to do so.

The Exhibit contains compensation information for Medical Mutual's chief executive officer and for its next 5 most highly compensated officers, and for each of its 12 directors. (App. at 41.) The annual compensation information for the officers covers three years (2000, 2001, and 2002) and one year for the directors. *Id.*

On June 1, 2003, Dr. Roediger made a Freedom of Access request for a copy of the Exhibit. (App. at 42.) Prior to acting on the request, the Superintendent directed Medical Mutual to "provide a detailed written response together with supporting legal analysis as to: (a) why the Supplemental Compensation Exhibit is not a public record pursuant to the

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P.L. 2003, ch. 709 is included in the Supplement of Legal Authorities ("Suppl.") attached hereto.

[2] A copy of the complete administrative record is included in the Appendix. (App. at 36-74.) The Certification of Record provides an index. (App. at 37-39.)

provisions of Maine's Freedom of Access Laws, and (b) which exception protects the Supplemental Compensation Exhibit from being made publicly available for inspection and copying pursuant to the provisions of Maine's Freedom of Access Laws." (App. at 53-54.)

In presenting its position, Medical Mutual provided seven pages of written argument and one item of documentary evidence. (App. at 48-49, 50, 57-61.) Medical Mutual argued that the Exhibit is exempt under 1 M.R.S.A. § 402(3)(A) ("Exception A") by the MBCA (App. at 48, 59-60), and under 1 M.R.S.A. § 402(3)(B) ("Exception B") by the rule 507 trade secret privilege (App. at 57-58) or civil procedure rule 26(c)(7) (App. at 60). 1 M.R.S.A. §§ 402(3)(A) & (B) (Supp. 2003). Medical Mutual also argued that the request violated the "proper purpose" standard for shareholder corporate record inspection rights under the MBCA (App. at 48, 59), and that the release of the document would violate the officer's and director's personal privacy rights (App. at 49, 61).

The Bureau made an informal administrative forum available for Medical Mutual and the doctor to present their positions. (App. at 53-54, 62.) In availing itself of that forum, Medical Mutual never argued that it was insufficient or otherwise objectionable. Instead, Medical Mutual's legal counsel merely requested that "[i]f the Bureau concludes that it disagrees with [Medical Mutual's] conclusions [in support of non-disclosure], . . . that [Medical Mutual] be given a week to consider its options in this matter." (App. at 61.) The Superintendent complied with that request.

On August 7, 2003, the Superintendent granted access to the Exhibit, but delayed its release for a two-week period. (App. at 73-74.) Prior to the scheduled release of the Exhibit,

Medical Mutual filed a multi-count complaint with the Superior Court.[3] By agreement of the parties and pursuant to order of the court, disclosure remained delayed during the intermediate appellate proceeding. *See* Superior Court Order issued August 20, 2003.

By *Decision on 80C Review* dated June 4, 2004, the Superior Court affirmed the grant of the access request. (App. at 10-14.) The Court found that Medical Mutual "has not established that the Exhibit should be included in either [Exception A or B]."[4] *Decision on 80C Review* at p. 3 (App. at 12). Under Exception A, the court rejected Medical Mutual's reliance on the MBCA as a "confidential records statute" explaining that the MBCA is inapplicable "because Rodeiger [sic] is not requesting corporate information from the corporation." Id. The court held that Medical Mutual's salary information was not exempt under Exception B "because it cannot be said to be a 'trade secret'" where Medical Mutual did not establish "independent economic value." Id. at pp. 3-4, and n.1 (App. at 12-13, and n. 1). The court rejected Medical Mutual's assertion that the decision to release the Exhibit constituted "illegal rulemaking." Id. at p. 4 (App. at 13). Finally, the court ordered that the Exhibit remain confidential for 21 days from the date of the decision. Id. at p. 5 (App. at 14).

On June 18, 2004, Medical Mutual filed a Notice of Appeal to the Law Court. By agreement of the parties and pursuant to order of the court, the Exhibit will continue to be un-disclosed until the issuance of a decision. *See* Law Court Order issued June 23, 2004.

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[3] The complaint included three counts: Count I, Appeal of Freedom of Access Decision; Count II, Rule 80C Appeal; and Count III, Declaratory Judgment Act. The Superior Court dismissed Counts I and III and ruled that the case would proceed solely as a Rule 80C judicial review proceeding under Count II. *Medical Mut. Ins. Co. v. Maine Bur. of Ins.*, 2003 Me.Super. LEXIS 264.

[4] The Superior Court's decision substantively addressed Medical Mutual's reliance on Exceptions A and B, but rejected those arguments. The decision mistakenly cites to FOAA section 402(3)(C) for the "privileged records exception." The correct cite for that exception is FOAA section 402(3)(B).

ISSUE ON APPEAL

Whether Medical Mutual Met Its Burden Of Demonstrating That The Exhibit Is Exempt From Disclosure Under A Confidential Records Statute Or By A Judicially Recognized Privilege.

ARGUMENT

Medical Mutual Did Not Meet Its Burden Of Demonstrating That The Exhibit Is Exempt From Disclosure Under A Confidential Records Statute Or By A Judicially Recognized Privilege.

I. STANDARD OF REVIEW

This case is an appeal from the *grant* of a Freedom of Access request. While Medical Mutual attempted to bring an action for traditional *de novo* review under the FOAA, the Superior Court dismissed that claim. *Medical Mut. Ins. Co. v. Maine Bur. of Ins.*, 2003 Me.Super. LEXIS 264. The plain meaning of the FOAA does not provide a cause of action to enjoin an agency from disclosing information. 1 M.R.S.A. § 409(1) (2002); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 294 (1979).[5] The only action under the FOAA is to compel disclosure of information. That action is inapplicable to this case.

In the federal context, the cause of action for non-disclosure is called a "reverse Freedom of Information Act [FOIA]" challenge. *Brown*, 441 U.S. at 285. In *Brown*, the Supreme Court held that reverse-FOIA actions are not actions under FOIA but, rather, are actions under the APA. *Id.* at 290-94, 316-19. That holding has been repeatedly followed by federal circuit courts. *OSHA Data / CIH, Inc. v. Department of Labor*, 220 F.3d 153, 160 (3d Cir. 2000); *RSR Corp. v. Browner*, 1997 U.S. App. LEXIS 5523, *6-7 (2d Cir. 1997); *Pacific Architects &*

[5] *See Shaw v. Jendzejec*, 1998 ME 208, ¶ 4, 717 A.2d 367, 369 (stating that it is "routine practice" for the Law Court to utilize how other jurisdictions interpret similar statutes in deciding cases.)

Eng'rs., Inc. v. United States Dep't. of State, 906 F.2d 1345, 1347-48 (9th Cir. 1990); *Acumenics Research & Tech. v. Department of Justice*, 843 F.2d 800, 804 (4th Cir. 1988).

Thus, under the APA, the Superintendent's decision may be reversed or modified by the Court if it determines that the:

> ...findings, inferences, conclusions or decisions are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; (3) Made upon unlawful procedure; (4) Affected by bias or error of law; (5) Unsupported by substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion.

5 M.R.S.A. § 11007(4)(C) (2002). The burden of proof is on Medical Mutual as a challenger of the decision. *See Fryeburg Health Care Ctr. v. Department of Human Servs.*, 1999 ME 122, ¶ 7, 734 A.2d 1141, 1143. The court is limited to a review of the administrative record, with few exceptions that are not applicable to the instant case. 5 M.R.S.A. § 11006(1) (2002). Medical Mutual "must prove that no competent evidence supports the [Superintendent's] decision and that the record compels a contrary conclusion." *Bischoff v. Board of Trustees*, 661 A.2d 167, 170 (Me. 1995). When an agency concludes that a party with the burden of persuasion fails to meet that burden, the appellate court will reverse that determination only if the record compels a contrary conclusion to the exclusion of any other inference. *See Hale-Rice v. Maine State Retirement Sys.*, 691 A.2d 1232, 1237 (Me. 1997).

The evidence in the record shows that Medical Mutual did not meet its burden of demonstrating that the Exhibit is exempt under a confidential records statute (Exception A) or by a judicially recognized privilege (Exception B). The Superintendent's decision should be affirmed.

II. THE EXHIBIT IS A PUBLIC RECORD

The Exhibit is a public record because it is required under the Insurance Code to be filed with the Superintendent, is used to perform his statutory responsibilities, and does not fall within any exception.[6] The document, therefore, must be disclosed to the public.

Section 423(1) of the Insurance Code requires Maine-licensed insurers to "file with the superintendent" an annual statement, including required schedules and supplements thereto. 24-A M.R.S.A § 423(1) (2000). The Legislature could not have been clearer in establishing this reporting requirement, and Medical Mutual does not dispute that the Exhibit is a part of the annual statement required by section 423(1). *Id.*

The purposes of the Insurance Code's filing requirement are multi-faceted. They include, among other factors, the Superintendent's statutory responsibilities: (a) to evaluate an insurer's "financial condition, transactions and affairs" under 24-A M.R.S.A § 423(1); and (b) to determine whether board of director compensation constitutes "a reasonable fee for lawful services actually rendered to the insurer" under 24-A M.R.S.A § 3413(4).[7] 24-A M.R.S.A § 423(1) (2000); 24-A M.R.S.A § 3413(4) (2000). These are essential governmental functions of

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[6] The term "public record" is expansively defined to mean a document filed with a state agency that "has been received or prepared for use in connection with the transaction of public or governmental business." 1 M.R.S.A. § 402(3) (Supp. 2003). The Compensation Exhibit clearly fits within this expansive statutory definition.

[7] Medical Mutual expends 3 pages in its brief criticizing the Superintendent's reference to the National Association of Insurance Commissioner's (NAIC) instructions in his decision. (Blue Br. at pp. 8-10.) A copy of the NAIC "Instructions For Completing The Supplemental Compensation Exhibit" is included in the administrative record. *See* NAIC Sup. Inst. 9-1 (App. at 67). The instructions were not independently relied on by the Superintendent to decide whether to release the Exhibit. Instead, the reference to the instructions was to provide additional support for the governmental purposes behind the annual statement filing requirement as related to the Compensation Exhibit. Thus, the Superintendent explained: "Specifically as to Supplemental Compensation Exhibit, the [] NAIC instructions state that the purpose of the Exhibit is to disclose information concerning compensation levels of senior management and directors that could 'negatively impact an insurer's financial condition.'" (App. at 73.) The Superintendent did not commit legal error by using the NAIC instructions in his decision-making.

the Superintendent who is vested with the obligations to protect the insuring public, to maintain the integrity of the insurance marketplace, and to oversee the financial condition of Maine-licensed insurers.[8]

The public has a right of access to the Compensation Exhibit unless it is shown to meet one of the strictly construed exceptions under sections 402(3)(A) through (M) of the FOAA. 1 M.R.S.A. § 402(3)(A)-(M) (Supp. 2003). As explained below, Medical Mutual did not meet its burden of demonstrating that the Exhibit is exempt from disclosure.

III. THE EXHIBIT IS NOT EXEMPT UNDER A CONFIDENTIAL RECORDS STATUTE OR BY A JUDICIALLY RECOGNIZED PRIVILEGE

"[B]ecause the Freedom of Access Act mandates that its provisions 'shall be liberally construed,' [] '[the Court] must interpret strictly any statutory exceptions to its requirements.'" *Springfield Terminal Ry. Co. v. DOT*, 2000 ME 126, ¶ 8, 754 A.2d 353, 356 (*quoting case omitted*). There must be a clear legislative purpose to exempt records from disclosure in the actual words of the statute based on the "plain meaning rule." *Id.*

The Legislature, in defining what a public record is, was explicit in enumerating the exceptions to that definition. *See* 1 M.R.S.A. § 402(3)(A)-(M) (Supp. 2003). It is a well-settled rule of statutory construction that express mention of one concept implies the exclusion of others not listed. *Musk v. Nelson*, 647 A.2d 1198, 1201 (Me. 1994). By explicitly listing the exceptions, the Legislature implicitly denied the availability of any others. *Id.*, at 1202.

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[8] Comparable to the Superintendent's regulatory obligations, the U.S. Securities and Exchange Commission ("SEC") is responsible for protecting investors and maintaining the integrity of the securities markets. Federal securities laws and regulations require regulated firms to disclose executive compensation information materially identical to that contained in the Compensation Exhibit. *See* 17 C.F.R. § 229.402 (2004). Notwithstanding the SEC's longstanding disclosure requirement, it has not been struck-down for any of the reasons asserted by Medical Mutual in this case. Neither does the Superintendent's decision to release the Exhibit violate Medical Mutual's or its employee's rights.

"In construing the Freedom of Access Act [the Court] ha[s] kept steadily before [it] the legislature's declared purpose that to a maximum extent the public's business must be done in public." *Moffet v. City of Portland*, 400 A.2d 340, 347-348 (Me. 1979). "The Act . . . 'shall be liberally construed and applied to promote its underlying purposes and policies.' 1 M.R.S.A. § 401." Id., at 348. "The purpose of FOAA is to open public proceedings and require that public actions and records be available to the public." *Town of Burlington v. HAD No. 1*, 2001 ME 59, ¶ 13, 769 A.2d 857, 861. An agency's access law duty is to disclose records. *See DeLorme Publ. Co. v. NOAA*, 907 F.Supp. 10, 12 (D. Me. 1995).[9]

It is the Legislature's function, and not the courts, to resolve the conflict that exists between the public interest in open access to government records on the one hand, and the public interest in preventing access to information on the other. *See Lewiston Daily Sun v. Lewiston*, 596 A.2d 619, 621 (Me. 1991). The judiciary's role in analyzing the strictly construed statutory exceptions is to "apply what the legislature has plainly dictated." *Bangor Publ'g. Co. v. Bangor*, 544 A.2d 733, 736 (Me. 1988).[10] "The burden of establishing the applicability of an exemption to [disclosure] rests squarely on the party claiming the exemption." *Underwood v. City of Presque Isle*, 1998 ME 166, ¶ 19, 715 A.2d 148, 154 (*quoting cite omitted*).

Administratively, Medical Mutual failed to demonstrate that the Exhibit was exempt under any of the FOAA's strictly construed exceptions. Judicially, Medical Mutual has

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[9] "Cases arising under the [federal FOIA] are useful in analyzing the scope of [the Maine FOAA]." *Campbell v. Town of Machias*, 661 A.2d 1133, 1136 (Me. 1995).

[10] In *Bangor Publishing v. Bangor*, the court explained that the concern that the disclosure of job applicants may inhibit the City's efforts to recruit the best available people for its openings "is more properly addressed to the legislature than to the judiciary." Id. As is evident by P.L. 2003, ch. 709 and Resolve 2003, ch. 83, the Legislature has undertaken an ongoing process of actively examining the statutory public record exceptions. (*See* Suppl. at 1-5, 7-8.) Medical Mutual's public policy arguments about the effects of disclosure of the Exhibit should be addressed by the Legislature, not by the Court.

not proven that the Superintendent's decision was "in violation of statutory provisions," "affected by error of law," or "unsupported by substantial evidence on the whole record" under the APA.

A. Maine Lawmakers Have Not Adopted A "Confidential Commercial Information" Exception Under The FOAA.

Medical Mutual presented lengthy argument and federal case-law analysis to persuade the Court that Maine law protects "confidential commercial information" from disclosure if release of the information would result in competitive harm. (Blue Br. at pp. 16-20.) This position is based on the federal FOIA which provides an exception for "trade secret and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (2000) ("Exemption 4"). The federal law is much broader than Maine's "privileged records exception."

FOAA Exception B reads in its entirety: "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." 1 M.R.S.A. § 402(3)(B) (Supp. 2003) (emphasis added). Contrast this to FOIA Exemption 4 which applies to "trade secret *and* commercial or financial information" that is "privileged *or* confidential." Conversely, Exception B neither applies to confidential information nor to commercial or financial information (unless it is privileged). Under the FOAA, confidentiality is addressed under Exception A. As explained in subpart III(D) below at pp. 17-20, that exception does not apply in the circumstances of this case.

In none of the 13 exceptions did the Legislature exempt "confidential commercial or financial information" from disclosure. 1 M.R.S.A. § 402(3)(A)-(M) (Supp. 2003). Although

such information may be protected under the FOAA, the statute does not provide an independent exception for this information. Instead, one has to work through section 402(3)(A) through (M) to determine whether particularized commercial or financial information is protected.[11] *Id.* It is the Legislature's function, and not the courts, to resolve the conflict that exists between the public interest in open access to government records on the one hand, and the public interest in preventing access to confidential commercial or financial information on the other. *See Lewiston Daily Sun*, 596 A.2d at 621. In performing this function, Maine lawmakers did not independently exempt "confidential commercial or financial information." This is the very province of the Legislature which is currently undertaking a thorough re-examination of the FOAA. (*See* Suppl. at 1-5, 7-8.) Heightened judicial restraint is appropriate under these circumstances.

Because Medical Mutual incorrectly equates federal Exemption 4 to a non-existent Maine FOAA exception, the "substantial competitive harm" standard applied by federal courts is inapplicable to this case. The federal standard is based on the "confidential commercial or financial information" prong of the federal exemption. As explained, the Maine FOAA does not contain such an exception and, therefore, the federal standard and case-law do not apply to this Court's state-law analysis.[12]

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[11] For example, insurers are required to file risk-based capital reports with the Superintendent. 24-A M.R.S.A. § 6452(1) (2000). The reports contain confidential commercial and financial information concerning the amount of capital a company needs to support its overall business operations. While there is no FOAA exception for "confidential commercial and financial information," section 6458 of the Insurance Code makes non-public components of risk-based capital reports confidential. 24-A M.R.S.A. § 6458(1) (2000). Accordingly, the confidential commercial and financial information contained in the reports is exempt under Exception A.

[12] If, *arguendo*, the federal "substantial competitive harm" standard were applicable, Medical Mutual nonetheless failed to meet its burden of demonstrating that it would be substantially injured by the release of the Exhibit to the degree necessary to overcome the legislative mandate of open government

B. The Exhibit Is Not Privileged By Virtue Of Civil Procedure Rule 26(c)(7).

Medical Mutual argues that the Exhibit is exempt under Exception B because the document would be protected from discovery under rule 26(c)(7). (Blue Br. at pp. 15-16.) Exception B reads in its entirety: "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." 1 M.R.S.A. § 402(3)(B) (Supp. 2003) (emphasis added). It is undisputed that discovery privileges protect records from disclosure, as do evidentiary privileges. It is for this reason that the Law Court appropriately refers to Exception B as the "privileged records exception." *Moffett*, 400 A.2d at 346. Exception B, however, is limited to "privileged" matter – it does not protect "confidential" information. Confidentiality is covered by Exception A which, as discussed in subpart III(D) below at pp. 17-20, does not apply in the circumstances of this case.

The sole purpose of rule 26(c) is to authorize a judge, in the exercise of discretion, to preclude, limit, or condition disclosure of otherwise discoverable information "for good cause shown" and "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[13] M.R. Civ. P. 26(c). "Materials which are subject to a protective order under rule 26(c)(7) are not privileged for purposes of FOIA Exemption 4. . ."[14]

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established by the FOAA. (*See* Medical Mutual's conclusory statements of harm quoted in footnote 18 below at p. 16.)

[13] A court's decision to issue a rule 26(c) protective order rests on a balancing of various factors: the need for the information, its relevance, the burden of responding, and the harm which disclosure would cause. *See Burka v. U.S. Dept. of Health and Human Services*, 87 F.3d 508, 517 (D.C. Cir. 1996). Several of these factors are not pertinent to access law analysis. "Relevance and need mean nought, since by statute a FOIA requester need not disclose either, and any burdensomeness of a request is accounted for in other provisions of the FOIA statute." *Id.*

[14] FOIA Exemption 4 provides an exception for "trade secret and commercial or financial information

Anderson v. Health & Human Servs., 907 F.2d 936, 945 (10th Cir. 1990). This is buttressed by other federal decisions which hold that "confidential commercial information" enjoys no privilege from disclosure, although courts may choose to protect such information. *A.H. Robins v. Fadely*, 299 F.2d 557, 562 (5th Cir. 1962) (*quoting* 4 Moore, 2d Ed. p. 2468); *Triangle Ink & Color Co. v. Sherwin-Williams Co.*, 61 F.R.D. 634, 636 (N.D. Ill. 1974); *United States v. International Business Machines Corp.*, 67 F.R.D. 40, 42, n. 1 (S.D.N.Y. 1975).

As has been recognized, "it will almost always be possible to identify some combination of circumstances under which requested information may appropriately be the subject of a [rule 26(c)] protective order." *Burka*, 87 F.3d at 517. It makes sense, therefore, that courts have found rule 26(c) not to exempt matter from disclosure. Otherwise, if Exception B were construed to apply every time a person made a rule 26(c) argument like Medical Mutual in this case, "the exception carved out of [FOIA's] overarching policy of disclosure [would] quickly swallow up the rule." *Id.*[15]

Furthermore, the interpretation that Exception B does not apply to matter protected by rule 26(c) is consistent with the general structure of the rule. *See Burka*, at 518. Litigants are allowed to obtain discovery "regarding any matter, not privileged, which is relevant to the

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obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (2000). *See* discussion in subpart III(A) above at pp. 10-11.

[15] In *Burka*, the court's analysis concerned FOIA Exemption 5 which excludes any information that is protected in civil discovery. 5 U.S.C. § 552(b)(5) (2000) (exempting: "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.") This is much broader than Maine's Exception B. Federal Exemption 5 is not confined to civil discovery privileges as is the state-law provision. Thus, while the federal-law analysis is applicable in many respects to this Court's state-law analysis, it is inapplicable in one essential aspect. The *Burka* court remanded the case for a "good cause" determination under rule 26(c) for whether the information should be protected. As has been explained, such an analysis is inapplicable under Maine law where the Legislature has confined Exception B to privileged matter. Rule 26(c) does not create a privilege and, therefore, the "good cause" standard is meaningless to an Exception B analysis.

subject matter involved in the pending action." M.R. Civ. P. 26(b)(1). "Privileged information, then, is presumptively not discoverable." *Burka*, *id.* In addition, the rule generally protects attorney work-product and expert material. *See* M.R. Civ. P. 26(b)(3), (4). "Material which falls outside [rule 26(b)(1), (3), and (4)] is presumptively discoverable." *Burka*, *id.* Applying this two-tiered arrangement into the FOAA context means that information which is privileged under rule 26(b)(1),(3), and (4) is exempt under Exception B. All other material outside of the presumptive privileges recognized by rule 26(b)(1), (3), and (4) – including material for which a protective order may be issued under rule 26(c) – is presumptively discoverable and not privileged. Such non-privileged, discoverable material includes Medical Mutual's Supplemental Compensation Exhibit.

Simply put, "there is no *per se* rule" that material which qualifies for a protective order under rule 26(c) is exempt from disclosure under the FOAA. *Hall v. United States DOJ*, 63 F.Supp.2d 14, 17 (D.D.C. 1999). Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as they arise. On the other hand, because the FOAA establishes a presumption in favor of disclosure, material must be disclosed unless it falls squarely within one of the 13 specifically enumerated exceptions. For Exception B to apply, Medical Mutual must make an independent showing of privilege. It has made no such showing.

The Law Court's holdings in the *Bangor Publishing* and *Springfield Terminal* cases are harmonious with the above-analysis and do not support Medical Mutual's position that rule 26(c)(7) protects the Exhibit from disclosure under Exception B. (Blue Br. at 11-15.) *Bangor Publ. Co. v. Town of Bucksport*, 682 A.2d 227 (Me. 1996); *Springfield Terminal Ry. Co. v. DOT*, 2000 ME 126, 754 A.2d 353. In *Bangor Publishing*, the court held that an agency had just and proper cause to deny an access request on the basis of a protective order which "specifically

states that the documents are privileged pursuant to M.R. Evid. 507 and are not 'public records' pursuant to the [FOAA]." *Id.*, 229 (*internal footnote omitted*). Rule 26(c)(7) did not protect the documents under Exception B but, instead, the rule 507 trade secret privilege. *Id.* In *Springfield Terminal*, the basis for non-disclosure was the work-product doctrine. *Springfield Terminal*, ¶ 13, at 357 ("One such privilege [for purposes of Exception B] is the work product doctrine.") (Emphasis added.)[16] In each of the *Bangor Publishing* and *Springfield Terminal* cases, therefore, it was a judicially recognized privilege that mandated non-disclosure. In the circumstances of this case there is no privilege which attaches to the Compensation Exhibit. Rule 26(c)(7) does not create such a privilege.

C. Medical Mutual's Salary Arrangements Are Not A Trade Secret.

Medical Mutual asserts, in one sentence, that "the information contained in the Confidential Compensation Exhibit is a trade secret protected under the FOA[A]." (Blue Br. at 18.) Because the rule 507 privilege gives little guidance on the meaning of "trade secret," the Law Court has relied on the Uniform Trade Secrets Act (10 M.R.S.A. §§ 1541-1548, the "UTSA" or "Uniform Act") as "a useful guidepost." M.R. Evid. 507; *HAD No. 1*, 2001 ME 59, ¶ 20, 769 A.2d at 864. To qualify for trade secret protection under the Uniform Act, the burden was on Medical Mutual to demonstrate that its compensation information: (A) derives independent economic value from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use; and (B) is subject to reasonable efforts to maintain its

[16] *See also Lewellyn v. Bell*, 635 A.2d 945, 948 (Me. 1993); *Pierce v. Grove Mfg. Co.*, 576 A.2d 196, 198 (Me. 1990) (recognizing the "work-product privilege.") The "attorney work-product privilege" is also recognized as a ground for withholding documents under the FOIA. *Public Citizen, Inc. v. Department of State*, 100 F.Supp.2d 10, 29 (D.D.C. 2000) (*citing Burka*).

secrecy.[17] 10 M.R.S.A. § 1542(4)(A) and (B) (1997). The only position presented by Medical Mutual concerns efforts to maintain the "secrecy" of the compensation information, with no argument or analysis as to "independent economic value." (Blue Br. at 16-18.)

On the issue of "secrecy," Medical Mutual provided one item of documentary evidence – an internal policy document entitled "Inquiries Regarding Medical Mutual Payroll." (App. at 50-51.) That corporate policy prohibits Medical Mutual from disclosing specific compensation information, but does not prohibit the *employees* from individually releasing their income levels. *Id.* Medical Mutual provided no evidence or argument that the officers and directors are restricted from disclosing their salaries to others. On similar facts in another case, the Law Court held that "secrecy" has not been established where the employees who are receiving the compensation are under no duty to keep the information confidential. *See HAD No. 1*, 2001 ME 59, ¶ 22, 769 A.2d at 864-865. The same result should follow in this case.

On the issue of "independent economic value," Medical Mutual did not present any evidence to the Superintendent. The conclusory assertions that disclosure would be unfair to Medical Mutual and would harm its competitive position and financial interests provides no articulated reasoning for why the information derives "independent economic value."[18] (App. at 58, 60, 61.) Conclusory statements by an entity claiming trade secret protection for salary information are insufficient in themselves to satisfy the burden. *See Svoboda v. Clear Channel Communs., Inc.*,

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[17] In *Spottiswoode*, the Law Court identified numerous factors applicable to the UTSA's trade secret definition. *Spottiswoode v. Levine*, 1999 ME 79, ¶ 27, nn. 6 & 7, 730 A.2d 166, 175 (*citations omitted*). Despite these numerous factors, Medical Mutual provided only one piece of evidence to support its claim of trade secret privilege protection. (App. at 50-51.)

[18] Medical Mutual's counsel asserts that the disclosure would "cause substantial harm to [its] competitive position. . .." (App. at 58.) Counsel further asserts that "it would be unfair to Medical Mutual and its policyholders for its competitors to know its compensation arrangements. . .." (App. at 60.) Counsel concludes that disclosure will "harm the financial interests of Medical Mutual. . .." (App. at 61.)

2003 Ohio 6201, ¶ 17 (Ohio C.A., Lucas County 2003).

In *Svoboda*, the state court (applying the Uniform Act in substance materially identical to Maine's adoption of the UTSA) held that appellants did not meet their burden of demonstrating that salary information is a trade secret. Id. Plaintiffs submitted affidavits to the trial court containing a number of conclusory statements in an attempt to show that the compensation information was a trade secret. The appeals court held that the conclusory statements were not enough to prove trade secret status. Id. Nothing in the evidence or arguments presented by Medical Mutual distinguishes its position from the *Svoboda* appellants.

In another state court decision applying the Uniform Act in substance materially identical to Maine's adoption of the UTSA, compensation information was not held to qualify for trade secret protection. *GAB Bus. Servs. v. Lindsey & Newsom Claim Servs.*, 83 Cal. App. 4th 409 (2000). Although evidence of the secrecy of salary information was undisputed, the jury "concluded the [salary] information lacked the necessary element of independent economic value [to constitute a trade secret]." Id., at 428-429. The appellate court did not find fault with that finding. Id., at 429. Instead, the court held that independent economic value must be established for salary information to be a trade secret; secrecy alone does not equal economic value. Id. Similarly, the mere fact that Medical Mutual undertook some efforts to maintain secrecy of its compensation information does not demonstrate independent economic value.

D. The Maine Business Corporation Act Is Not A "Confidential Records Statute," And Motive Is Irrelevant Under The FOAA.

Medical Mutual argues that Exception A exempts information that is not available to the public by statute, and then relies on the MBCA for non-disclosure. (Blue Br. at pp. 21-22.) The precise mandate of the Legislature succinctly protects: "[r]ecords that have been designated

confidential by statute." 1 M.R.S.A. § 402(3)(A) (Supp. 2003) (emphasis added). Nowhere in any of the corporate laws cited by Medical Mutual did the Legislature establish confidentiality for compensation information.

The provisions of current corporate law section 1602(4) and pre-existing corporate law section 626(2) relate to a request for inspection of corporate records made by a shareholder to a corporation. 13-C M.R.S.A. § 1602(4) (Supp. 2003); 13-A M.R.S.A. § 626(2) (1981), *repealed by* P.L. 2001, ch. 640, § A-1 (eff. July 1, 2003) (Suppl. at 6).[19] The plain meaning of those laws does not provide confidentiality for Medical Mutual's compensation information. Limitations on shareholder corporate record inspection rights under the MBCA do not constitute a statutory "designation of confidentiality" for purposes of Exception A.

For example, contrast the MBCA with some laws which the Law Court has held to be "confidential records statutes" under Exception A. *See Lewiston Daily Sun*, 596 A.2d 619 (Me. 1991); *Springfield Terminal Ry. Co.*, 2000 ME 126, 754 A.2d 353. In *Lewiston Daily Sun*, the court held 30-A M.R.S.A. § 2702(1) and 16 M.R.S.A. § 614(1) to be confidential records

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[19] Current corporate law section 1602(4) reads in relevant part: "A shareholder may inspect and copy the records described in subsection 3 only if: (A) The shareholder's demand is made in good faith and for a proper purpose[.]" The records included under subsection 3 are:

A. Excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under subsection 2;

B. Accounting records of the corporation; and

C. The record of shareholders.

Pre-existing corporate law section 626(2) reads in relevant part: "Any such shareholder shall have the right to inspect during normal business hours, for any proper purpose, the corporation's books and records of account, minutes of meetings, and list or record of shareholders, and copy them or make extracts therefrom."

statutes; and in *Springfield Terminal*, 23 M.R.S.A. § 63 was held to be a confidential records statute. Section 2702(1) provides that municipal personnel records "are confidential and not open to public inspection. They are not 'public records' as defined in Title 1, section 402, subsection 3." 30-A M.R.S.A. §2702(1) (1996 & Supp. 2003). Section 614(1) provides that "reports or records that contain intelligence and investigative information and that are . . . kept in the custody of [government agencies] are confidential and may not be disseminated." 16 M.R.S.A. § 614(1) (Supp. 2003). Section 63 provides that certain Department of Transportation records, correspondence, and data "are confidential and may not be open for public inspection." 23 M.R.S.A. § 63 (Supp. 2003).

Those statutory provisions are very different than the MBCA, 13-C M.R.S.A. § 1602(4) and 13-A M.R.S.A. § 626(2), which nowhere designates any information to be confidential. The corporate laws relied on by Medical Mutual simply are not confidential records statutes for purposes of FOAA Exception A.[20]

Medical Mutual also seeks non-disclosure asserting that Dr. Roediger's motive was not in furtherance of Medical Mutual's corporate interests, thereby violating the "proper purpose" standard for shareholder corporate record inspection rights under the MBCA. 13-C M.R.S.A. § 1602(4) (Supp. 2003); 13-A M.R.S.A. § 626(2) (1981), *repealed by* P.L. 2001, ch. 640, § A-1 (eff. July 1, 2003) (Suppl. at 6). (Blue Br. at 8, 21-22.) The fact that Dr. Roediger is a policyholder and shareholder (mutual owner) of Medical Mutual is irrelevant under the FOAA.

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[20] In 2003, the Legislature established the *Committee to Study Compliance with Maine's Freedom of Access Laws* ("Committee"). Resolve 2003, ch. 83 (Suppl. at 7-8), *amended and/or enacted by* P.L. 2003, ch. 709, §§ 5, 6, 7, and 8 (eff. July 30, 2004) (Suppl. at 4-5). In its Final Report, the Committee included a document identifying approximately 350 statutory public record exceptions. Neither corporate law section 1602(4) nor section 626(2) (and, in fact, no corporate laws) are identified in Appendix F. *See* Committee to Study Compliance with Maine's Freedom of Access Laws, Final Report to the 121st Legislature, 1st Regular Session, Appendix F (January 2004) (on the internet at www.state.me.us/legis/opla/reports2.htm.)

U.S. Dept. of Justice v. Reporters Committee, 489 U.S. 749, 771 (1989); *Union Leader Corp. v. City of Nashua*, 686 A.2d 310, 313 (N.H. 1996); *Finberg v. Murnane*, 623 A.2d 979 (Vt. 1992). This is because freedom of access laws "give[] any member of the public as much right to disclosure as one with a special interest in a particular document." *Reporters Committee*, at 771.

"Full disclosure by public agencies is, under [the access law], a public right and in the public interest, irrespective of the status or need of the person making the request." *M. Farbman & Sons v. New York City Health & Hospitals Corp.*, 464 N.E.2d 437, 439 (N.Y. 1984). "The party requesting records [is not required to] make any showing of need, good faith or legitimate purpose. . .." *Id.* The request by Dr. Roediger should be treated no differently than a request by a newspaper or member of the public for the same information.

E. There Is No "Personal Privacy Rights" Exception Under The FOAA.

Medical Mutual argued before the Superintendent and to the Superior Court that the release of the compensation information would violate the officer's and director's personal privacy rights, but appears to have waived this argument on appeal to the Law Court. (App. at 49, 61.) In any event, and under the circumstances of this case, the argument is unavailing.

As with "confidential commercial or financial information" for which there is no exception under the FOAA (*see* subpart III(A) above at pp. 10-11), there likewise is no state-law "personal privacy rights" exception. The federal FOIA allows agencies to withhold information contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (2000). That law does not apply in this case.

While one can "appreciate an employee's desire not to have his or her income

publicized," compensation information does not constitute facts involving "'intimate details' of a 'highly personal' nature." *See Hastings & Sons Pub. Co. v. City Treasurer of Lynn*, 375 N.E.2d 299, 304 (Mass. 1978) (*citations omitted*). Moreover, specifically in the access law context, courts have rejected privacy rights claims to compensation information:

> An invasion of privacy occurs when disclosure would subject a person to embarrassment, harassment, physical danger, disgrace, or loss of employment or friends. [*Quoting case and procedural history omitted*]. Such consequences are unlikely to result, at least to any measurable extent, from the disclosure of a[n] . . . employee's name, classification or job title, salary rate and gross salary. Thus, any invasion of privacy would be slight and insufficient to outweigh the public's right to know.

State ex rel. Petty v. Wurst, 550 N.E.2d 214, 216 (Ohio 1989) (*citing case omitted*). Likewise, this Court should not recognize any privacy right protection for the officer's and director's salaries.

IV. THE SUPERINTENDENT DID NOT VIOLATE THE APA

A. The Decision-Making Included Adequate Factfinding.

Medical Mutual argues that the Superintendent violated the APA by failing to contain any findings in his decision. (Blue Br. at pp. 23-24.) Under the FOAA, the Superintendent's obligation was to grant or deny the access request. Medical Mutual did not have the right to a hearing under the FOAA, and no other statute, regulation, or constitutional law gave Medical Mutual the right to a hearing prior to the issuance of the decision.[21] Thus, the adjudicatory proceeding provisions of the APA are not applicable. 5 M.R.S.A. § 9051(2) (2002) ("Unless a

[21] Under the Insurance Code, *following* the grant of the request Medical Mutual had the right to an administrative hearing as "a person aggrieved by any act or impending act" of the Superintendent, but did not exercise that right. 24-A M.R.S.A. § 229(2)(B) (2000). The Superintendent also had the authority to "suspend or postpone the effective date of his previous action" pending the hearing and decision thereon. 24-A M.R.S.A. § 229(6) (2000).

hearing is required by statute, the requirements of [APA subchapter IV, *Adjudicatory Proceedings*] . . . shall not apply. . ..") Therefore, Medical Mutual misapplies the statutory "findings of fact" requirement under section 9061 of the APA in the context of this case. 5 M.R.S.A. § 9061 (2002). That requirement applies to "agency decision[s] made at the conclusion of an adjudicatory proceeding." Id. It does not apply to agency action taken without a hearing.[22]

Although Medical Mutual did not have the right to a hearing prior to the issuance of the decision, federal courts have held that action to release information pursuant to the FOIA over the objections of the person that submitted the information to the government is "adjudicatory in nature" under the APA. *Browner*, 1997 U.S. App. at *9-10; *Pacific Architects*, 906 F.2d at 1348; *Acumenics*, 843 F.2d at 804-805. In this context, factfinding is held to be adequate based on informal "notice and comment" procedures. Id. The Superintendent provided Medical Mutual notice of the request for access and an opportunity to object to disclosure (App. at 53-54), carefully considered Medical Mutual's objections, and issued a ruling which provided Medical Mutual an opportunity to appeal the decision in favor of disclosure (App. at 73-74). Court's have held similar procedures to be adequate under the FOIA. Id.

Thus, on the record before him, the Superintendent found that: (a) Medical Mutual is required to file the Exhibit with the Superintendent; (b) the Exhibit is used for governmental purposes, of which the public has a right-to-know; and (c) records of the Bureau are subject to disclosure unless meeting a strictly construed statutory exception. (App. at 73-74.) On these

[22] Each of the three cases cited by Medical Mutual in support of its argument deal with agency decisions made pursuant to hearings in adjudicatory proceedings. (Blue Br. at 23-24.) Under section 9061 of the APA, those agency decisions were required to contain "findings of fact." As explained, that section does not apply to the Superintendent's decision-making in this case.

findings, the Superintendent decided to release the Exhibit. The findings are "sufficient to show the basis for [his] decision and for effective judicial review." *Credit Counseling Ctrs., Inc. v. City of S. Portland*, 2003 ME 2, ¶ 13, 814 A.2d 458, 462. The subsidiary facts are obvious or easily inferred from the record and the general factual findings. *See Christian Fellowship and Renewal Ctr. v. Town of Limington*, 2001 ME 16, ¶ 19, 769 A.2d 834, 840; *Thacker v. Konover Dev. Corp.*, 2003 ME 30, n. 4, 818 A.2d 1013, 1018 (*citing and quoting cases omitted*). The clear inference and obvious result is that the Superintendent rejected each of Medical Mutual's arguments for non-disclosure, and so should this Court.

B. The Determination To Release The Exhibit Was Not Illegal Rulemaking.

Medical Mutual argues that the Superintendent's "new policy" of applying the FOAA to the Exhibit in determining whether to release the document constituted illegal rulemaking. (Blue Br. at pp. 24-26.) While Medical Mutual would have this Court interpret the annual statement filing instructions as a blanket determination of public access for the Exhibit, the record demonstrates otherwise. (*See* App. at 43, 46, 53-54, 62, 73-74.) Thus, in accordance with his instructions, the Superintendent applied Maine's insurance and right-to-know laws in deciding whether to release the Exhibit.[23]

Under both the Insurance Code and the FOAA, the Superintendent is required to disclose public records. 24-A M.R.S.A. § 216(2) (Supp. 2003); 1 M.R.S.A. §§ 401 (1989), 408(1) (P.L. 2003, ch. 709, § 2 (eff. July 30, 2004) (Suppl. at 1). The presumption is that citizens have a right to freely access the Exhibit. The Legislature has contemplated that the annual statement and its

[23] The Bureau understands that the State of Vermont and several other state insurance departments do not grant *per se* confidentiality to the Exhibit but either make it universally public or, like Maine, subject the information to a right-to-know law analysis in response to an access request. (App. at 56.)

schedules and supplements are publicly available. *See* 24-A M.R.S.A § 6458(1) (2000) (referring to "publicly available annual statement schedule[s].") The right of access is limited by the strictly construed exceptions under sections 402(3)(A) through (M) of the FOAA. 1 M.R.S.A. § 402(3)(A)-(M) (Supp. 2003). Medical Mutual did not demonstrate to the Superintendent, and has not proven to the Court, that the Exhibit is exempt under any statutory exception. The decision to release the Exhibit was based on a correct interpretation and application of existing Maine law. It did not constitute illegal rulemaking.

CONCLUSION

By reason of the foregoing, the Court should affirm the Superintendent's grant of Dr. Roediger's Freedom of Access request and the release of Medical Mutual's Supplemental Compensation Exhibit.

Dated at Augusta, Maine this 1st day of September, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas C. Sturtevant, Jr., hereby certify that I have this day caused two copies of the foregoing Brief of Respondents-Appellees to be served upon Appellants' counsel of record by having the referenced document hand delivered to the following:

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Dated at Augusta, Maine this 1st day of September, 2004.

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SUPPLEMENT OF LEGAL AUTHORITIES

HUMAN SERVICES, DEPARTMENT OF DEPARTMENT TOTALS	2003-04	2004-05
FEDERAL EXPENDITURES FUND	$0	$500
OTHER SPECIAL REVENUE FUNDS	0	500
DEPARTMENT TOTAL - ALL FUNDS	$0	$1,000

See title page for effective date.

CHAPTER 709

H.P. 1456 - L.D. 1957

An Act To Implement the Recommendations of the Committee To Study Compliance with Maine's Freedom of Access Laws

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

Sec. 1. 1 MRSA §405, sub-§4, as enacted by PL 1975, c. 758, is amended to read:

4. Motion contents. A motion to go into executive session ~~shall~~ must indicate the precise nature of the business of the executive session and include a citation of one or more sources of statutory or other authority that permits an executive session for that business. Failure to state all authorities justifying the executive session does not constitute a violation of this subchapter if one or more of the authorities are accurately cited in the motion. An inaccurate citation of authority for an executive session does not violate this subchapter if valid authority that permits the executive session exists and the failure to cite the valid authority was inadvertent.

Sec. 2. 1 MRSA §408, as enacted by PL 1975, c. 758, is repealed and the following enacted in its place:

§408. Public records available for public inspection and copying

1. Right to inspect and copy. Except as otherwise provided by statute, every person has the right to inspect and copy any public record during the regular business hours of the agency or official having custody of the public record within a reasonable period of time after making a request to inspect or copy the public record.

2. Inspection, translation and copying scheduled. Inspection, translation and copying may be scheduled to occur at such time as will not delay or inconvenience the regular activities of the agency or official having custody of the public record sought.

3. Payment of costs. Except as otherwise specifically provided by law or court order, an agency or official having custody of a public record may charge fees as follows.

A. The agency or official may charge a reasonable fee to cover the cost of copying.

B. The agency or official may charge a fee to cover the actual cost of searching for, retrieving and compiling the requested public record of not more than $10 per hour after the first hour of staff time per request. Compiling the public record includes reviewing and redacting confidential information.

C. If translation is necessary, the agency or official may charge a fee to cover the actual cost of translation.

D. An agency or official may not charge for inspection.

4. Estimate. The agency or official shall provide to the requester an estimate of the time necessary to complete the request and of the total cost. If the estimate of the total cost is greater than $20, the agency or official shall inform the requester before proceeding. If the estimate of the total cost is greater than $100, subsection 5 applies.

5. Payment in advance. The agency or official may require a requester to pay all or a portion of the estimated costs to complete the request prior to the translation, search, retrieval, compiling and copying of the public record if:

A. The estimated total cost exceeds $100; or

B. The requester has previously failed to pay a properly assessed fee under this chapter in a timely manner.

6. Waivers. The agency or official may waive part or all of the total fee if:

A. The requester is indigent; or

B. Release of the public record requested is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

Sec. 3. 1 MRSA c. 13, sub-c. 1-A is enacted to read:

SUBCHAPTER 1-A

EXCEPTIONS TO PUBLIC RECORDS

§431. Definitions

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Public records exception. "Public records exception" or "exception" means a provision in a statute or a proposed statute that declares a record or a category of records to be confidential or otherwise not a public record for purposes of subchapter 1.

2. Review committee. "Review committee" means the joint standing committee of the Legislature having jurisdiction over judiciary matters.

§432. Exceptions to public records; review

1. Recommendations. During the second regular session of each Legislature, the review committee shall report out legislation containing its recommendations concerning the repeal, modification and continuation of public records exceptions and any recommendations concerning the exception review process.

2. Process of evaluation. According to the schedule in section 434, the review committee shall evaluate each public records exception that is scheduled for review that biennium. The review committee shall use the following criteria to determine whether each exception scheduled for review should be repealed, modified or remain unchanged:

A. Whether a record protected by the exception still needs to be collected and maintained;

B. The value to the agency or official or to the public in maintaining a record protected by the exception;

C. Whether federal law requires a record to be confidential;

D. Whether the exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records;

E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records;

F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records;

G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records;

H. Whether the exception is as narrowly tailored as possible; and

I. Any other criteria that assist the review committee in determining the value of the exception as compared to the public's interest in the record protected by the exception.

3. Assistance from committees of jurisdiction. The review committee shall seek assistance in evaluating public records exceptions from the joint standing committees of the Legislature having jurisdiction over the subject matter related to the exceptions being reviewed. The review committee may hold joint public hearings with the appropriate committees of jurisdiction. The review committee shall notify the appropriate committees of jurisdiction concerning work sessions and shall allow members of the appropriate committees of jurisdiction to participate in work sessions.

§433. Schedule for review of exceptions to public records

1. Scheduling guidelines. The joint standing committee of the Legislature having jurisdiction over judiciary matters shall review public records exceptions as follows.

A. In 2006 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 1;

(2) Title 2;

(3) Title 3;

(4) Title 4; and

(5) Title 5.

B. In 2008 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 6;

(2) Title 7;

(3) Title 8;

(4) Title 9;

(5) Title 9-A;

(6) Title 9-B;

(7) Title 10;

(8) Title 11;

(9) Title 12;

(10) Title 13;

(11) Title 13-B;

(12) Title 13-C;

(13) Title 14; and

(14) Title 15.

C. In 2010 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 16;

(2) Title 17;

(3) Title 17-A;

(4) Title 18-A;

(5) Title 19-A;

(6) Title 20;

(7) Title 20-A;

(8) Title 21-A; and

(9) Title 22.

D. In 2012 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 23;

(2) Title 24;

(3) Title 24-A;

(4) Title 25;

(5) Title 26;

(6) Title 27;

(7) Title 28-A; and

(8) Title 29-A.

E. In 2014 and every 10 years thereafter, the committee shall review exceptions codified in:

(1) Title 30;

(2) Title 30-A;

(3) Title 31;

(4) Title 32;

(5) Title 33;

(6) Title 34-A;

(7) Title 34-B;

(8) Title 35-A;

(9) Title 36;

(10) Title 37;

(11) Title 37-A;

(12) Title 38; and

(13) Title 39-A.

§434. Review of proposed exceptions to public records

1. Procedures before legislative committees. Whenever a legislative measure containing a new public records exception is proposed, the joint standing committee of the Legislature having jurisdiction over the proposal shall hold a public hearing and determine the level of support for the proposal among the members of the committee. If there is support for the proposal among a majority of the members of the committee, the committee shall request the review committee to review and evaluate the proposal pursuant to subsection 2 and to report back to the committee of jurisdiction. A proposed exception may not be enacted into law unless review and evaluation pursuant to subsection 2 have been completed.

2. Review and evaluation. Upon referral of a proposed public records exception from the joint standing committee of the Legislature having jurisdiction over the proposal, the review committee shall conduct a review and evaluation of the proposal and shall report in a timely manner to the committee to which the proposal was referred. The review committee shall use the following criteria to determine whether the proposed exception should be enacted:

A. Whether a record protected by the proposed exception needs to be collected and maintained;

B. The value to the agency or official or to the public in maintaining a record protected by the proposed exception;

C. Whether federal law requires a record covered by the proposed exception to be confidential;

D. Whether the proposed exception protects an individual's privacy interest and, if so, whether

that interest substantially outweighs the public interest in the disclosure of records;

E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records;

F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records;

G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records;

H. Whether the proposed exception is as narrowly tailored as possible; and

I. Any other criteria that assist the review committee in determining the value of the proposed exception as compared to the public's interest in the record protected by the proposed exception.

3. Report. The review committee shall report its findings and recommendations on whether the proposed exception should be enacted to the joint standing committee of the Legislature having jurisdiction over the proposal.

Sec. 4. 29-A MRSA §2251, sub-§7, as amended by PL 2003, c. 434, §27 and affected by §37, is further amended to read:

7. Report information. An accident report made by an investigating officer or a 48-hour report made by an operator as required by former subsection 5 is for the purposes of statistical analysis and accident prevention.

A report or statement contained in the accident report, or a 48-hour report as required by former subsection 5, a statement made or testimony taken at a hearing before the Secretary of State held under section 2483, or a decision made as a result of that report, statement or testimony may not be admitted in evidence in any trial, civil or criminal, arising out of the accident.

A report may be admissible in evidence solely to prove compliance with this section.

The Chief of the State Police may disclose the date, time and location of the accident and the names and addresses of operators, owners, injured persons, witnesses and the investigating officer. On written request, the chief may furnish a photocopy of the investigating officer's report at the expense of the person making the request. The cost of furnishing a copy of the report is not subject to the limitations of Title 1, section 408, subsection 3.

Sec. 5. Resolve 2003, c. 83, §4 is amended to read:

Sec. 4. Committee duties. Resolved: That the committee shall meet a total of not more than ~~4~~ 8 times to study state and local governmental compliance with Maine's freedom of access laws and other issues relating to citizens' access to public records and public proceedings. In examining these issues, the committee shall:

1. Review and analyze the Report on Public Records Audit, prepared by the Maine Freedom of Information Coalition in November 2002, and the recommendations made in the report;

2. Study what measures, if any, state and local governmental entities in Maine and in other states have taken to ensure their employees are knowledgeable about and comply with Maine's freedom of access laws or other comparable state laws;

3. Investigate and recommend ways in which governmental compliance with Maine's freedom of access laws may be meaningfully improved and calculate what, if any, costs may be associated with making such improvements;

4. Undertake a comprehensive inventory and review of the various exceptions to public access to records and proceedings found within the freedom of access laws and identify possible changes to these exceptions in order to streamline Maine law and thereby make it more easily understood and complied with by governmental employees;

5. Reconsider whether the need for any of the statutory exceptions, as currently worded, is outweighed by the State's general interest in ensuring citizens' access to public records and proceedings; ~~and~~

6. Study whether and to what extent the freedom of access laws may be used as a harassment tool against local governmental entities and what remedies may be available and appropriate to deter any such harassment; ~~and be it further~~

7. Recommend whether the personal home contact information of public employees should be confidential and not subject to disclosure;

8. Review the fees charged by agencies and officials for copies of public records and determine whether a cap on fees is appropriate and, if so, recommend the level of such a cap on copying fees;

9. Review the issues surrounding appropriate charges for remote electronic access to public records;

10. Recommend whether the court should have discretion to award attorney's fees to a party denied access to records or proceedings and, if so, under what circumstances;

11. Recommend whether the enforcement procedures of Maine's freedom of access laws, including the imposition of monetary penalties, should be modified;

12. Explore options for providing staffing assistance for the legislative review of exceptions to the definition of "public records";

13. Review the issues surrounding the extent to which voice mail and electronic mail are public records and determine if statutory changes are necessary to ensure public access to public records;

14. Review the issues surrounding the conduct of public proceedings through electronic means and the methods of ensuring public access to such proceedings;

15. Review the options for standardization and clarification of Maine law contained in the report to the Legislature, Confidentiality of Public Records (1992), prepared by the Office of Policy and Legal Analysis;

16. Review the efforts of the Department of the Attorney General to provide public access assistance to the public and entities covered by Maine's freedom of access laws; and

17. Review any other public access issues that may improve compliance with Maine's freedom of access laws and enhance public access to public proceedings; and be it further

Sec. 6. Resolve 2003, c. 83, §7-A is enacted to read:

Sec. 7-A. Funding for 2nd year of study. Resolved: That any unexpended balance of funds originally budgeted to support the work of the committee that remain within the Legislature's Miscellaneous Studies account must be used for the same purposes; and be it further

Sec. 7. Resolve 2003, c. 83, §9 is amended to read:

Sec. 9. Initial report. Resolved: That the committee shall submit ~~a~~ an initial report that includes its findings and recommendations including suggested legislation for presentation to the Joint Standing Committee on Judiciary and the Legislative Council by December 3, 2003. Following receipt and review of the report, the Joint Standing Committee on Judiciary may report out a bill to the Second Regular Session of the 121st Legislature to implement the committee's recommendations. If the committee requires a limited extension of time to conclude its study and to make its report, it may apply to the Legislative Council, which may grant the extension; and be it further

Sec. 8. Resolve 2003, c. 83, §9-A is enacted to read:

Sec. 9-A. Final report. Resolved: That, not later than November 3, 2004, the committee shall submit a final report that includes its findings and recommendations, including suggested legislation, for presentation to the First Regular Session of the 122nd Legislature. The committee is authorized to submit legislation related to its report for introduction to the First Regular Session of the 122nd Legislature at the time of submission of its report; and be it further

Sec. 9. Codification of public records exceptions. The Office of Policy and Legal Analysis and the Office of the Revisor of Statutes shall produce a bill for introduction in the First Regular Session of the 122nd Legislature that lists in the Maine Revised Statutes, Title 1, chapter 13, subchapter 1-A all the public records exceptions that exist elsewhere in the statutes, including cross-references to those exceptions.

Sec. 10. Retroactivity. Those sections of this Act that amend Resolve 2003, chapter 83, section 9 and enact Resolve 2003, chapter 83, section 9-A apply retroactively to December 3, 2003.

See title page for effective date.

CHAPTER 710

S.P. 334 - L.D. 993

An Act To Promote Economic Growth by Retaining Engineers in Maine

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

Sec. 1. 5 MRSA §12004-I, sub-§18-E is enacted to read:

18-E. Education: Financial Aid	Maine Engineers Recruitment and Retention Advisory Committee	Expenses Only	20-A MRSA §12523

CHAPTER 640

H.P. 283 - L.D. 361

An Act to Adopt the Model Business Corporation Act in Maine

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

PART A

Sec. A-1. 13-A MRSA, as amended, is repealed.

Sec. A-2. 13-C MRSA is enacted to read:

TITLE 13-C

MAINE BUSINESS CORPORATION ACT

CHAPTER 1

GENERAL PROVISIONS

SUBCHAPTER 1

GENERAL PROVISIONS

§101. Short title

This Act may be known and cited as the "Maine Business Corporation Act."

§102. Definitions

As used in this Act, unless the context otherwise indicates, the following terms have the following meanings.

1. **Articles of incorporation.** "Articles of incorporation" means the original or restated articles of incorporation and all amendments thereto. "Articles of incorporation" includes articles of merger, articles of consolidation, articles of domestication, articles of conversion, a certificate of incorporation and what has previously been designated as "articles of agreement" for a corporation and certificate of organization. "Articles of incorporation" also includes special acts of the Legislature chartering corporations that could not be organized under general acts. If any document filed under this Act restates the articles of incorporation in their entirety, the articles do not include any prior documents.

2. **Authorized shares.** "Authorized shares" means the shares of all classes that a domestic or foreign corporation is authorized to issue.

3. **Conspicuous.** "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. Words that are printed in italics or boldface or contrasting color or typed in capitals or underlined are conspicuous.

4. **Corporation; domestic corporation; domestic business corporation.** "Corporation," "domestic corporation" or "domestic business corporation" means a corporation for profit or with shares, that is not a foreign corporation, incorporated under or subject to the provisions of this Act.

5. **Deliver; delivery.** "Deliver" or "delivery" means any method of delivery used in conventional commercial practice, including delivery by hand, mail, commercial delivery and electronic transmission.

6. **Distribution.** "Distribution" means a direct or indirect transfer of money or other property, except a corporation's own shares, or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption or other acquisition of shares; a distribution of indebtedness; or otherwise.

7. **Domestic unincorporated entity.** "Domestic unincorporated entity" means an unincorporated entity whose internal affairs are governed by the laws of this State.

8. **Effective date of notice.** "Effective date of notice" has the meaning set forth in section 103.

9. **Electronic transmission; electronically transmitted.** "Electronic transmission" or "electronically transmitted" means any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval and reproduction of information by the recipient.

10. **Employee.** "Employee" includes an officer of a domestic or foreign corporation but does not include a director. A director may accept duties that make that director also an employee.

11. **Entity.** "Entity" includes a domestic or foreign business corporation; a domestic or foreign nonprofit corporation; an estate; a partnership; a trust; 2 or more persons having a joint or common economic interest; a domestic or foreign unincorporated entity; a state; the United States; and a foreign government.

12. **Filing entity.** "Filing entity" means an unincorporated entity that is created by filing a public organic document.

13. **Foreign corporation; foreign business corporation.** "Foreign corporation" or "foreign business corporation" means a corporation incorporated for profit under a law other than the law of this

Sec. 2. Report. Resolved: That, by January 15, 2004, the Commissioner of Inland Fisheries and Wildlife shall report to the Joint Standing Committee on Inland Fisheries and Wildlife and the Joint Standing Committee on Natural Resources on the progress of the mapping of high and moderate value waterfowl and wading bird habitats. The report must contain a schedule for the mapping and a projected cost to map all high and moderate value waterfowl and wading bird habitats.

See title page for effective date.

CHAPTER 83

H.P. 797 - L.D. 1079

Resolve, To Establish the Committee To Study Compliance with Maine's Freedom of Access Laws

Sec. 1. Committee established. Resolved: That the Committee to Study Compliance with Maine's Freedom of Access Laws, referred to in this resolve as "the committee," is established; and be it further

Sec. 2. Committee membership. Resolved: That the committee consists of 16 members appointed as follows:

1. One member of the Senate, appointed by the President of the Senate;

2. One member of the House of Representatives, appointed by the Speaker of the House;

3. One member representing the Maine Press Association, appointed by the President of the Senate;

4. One member representing the Maine Daily Newspapers Publishers Association, appointed by the Speaker of the House;

5. One member representing the Maine Municipal Association, appointed by the Governor;

6. One member representing the Maine Chiefs of Police Association, appointed by the Governor;

7. One member representing the Maine School Management Association, appointed by the Governor;

8. The Attorney General, or the Attorney General's designee;

9. One member representing the Maine Association of Broadcasters, appointed by the President of the Senate;

10. One member representing the Maine Freedom of Information Coalition, appointed by the Speaker of the House;

11. The Commissioner of Public Safety, or the commissioner's designee;

12. One member representing county commissioners, appointed by the President of the Senate;

13. One member representing the Maine Sheriffs' Association, appointed by the President of the Senate;

14. One member representing persons whose privacy interests are protected by the freedom of access laws, appointed by the President of the Senate;

15. One member of the public, appointed by the President of the Senate; and

16. One member of the public, appointed by the Speaker of the House; and be it further

Sec. 3. Appointments; cochairs. Resolved: That all appointments must be made no later than 30 days following the effective date of this resolve. The appointing authorities shall notify the Executive Director of the Legislative Council upon making their appointments. The legislative members named to the committee shall serve as cochairs. When the appointment of all members is completed, the cochairs of the committee shall call and convene the first meeting of the committee no later than 15 days after the last member is appointed; and be it further

Sec. 4. Committee duties. Resolved: That the committee shall meet not more than 4 times to study state and local governmental compliance with Maine's freedom of access laws and other issues relating to citizens' access to public records and public proceedings. In examining these issues, the committee shall:

1. Review and analyze the Report on Public Records Audit, prepared by the Maine Freedom of Information Coalition in November 2002, and the recommendations made in the report;

2. Study what measures, if any, state and local governmental entities in Maine and in other states have taken to ensure their employees are knowledgeable about and comply with Maine's freedom of access laws or other comparable state laws;

3. Investigate and recommend ways in which governmental compliance with Maine's freedom of access laws may be meaningfully improved and calculate what, if any, costs may be associated with making such improvements;

4. Undertake a comprehensive inventory and review of the various exceptions to public access to records and proceedings found within the freedom of access laws and identify possible changes to these exceptions in order to streamline Maine law and thereby make it more easily understood and complied with by governmental employees;

5. Reconsider whether the need for any of the statutory exceptions, as currently worded, is outweighed by the State's general interest in ensuring citizens' access to public records and proceedings; and

6. Study whether and to what extent the freedom of access laws may be used as a harassment tool against local governmental entities and what remedies may be available and appropriate to deter any such harassment; and be it further

Sec. 5. Staff assistance. Resolved: That upon approval of the Legislative Council, the Office of Policy and Legal Analysis shall provide necessary staffing services to the committee; and be it further

Sec. 6. Reimbursement. Resolved: That legislative members of the committee are entitled to receive legislative per diem, as defined in the Maine Revised Statutes, Title 3, section 2, and reimbursement for travel and other necessary expenses for their attendance at authorized meetings of the 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 committee; and be it further

Sec. 7. Funding. Resolved: That the committee may seek outside funds to advance its work. Prompt notice of solicitation of funds must be sent to the Legislative Council. Contributions to support the work of the 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 must certify to the Legislative Council that it has no pecuniary or other vested interest in the outcome of the study. Such 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 and any limitation on the use of the funds. The Executive Director of the Legislative Council administers any funds received; and be it further

Sec. 8. Committee budget. Resolved: That the cochairs of the committee, with assistance from the committee staff, shall administer the committee's budget. Within 10 days after its first meeting, the committee shall present a work plan and proposed budget to the Legislative Council for its approval. The committee may not incur expenses that would result in the committee's exceeding its approved budget; and be it further

Sec. 9. Report. Resolved: That the committee shall submit a report that includes its findings and recommendations including suggested legislation for presentation to the Joint Standing Committee on Judiciary and the Legislative Council by December 3, 2003. Following receipt and review of the report, the Joint Standing Committee on Judiciary may report out a bill to the Second Regular Session of the 121st Legislature to implement the committee's recommendations. If the committee requires a limited extension of time to conclude its study and to make its report, it may apply to the Legislative Council, which may grant the extension; and be it further

Sec. 10. Appropriations and allocations. Resolved: That the following appropriations and allocations are made.

LEGISLATURE

Committee to Study Compliance with Maine's Freedom of Access Laws

Initiative: Provides a base allocation of Other Special Revenue funds to authorize expenditures from this dedicated account.

Other Special Revenue Funds	2003-04	2004-05
All Other	$500	$0
Other Special Revenue Funds Total	$500	$0

See title page for effective date.

CHAPTER 84

S.P. 193 - L.D. 553

Resolve, To Study the Needs of Deaf and Hard-of-hearing Children and Adolescents

Sec. 1. Task force established. Resolved: That the Task Force to Study the Needs of Deaf and Hard-of-hearing Children and Adolescents, referred to in this resolve as "the task force," is established; and be it further

Sec. 2. Task force membership. Resolved: That the task force consists of 18 members appointed as follows:

Prev: Chapter 3 §613
Next: Chapter 3 §615

Download Chapter 3 PDF, Word (RTF)

Download Section 614 PDF, Word (RTF)

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Title 16: COURT PROCEDURE -- EVIDENCE

Chapter 3: RECORDS AND OTHER DOCUMENTS

Subchapter 8: CRIMINAL HISTORY RECORD INFORMATION ACT

§614. Limitation on dissemination of intelligence and investigative information

1. Limitation on dissemination of intelligence and investigative information. Reports or records that contain intelligence and investigative information and that are prepared by, prepared at the direction of or kept in the custody of a local, county or district criminal justice agency; the Bureau of State Police; the Department of the Attorney General; the Maine Drug Enforcement Agency; the Office of State Fire Marshal; the Department of Corrections; the criminal law enforcement units of the Department of Marine Resources or the Department of Inland Fisheries and Wildlife; or the Department of Conservation, Division of Forest Protection when the reports or records pertain to arson are confidential and may not be disseminated if there is a reasonable possibility that public release or inspection of the reports or records would:

A. Interfere with law enforcement proceedings; [1993, c. 719, §7 (rpr); §12 (aff).]

B. Result in public dissemination of prejudicial information concerning an accused person or concerning the prosecution's evidence that will interfere with the ability of a court to impanel an impartial jury; [1993, c. 719, §7 (rpr); §12 (aff).]

C. Constitute an unwarranted invasion of personal privacy; [1993, c. 719, §7 (rpr); §12 (aff).]

D. Disclose the identity of a confidential source; [1993, c. 719, §7 (rpr); §12 (aff).]

E. Disclose confidential information furnished only by the confidential source; [1993, c. 719, §7 (rpr); §12 (aff).]

F. Disclose trade secrets or other confidential commercial or financial information designated as such by the owner or source of the information or by the Department of the Attorney General; [1993, c. 719, §7 (rpr); §12 (aff).]

G. Disclose investigative techniques and procedures or security plans and procedures not generally known by the general public; [1993, c. 719, §7 (rpr); §12 (aff).]

H. Endanger the life or physical safety of any individual, including law enforcement personnel; [1993, c. 719, §7 (new); §12 (aff).]

I. Disclose conduct or statements made or documents submitted by any person in the course of any mediation or arbitration conducted under the auspices of the Department of the Attorney General; [1993, c. 719, §7 (new); §12 (aff).]

J. Disclose information designated confidential by some other statute; or [1993, c. 719, §7 (new); §12 (aff).]

K. Identify the source of complaints made to the Department of the Attorney General involving violations of consumer or antitrust laws. [1993, c. 719, §7 (new); §12 (aff).]

[1999, c. 155, Pt. A, §5 (amd).]

1-A. Limitation on release of identifying information; cruelty to animals. The names of and other identifying information on persons providing information pertaining to criminal or civil cruelty to animals to the Department of Agriculture, Food and Rural Resources is confidential information and may not be disseminated. [1997, c. 456, §10 (new).]

2. Exception to this limitation. [2001, c. 532, §1 (rp).]

3. Exceptions. Nothing in this section precludes dissemination of intelligence and investigative information to:

A. Another criminal justice agency; [2001, c. 532, §1 (new).]

B. A state agency responsible for investigating abuse, neglect or exploitation of children under Title 22, chapter 1071 or incapacitated or dependent adults under Title 22, chapter 958-A for use in the investigation of suspected abuse, neglect or exploitation; [2003, c. 402, §1 (amd).]

C. An accused person or that person's agent or attorney if authorized by:

(1) The district attorney for the district in which that accused person is to be tried;

(2) A rule or ruling of a court of this State or of the United States; or

(3) The Attorney General; or

[2003, c. 402, §1 (amd).]

D. A victim or victim's agent or attorney, subject to reasonable limitations to protect the interest described in subsection 1. [2003, c. 402, §2 (new).]

[2003, c. 402, §1, 2 (amd).]

Intelligence and Investigative Records

- What records do we have to disclose upon request?
- What analysis do we need to make of the records before disclosing?
- To redact or not to redact?

The good old days: Just say no.

- 5 MRSA 200-D used to prevent the disclosure of any investigative records of the Department of the Attorney General to the public.
- Repealed in 1993 (prospective only)
- The Office of Attorney General was added to the list of agencies covered by the Criminal History Records Information Act, 16 MRSA 614. Records and reports compiled by AG's Office prior to July 1,1995 remain confidential under 5 MRSA 200-D.
- P.L. 1993, ch. 719.

- Also in the 1993 legislation, 16 MRSA 614 was AMENDED to add language tracking exemptions in the federal Freedom of Information Act (FOIA), including "unwarranted invasion of personal privacy."

Intelligence and investigative information

- **Information collected by criminal justice agencies in an effort to anticipate, prevent or monitor possible criminal activity, or compiled in the course of investigation of known or suspected crimes.**

Limits on dissemination of Intelligence and Investigative Information

T. 16

- Section 614 limits the protections on intelligence and investigative information to those "reports or records" in the custody of:
  - A local, county or district criminal justice agency
  - Maine State Police
  - Department of Attorney General
  - MDEA
  - Office of the State Fire Marshall
  - DOC
  - The "criminal law enforcement units" of DMR or IFW
  - Dept of Conservation, Division of Forest Protection, but only if pertaining to ARSON

Intelligence and Investigative Records made confidential under section 614:

May include records "compiled" or maintained by an agency *not listed* in the statute, so long as the records are subsequently compiled for law enforcement purposes by one of the listed agencies.

John Doe Agency v. John Doe Corporation, 493 US 146 (1989)

FBI v. Abramson, 456 US 615 (1982)

Exner v. Dept of Justice, 902 F. Supp. 240, 242 n.3 (D.D.C. 1995)

Then, regardless if they hold, are confidential

NO DISCLOSURE of Intelligence and Investigative Records:

- **If there is a *reasonable possibility* that public release or inspection of the reports would cause one or more of the following harms:**

- Interfere with law enforcement proceedings;
- Result in public dissemination of prejudicial information concerning an accused person or concerning the prosecution's evidence that will interfere with the ability of a court to impanel an impartial jury;
- Constitute an unwarranted invasion of personal privacy;

- **Disclose the identity of a confidential source or confidential information furnished by the source;**
- **Disclose trade secrets or other confidential commercial or financial information;**
- **Disclose investigative techniques and procedures or security plans and procedures not generally known by the general public;**
- **Endanger the life or physical safety of any individual, including law enforcement personnel;**

- Disclose conduct or statements made or documents submitted by any person in the course of any mediation or arbitration conducted under the auspices of the Department of the Attorney General;
- Disclose information designated confidential by some other statute; or
- Identify the source of complaints made to the Department of the Attorney General involving violations of consumer or antitrust laws.

LOOK TO THE FEDERAL CASES

- The Law Court has held that cases under the federal act are "helpful" in analyzing the scope of the FOAA. *Campbell v. Town of Machias*, 661 A.2d 1133 (Me. 1995).
- The Law Court plurality purported to rely on federal cases interpreting the exemptions to the FOIA in ordering the release of the investigative records on deceased priests. *Blethen Maine Newspapers v. State*, 2005 ME 56 P13, 871 A.2d 523, 529.
- Since the language in 614 nearly identical to Exemption 7 of FOIA, federal cases in this aspect of the act may be particularly persuasive. 5 USC 552 (b)(7)

Source for information on federal cases interpreting the FOIA:

- www.usdoj.gov/oig/exemption7.htm

- Provides DOJ's analysis, with case cites, for each of the exemptions under the FOIA
- Updated every two years

Interfere with law enforcement proceedings

- Must show distinct, articulable harm
- Law enforcement proceedings may include civil and administrative enforcement proceedings
- *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)
- *Campbell v. Town of Machias*, 661 A.2d 1133 (Me. 1995)(records remained confidential even though DA was "not authorizing criminal prosecution at this time")

Unwarranted Invasion of Personal Privacy:

The FOIA "focuses on the citizens' right to be informed with 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that has accumulated in various governmental files but reveals nothing about an agency's own conduct...There is little question that disclosing the identity of targets of law enforcement investigations can subject those identified to embarassment and potentially more serious reputational harm."

***United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 US 749, 773 (1980)**

Refused disclosure of rap sheets for individuals with reputed mob ties.

- Followed by *Lewiston Daily Sun v. Herrick*, 1996 Me. Super. LEXIS 220 (Me. Super. Ct. Andro. Cty. 1996) (Calkins, J.)

Investigators, witnesses, victims *and* suspects are all entitled to privacy:

- "[Investigating] agents, government employees, third party suspects, and other third parties mentioned or interviewed in the course of the investigation have well-recognized and substantial privacy interests in the withheld information. Among other things, these individuals have a substantial interest in the non disclosure of their identities and their connection with particular investigations because of the potential for future harassment, annoyance, or embarassment."

- *Bast v. Department of Justice*, 665 F.2d 1251 (D.C.Cir. 1999)
- *SafeCard Services v. Securities and Exchange Commission*, 926 F.2d 1197, 1205 (D.C.Cir. 1991)
- *Senate of the Commonwealth of Puerto Rico v. United States Department of Justice*, 823 F.2d 574 (D.C. Cir. 1987)
- *Neely v. Federal Bureau of Investigation*, 208 F.3d 461, 464 (4th Cir. 2000).

Balancing test: Individual privacy rights v. the public's right to know

- *National Archives and Records Administration v. Favish*, 541 US 157 (2003)
- Must show that public interest advanced by the disclosure is a significant one
- Must show that the information is likely to advance that interest

The *Favish* balancing test

"[W]here there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred."

Blethen Maine Newspapers v. Maine 2005 ME 56

- Blethen's position: Scope of right to privacy under section 614 is equivalent to rights under the tort of invasion of privacy.
  - No right to privacy once persons named in file are dead
  - No right on behalf of surviving relatives to assert privacy rights of deceased persons

Superior Court (Studstrup. J.)

- Balancing test: Interest in public disclosure outweighs rights of accused deceased priests, witnesses and victims in non-disclosure.
- "To the extent that the alleged victims or others working on their behalf have stepped forward and lodged their complaints, their expectation of continued privacy would be diminished to the extent that the investigation would require disclosure."

Superior Court on the Victims' Rights

- "Therefore, there may be some residual privacy interest of named victims and witnesses, but due to the manner in which this information has been handled, that interest has been reduced for purposes of balancing against the public interest in disclosure."

Superior Court on the Deceased Priest's Right to Privacy

- "Under the proper circumstances," there may be "a residual privacy right" for deceased individuals named in file.
- Court deemed that right academic in its conclusion that public interest in disclosure so clearly outweighed the privacy interests of the deceased priests.
- The countervailing public interest was "in allegations of sexual abuse of minors, and particularly how such allegations were or were not investigated by the Diocese and law enforcement officials."

The Law Court Decision

Stands for the proposition that State must disclose investigative records identifying deceased priests alleged to have engaged in the sexual abuse of minors at least 22 years ago

- Medium number of years since the priests' deaths was 25 years
- Average number of years since abuse exceeds 40 years (with most recent abuse occurred "not later than 1983")

Levy, Calkins and Dana on Victims' Rights

- Agreed with Studstrup that "[t]he privacy interests are diminished to the extent the information was voluntarily reported to church and public authorities with the expectation that it would be used to investigate possible wrongdoing.
- No "claim that any of the individuals who reported the information to authorities did so under circumstances where there was an express or implied understanding that their identity or the identity of others named in the records would remain confidential."
- (but cites as authority federal case relating to exemption on "confidential sources," not privacy exemption.)

On Rights of the Deceased Priests

- "[W]e need not separately determine whether the deceased priests have privacy interests within the ambit of section 614(1)(C) that survive their deaths."
- "[T]he passage of time has substantially dissipated or extinguished the privacy interests of the deceased priests, if any, and of their relatives."

On Public Interest in Disclosure

- Rejected *Favish*'s standard describing the "public interest" necessary to outweigh individual privacy interests.
- "FOAA'S central purpose of ensuring the public's right to hold the government accountable would be unnecessarily burdened if we adopted *Favish*'s evidentiary requirement for purposes of a case such as this, involving a request for written investigative records concerning events that occurred two or more decades ago."

- "The records sought by Blethen are necessary for the public to understand why the Attorney General exercised his discretion not to pursue criminal prosecutions in connection with the sexual abuse allegations. An informed citizenry has no less of an interest in information that might document governmental efficiency or effectiveness than it does in information documenting governmental negligence or malfeasance."

- "Absent the unique cultural and familial interests confronted in *Favish*, the public's interest in knowing what its government is up to encompasses a broader universe of concerns than simply the possibility of governmental wrongdoing."

Final Order (joined by Saufley)

- REMANDED to Superior Court "for the entry of a new judgment that provides for disclosure of the records after redaction of the names and other identifying information of persons named in the records other than the deceased priests."

Saufley concurs *only* in the result

- Disagrees with the Levy opinion's rejection of *Favish*'s definition of what qualifies as sufficient public interest to trump individual privacy interests.
- "[I]n absence of an allegation of governmental wrongdoing, the interests in protection of the witnesses, alleged victims, informants, and others who have been the subject of investigation would outweigh the public's interest in the disclosure of the records."

Saufley: Protect the victims.

"The privacy interests of the living individuals named in the Attorney General's records are substantial based on the sensitive nature of the events described in the records."

Saufley's reasoning requires her to find governmental misconduct

- Concedes Blethen "does not specifically articulate [a credible] allegation [of governmental misconduct] in detail."
- "Nonetheless, I would conclude that the serious allegations of child sexual abuse, involving many children, made or alleged to have occurred over decades, without prosecution, is equivalent to an allegation of governmental misconduct in the present case."

This case is really unique...

- "I would conclude that the present case, *unique in its factual background*, presents a sufficient allegation of governmental wrongdoing to require a balancing against the privacy interests to be protected."
- "The present case...poses *special circumstances* warranting greater flexibility in applying" *Favish's* standards of good faith allegations and evidence of governmental negligence or impropriety.
- "In this *unique setting*, where the Court has protected the privacy of the alleged victims, ...[disclosure] "does not present...dangerous implications..."
- "Given the *unique facts* of the present case, the holding today has limited precedential force and should not have the chilling effect on prosecutorial investigations that the dissent suggests."

Clifford, Rudman & Alexander Dissent

- Disagrees that "the privacy interests of the people who reported the incidents, but who did not do so publicly, are diminished to any substantial degree."
- Some "reputational interests and family-related privacy expectations [may] survive death."
- Agrees that the privacy interests of priests and families have "significantly diminished over time," but disagrees that it is so diminished that their names may be disclosed without a "substantial showing of a significan public interest to make such disclosure 'warranted' within the meaning of" section 614.

Clifford's Balancing Test precludes disclosure.

- "A public interest sufficient to overcome the privacy interest protected by the privacy exemption cannot be established unless there is a claim of governmental wrongdoing and evident to support that claim." (Agrees with Saufley).
- "The complaint does not assert any government impropriety, nor does the record suggest or address any impropriety in the investigation conducted by the Attorney General or other governmental agencies." (Disagrees with Saufley).

Alexander's Separate Dissent

- The "substantial public interest in government integrity, prompt reporting and successful prosecution of crime, respecting the rights of the accused, and protecting the privacy of sex crime victims" "does not create a license for newspapers or anyone else, to review old case files and publicize them or use them as they see fit."

- "Persons wrongly or mistakenly accused of crimes risk being pilloried in public by newspapers reporting accusations that competent, professional prosecutors have determined do not constitute prosecutable offense"
- "Nothing in the history of the legislation suggests that the Legislature intended that when a prosecutor reaches a difficult decision not to prosecute, the 'public interest' may be invoked by anyone to require that the prosecutor's investigative records be turned over to the press on demand for any use, responsible or salacious, that anyone chooses to make of the record."

How does this decision affect future requests for investigative files which impact individual privacy interests?

- Saufley plus the dissenters require a balancing test of privacy interests against the public's right to know ONLY IF the requester demonstrates a credible evidence of government misconduct. (Majority of 4).

Redaction of Records

- Unlike the FOIA, FOAA has no statutory provision authorizing redaction of records to protect confidential information in otherwise public records. 5 U.S.C. 552(b).
- The Law Court has permitted redaction of protected information to permit disclosure of records. *Guy Gannett Publishing Co. v. University of Maine*, 555 A.2d 470 (Me. 1989)(excising one sentence of a settlement agreement).

When documents contain ONLY protected information, Court will not order redaction. *Springfield Terminal Railway Company v. Department of Transportation*, 2000 ME 126 P11n.4, 754 A.2d 353, 357.

When does a document have so much confidential information in it that it cannot be considered a public record subject to disclosure even with redaction?

APPEALS FROM FOAA DENIAL IN A NUTSHELL

I. Deadlines

Aggrieved party must appeal agency's written denial of FOAA request within five "working days" (1 MRSA 409(1)). A party must appeal executive session violations within 30 days of the discovery that "any body or agency" may have taken "official action" in executive session (1 MRSA 409(2); Rule 80B).

Appeals not filed within five days of denial *must be* dismissed by the Court. *Guy Gannett Publishing Co. v. Maine Department of Public Safety*, 555 A.2d 474, 475-476 (Me. 1989). If, however, the requester misses the five day deadline, the requester can make a second request, and start the clock running again. *Id., citing Bangor Publishing Co. v. City of Bangor,* 544 A.2d 733, 735 n.2 (Me. 1989).

See also Palmer v. Portland School Committee, 652 A.2d 86, 89 (Me. 1995); *citing Marxsen v. Board of Directors, MSAD No. 5*, 591 A.2d 867, 871 (Me. 1991) (overruled on other grounds by *Underwood v. City of Presque Isle*, 1998 ME 166, 715 A2d. 148), *Colby v. York County Commissioners*, 442 A.2d 544, 546 (Me. 1982).

II. Nature of Superior Court Proceeding in Review of Denial of FOAA Request.

Trial *de Novo* (1 MRSA 409(1)) "within the framework of an 80B review." *Palesky v. Town of Topsham*, 614 A.2d 1307, 1310 n. 3 (Me. 1992).

Rule 80B's time limit of 30 days to request a trial does not apply to FOAA appeals, because Court is not acting as an appellate court. *Underwood v. City of Presque Isle*, 1998 ME 166 P22-23, 715 A.2d 148, 153, *citing Service & Erection Co. v. State Tax Assessor*, 684 A.2d 1, 1-2 (Me. 1996) (When statute "expressly requires the

Superior Court...to conduct a *de novo* trial as to both the facts and the applicable law, that statute governs any inconsistency between the statute and Rule 80C(e)"). *Underwood* overrules previous decisions, including *Marxsen* and *Palesky*, to the extent that the plaintiffs were denied a trial if they had not filed a motion for one within 30 days.

As a practical matter, counsel for the State should work with Plaintiff to stipulate to the facts or record for review.

Court is directed to give FOAA proceedings priority in scheduling over most other matters.

III. Violations

Government agency shall be liable for a civil violation and forfeiture of up to $500 for "every willful" violation of FOAA committed by an employee or officer of the agency. 1 MRSA 410.

Agency's failure to respond to FOAA request within five days is deemed a denial and the "subsequent production does not moot the alleged violation." *Cook v. Lisbon School Committee*, 682 A.2d 672, 680 (Me. 1996) (Plaintiff entitled to *costs* even though defendant produced documents prior to court's decision).

Private individuals may not recover the $500 forfeiture. Only the Attorney General or his designee may bring an action for forfeiture. 17-A MRSA 4-B(1) ("All civil violations...are enforceable by the Attorney General...in a civil action...to secure the forfeiture that may be decreed by law."); *Underwood v. City of Presque Isle*, 1998 ME 166 P12 n.4, 715 A.2d 148, 152 n.4; *Scola v. Town of Sanford*, 1997 ME 119 P7, 695 A.2d 1194, 1195.

The term "willful" has the same meaning as "knowingly" and "intentionally" under the Criminal Code. 17-A MRSA 34(1); *District Attorney for the Fifth Prosecutorial District of Maine v. City of Brewer*, 543 A.2d 837, 839 (Me. 1988).

Other remedies: Action illegally taken during executive session may be declared NULL and VOID. 1 MRSA 410.

"[A] public body charged with violating the terms of the FAA during an executive session has the burden of proving that its actions during the executive session complied with an exception to the FAA's meeting requirement." *Underwood*, 1998 ME at P19, 715 A.2d at 153. The burden recognizes that "requiring a plaintiff to plead and prove specific facts regarding alleged violations that are taking place in secret is a circular impossibility." *Id.* at P18.

FREEDOM OF ACCESS AND PUBLIC RECORDS LEGISLATION CONSIDERED BY THE 122D LEGISLATURE, 1st REGULAR SESSION AND 1st SPECIAL SESSION (2005)

1. LD 157 An Act Concerning the Disclosure of Juror Information

As enacted, Public Law 2005, chapter 285 provides that juror qualification forms are confidential and may not be disclosed, except that prospective juror information is available for review for *voir dire* purposes at the courthouse, and then only available for the attorneys, attorneys' agents and investigators, and pro se parties. Disclosure of juror names is allowed once the juror's service
has expired, but only upon written request to the court and a determination by the court that disclosure is in the interests of justice.

2. LD 301 Resolve, To Implement the Recommendations of the Committee To Study Compliance with Maine's Freedom of Access Laws

As enacted, Resolve 2005, chapter 123 establishes the Freedom of Access Advisory Committee for an additional year for the purpose of providing information and advice to the Joint Standing Committee on Judiciary as it reviews public record exceptions and to review issues concerning the public's access to public proceedings and records. The committee is also directed to make recommendations to the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court, as well as local and regional governmental activities, for changes in law and practice that are appropriate to maintain the integrity of the freedom of access laws and their underlying principles. The Study Committee's proposal to establish a Public Access Ombudsman within the Department of the Attorney General was not accepted.

3. LD 466 An Act To Implement the Recommendations of the Committee To Study Compliance with Maine's Freedom of Access Laws Concerning Attorney's Fees

LD 466, which was voted ONTP by the Judiciary Committee, is the recommendation of the majority of the Committee to Study Compliance with Maine's Freedom of Access Laws. It proposed to authorize the court in Freedom of Access litigation to award reasonable attorneys' fees to a wholly prevailing party if the court determines that the failure to comply with the law was committed in bad faith or that the requested access or the enforcement action was frivolous, vexatious or without merit (eight members in favor, five opposed).

4. LD 467 An Act To Implement the Recommendations of the Committee To Study Compliance with Maine's Freedom of Access Laws Concerning Personal Contact Information

LD 467 is the recommendation of the majority of the Committee to Study Compliance with Maine's Freedom of Access Laws; as amended, it was enacted as Public Law 2005, chapter 381. It provides an exception to the definition of "public record" in Maine's freedom of access laws for the personal contact information, including home address, home telephone number, home facsimile number, home e-mail address, personal cellular telephone number and personal pager number, of public employees. Public employees covered are those who are employed by a governmental entity, as that term is defined by the Maine Tort Claims Act, but does not include public officials.

5. LD 1202 Resolve, To Study the Accessibility of Birth Certificates and Other Vital Records

Enacted as Resolve 2005, chapter 107, this resolve requires the Department of Health and Human Services, Office of Vital Records to study the effects of the freedom of access laws on the ability of registrars to restrict access to vital records, such as certificates of birth, death and marriage. The purpose of the study is to reduce identity theft and preserve the rights of adoptees while balancing the right of the public to access certain records.

6. LD 1455 An Act To Codify Public Records Exceptions

Public Law 2003, chapter 709, section 9 required the Office of Policy and Legal Analysis and the Revisor of Statutes to produce a bill listing statutes that by designating records or information as confidential remove the records or information from the definition of "public record" in the freedom of access laws. LD 1455 is that bill. It was carried over by H.P. 1203 to any subsequent special or regular session of the 122nd Legislature. There was discussion of an alternative approach, such as posting a listing of these provisions on the Law Library's web page.

LEGISLATIVE REVIEW OF NEW AND EXISTING PUBLIC RECORDS EXCEPTIONS

In its January 2004 report, the Committee to Study Compliance with Maine's Freedom of Access Law made two recommendations designed to address a general concern over the large number of exceptions to the definition of records available to the public. Both were enacted by P.L. 2003, ch. 709, and appear as Subchapter 1-A, Exceptions to Public Records (§§ 431-434) of Title 1, Chapter 13, Public Proceedings and Records.

The first is a periodic review of existing exceptions (§§ 432-433), which will be undertaken by the Joint Standing Committee on Judiciary. The first such review will take place in 2006, and will cover exceptions in Titles 1-5. Committees with jurisdiction over the subject matter contained in these exceptions will be asked to participate in the review. Using the criteria specified in § 432, the Judiciary Committee will "report out legislation containing its recommendations concerning the repeal, modification and continuation of public records exceptions and any recommendations concerning the exception review process." The attachment entitled "Public Records Exceptions" contains many of the exceptions that currently exist in statute.*

The other recommendation designed to control the number of public record exceptions enacted last year is found in 1 M.R.S.A. § 434. Section 434 provides for the Judiciary Committee to review and evaluate new proposed public records exceptions using criteria specified in the statute, and to report its findings and recommendations on whether the proposed exception should be enacted to the committee of jurisdiction. The Judiciary Committee has adopted a detailed process for undertaking these reviews, which is contained in the attachments entitled "Outline of Review and Evaluation Process" and "Review of Proposed Public Records Exceptions."

This review process was bill was first used earlier this year to evaluate L.D. 90, "An Act Regarding the Gambling Control Board." The Judiciary Committee's findings and recommendations are detailed in a March 4, 2005 letter to the Chairs of the Legal and Veterans' Affairs Committee, which is also attached.

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* The three attachments to this section were prepared by Peggy Reinsch, Office of Policy and Legal Analysis, whose assistance is here gratefully acknowledged.

PUBLIC RECORDS EXCEPTIONS

Sorted by Title and Section

TITLE	SECTION	SUB-SECTION	SUBJECT	STATUTE TYPE	SUBJECT OF RECORD	PERMITTED RELEASE
01	1013	2	Governmental Ethics Commission records, info received; exceptions	C	G, I	
01	1013	3	Governmental Ethics Commission, complaints	C	I	T
01	402	3	* Architecture, design, access, authentication, encryption, security of information technology infrastructure and systems	C	G	
01	402	3	Freedom of access, public records, exemption	C, P	G, I	
01	402	3, ¶N	^Social Security Number in possession of IFW	NPR	I	
01	402	3, ¶O	+Public employee personal contact information	C	I	
01	402	3-A	Freedom of access, public record, criminal justice agency records	D	I	
01	535	2	InforME network manager, maintain confidentiality	P	NS	
01	535	3	InforME network manager, access to carry out duties	A	NS	F
01	538	3	InforME subscriber information	C	I	WP, SC
03	156 & 159		Legislative confirmation of appointments, prehearing conference materials	T1 c.13	NS	T
03	997	1, 3	OPEGA, program evaluation working papers	C	G	T
03	997	4	* OPEGA - access to records, chapter 21	A	NS	
03	997	4	^OPEGA - access to confidential information	A		L
03	997	4, 6	OPEGA, access to confidential records	A, C	NS	F
03	997	5	OPEGA, working papers	C	G	T, L
04	17	3	State Court Administrator, complaints and investigative files	C	NS	L
04	1701	7	Judicial Compensation Commission – working papers in possession of legislative employee	T1,§402	G	
04	809		Attorneys, investigation by AG	C	NS	L

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- D = statutes declares otherwise confidential information public
- P = statute requires adoption of procedures to maintain confidentiality
- NPR = "not a public record"
- T1, c. 13 = "notwithstanding T1, c. 13"
- T1, §402 = "notwithstanding T1, §402"

SUBJECT OF RECORD:
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- E = business or enterprise information, including trade secrets
- G = information about governmental operations
- NS = not specified (e.g., "records")

- * added in 2003
- ^ added in 2004
- + added in 2005 (Titles 1-5)

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05	10203-C	3	HIV testing, judicial consent	C	I	WP
05	13119-A		Economic and Community Development - proprietary information, tax info, financial info, credit info	C	I, E	L
05	13119-C		Economic and Community Development, disclosure of info confidential under §13119-A	A	I, E	L, SC, WP
05	13120-M	2	Maine Rural Development Authority- pre-application info, peer analysis, info requested to be confidential because of significant detriment if released, financial and tax info if invasion of privacy,	C	I, E	N, L, SC
05	15302-A	2	Maine Technology Institute -pre-application info, peer analysis, info requested to be confidential because of competitive harm if released, financial and tax info, personnel records	C	I, E	L, SC
05	15321	3	Applied Technology Development Center System – records and proceedings	T1, c13	NS	
05	1545		Accounts and control, outstanding and unpaid checks	C	G?	L
05	17057	1	Maine State Retirement System, information not public	C	I	L
05	17057	3	^Home info of MSRS members, benefit recipients and staff	C	I	WP
05	17057	3, ¶¶B & C	+Home addresses of retirement system members and benefit recipients	A	I	L, WP
05	1743	5	Public improvement construction contracts, evaluations of proposals	C	E	T
05	1747	3	Public improvements contracts, prebid qualification	C	E	N
05	1886	12	Bureau of Information Services, rules	P	NS	
05	19506	1	Protection and advocacy for persons with disabilities	A	I	
05	1976	1	Misuse of State government computer system, computer	C	E	

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			codes, etc. = trade secrets			
05	1995		+GIS data available only in accordance with subchapter and upon payment of fees	C?, A?		
05	20047	1	Office of Substance Abuse, registration and other records of treatment facilities, privileged to the patient	C	I	WP
05	200-E	4	Medical records, held by prosecutor	A	I	WP, SC, L
05	200-H	5	* Maine Elder Death Analysis Review Team - access to confidential information	A	I	
05	200-H	6	* Maine Elder Death Analysis Review Team - proceedings and records	C	NS	L
05	22009	2	* Baxter Compensation Program - claimant info	C	I	L
05	244-C	2	Department of Audit, access to confidential records	A, C	NS	F
05	244-C	3	Department of Audit, working papers	C	G	L
05	3304	3	State Planning Office director, confidential records	P	NS	
05	3305-B	1	State Planning Office, energy policy	C	E	
05	3360-D	4	Victims' Compensation Fund, application and award	C	NS	L, F
05	4572	2	Human Rights Act, employment discrimination, medical condition or history of applicant (applies to covered employers)	C	I	L
05	4573	2	Human Rights Act, employment discrimination, records of mental or physical disability (applies to covered employers)	C	I	
05	4612	5	Human Rights Commission, 3rd party records	C, P	I	
05	48-A	5	^Confidential communication facilitated by privileged interpreters for the Deaf	C	NS	SC, WP
05	651	8	^Employee Suggestion System Board - name of employee	C (treated	I	T

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			w/suggestion	confidentially)		
05	7036	28	* State Civil Service System - Policy regarding complaints against state employees; does not authorize release of confidential info	P	I	N
05	7070	1	State employee applicants - confidential records	C	I	N, L
05	7070	2, 4	State employees - personal information	C, P	I	N, l, T, F
05	7070-A		State employees, law enforcement officer, use of force	A	I	T
05	791		Code of Fair Practices and Affirmative Action, records and correspondence in certification	C	E, I	N
05	9057	6	Administrative Procedure Act, adjudicatory proceedings	A, P	NS	L, SC
05	9059	3	Administrative Procedure Act, record of adjudicatory proceeding	P	NS	
05	90-B	7	Address Confidentiality Program	C	I	N
05	95	11	Archives patrons	C	I	WP, SC
05	957	5	State Employee Assistance Program, client records	C	I	
07	1052	2	Genetically engineered plants and seeds – manufacturer's list of growers of genetically engineered plants	NPR	I	L
07	20	1	Dept of AFRR, info reported voluntarily	C, P	E	
07	2103-A	4	Records relating to patented and nonreleased potato varieties	C	E	WP
07	2226	1	Ginseng license applications, licensees, locations	C	I, E	SC, WP
07	2992-A	1	Maine Dairy Promotion Board	A	E	
07	2998-B	1	Maine Dairy and Nutrition Council	A	E	
07	306-A	3	Agricultural development grant program, market research or development activities	C	E	WP, L
07	4204	1	Nutrient management plan	C	E	

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07	4204	10	* Nutrient management plan	C	E	L
07	4205	2	Livestock operations permit, nutrient management plan	C	E	
07	607	4	Pesticides, results of tests	C	E	N
07	951-A		Potatoes, minimum standards for planting	C	E	SC, WP
08	1006	1, ¶A	+Gaming application and materials: trade secrets	C	I,E	WP, L
08	1006	1, ¶B	+Gaming application and materials: unwarranted invasion of privacy	C	I	WP, L
08	1006	1, ¶C	+Gaming application and materials: key executive or gaming employee compensation	C	I, E	WP, L
08	1006	1, ¶D	+Gambling Control Board - financial, statistical and surveillance info from central monitoring system or surveillance	C	I, E	WP, L
08	1006	1, ¶E	+Gambling Control Board - assessment by nonemployee, summary available	C	I, E	WP, L
08	1006	1, ¶F	+Gambling control info from other jurisdictions	C	I, E	WP. L
08	1006	1, ¶G	+Gambling control info designated confidential under federal law	C	I, E	WP, L
08	1006	1, ¶H	+Gaming application and materials - personal information	C	I	WP, L
08	1006	3	+Gaming - central site monitoring system operator suitability information	C	I, E	WP, L
08	1006	4	+Gaming - financial, statistical and surveillance information from central site monitoring system or surveillance devices	C, P	I, E	L
08	1006	6	+Gaming application and materials: if otherwise publicly available	C	I, E	
08	1006	7	+Gaming operations report - summary of confidential	C	I, E	

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			information			
08	1052	1st ¶	Gambling Control Board - all reports, info, records compiled about applicant, licensee, owner or key executive	C	NS	T
08	1052	1st ¶	+Gaming laws - info concerning noncompliance by applicant, licensee, owner or key executive	C	I, E	L, SC, T
08	416-A	9	Tri-State Lotto, personal records in connection with payment of prize	C	I	L
09-A	2-304	2	Consumer loans, supervised lenders, annual reports	C	E	
09-A	6-116		Office of Consumer Credit Regulation	C	I, E	SC
09-A	6-117	3	Info furnished to Office of Consumer Credit Regulation	P	NS	F
09-B	226	3	Info furnished to Bureau of Financial Institutions	P	NS	F
09-B	252	3-A	Info furnished to Bureau of Financial Institutions	P	NS	
10	1079	4	Family Development Account Program, account holders and their families	C	I	
10	1109	4	Info reported to AG concerning monopolies and profiteering	C	E	
10	1495-G	3	^Payroll processing bonding - DPFR cooperation with other regulatory agencies	C	NS	F, WP
10	1675		Petroleum Market Share Act, info received by AG	C	E	
10	391	2, 3	Small Enterprise Growth Program	C	I, E	L, T
10	8002	10	Commissioner of Professional and Financial Regulation, info provided to	C	NS	WP. F
10	8003	2-A	Info furnished to Office of Licensing and Registration	P	NS	F
10	8003-B	1	Dept. of Professional and Financial Regulation, complaints and investigations records of boards and commissions	C	NS	T
10	8003-B	2-A	Dept. of Professional and Financial Regulation, complaints	C	I	T, WP

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			and investigations records of boards and commissions, client records			
10	9012	1	Info provided to Manufactured Housing Board	C	E	
10	9202	1-B	* Northern Maine Transmission Corporation - records of FAME; information furnished or developed (10 §975-A)	C	I, E	WP, L
10	945-J		Maine International Trade Center, business and marketing, tax, credit assessment	C	I, E	
10	975-A	2, 3	Finance Authority of Maine, info furnished or developed	C	I, E	WP, L
12	1827	3	* Dept of Conservation - camper reservations at state parks	C	I	L
12	550-B	6	Water well information collected by Bureau of Geology and Natural Areas	T1, c13	NS	L
12	6072	10	* Aquaculture leasing - seeding and harvesting report	C	E	
12	6072-A	10	* aquaculture leasing - research and development reports	C	E	
12	6072-A	17	Marine Resources, aquaculture leases research and development info	C	E	L
12	6077	4	Aquaculture monitoring program	C	E	WP, L
12	6078-A	1	* Aquaculture Monitoring, Research and Development Fund - harvest information from leaseholders	C	E	
12	6173		Marine resources statistics	C	I, E	L
12	6173	1	* Marine Resources - fisheries information collected by and reported to Commissioner	C	E	SC, L, F
12	6310	3	Lobster and crab license denial appeals – medical info	C	I	
12	6431-F	3	Appeal of trap tag denial – medical info	C	I	
12	6455	1-A	Lobster Promotion Council - market studies or promotional plans	C	E	L
12	7365	7	Whitewater outfitters, affiliated outfitter records	C	E	L

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12	8611	1	* Forest management information - landowner contact information	C	I	L
12	8869	13	Forest practices, info provided to bureau, outcome-based forest policy experimental areas	C	E	L
12	8884	3	Forest landowner and wood processor reporting requirements – volume info	C	E	L
13	1957	8	Maine Agricultural Marketing and Bargaining Act, member info, volume info	C	I, E	T
14	1254-A	7	Jurors – names and juror qualification forms	C	I	L
14	164-A	3	* Maine Assistance Program for Lawyers	C	I	WP
15	101-C	3	Mental responsibility for criminal conduct, records necessary to conduct evaluation	C	I	SC, L
15	3009	2	Info related to reintegration of juvenile into school	C	I	N
15	3301	6-A	Info about juvenile against whom a juvenile petition has not been filed	C	I	WP, L
15	3301-A	1	*Juveniles - sharing information about juveniles, notification teams	A	I	L, F
15	3308	7	Records of juvenile proceedings	C	I	L, SC, F, WP
16	614	1	Criminal History Record Information Act; intelligence and investigative info	C	I, E. G	L
16	614	2	Criminal History Record Information Act; cruelty to animals informants	C	I	N
18-A	2-901		Will deposited with Probate Court	C, P	I	L
18-A	9-304	(a-1)	Adoption, background checks	C	I	L
18-A	9-304	(a-2) (1)(iv)	^Adoption background check	C	I	N, SC

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18-A	9-308	(c)	Adoption, final decree	C	I	L
18-A	9-310		Adoption records, adoption decreed after 8/8/53	C	I	L
19-A	1565	4	Uniform Act on Paternity, social security numbers	C	I	L
19-A	1653	6	Parental rights and responsibilities, domestic abuse, address of child and victim	C	I	L
19-A	2006	10	Child support guidelines, social security numbers	C	I	L
19-A	2152	11	Child support enforcement - information collected for medical support and child support enforcement	C	I	L
19-A	3012		* Uniform Interstate Family Support Act - if disclosure of specific identifying information would jeopardize health, safety or liberty of a party or child	C, P	I	SC
19-A	4013	4	Domestic Abuse Homicide Review Panel, proceedings and records	C	I, G	N
19-A	651	2	Marriage application, social security numbers	C	I	N
19-A	908		Divorce, social security numbers	C	I	L
20-A	10206	2	Education, Energy Testing Laboratory of Maine (ETLM) records	NPR	I, E	
20-A	11418	1, 2	Maine Educational Loan Authority, info about applicants or recipients	C	NS	L, SC
20-A	11444	1, 2	Student Financial Aid Supplemental Loan Program, info about applicants or recipients	C	NS	L, SC
20-A	11494	1, 2	* Higher Education Loan Purchase Program - information from borrowers	C	NS	L, SC
20-A	13004	2	Certification and registration of teachers; application and certification	C	I	L
20-A	13004	2-A	Certification and registration of teachers; complaints,	C	I	SC

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			charges, accusations			
20-A	13015	5	Educational personnel, support system, teacher action plan	C	I, G	L
20-A	13034		Teacher qualifying exam scores	C	I	L
20-A	254	12	Juvenile reintegration planning, standards for access to confidential records	P	I	
20-A	4008	2	School counselor/social worker, info from counseling relationship	C	I	L
20-A	4502	5	School approval standards. Access to confidential info	P	I	
20-A	5001-A	3	* Education - home schooling records	C, P	I	WP, T
20-A	6001	3	Education records: students	C	I	L, WP
20-A	6001-B	2	* Education - health records	P	I	
20-A	6101	3	School records: employees and applicants	C	I	L
20-A	6102	1	School records: employees and applicants	A	I	
20-A	6103	3	School records: employees and applicants, background checks	C	I	L
20-A	6205		Standards and assessments of student performance	C	I	L
20-A	6357	1	School records: students, immunization	C	I	L
21-A	22	2	Ballots	NPR	Ballots	
21-A	22	5, 6	^Signature and identification number of registered voter - applications	NPR	I	
21-A	737-A	7	Disputed ballots	NPR	Ballots	
21-A	764		Applications and envelopes for absentee ballots	NPR	Ballot apps & envelopes	L
22	1494		Occupational disease reporting	C	I	L, SC, WP
22	1580-L	10	* Tobacco Product Manufacturers - Bureau of Revenue Services disclose tax information to AG	A	E	

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22	1596		Abortion reporting, physician or patient	C, P	I	
22	1597-A	6	Petition for court order consenting to minor's abortion	C	I	Impounded
22	1692-B	1	Environmental health programs, records filed by physicians, hospitals or other public or private orgs - disease surveillance	A	NS	F
22	17	7	Access to records of individuals who owe child support	C	I	L
22	1711-C		Individual's health care information	C, P	I	L, WP
22	1828		Medicaid and licensing of hospitals	C, P	I	SC, WP, L, F
22	1885	1	Hospital Cooperation Act, info provided to AG	C	E	
22	2698-B	5	Prescription drug info provided by mfr to DHS commissioner re disclosure of price	C	NS	WP, L, SC
22	2699	7	* Prescription drug marketing costs submitted to DHS	C	E	L
22	2706-A	6	Adoption contact files	C	I	WP
22	3022	8, 12, 13	Medical Examiner info	C	I, G	L, SC
22	3034	2	Chief Medical Examiner - missing persons files	C	I	T
22	3173		Aid to needy persons, DHS sharing info with Superintendent of insurance	P	NS	F
22	3188	4	Maine Managed Care Insurance Plan Demonstration for Uninsured Individuals	C	I, E	WP
22	3192	13	Community Health Access Program - info in medical data collection system	C	NS	L
22	3292		Info for personnel and licensure actions	P	I, E?	L
22	3293		DHS - info relevant to grievance or disciplinary procedure	P	I, G	L
22	3294		Confidential info provided to professional and occupational licensing boards	P	I, E?	L
22	3295		Info provided for unemployment compensation, state	P	I	L

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			employee			
22	3474	1	Adult protective records	C	I	L, SC
22	3480-A		^Confidential information in adult protective activity	P	NS	F
22	4008	1	Child protective records	C	I	L, SC
22	4008	3-A	Proceedings and records of child death and serious injury review panel	C	NS	N
22	4008	6	^DHS rules for disclosure of records in child protective cases	A		
22	4015		Confidential communications - husband-wife, physician, psychotherapist-patient privileges abrogated for child protective	A	NS	F
22	4018	4	Info of person delivering child to safe haven	C	I	L, SC
22	4087-A	6	Child and family services complaint or inquiry - Ombudsman program	C	NS	WP, SC
22	42	5	DHS - public health records	C	I	L, WP
22	4306		General assistance records	C	I	WP
22	4314	4	Cooperation in administration of general assistance	A, P	I	F
22	5328	1	Community services records - information provided by applicant for services, info about provider of services	C	I, E	L, WP
22	666	3	State Nuclear Safety Program, identity of person providing info about unsafe activities, conduct or operation, or license violation	C	I	WP
22	7250	1	* Prescription Drug Monitoring Program - information submitted to office	C	NS	L
22	7703	2	Facilities for children and adults	C	I	SC, WP
22	811	6	Control of communicable diseases, hearing on testing or	C	I	WP

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			admission for treatment			
22	815	1	Communicable diseases info disclosed to Dept. in confidence	C	I	L
22	824		Names of persons having or suspected of having a communicable disease	C	I	L, F
22	832	3	Hearing for judicial consent for blood-borne pathogen source of exposure	Not declared confidential; "may not be released to the public"	I	L
22	8704	10	Maine Health Data Organization	P	NS	
22	8707		Maine Health Data Organization	P, C	I, E	L
22	8754		Sentinel events reporting and filing	C, P	I, E	N, L
22	8824	2	Newborn hearing program tracking information	C	I	L
22	8943		Registry for birth defects	C, P	I	L
23	1980	2-B	Recorded images to enforce tolls	C	I	L
23	1982		Patrons of turnpike	C	NS	L
23	63		Records of right-of-way divisions of DOT and Turnpike Authority	C	E	T
23	753-A	3, 4, 5	State highways - design-build contracts	C	E	T
23	8115		Northern New England Passenger Rail Authority - projects	C	E	
24	2307	3	Nonprofit hospital or medical service organizations, accountant's work papers in custody and control of Superintendent of Insurance	C	E	N
24	2510	1	Maine Health Security Act, professional competence reports	C	I, E	L, SC

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24	2510-A		Maine Health Security Act, professional competence review records	C	NS	N, WP
24	2604		Maine Health Security Act, liability claims reports maintained by Superintendent of Insurance	C	I, E	N, L
24	2853	1-A	Maine Health Security Act - notice of claim	C	E	T
24	2857	1, 2	Mandatory Prelitigation Screening and Mediation Panels proceedings	C	NS	L
24-A	1420-N	6	Insurance producer	C	NS	L
24-A	1905	1	Insurance administrator, credit and investigative report	C	NS	
24-A	1911		Insurance administrator, audit and examination	C	I	
24-A	216	2, 3	Superintendent of Insurance – complaint and investigation records	C	NS	L, SC
24-A	216	5	Superintendent of Insurance – information received from agencies	P	NS	L, F
24-A	2204	4	Ins information and privacy act – investigative info (def)	C	I?	
24-A	2215	1	Ins information and privacy act – confidential info, marketing	C	I	N
24-A	222	13	Insurance – registration statement, tender offer, request or invitation for tender offers, option to purchase, agreement to merge, contract to manage filed with Superintendent of Insurance	C	E	L
24-A	225	3	Insurance examination report, all materials	C	E	L, F
24-A	226	2	Insurance examination reports furnished to Gov, AG, Treasurer, pending final decision	C	E	T
24-A	227		Insurance examination report, info pertaining to individuals	C	I	
24-A	2304-A	7	Ins – rate filings	C	E	T

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24-A	2304-C	3, 5	Physicians and surgeons liability ins rates	P	NS	L, F
24-A	2315		Ins – rates and rating orgs, stamping bureau	C	E	
24-A	2323	4	Ins – rates and rating orgs, loss or expense experience	C	E	N
24-A	2384-B	8	Ins – workers comp rating; claims, self-insurance	C	I, E	
24-A	2384-C	7	Ins – workers comp rating; claims, self-insurance	C	I, E	
24-A	2393	2	Workers comp pool – self-ins, surcharges	C	NS	
24-A	2412	8	Ins – contract, forms	C	E	T
24-A	2476	3, ¶D	^Interstate Insurance Product Regulation Commission	P	I, E	
24-A	2479	2	^Interstate Insurance Product Regulation Commission	A		L, F
24-A	2483	6	^Interstate Insurance Product Regulation Commission - work papers, individuals privacy, proprietary info of insurers	C	I, E	
24-A	3413	2	Stock and mutual insurers – use of info	P	E	
24-A	414	4	Info provided to Superintendent of Insurance by NAIC	P	E	L, SC
24-A	414	5	Ins certificate of authority audit – work papers	C	NS	N
24-A	4204	2-A	Health maintenance orgs – quality assurance programs	C	NS	L
24-A	4224	2	Health maintenance orgs – quality assurance committees	C	NS	L, F
24-A	4233	2	Health maintenance orgs – work papers with superintendent	C	NS	N
24-A	423-C	4	Ins, reports of material transactions	C	NS	L, WP
24-A	4245	1	Health maintenance orgs – NCQA accreditation survey report	C	NS	N, L
24-A	4303	3	Health Plan requirements – enrollee	P	I	WP
24-A	4406	3	Ins – delinquent insurers	C	NS	L, WP
24-A	4612	3	Maine Life and Health Insurance Guaranty Association – reports and recommendations of board	P	E	

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24-A	6458	1	Ins – risk-based capital stands	P	E	
24-A	6708	2	Ins – captive ins companies – examination documents	C	E	L, F
24-A	6715		Ins – captive ins companies – info submitted to supt	C	NS	L, F
24-A	6807	2	Viatical settlements – examinations	C	I	L
24-A	6807	7, ¶A	^Names of individual identification data for all viators and insured persons in possession of Ins. Supt.	C	I	If req'd by law
24-A	6807	7, ¶B	^Viatical settlement licensee examination records	C	NS	N, L, F
24-A	6818	6	^Fraudulent viatical or life insurance settlements info provided to enforce	C	NS	N, L
24-A	6907	1	* Dirigo Health - personally identifiable financial information obtained	C	I	N
24-A	6907	2	* Dirigo Health - health information (covered by HIPAA)	C	I	N
24-A	952-A	4	Life ins, actuarial opinion of reserves	C	E	N
25	1577	1	DNA data base and data bank	C	I	L
25	2003	5	Concealed firearms permits, access to confidential records	A	I	
25	2006		Concealed firearms permits – applications	C	I	WP
25	2806	8	Maine Criminal Justice Academy – misconduct info	C	I	T
25	2929	1, 2, 3, 4	Emergency services communications	C, P	I	L
25	2929	2	* Public safety answering point records	C, P	NS	L, F
25	2957		Maine Drug Enforcement Act – investigative records	C	NS	
26	1082	7	Unemployment compensation – final adjudicatory decisions	A	I	L
26	1082	7	Unemployment compensation – individual information in records and reports of employer	C	NS	L
26	1311		* Wage and benefit reports filed by contractor with DOL - protection of personal information	P	I	

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26	1353	2	^State Bd of Arbitration - adopt rules to determine what is confidential re forestry rates	P	E	
26	1419-A	5	Rehab, Deaf and hard-of-hearing, assessment on telecommunications carriers protective order	C	NS	
26	1419-B	5	Rehab, Deaf and hard-of-hearing, assessment on telecommunications carriers protective order	C	NS	
26	3		Labor – general provisions; info, reports and records of director	C	NS	L
26	43		Bur of Labor Standards - names of persons, firms or corporations providing information	C	I, E	WP
26	665	1	Minimum wage – employer records submitted to dir	C	NS	L
26	685	3	Substance abuse testing by employer	C	I	L
26	934		State Bd of Arbitration and Conciliation – report	C	NS	T
26	939		State Bd of Arbitration and Conciliation – info disclosed by party	C	NS	L
26	979-Q	2	State Employees Labor Relations Act grievance info	P, C	NS	L
26	979-Q	2	State Employees Labor Relations Act – personnel records in possession of Bur of Employee Relations	P, C	I	
27	121		Library records – identity of patron	C	I	WP, SC
27	377		Location of site in possession of State agency for archeological research	C, P	NS	L
28-A	755		Liquor licensees – business and financial records	C	E	
29-A	1258	7	Driver's licenses – Medical Advisory Board report	C	I	WP
29-A	1401	6	Driver's license – digital image	C	I	L
29-A	152	3	Motor vehicles – Secretary of State, data processing information files	C, P	G	

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29-A	2103	4	^Driver's license and registration - photocopies	P	I	F
29-A	2405	3	Reporting of OUI – physician-patient privilege	A	I	
29-A	251	3	Motor vehicles – written complaints, control numbers in titling vehicles	C?	G	
29-A	253		Motor vehicles – nongovernment vehicle info	C	NS	T
29-A	255	1	Motor vehicle records – driver's license and registration if protection order, etc.	C	I	L, F
29-A	257		* Secretary of State/Motor Vehicles - confidentiality of information technology system	C	G	
29-A	517	4	Motor vehicle records – unmarked law enforcement vehicles, registration	C	G	L
30-A	2702	1	Municipal personnel records	C	I	L, T
30-A	2702	1-A	Municipal personnel records, investigations of deadly force	C, A	I	T
30-A	4706	1, 2, 3	Municipal housing authorities	C	I, E	L, WP
30-A	503	1	County personnel records	C	I	L, T
30-A	503	1-A	County personnel records, investigations of deadly force	C, A	I	T
30-A	5205	1, 2, 3	Municipal community development	C	I, E	L, WP
30-A	5242	13	Tax Increment Financing Districts	C, P	I, E	
32	10701	4	Maine Securities Act, info furnished by agency to administrator	C, P	NS	F
32	10701	5-A	* Securities - disclosure of nonpublic information from investigation, protection of investors or public	D	NS	
32	1092-A	1, 2	Dentists and dental hygienists, patient's privilege	C	I	SC, L
32	11305	3	Maine Commodity Code, info by rule or order of administrator	C	NS	
32	13006		Real Estate Brokerage License Act – grievance or	C	NS	N

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PUBLIC RECORDS EXCEPTIONS

Sorted by Title and Section

TITLE	SECTION	SUB-SECTION	SUBJECT	STATUTE TYPE	SUBJECT OF RECORD	PERMITTED RELEASE
			professional standards committee info			
32	1658-F	1	Hearing aid dealers and fitters, testing and sales info	C	I, E	
32	2105-A	3	Nurses and nursing, info provided by health care facility to board	C	I	SC, L
32	2109		* Nurse applicants or licensees - personal residence and address	C	I	L
32	2599		Osteopathic physicians, medical staff review committees	C	NS	
32	2600-A		Osteopathic physicians, personal info about applicant/licensee	C	I	L
32	3296		Board of Licensure in Medicine, medical staff review committees	C	NS	
32	3300-A		Board of Licensure in Medicine, personal info about applicant/licensee	C	I	L
32	6115	1	Money transmitters and check cashers, financial info	C	I, E	
32	8121		^Private investigators under contract with law enforcement agency subject to same confidentiality	A	NS	L
32	87-B	3	Emergency Medical Services' Board, trauma incidence registry	C	I	
32	88	4	Emergency Medical Services' Board, letter of guidance or concern	D	NS	
32	92		Emergency Medical Services' Board - reports, info records	C, P	I	SC, WP
32	92+	First ¶	Emergency Medical Services Board – complaints and investigative records	C	E, I	T
32	92-A	2	Emergency Medical Services' Board, quality assurance activities	C	NS	N
32	92-A+	2	Emergency Medical Services Board – quality assurance	A	I	L

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TITLE	SECTION	SUB-SECTION	SUBJECT	STATUTE TYPE	SUBJECT OF RECORD	PERMITTED RELEASE
			info			
32	9405	4	Private security guards, info for licensing purposes	A	I	
32	9410-A	5	Private security guards, info for licensing purposes	A	I	
32	9418		Private security guards, info collected by commissioner for licensing	C	I	WP
33	1971	4	Unclaimed Property Act – info derived from reports	C	NS	L, F
34-A	11221	9, 10	* Information on sex offenders, sexual violent predators	D	I	
34-A	1203	5	Dept. of Corrections, Office of Advocacy – requests for action	C	I	L
34-A	1212		Dept. of Corrections, employees and contractors info	C	I	
34-A	1214	3, 4	Dept. of Corrections, Victims Services Coordinator – release information, requests for release information	P	I	
34-A	1216	1, 2	* Corrections: Commitment - medical and administrative records	P	I	L, WP, F
34-A	1216	6	* Corrections: assessment tools used to screen or assess clients	NPR	I?	L
34-A	5210	4	Parole Board info, report to Governor	C	NS	
34-A	9877	4	* Interstate Compact for Adult Offender Supervision - records that adversely affect personal privacy rights or proprietary interests	May exempt from disclosure	I, E	L
34-A	9903	8	* Compact for Juveniles, Interstate Commission - records that adversely affect personal privacy rights or proprietary interests	May exempt from disclosure	I, E	
34-B	1205	5	BDS, Office of Advocacy – requests for action	C	I	L
34-B	1207	1	BDS, commitment, medical, administrative records, applications, reports to person pertaining to person	C	I	L, SC, WP

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PUBLIC RECORDS EXCEPTIONS

Sorted by Title and Section

TITLE	SECTION	SUB-SECTION	SUBJECT	STATUTE TYPE	SUBJECT OF RECORD	PERMITTED RELEASE
			receiving services			
34-B	1207	1, ¶H	^Deaths at AMHI, BMHI, Riverview Psychiatric Center	A, P	I	L
34-B	1216	3	Mental health, Consumer Advisory Board	C, P	I	
34-B	3864	5	Mental health, involuntary commitment – hearing	C	NS	WP
34-B	5475	3	Mental retardation, judicial certification – hearing	C	NS	WP
34-B	5476	6	Mental retardation, judicial commitment – hearing	C	NS	WP
34-B	5605		Mental retardation – records of persons receiving services	C	I	L, SC, WP
34-B	7014	1	BDS, Sterilization – court proceedings	C	I	WP
35-A	114	1	Utility personnel records	C	I	L
35-A	1311-A	1	PUC – protective orders	C	E	L
35-A	1311-B	1, 2, 4	Public utility technical information	C, P	E	L
35-A	1316-A		PUC – communication re utility violation	C	I, E	
35-A	3203	3	PUC – informational filings, individual service contracts	A	I, E	
35-A	704	5	Utility records – customer information	C	I	L
35-A	8703	5	Telecommunication relay services	C	NS	
36	191	3-A	* Additional restrictions for proprietary information provided to State Tax Assessor for preparing legislation or legislative analysis	P	NS	
36	4312-C	1	Wild Blueberry Commission, info designated confidential	C, A	NS	
36	4315	1	Transportation of wild blueberries	C	E	SC
36	4316	4	Wild blueberries – audit	C, P	E	SC
36	4604	5	Potato industry, special taxes – Maine Potato Board: records and meetings if would adversely affect competitive position of industry or segments	T1, c13	NS	
36	579		Tree Growth Tax Law, forest management plan	C	NS	
36	6760		Employment tax increment financing	C, P	I, E	

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PUBLIC RECORDS EXCEPTIONS

Sorted by Title and Section

TITLE	SECTION	SUB-SECTION	SUBJECT	STATUTE TYPE	SUBJECT OF RECORD	PERMITTED RELEASE
36	7113	4	Multistate Tax Compact – information obtained in audit	C, P	NS	
36	841	2	Property tax abatement application information, proceedings	C	NS	
37-B			Bur of Veterans' Services, claims for benefits	C	I	WP, L. SC
37-B	395		Maine Military Authority – financial records	C	G	
37-B	797	7	MEMA. Chemical inventory reporting - transportation routes	C	E	L, F
38	100-A	1	Operation of vessels, pilots – complaints and investigative records	C	I	T, L
38	1310-B	2	Hazardous waste information	C, P	E	L
38	1661-A	4	Mercury-added products and services – info submitted to DEP	C, P	E	
38	1671		Mercury-added products and services – interstate clearinghouse	P	NS	
38	2303	5	Toxics use and hazardous waste reduction – progress evaluation, report by DEP	P	E	
38	2307-A	1, 5	Toxics use and hazardous waste reduction – facility plan	C, P	E	
38	2309	1	Toxics use and hazardous waste reduction – data collection and dissemination	P	E	
38	2313	2	Toxics use and hazardous waste reduction – trade secrets	P	E	
38	343-F		DEP – reporting and disclosure requirements	P	NS	
38	345-A	4	DEP/BEP – records, books, records	C, P	E	
38	414	6	BEP – records, reports or information obtained by BEP in license application procedure	C, P	E	
38	470-D		BEP – individual water withdrawal reports	C	E	
38	585-C	2	Hazardous air pollutant emissions inventory	C, P	E	

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PUBLIC RECORDS EXCEPTIONS

Sorted by Title and Section

TITLE	SECTION	SUB-SECTION	SUBJECT	STATUTE TYPE	SUBJECT OF RECORD	PERMITTED RELEASE
39-A	153	5	Workers' Compensation Board, abuse investigation unit – records, correspondence, reports	C	NS	SC
39-A	153	9	Workers' Compensation Board – audit and enforcement working papers	C	NS	
39-A	355	11	Workers' Compensation, Supplemental Benefits Oversight Committee – records and proceedings relating to individual claims	NPR	I	
39-A	403	15	Workers' Compensation – written, printed, graphic matter, data compilation	C	I, E	L
39-A	403	3	Workers' Compensation – insurance and self-insurance, certification	P	E	
39-A	409		Workers' Compensation – info filed by self-insurers	C	E	
Unallo-cated	PL 2003, c. 673	Pt. UUU	^FAME share w/DHS - Maine State Grant Program and TANF	A		L, F

C:\confidentiality laws for Linda T&S.doc (9/16/2005 1:04:00 PM)
Added all new confidentiality provisions through PL 2005, c. 12
Added new confidentiality provisions all 2005 PL chapters in Titles 1-5

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OUTLINE OF REVIEW AND EVALUATION PROCESS

Revised 4/6/05

I Preliminary

A. Identification of legislative measure that proposes a new exception from the definition of "public record"

1. Type of legislative measure
   - Bill/resolve
   - Committee amendment
   - Floor amendment?
   - Committee of conference amendment?
   - Other?

2. Nonpartisan staff review as printed; brought to attention of chairs of the Committee of Jurisdiction and the Chairs of the Review Committee

3. Review Committee sends letter to Committee of Jurisdiction indicating identification of legislative measure that may be subject to §434 review, and outlining procedures

B. Committee of Jurisdiction determines sufficient support (statute says "majority") to trigger review requirement (If the legislative measure is not a bill referred to a committee, who is the Committee of Jurisdiction?)

C. Committee of Jurisdiction written request for review by Review Committee

1. Support for proposal within Committee of Jurisdiction

2. Provision of written copy of the draft that is the subject of the requested review

3. Timing
   - Early enough in process to be useful to Committee of Jurisdiction (e.g., not after final vote)
   - Late enough in process that Review Committee is not reviewing a proposal that is not supported by the Committee of Jurisdiction
   - Sufficient time for Review Committee to conduct review and evaluation and make recommendations to Committee of Jurisdiction within Committee of Jurisdiction's time constraints

OUTLINE OF REVIEW AND EVALUATION PROCESS

Revised 4/6/05

II Review and evaluation

A. Schedule:

Review Committee must have sufficient time to schedule appropriate work sessions on proposal, seek appropriate input as necessary, deliberate by applying the statutory criteria for evaluation, develop recommendation and submit recommendation to the Committee of Jurisdiction; Schedule must be sensitive to the needs of Committee of Jurisdiction and Review Committee, and take into account the emergency nature, if any, of the legislative measure

B. Identification of interested persons

- Committee of Jurisdiction
- Presentation of proposal
- Resources to explain the interests to be balanced
- Resources to answer Review Committee questions

C. Identification of materials needed to review and evaluate

D. Notice of meetings

E. Review and evaluation

- Presentation of proposal
- Evaluation
  - Application of criteria
- Findings and recommendations

III Report findings and recommendations concerning whether the proposal should be enacted to Committee of Jurisdiction

IV Evaluation of process

A. Committee of Jurisdiction's comments and recommendations

B. Review Committee's comments and recommendations

1. Changes in procedures
2. Changes in statute
3. Changes in Joint Rules
4. Other

REVIEW OF PROPOSED PUBLIC RECORDS EXCEPTIONS

Revised 2/21/05

APPLICATION OF EXCEPTION REVIEW CRITERIA

The Maine Freedom of Access laws establish a policy of openness in all governmental functions. The "people's business" is to be handled in meetings that are open to the public. Similarly, the law provides that records that are in the possession or custody of an agency or public official that have been received or prepared for use in connection with the transaction of public or governmental business or contain information relating to the transaction of public or governmental business are public records, and the public has a right to access public records.

The FOA laws do provide exceptions to these general pronouncements, but, because the FOA laws are to be liberally construed, the exceptions to the general rules must be strictly construed. (Medical Mutual Insurance Company of Maine v. Bureau of Insurance, 2005 ME 12.) Although the evaluation of whether a proposed exception to the definition of "public records" is different from an interpretation of statute to determine whether existing law shields a particular record from public access, it is consistent with the fundamental underlying principles of the Freedom of Access laws to start with the premise that any records created, held or used by a governmental entity in the transaction of public or governmental business are public records. When a legislative measure proposes to except what is a public record from public access by designating the record as "confidential" and not subject to public disclosure, the burden of persuasion should be on the proponents of the exception. Without the designation of "confidential," the record is a public record and must be accessible to the public.

Section 434 provides the criteria for evaluation. The evaluation is constructed as a balancing process, through which the Review Committee is required to weigh the various competing interests. The balancing process is designed to be applied on a case-by-case basis, with the specific records and the needs and interests of all sides taken into account.

A. Whether the record protected by the proposed exception needs to be collected and maintained.

Section 434 was written with the recognition that there are many categories of information that should not be or do not need to be public. Criterion A asks the basic question of whether the record proposed to be protected needs to be collected and maintained by the governmental entity at all. If the information contained in the record will not be used in the transaction of public or governmental business, then, presumably, it should not be collected or maintained. Because there is a bias to make public as much information in the hands of the governmental agency as possible, there is great benefit in not collecting or maintaining information that is sought to be protected from public access if it is not needed by the governmental entity to do its business.

The transaction of public or governmental business is very broad and is intended to cover any action a government agency or official can take, including provision of services, law enforcement and licensing functions, to name just a few.

B. The value to the agency or official or to the public in maintaining a record protected by the proposed exception.

If it is determined that a record is useful to the transaction of public or governmental business, the next question is how important it is to the agency or official. If the benefit the agency or official gains by having that record as part of the pool of information used for decision-making or provision of other governmental functions is minimal, it might be better to not collect or maintain the record if there is concern that it should not be made public. If the record is useful or necessary to the agency or official, the question of its value to the public must also be asked. This can be seen as a two-pronged question. First, is the information valuable to the public in the sense that it is important information for the governmental entity to make informed decisions, provide appropriate services or otherwise carry out its governmental functions in an intelligent and responsible manner? The answer is helpful in determining the value of the record to the agency or official, and the public has an interest in that determination. The second prong, however, whether there is value to the public in having access to that record, is part of the balancing that criteria D, E, F, G, and I require. (See below.)

C. Whether federal law requires a record covered by the proposed exception to be confidential.

If federal law designates the record as confidential, it makes no sense for state law to not follow suit. The federal law will generally preempt contrary state provisions. (E.g., certain education records, certain health information.) The federal confidentiality provisions may be different than the proposed exception, however, or may not protect an entire record that the state or local governmental entity would create or possess. The state law should be carefully tailored to not be in conflict with federal law in order to ensure clarity for all who will interpret the state and federal provisions. The public may have a legitimate expectation that a record will be accessible under state law, without any indication that the federal law prohibits such access.

D. Whether the proposed exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records.

One of the most fundamental rights recognized in this country is the "right to be left alone." There is a reasonable expectation of privacy that at some point necessarily intersects a governmental entity's functions. This criterion supports the idea that the records be as accessible as possible without unnecessarily invading an individual's

privacy. Access to governmental records that do not identify individuals should not be restricted on the basis of protecting privacy. Similarly, closing records that contain information about individuals that is publicly available from other sources does not prohibit public access to that same information.

This criterion forces the review committee to identify an individual's privacy interest in the record, and compare that interest to the public's interest in the disclosure of public records in general and this record in particular. The evaluation will necessarily have to take into account the specific type of information that is within the record, and the individual's expectation in keeping that information private. This is not a question of whether or not the individual "has something to hide," but rather whether there is a generally recognized expectation that the information is not part of the public discourse. It arguably implicates at least two branches of protected privacy interests: protection from unreasonable intrusion upon one's seclusion, and protection from unreasonable publicity given to one's private life. (The other two interests protected by the tort of invasion of privacy, as mentioned in the Restatement (Second), of Torts Sec. Sec. 652A-652I (1977) are protection from appropriation of one's name or likeness and protection from publicity, which unreasonably places one in a false light before the public.)

The review committee must also examine the public's interest in the disclosure of those records. The evaluation has reached the point that the information in the record is of value to the agency or official, and to the public, in carrying out the governmental functions. The fact that the information is valued in this context automatically gives some weight to the public's interest in having access to the information. If a governmental decision is made based on the information in the record proposed to be protected, the public has an interest in knowing what the facts are that led to that decision. If it is important enough to be useful to the agency or official in transaction the public's or government's business, then the initial presumption is that the record should be public.

This is the point at which the balancing of the competing interests enters the evaluation. The statutory criterion recognizes that an individual has a right to privacy, and that interest in privacy is to be taken into account. The review committee must weigh the competing interests. The criterion states that the individual's interest must substantially outweigh the public interest in disclosure of the record. According to the statute, equal weight or slightly more import in favor of the individual's privacy interest is not sufficient to support the proposed exception.

E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records.

This criterion recognizes that a business does not have the same interest in privacy that an individual possesses. Nonetheless, a business still has interest in protecting proprietary information, trade secrets or commercial or financial information; the release of which could be competitively harmful. The Freedom of Access laws currently provide an exception from the definition of "public records" for "*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." (§402, sub-§3, ¶B) It is clear that information meeting the definition of "trade secret" is privileged and not subject to disclosure as a public record.*

The review committee is left with the task of determining whether the business's interest in keeping the information confidential - information that is not a trade secret but is still related to the business's competitiveness, and that is useful to the agency or official in carrying out the governmental function - substantially outweighs the public interest in releasing that record and public records in general. Equal weight or slightly more import in favor of the business's privacy interest is not sufficient, according to the statute, to support the proposed exception.

more??

F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records.

This criterion is anticipated to be applied in limited situations. It is intended to place a governmental entity in the shoes of a private entity, for Freedom of Access laws purposes, when the governmental entity is engaging in the same type of negotiations that private parties do. The Freedom of Access laws provide a general exemption for public entities for such records in labor negotiations. This criterion covers a broader category of negotiations, such as the purchase or sale of real property, but requires a balancing of interests that is not present in the FOA exception. The review committee must determine first, if the disclosure of such records would compromise a public body in negotiations, and then, whether the interest of the public body substantially outweighs the public interest in the disclosure of the records. The public has competing interests in making

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* Maine Rules of Evidence, Rule 507 protects "trade secrets."

Title 10, Chapter 302, the Uniform Trade Secrets Act, defines "trade secret." 10§1542, sub-§4:

4. Trade secret. *"Trade secret" means information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique or process, that:*

A. Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

B. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Maine Rules of Civil Procedure, Rule 26(c) authorizes the court to issue a protective order in discovery that provides "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed in only in a designated way. Such information is apparently considered confidential only if a protective order has been issued to prohibit or limit its disclosure; simply falling into the category of what may be the subject of a protective order does not make the record or information confidential. Medical Mutual Insurance Company of Maine v. Bureau of Insurance, 2005 ME 12.

such records public. The public can argue an interest in knowing the information the public body uses to negotiate, to determine if the terms being offered are appropriate and whether the negotiations are conducted in good faith. On the other hand, the public has an interest in the governmental entity negotiating the best conclusion possible, which may mean keeping certain information confidential, at least until the negotiations have been completed. Equal weight or slightly more import in favor of the individual's privacy interest is not sufficient, according to the statute, to support the proposed exception.

G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records.

This criterion requires the review committee to determine whether the disclosure of the record jeopardizes the safety of either an individual or the public in general. The review committee does not reach this question until it has already been determined that the record to be protected is needed by the governmental entity. Examples of records that might jeopardize the safety of an individual include law enforcement investigative or intelligence information about the identity of a confidential informant, or the address of a domestic violence victim needed for licensing purposes. Certain records documenting particular phases of disaster response plans (see 1 MRSA §402, sub-§3, ¶L), or the particular vulnerabilities of public infrastructure that could easily be exploited to panic or immobilize large contingents of the population are examples of information that, if released to the public, could jeopardize the public in general. The review committee will have to examine these potential threats, and determine whether that safety interest substantially outweighs the public's interest in the disclosure of the records. This balancing may be more difficult, as there is an argument that the public has a right to know the vulnerabilities of the governmental services infrastructure, for example, not just to know that government is doing its job, but in order to protect itself should a problem arise. Equal weight or slightly more import in favor of the individual's privacy interest is not sufficient, according to the statute, to support the proposed exception.

H. Whether the proposed exception is as narrowly tailored as possible.

With the starting premise that all records are open to the public, it is consistent to provide that, once an interest in confidentiality is found to substantially outweigh the public interest in disclosure, the protection of the information be as narrow as possible to protect only the information necessary to be shielded from public disclosure. The limitation may be temporal: e.g., the record is confidential until a governmental decision is made.

more???

I. Any other criteria that assist the review committee in determining the value of the proposed exception as compared to the public's interest in the record protected by the proposed exception.

If the review committee determines that there are additional criteria or considerations that are helpful to the committee in carrying out its review and evaluation functions, then the committee should document them and add them to its procedures.

PUBLIC RECORDS EXCEPTION REVIEW CHECKLIST

Revised 3/29/05

A. Whether the record protected needs to be collected				
B. The value to the agency or official or to the public in maintaining the record				
C. Whether federal law requires the record to be confidential				
D. Whether the proposed exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in disclosure				
E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records				
F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records				
G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records				
H. Whether the proposed exception is as narrowly tailored as possible				
I. Any other criteria that assist the review committee in determining the value of the proposed exception as compared to the public's interest in the record protected by the proposed exception				

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STATE OF MAINE

ONE HUNDRED AND TWENTY-SECOND LEGISLATURE

COMMITTEE ON JUDICIARY

March 4, 2005

Honorable Kenneth T. Gagnon, Senate Chair
Honorable John L. Patrick, House Chair
Joint Standing Committee on Legal and Veterans' Affairs
122nd Maine Legislature

Dear Senator Gagnon and Representative Patrick:

Introduction

This letter is the report of the Joint Standing Committee on Judiciary pursuant to Title 1, section 434 on the proposed committee amendment to LD 90, An Act Regarding the Gambling Control Board. The Committee reviewed the draft dated 3-2-05, and makes the recommendations described below.

We would like to open this report by expressing our appreciation for the participation and cooperation of all those involved. We extend special thanks to Chief Deputy Attorney General Linda Pistner for her constant attention and candor in helping us work through the process. Executive Director of the Gambling Control Board Robert Welch was an invaluable resource in explaining how the law applies and providing practical background. We want to especially thank the members of the Legal and Veterans' Affairs Committee for their attendance and willingness to share their thoughts and insights, and for the assistance of Legislative Analyst Danielle Fox. We also appreciate the attendance of the interested parties and members of the public who have followed every step of this process.

Process

The Judiciary Committee met after the House and Senate adjourned on Wednesday, March 2, 2005. We reviewed each proposed public record exception in the proposed committee amendment and evaluated it in the context of the nine criteria established in Title 1, section 434:

A. Whether the record protected by the proposed exception needs to be collected and maintained;

B. The value to the agency or official or to the public in maintaining a record protected by the proposed exception;
C. Whether federal law requires a record covered by the proposed exception to be confidential;
D. Whether the proposed exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records;
E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records;
F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records;
G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records;
H. Whether the proposed exception is as narrowly tailored as possible; and
I. Any other criteria that assist the review committee in determining the value of the proposed exception as compared to the public's interest in the record protected by the proposed exception.

In examining the criteria we reached the initial conclusion that we did not need to apply criteria A and B to the proposed public record exceptions in the proposed committee amendment, believing that the thoroughness of the work of the Legal and Veterans' Affairs Committee ensured that the information to be collected and maintained by the Gambling Control Board and the Department of Public Safety was necessary and was of significant value in carrying out the responsibilities entrusted to the board and the department. We noted that an exception falling under criterion C would require no further evaluation. We recognized that most of the proposed exceptions would be weighed appropriately under criteria D, E and F. We acknowledged that criterion H would have to be applied in evaluating every proposed exception. We understood criterion I to apply when the evaluation of a particular proposed exception does not quite fit under the other criteria.

Evaluation and recommendations

- Subsection 1, paragraph A:

  A. Trade secrets as defined in Title 10, section 1542 and proprietary information that if released could be competitively harmful to the submitter of the information;

  The Committee recognized that current law protects trade secrets and proprietary information in other contexts. The Committee applied Criterion E to this proposed exception, and concluded that it is an appropriate exception and is no broader than necessary.

- Subsection 1, paragraph B:

  B. Information that if released would constitute an unwarranted invasion of personal privacy of a key executive, gaming employee or any other individual included in application materials, as determined by the board. The board may release a summary of information confidential under this paragraph describing the basis for the board's action in granting, denying, renewing, suspending, revoking, or failing to grant or renew a license issued under this chapter. In preparing a summary, the board shall maximize public access to that information while taking reasonable measures to protect the confidentiality of that information;

  The Committee initially applied Criterion D to this proposed exception. The Committee recognized that before the information is considered confidential, the Gambling Control Board must determine that release of the information would constitute an unwarranted invasion of personal privacy. This allows the Board to release information as public if the Board determines that the release, although an invasion of personal privacy, is warranted. This determination will have to be made on a case-by-case basis by the Board. The Committee also applied Criterion H to determine if the exception is as narrowly tailored as possible to achieve its purpose. The Committee is comfortable with this exception as providing protection for personal privacy while, by giving the Board the discretion to determine in each case whether the release is an unwarranted invasion of personal privacy, the exception is as narrow as possible.

  The second part of this paragraph, as written, gives the Board the option of releasing a summary of information that is confidential under the paragraph (i.e., unwarranted invasion of personal privacy) in order to describe the basis for the Board's decision concerning an applicant or licensee. The Committee discussed this provision and concluded that a summary that maximizes public access while still protecting personal privacy is a good way to meet the public's interest in the information that was important to the Board's decision without requiring the release of personal, private details. Although both the Freedom of Access laws (1 MRSA §407) and the Administrative Procedure Act (5 MRSA §9061 and §10005) require a written record of and adjudicatory or licensing decision, there are circumstances in which the Board would not be required to prepare a summary. Keeping the summary at the discretion of the Board does not enhance public access. Therefore, the Committee recommends that the Board be required to provide the summary when requested. We think this is consistent with the original intent of paragraph B.

  Recommended language:
  B. Information that if released would constitute an unwarranted invasion of personal privacy of a key executive, gaming employee or any other individual included in application materials, as determined by the board. Upon request, the board shall release

a summary of information confidential under this paragraph describing the basis for the board's action in granting, denying, renewing, suspending, revoking, or failing to grant or renew a license issued under this chapter. In preparing a summary, the board shall maximize public access to that information while taking reasonable measures to protect the confidentiality of that information;

- Subsection 1, paragraph C:

  C. Key executive or gaming employee compensation, except for executive compensation required to be filed with the Securities and Exchange Commission, or, with respect to applicants or licensees that are not publicly traded corporations, executive compensation that would be required to be filed with the Securities and Exchange Commission were the applicant or licensee a publicly traded corporation or controlled by a publicly traded corporation;

  The Committee also examined the proposed exception in paragraph C using criterion D. We recognize that generally compensation is not a matter of public record. There are situations in which the public has an interest in knowing whether the compensation of an executive is related to revenue that is due the State. Although the Committee is not exactly clear on what the Securities and Exchange Commission requires for disclosure for top executives of publicly traded corporations, we do know that it is a known quantity for those who have to make the disclosures. We think it is a reasonable requirement for publicly traded corporations as well as business organizations that are not publicly traded. Members of the Committee noted that in the case of a large corporation or other business entity, a wholly-owned subsidiary in Maine may carry out the gaming operations in this State, and yet the top executives' compensation of that subsidiary would not be disclosed. The Committee noted that the information is pertinent to public oversight if salaries are excessive, or if the public is asked to authorize another gaming establishment in the State. A majority of the Committee (9-1) therefore recommends disclosure of the compensation of the individuals in control of the Maine operations as well.

  Recommended language:
  C. Key executive or gaming employee compensation, except:

  (1) Executive compensation required to be filed with the Securities and Exchange Commission, or, with respect to applicants or licensees that are not publicly traded corporations, executive compensation that would be required to be filed with the Securities and Exchange Commission were the applicant or licensee a publicly traded corporation or controlled by a publicly traded corporation, <u>is not confidential</u>; <u>and</u>

(2) Compensation of the officers of the business entity that is organized or authorized to do business in this State who are responsible for the management of gaming operations, as determined by the board, is not confidential;

- Subsection 1, paragraph D:

  D. Financial, statistical and surveillance information related to the applicant or licensee that is obtained by the board or department from the central site monitoring system or surveillance devices;

  The Committee applied Criterion E to the exception proposed in paragraph D. The Committee agreed that even though the raw information from the central site monitoring system and surveillance devices may apply directly to a licensee or applicant, the information was sensitive enough in a business context to be appropriately protected from public disclosure. The Committee also noted that some personal privacy interests, particularly with regard to surveillance devices such as video cameras, implicate privacy concerns. The Committee found little weight to the public interest in the raw data, and agreed with the propriety of the proposed exception. This exception is related to the exception proposed in subsection 4, in which a summary of the information is required to be made available on a regular basis.

- Subsection 1, paragraph E:

  E. Records that contain an assessment by a person who is not employed by the board or the department of the credit worthiness, credit rating or financial condition of any person or project, including reports that detail specific information for presentation to the board or department. Persons retained by the board or department to provide such an assessment shall prepare reports that indicate their conclusion and summarize information reviewed by them in a way that maximizes public access to that information;

  The Committee applied Criterion E to the exception proposed in paragraph E. The Committee recognized this proposed exception as a protection against "backdoor" disclosure of confidential financial information. The public's interest in the information is to ensure that the license was appropriately awarded and the gaming enterprise remains solvent and providing revenue to the State. The summary of the information is sufficient to meet those needs.

- Subsection 1, paragraph F:

  F. Information obtained from other jurisdictions designated as confidential by the jurisdiction from which it is obtained and that must remain confidential as a condition of receipt. The board and the department may use information designated as confidential

by the state from which it is obtained but shall first make reasonable efforts to use information that is known to be publicly available from another source;

The Committee applied Criteria F and I to the exception proposed in paragraph F. It is our understanding that other states were willing to share confidential information with the Department of Public Safety and the Gambling Control Board, but only if the Department and the Board would continue to keep that information confidential. Because Maine's Freedom of Access laws treat all governmental records as public unless designated as confidential, the Department and the Board could not guarantee that confidentiality, and therefore did not receive access to pertinent information. We believe paragraph F proposes a reasonable exception. We understand that such protections may be necessary in negotiations among jurisdictions in order to share information that is integral to the regulatory process. The requirement that the Board and the Department first make reasonable efforts to use information that is publicly available tailors the exception to be as narrow as possible. We note one correction to ensure that the language consistently refers to "jurisdictions" in order to accommodate all states, municipalities and the federal government, as well as foreign jurisdictions.

Recommended language:
F. Information obtained from other jurisdictions designated as confidential by the jurisdiction from which it is obtained and that must remain confidential as a condition of receipt. The board and the department may use information designated as confidential by the jurisdiction from which it is obtained but shall first make reasonable efforts to use information that is known to be publicly available from another source;

- Subsection 1, paragraph G:
  G. Information that is designated confidential under federal law whether obtained from federal authorities or provided to the board or department by an applicant, licensee or key executive; and

  The Committee applied Criterion C to the exception proposed in paragraph G. It is our understanding that information designated confidential under federal law would be confidential even if this provision were not included. The proposed exception does not detract from public access to otherwise public records, so we are comfortable with retaining it.

- Subsection 1, paragraph H:
  H. Birth dates, social security numbers, home addresses and telephone numbers, passport numbers, driver's license numbers, fingerprints, marital status, family relationships and support information, health status, personal financial records and tax returns of any individual.

The Committee applied Criterion D to the exception proposed by paragraph H. We recognize that paragraph H, when read in conjunction with subsection 6, merits special consideration. Subsection 6 provides that all the information that is designated confidential in the entire section becomes public and the Board must therefore release it upon request, when the information is otherwise publicly available. Subsection 6, however, specifically excepts the personal information listed in paragraph H from such disclosure, even if the information is otherwise publicly available.

The Committee reviewed each item listed in paragraph H, and reviewed it with Criterion H in mind. The Committee noted that an individual's scattered data does not have the same impact as the same data gathered in a single place. The Committee therefore recognizes this exception, with one deviation, as a reasonable limitation on public access. Although there was discussion about birth dates and family relationships and support, the Committee was unanimous in recommending that "marital status" not be a protected item of information under this exception.

Recommended language:
H. Birth dates, social security numbers, home addresses and telephone numbers, passport numbers, driver's license numbers, fingerprints, ~~marital status,~~ family relationships and support information, health status, personal financial records and tax returns of any individual.

- Subsection 3:

*3. **Central site monitoring operator.** Records and information obtained or developed by the board or the department as part of a suitability requirement for selecting a 3rd party to operate the central site monitoring system pursuant to section 1004 are confidential for the purposes of Title 1, section 402, subsection 3, except that they may be disclosed with the written consent of the person applying as the central site monitoring operator.*

The Committee applied Criteria D and E to the exception proposed in subsection 3. Once the Committee understood that the information made confidential was the information created or obtained to determine the suitability of the entity chosen to operate the central site monitoring system, the Committee was comfortable that the exception was necessary to protect private personal information or competitive business information. The fact that the information provided by bidders is in the public domain helps to indicate that the exception is fairly narrowly tailored. In some respects, there is less protection for bidders on the central site monitoring system contract than there is for applicants and licensees. On the other hand, all the information that is used to determine suitability under section 1016, subsection 2 will be shielded from public disclosure. If the information is available

publicly, subsection 6 will authorize the release of it, even though it is part of the suitability review.

- Subsection 4:

4. Monitoring and surveillance records and information. *Financial, statistical and surveillance information obtained by the board or department from the central site monitoring system or surveillance devices is confidential and may not be disclosed. The board shall prepare and make publicly available monthly and annual reports on the results of slot machine operations using the information described in this subsection pursuant to section 1003, subsection 2, paragraphs Q and R, as long as the board takes appropriate measures to protect the confidentiality of specific information designated as confidential by this section.*

The Committee applied Criteria D and E to the exception proposed in subsection 5. Although there was some sentiment that it was duplicative of subsection 1, paragraph F, the Committee recognized that the raw data could provide more exposure than required in the public interest to individuals and competitive business information. The Committee agrees that the cumulative reports made on a regular basis should adequately serve the public interest in the operation and regulation of the gaming facility that can be gleaned from this type of information.

- Subsection 5:

5. Records on effective date. *This section determines whether a record or information in the possession of the board or the department on the effective date of this section is confidential, and not the law in effect when the board or the department obtained the record or information. Disclosure of the record or information is governed by this section.*

The Committee applied Criterion H to the application provisions of subsection 5. The Committee's concern was whether the Board or the Department had withheld information that is public under the existing law in anticipation that the law would be changed under LD 90. Executive Director Welch assured the Committee that every FOA request had been responded to completely and within the time frames established by statute, and that no requests for public documents were pending. The Committee does not believe subsection 5 creates a public record exception.

- Subsection 6:

6. Publicly available records. *Except for the information described in subsection 1, paragraph I, nothing in this section may be construed as designating confidential any*

records or information that are otherwise publicly available, and the board and department are not required to treat any such document or information as confidential.

The Committee applied Criterion H to subsection 6. We believe this is an important provision to ensure that public records are treated as public records, regardless of whose hands they are in. We are generally uncomfortable with denying the right to examine or copy public information held by a governmental agency, but we understand the special protection the Legal and Veterans' Affairs Committee proposed for certain items of personal information; our acceptance of that proposal is part of our discussion on subsection 1, paragraph H. Our only recommendation is to correct the cross-reference to subsection 1, paragraph H.

Recommended language:

6. Publicly available records. *Except for the information described in subsection 1, paragraph ~~I~~ H, nothing in this section may be construed as designating confidential any records or information that are otherwise publicly available, and the board and department are not required to treat any such document or information as confidential.*

We hope that you find our evaluation and recommendations useful. We believe the process was extremely useful, and we appreciate your participation and cooperation as we create the new course of action that was necessarily one of first impression. We look forward to your comments and suggestions as to how the entire review procedure can be improved. We are committed to the policy of openness in all governmental functions that is established in the Freedom of Access laws, and we appreciate your assistance in carrying out that commitment.

Sincerely,

Barry J. Hobbins, Senate Chair
Joint Standing Committee on Judiciary

Deborah L. Pelletier-Simpson, House Chair
Joint Standing Committee on Judiciary

LEXSEE 400 A2D 340

JAMES MOFFETT et al. v. CITY OF PORTLAND et al.

Law Docket No. Cum-79-4

Supreme Judicial Court of Maine

400 A.2d 340; 1979 Me. LEXIS 592; 5 Media L. Rep. 1015

April 10, 1979

DISPOSITION: [1]**

Appeal sustained. Judgment reversed.

LexisNexis(R) Headnotes

COUNSEL:

Attorneys for the Plaintiffs: Richardson, Hildreth, Tyler & Troubh. By: Ronald D. Russell, Esq. (orally), Portland, Maine.

Attorneys for the Defendants: William O'Brien, Esq. (orally), Deborah Keefe, Esq. Portland, Maine (City of Portland).

Glen L. Porter, Esq. (orally), Bangor, Maine (Maine Chiefs of Police Association, Amicus Curiae) (Plaintiff), Preti Flaherty & Beliveau. By: John J. Flaherty, Esq., David Cohen, Esq. Portland, Maine (Guy Gannett Publishing Company, Amicus Curiae) (Defendant).

JUDGES:

McKusick, C.J. Wrote The Opinion. Pomeroy, Archibald, Delahanty, Godfrey, and Nichols, concurring. Wernick, J., did not sit.

OPINIONBY:

McKUSICK

OPINION:

[*341] Plaintiffs Portland police officers n1 appeal from the Superior Court's dismissal of their motion for a preliminary injunction to prevent defendants, the City of Portland, the City Manager, and the Portland Chief of Police, n2 from publicly disclosing transcripts of statements made by the officers during an internal police disciplinary investigation. Guy Gannett Publishing Company (hereafter "Gannett"), n3 the publisher of daily newspapers in Portland, which seeks access to those **[**2]** records, bases its request upon section 408 of the Maine Freedom of Access Act, n4 1 M.R.S.A. § 401 *et seq.* (1978), which reads in pertinent part:

> **[*342]** "Except as otherwise provided by statute, every person shall have the right to inspect and copy any public record during the regular business hours of the custodian . . ."

Section 402(3) of the Act, however, defines "public records" to exclude:

> "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; . . ." (hereafter referred to as "Exception B")

Plaintiff officers n5 contend that the requested investigatory records fall within Exception B to the Freedom of Access Act because use of those records as evidence in a criminal trial against them would be barred by their Fifth Amendment privilege against self-incrimination; and the officers also point out that the City's contract with their union requires that "the interrogation of police officers shall be conducted with the maximum amount of confidentiality possible." **[**3]** From those premises the police officers urge that the City has no duty under the Freedom of Access Act to disclose the investigatory records and in the absence of any such duty, is contractually obligated *not* to do so. Unless enjoined, the City has declared its intention of complying with Gannett's request by turning over copies of the officers' statements and has in this proceeding actively defended its right to do so.

n1 Police officers James Moffett, Donald Mowatt, Francis Batchelder, John Fanning, Chris Murphy, David Richardson, Allan McIntire, and Robert Ridge are the plaintiffs in this case.

n2 We hereafter refer to all defendants collectively as "the City."

n3 The complaint also named Guy Gannett Publishing Company as a defendant. At the hearing in Superior Court on December 13, 1978, the trial justice granted a motion to dismiss the complaint as to defendant Gannett. Gannett then moved for permission to participate in the hearing as amicus curiae. This motion was denied. Subsequently, after appellants filed notice of appeal to the Law Court, all parties executed a consent form agreeing that Gannett could submit an amicus brief to the Law Court. Rule 75A(f)(1), M.R.Civ.P.

[**4]

n4 The legislative history of the Freedom of Access Act shows that access to public records and proceedings has had the continuing attention of the state legislature for the past two decades. As originally enacted by P.L. 1959, ch. 219, the so-called Right to Know Law provided for a right of public access to "public proceedings" and granted the public the right to inspect all records or minutes of such meetings. The act remained essentially unchanged until 1973 when the legislature expanded its scope by requiring that every governmental agency make a written record of every "decision" regarding licenses and permits, and by granting the public a right to inspect these records. P.L. 1973, ch. 433, § 2. The act was again amended to provide that legislative records were to be open to public inspection. P.L. 1975, ch. 483, § 1.

Additionally, a new definition of "public records" was promulgated, *id.* § 3; however, that latter definition of "public records" was immediately repealed and replaced by P.L. 1975, ch. 623, § 1, effective October 2, 1975.

The first special session of 1976 repealed the entire Freedom of Access Act as variously amended previously and rewrote it, codifying many of the provisions that had been developed in the prior amendment process. P.L. 1976, ch. 758, effective July 29, 1976.

The statutory language exempting records "within the scope of a privilege," herein called Exception B, first appeared in P.L. 1975, ch. 623, § 1, effective October 2, 1975, and was taken over without change in the 1976 rewriting and codification of the Freedom of Access Act by P.L. 1976, ch. 758. Thus, Exception B, which we are now called upon to construe for the first time, has been in the law for only three years.

[**5]

n5 The Maine Chiefs of Police Association as an amicus curiae has filed a brief and argued orally in support of the position taken by plaintiffs.

The applicable law supports the position taken by the police officers, and accordingly we sustain their appeal.

I. *The Facts*

On September 9, 1978, plaintiff police officers were called to investigate a disturbance on Winter Street in Portland. Several persons were arrested. Later, civilian complaints were filed against the officers charging that they had used excessive force in making the arrests.

The Portland Police Department conducted an internal investigation of the incident to determine whether any of the officers should be disciplined. Lieutenant Guevin and Sergeant Stanhope interviewed each of the eight plaintiff police officers and made a verbatim transcript of the proceedings. Although no express mention was made of the possibility of dismissal from the police force, each officer was informed before the interview began that failure to answer the questions put to him could result in "disciplinary action ". n6 Relying on the City's [**6] promise of maximum possible confidentiality contained in its contract with the Police Benevolent Association, and faced with the threat of "disciplinary action" if he remained silent, each officer answered all [*343] questions. Counsel for the City conceded in the hearing before the Superior Court that the officers "were compelled to make the statements against their free will." After completing all the interviews, Lieutenant Guevin and Sergeant Stanhope submitted a final report in which they concluded that all of the civilian complaints of police misconduct were without merit.

n6 In summarizing plaintiff's arguments, the opinion below refers to Portland Police Department Regulations § 5.15, para. 13, requiring police officers "'to answer questions by or render material in relevant statements to competent authority in a departmental investigation when so

directed' or be subject to possible disciplinary action including dismissal." The interrogation procedure used by the police department did not offend constitutional principles in any way. "Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity [against self-incrimination]." *Lefkowitz v. Cunningham, 431 U.S. 801, 806, 53 L. Ed. 2d 1, 97 S. Ct. 2132 (1977). See also Sanitation Men v. Sanitation Commissioner, 392 U.S. 280, 284, 20 L. Ed. 2d 1089, 88 S. Ct. 1917 (1968); Gardner v. Broderick, 392 U.S. 273, 278, 20 L. Ed. 2d 1082, 88 S. Ct. 1913 (1968).*

[7]**

Authorized police summaries of the eight interviews with plaintiff police officers were released to the press. Gannett then formally requested the City to give it access to the complete transcripts of the interviews. On advice of counsel, the City Manager, advised Gannett by a letter dated December 11, 1978, that the requested records would be made available under the Freedom of Access Act, but that the police officers involved would first be given an opportunity to take legal action to challenge the public disclosure of their interview transcripts.

The eight police officers promptly filed a complaint in the Superior Court (Cumberland County) seeking both a preliminary and a permanent injunction against public disclosure of their statements. After a hearing on December 13, 1978, the Superior Court by order dated December 22, 1978, denied the police officers' motion for a preliminary injunction. The police officers then prosecuted this appeal. n7 Recognizing that the public interest demanded a speedy resolution of this controversy, the court granted the parties' request for an expedited hearing of this appeal on March 19, 1979. n8

n7 Pursuant to Rule 62(d), M.R. Civ. P., a stay pending appeal was granted, in order to prevent disclosure of the requested records, which would have rendered the issues in this case moot.

[8]**

n8 Ordinarily there must be a final judgement before an appeal can be taken to the Law Court, but an exception is permitted where substantial rights of a party will be irreparably lost if review is delayed until final judgement. *See Hazzard v. Westview Golf Club, Inc., Me., 217 A.2d 217, 222 (1966).* The federal courts have followed the same rule. *Cf. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 441, 100 L. Ed. 1297, 76 S. Ct. 895 (1956)* (Frankfurter, J., concurring) ("the Court has permitted appeal before completion of the whole litigation when failure to do so would preclude any effective review or would result in irreparable injury"); *United States v. Wood, 295 F.2d 772, 777 (5th Cir. 1961).* Here, failure to allow the police officers to appeal the denial of their motion for a preliminary injunction would mean that the interview transcripts would be publicly disclosed, and the issue of whether any part of the transcripts are exempt from the Freedom of Access Act would become moot. On these facts, an appeal is appropriate as an exception to the "Final judgement" rule.

II. *The* **[**9]** *Police Officers' Constitutional Privilege Against Self-Incrimination*

Before turning to the question of statutory construction whether the word "privilege" is used in Exception B of the Freedom of Access Act to encompass the privilege against self-incrimination, we must decide whether these plaintiff police officers under the circumstances of their disciplinary interrogation can in any event assert that their Fifth Amendment privilege bars use of the transcripts against them in a subsequent criminal action.

The police officers rest their contention that the transcripts are protected by their privilege against self-incrimination upon *Garrity v. New Jersey, 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1967).* In *Garrity*, investigators had warned police officers suspected of participation in a conspiracy to fix traffic tickets that they would be subject to removal from office if they refused to answer the questions put to them. The officers then had given incriminating statements, which were introduced in evidence in subsequent trials where the officers were convicted of criminal offenses. In reversing their convictions, the United States Supreme Court concluded that the **[**10]** threat of discharge deprived the officers of their "free choice to admit, to deny or to refuse to answer." *Id. at 496.* The Court said:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty **[*344]** of self-incrimination is the antithesis of free choice to speak out or to remain silent . . . We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." *Id. at 497-98.*

In the case at bar, the Superior Court justice, in denying plaintiff police officers' motion to enjoin public disclosure of the transcripts, distinguished *Garrity* on the basis of the warning given the officers prior to the interrogation. The trial justice noted that in *Garrity* the officers being interrogated were faced with "a specific state statute mandating a forfeiture of 'office, position or employment' of any person holding an elective or appointive public office who refused to answer questions while under oath," while the officers in the instant case were merely threatened with unspecified **[**11]** "disciplinary action."

The Superior Court justice's reading of *Garrity* as applied to this case is unnecessarily narrow. All involuntary self-incriminating statements, regardless of the nature of the coercion that produced them, are privileged under the Fifth Amendment. "[The] touchstone of the Fifth Amendment is compulsion," *Lefkowitz v. Cunningham, 431 U.S. 801, 806, 53 L. Ed. 2d 1, 97 S. Ct. 2132 (1977),* and the compulsion may take many forms. "[Direct] economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids." *Id. at 806.* The loss of unsalaried political positions involved in *Cunningham* had no direct economic consequences upon the politician-lawyer. Recognizing that its earlier decisions had been premised on "penalties having a substantial economic impact," the Supreme Court nevertheless held that the indirect consequences of the political dismissals were sufficient to trigger the protection of the Fifth Amendment. The Court noted that the loss of his political offices deprived the politician of substantial prestige and political influence, diminished his general reputation in the **[**12]** community, and indirectly had an economic impact on his professional practice of law by injuring his reputation. In assessing coercion the Court took into account those "potential economic benefits" of which Cunningham "might" be deprived. Thus, the test is whether the threatened penalty "reasonably appears to have been of sufficiently appreciable size and substance to deprive the accused of his 'free choice to admit, to deny, or to refuse to answer'." *United States ex rel. Sanney v. Montanye, 500 F.2d 411, 415 (2d Cir. 1974),* citing *Garrity v. New Jersey, supra at 495.*

Even if the City had not conceded that plaintiff police officers "were compelled to make the statements against their free will," this record establishes beyond debate that they were in fact deprived of their "free choice to admit, to deny or to refuse to answer." Although the officers apparently were not told what sanctions exactly would be employed if one of them resisted responding to the departmental interrogation, the officers could have reasonably assumed that the threatened "disciplinary action" ran the gamut from demerits or reprimands to dismissal. But no matter what particular sanctions may have **[**13]** been contemplated, one thing is clear: *any* disciplinary action would become a part of the officer's history of career service. Even the accumulation of a few demerits might impair his career progress and could lead to his later nonpromotion, suspension, or even dismissal. Much like the clouding of the lawyer-politician's reputation in *Lefkowitz v. Cunningham, supra,* the imposition of any disciplinary sanction would cast a shadow over the professional reputation of the officer and would have similar indirect economic effects. The threat of potential disciplinary sanctions raised the specter of significant future economic injury which might have to be borne as the price of the police officers' assertion of his constitutional privilege to remain silent. The indisputable fact in this case is that the statement made by each of plaintiff police officers was coerced.

[*345] In view of the involuntary nature of his statement, each officer now has a privilege under the Fifth Amendment to bar the use of that statement in any way in a criminal prosecution against him. The coercion exerted by the threat of disciplinary action constituted "a classic case of 'compelling' a defendant **[**14]** to be a witness against himself." *New Jersey v. Portash, 440 U.S. 450, 59 L. Ed. 2d 501, 99 S. Ct. 1292 47 U.S.L.W. 4271, 4275 (1979)* consequences of the use of coercion to obtain a statement such as those obtained from plaintiff police officers. The Fifth Amendment forbids *any* use of such a coerced statement in a criminal proceeding against the person forced to make the statement. It excludes use of an involuntary statement even for impeachment purposes. *New Jersey v. Portash, supra.* In *Portash* the defendant was coerced into testifying before a grand jury by the threat of contempt sanctions. Here, the coercion consisted of a threat of disciplinary action. Exactly as the Fifth Amendment forbade the use, for any purpose, of the defendant's grand jury testimony in *Portash*, so each officer's involuntary statement is subject to his privilege to bar its use in any criminal proceeding against him.

The fact that each interrogation transcript is privileged does not mean that the interrogated officer cannot be prosecuted and convicted of a crime, if any crime was committed by him. "The privilege has never been construed to mean that one who invokes it cannot be subsequently **[**15]** prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts'." *Kastigar v. United States, 406 U.S. 441, 453, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972).* In the case at bar the privileged nature of the coerced statement made by each officer merely means that he may not be convicted by use in any way of the words that were forced out of his mouth. n9

n9 We do not mean to imply that plaintiff police officers committed any crimes. Here we decide merely that in the hypothetical event that a criminal prosecution were pressed against one of these officers, then the Fifth Amendment privilege would bar any use whatever of his coerced statement.

In sum, the entire statement made under coercion by each police officer would in any criminal proceeding be within the scope of his Fifth Amendment privilege against self-incrimination as interpreted last month by *Portash*.

III. *Meaning of Exception B to the Freedom of* **[**16]** *Access Act*

We are then brought to the question which lies at the heart of this case: Did the legislature intend to include the Fifth Amendment privilege among those "[privileges] against . . . use as evidence recognized by the courts of this State in . . . criminal trials"? Has the legislature made an exception to the Freedom of Access Act for those records of subject matter that would be subject to the Fifth Amendment privilege against self-incrimination if sought to be used as evidence in a criminal trial? We are compelled to answer in the affirmative.

In construing a statutory provision a court must look first and primarily at the language of the provision. Here the wording of the disputed Exception B, 1 M.R.S.A. § 402(3)(B), could hardly be more clear. n10 **[*346]** What would otherwise be "public records" are not "public records" if they

> "would be within the scope of a privilege against the 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."

The term "privilege against discovery or use as evidence" is at once precise and comprehensive. **[**17]** With care, the legislative draftsmen spelled out the way of determining whether particular records fall within the privileged records exception; that determination is to be made by considering whether by reason of a privilege they would be inadmissable as evidence in a court proceeding in the State of Maine. In addition to the privilege against self-incrimination declared by the Fifth Amendment to the United States Constitution, various privileges codified in Article V of the Maine Rules of Evidence and others provided by statute are "recognized by the courts of this State." n11 For example, Rule 504, M. R. Evid., makes husband-wife communications excludable from use as evidence under specified circumstances, and 35 M.R.S.A. § 141 (1978) similarly makes inadmissable in evidence accident reports filed by utilities with the Public Utilities Commission. *See also* 17 M.R.S.A. § 3964 (Supp. 1978) (statements obtained in hospital within 30 days of injury); 26 M.R.S.A. § 2 (Supp. 1978) (accident reports filed with the Director of the Bureau of Labor). Each of the privileges is justified by its own policy considerations recognized by the law, and each has developed its own special **[**18]** limitations and rules. The legislature declared that the public disclosure exception applied to a record falling within the scope of *any* evidentiary privilege recognized in the courts of Maine, and at the same time in effect incorporated by reference the special rules that have been developed by constitutions, statutes, rules of court, and judicial decisions to define the scope of the particular privilege.

n10 The complete text of 1 M.R.S.A. § 402(3), defining what are and what are not "public records" that must be disclosed under section 408, reads as follows:

> "3. Public records. The term 'public records' shall mean any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except:
> "A. Records that have been designated confidential by statute;
> "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*;

"C. Records, working papers 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 of any of its committees during the biennium in which the proposal or report is prepared;
"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; and
"E. Records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy and the University of Maine. The provisions of this paragraph do not apply to the boards of trustees, and the administrative council of the University of Maine, which were referred to in section 402, subsection 2, paragraph B." (Emphasis added)

[19]**

n11 On February 1, 1976, almost contemporaneously with the legislature's rewriting and codification of the Freedom of Access Act into its present form by P.L. 1976, ch. 758, to be effective July 29, 1976, the Supreme Judicial Court promulgated the Maine Rules of Evidence. Evidence Rule 501 broadly declares the sources of the evidentiary privileges "recognized by the courts of this State in civil or criminal trials":

> "Except as otherwise *provided by Constitution or statute or by these or other rules* promulgated by the Supreme Judicial Court of this state no person has [an evidentiary] privilege . . ." (Emphasis added)

In enacting Exception B, the legislature, by contemporaneously referring to evidentiary "[privileges] . . . recognized by the courts of this State," may reasonably be taken to have referred to the same privileges recognized by the Supreme Judicial Court by Rule 501. The broad category of "privileges" recognized by Rule 501 makes no distinction on the basis of source or purpose. *See also* 1 Field, McKusick & Wroth, 1 *Maine Civil Practice* § 26.13 "Scope of Discovery -- Privilege" (2d ed. 1970); 8 Wright & Miller, *Federal Practice and Procedure* § 2018 (1970) (Civil Rule 26(b)(1) broadly exempts "privileged" matter from discovery).

[20]**

To lawyers and nonlawyers alike, the word "privilege" selected by the legislature has a plain and all-encompassing meaning. The word carries not the slightest suggestion that only certain privileges are meant to be referred to by Exception B. Least of all does the language itself in any way suggest that the term "privilege against **[*347]** . . . use as evidence . . . in criminal trials" does not include that evidentiary privilege which is by far the best known of all, the constitutional privilege against self-incrimination. n12 Certainly, the 1976 draftsmen of Exception B and the 1976 legislators who enacted it were not oblivious to the Fifth Amendment privilege. It is equally certain that the language they selected for Exception B brooks of no discrimination among evidentiary privileges.

n12 As the Advisors' Note to Rule 501, M.R. Evid., states,

> "The most familiar constitutional privilege is the privilege against self-incrimination." Field and Murray, *Maine Evidence* 89 (1976).

In light **[**21]** of the precision and comprehensiveness of the language of Exception B, we do not find persuasive either of the arguments mustered by the City against a straightforward reading of Exception B. The City's semantical contention that plaintiff police officers would in any future criminal proceeding be asserting a "use immunity" rather than a "privilege," even if it is true, does not strike us as helpful in seeking out the legislature's intent. Whatever label might for other legal purposes be attached to the officers' right to have self-

incriminating statements excluded from use as evidence in court, the root source of that right is their Fifth Amendment privilege.

The City's other argument is more substantial. From the fact that some, if not most, of the other exceptions to the required disclosure of public records are principally concerned with protection of confidential communications, the City urges that Exception B should in its context be read to refer to only privileges that serve to protect such communications, such as the husband-wife or lawyer-client privilege. It argues that Exception B should not be applied to the privilege against self-incrimination, which prohibits use **[**22]** of involuntary self-incriminating statements in criminal prosecutions, but which does not prohibit other public disclosure of such statements even though they may have a tendency to disgrace or publicly embarrass the speaker. *Cf. Brown v. Walker, 161 U.S. 591, 598, 40 L. Ed. 819, 16 S. Ct. 644 (1886).* There are several responses. In the first place, the language used by the legislature in Exception B itself does not contain any such ambiguity as to require or permit a court to go outside that language to seek a resolution of a problem of meaning that otherwise might remain unresolved. "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning." *Chase v. Edgar, Me., 259 A. 2d 30, 32 (1969).* In any event, it is far from clear that the only purpose of the legislature in drafting and enacting these exceptions was to shield confidential communications from public disclosure. The outer limit of the purposes served by the exceptions is itself ambiguous. The legislature might well have been of the **[**23]** view that a statement extracted through coercive means should not be available to injure a citizen's reputation and standing in the community, any more than to convict him in court. n13 Also, it might well have believed that potential jurors should not be exposed to coerced statements that would be inadmissible in a criminal proceeding. Thus, even if we should go beyond the ordinary meaning of the language of Exception B, we are not led with any certainty to a different conclusion from that compelled by the language itself.

n13 The 1976 rewriting and codification of the Freedom of Access Act, P.L. 1976, ch. 758, which includes Exception B, section 402(3) (B), also includes section 405(6), which allows public bodies or agencies to hold executive sessions, shielded from public scrutiny, to discuss such matters as the "disciplining, resignation or dismissal of . . . employees of the body or agency or the investigation or hearing of charges or complaints against persons . .. *if public discussion could be reasonably expected to cause damage to the reputation or the individual's right to privacy would be violated . . .*" (Emphasis added)

[24]**

In construing the Freedom of Access Act we have kept steadily before us the legislature's declared purpose that to a maximum extent the public's business must be done in **[*348]** public. The Act, we are directed, "shall be liberally construed and applied to promote its underlying purposes and policies." 1 M.R. S.A. § 401 (1978), and a corollary to such liberal construction of the Act is necessarily a strict construction of any exceptions to the required public disclosure. At the same time, in construing Exception B, we must respect the limits of proper judicial action in departing from the plain and ordinary meaning of the words selected by the legislature to define what are not to be "public records." In the graphic phrase used by Chief Justice Taft in *Yu Cong Eng v. Trinidad, 271 U.S. 500, 518, 70 L. Ed. 1059, 46 S. Ct. 619 (1926),* a court must not treat a statute like "a nose of wax to be changed from that which the plain language imports . . ." Exception B and much of the balance of the Act were crafted in apparently careful detail by the legislature only three years ago. Policy arguments of the sort here suggested by the City -- to the effect that the proper purpose **[**25]** of a right-to-know law is not advanced by nondisclosure of "[records] that would be within the scope of [Fifth Amendment] privilege against discovery or use as evidence . . . in civil or criminal trials" -- are more properly addressed to the legislature. We might well do a serious disservice to the legislature which in 1976 enacted Exception B if we should guess that it meant anything different from the normal import of the statutory language it used.

As explained in part II of this opinion, the entire transcript of his disciplinary interrogation, conducted under threat of "disciplinary action" for failure to answer, falls within the scope of each police officer's Fifth Amendment privilege. We read Exception B to exempt that privileged transcript from the public disclosure otherwise mandated by the Freedom of Access Act.

IV. *The City's Obligation Under Its Collective Bargaining Agreement*

Through its agreement with the Police Benevolent Association, the City has committed itself to see to it that the disciplinary "interrogation of police officers . . . be conducted with the maximum amount of confidentiality possible." That contracted-for confidentiality requires more than **[**26]** merely closing sessions at which interrogation of police officers is conducted; it also requires protection for any transcript made of the interrogation.

Interpretation of the union contract's confidentiality clause any more narrowly would render it of no practical consequence.

The public policy of the State of Maine as declared in Exception B to the Freedom of Access Act is that records within the scope of these police officers' constitutional privilege against self-incrimination need not be open to public inspection. The City points to no other legal requirement that the public be given access to the interrogation transcripts. Accordingly, it is possible for the City to decline to turn the transcripts over to the newspapers, and since possible, its union contract with the police officers takes hold to require the City to withhold the transcripts in order to achieve the promised "maximum amount of confidentiality possible." When the City contracted with the Police Benevolent Association, it apparently concluded that the public interest was best served by promising confidentiality of police disciplinary interrogation -- at least where, as here, there is no supervening legal requirement **[**27]** of disclosure.

Until either the public policy declaration in Exception B or that represented by the confidentiality clause of the City's collective bargaining contract is changed, the City must upon the police officers' demand maintain the confidentiality of the statements they made in the disciplinary investigation of their part in the Winter Street incident.

The entry must be:

Appeal sustained.

Judgement reversed.

Remanded to the Superior Court with instructions to grant the permanent injunctive relief requested by plaintiff police officers.

Wernick, J., did not sit.

Pomeroy, Archibald, Delahanty, Godfrey, and Nichols, concurring.

GUY GANNETT PUBLISHING CO. v. UNIVERSITY OF MAINE, et al.

Decision No. 4995, Law Docket No. CUM-88-426

Supreme Judicial Court of Maine

555 A.2d 470; 1989 Me. LEXIS 36; 16 Media L. Rep. 1222

January 18, 1989, Argued
February 10, 1989, Decided

SUBSEQUENT HISTORY:

As Amended.

DISPOSITION:

Judgment of the Superior Court modified to protect from disclosure the second sentence of paragraph 3 of the settlement agreement. **[**1]** As so modified, the judgment is affirmed.

LexisNexis(R) Headnotes

COUNSEL:

Jonathan S. Piper, Esq., Joy C. Cantrell, Esq., (orally), Preti, Flaherty, Beliveau & Pachios, Portland, Maine, Attorneys for the Plaintiff.

F. Paul Frinsko, Esq. (orally), Catherine O'Connor, Esq., Bernstein, Shur, Sawyer & Nelson, Portland, Maine, Attorneys for University of Maine.

Howard T. Reben, Esq. (orally), Sunenblick, Reben, Benjamin & March, Portland, Maine, Attorney for M.T.A. and Gavett.

JUDGES:

McKusick, C.J., and Roberts, Glassman, Clifford, and Collins, JJ.

OPINIONBY:

McKUSICK

OPINION:

[*470] In this action under the Freedom of Access Act, *1 M.R.S.A. § § 401*-410 (1979 & Supp. 1988), plaintiff Guy Gannett Publishing Company seeks disclosure from defendant University of Maine of a settlement agreement between the University and the former coach of its women's basketball team, Peter M. Gavett. Gavett and the Maine Teachers Association intervened as defendants in the action. The Superior Court (Cumberland County; *Cole, J.*) ordered disclosure of the entire contents of the agreement, but stayed its order pending appeal. On defendants' appeal, we conclude that one sentence of the agreement contains medical information protected from disclosure under the Maine Civil **[**2]** Service Law, *5 M.R.S.A. § 7070(2)(A)* (Pamph. 1988). We therefore modify the judgment of the Superior Court to require that sentence be excised from the agreement to be disclosed under the Superior Court's judgment, and we affirm the Superior Court's judgment as so modified. A copy of the agreement with that one sentence excised is appended to this decision.

[*471] In June 1988, Gavett resigned his position as coach of the University's women's basketball team a few months after accepting reappointment for a three-year term to commence September 1, 1988. Gavett's surprise resignation led Gannett to make a series of requests for information under the Freedom of Access Act. The University denied all these requests, contending it had no records required to be disclosed in response to Gannett's requests. Following the University's final denial in August, Gannett filed this action in the Superior Court pursuant to the Freedom of Access Act. The University turned over four documents on September 29, n1 but Gannett was not satisfied that it had received all the documents to which it was entitled.

n1 The University disclosed the following documents on September 29:

1. Gavett's June 25, 1988, letter of resignation;
2. The University's June 26, 1986, letter notifying Gavett of his reap-

> pointment for a two-year term to begin September 1, 1986;
> 3. The University's January 28, 1988, letter notifying Gavett of his reappointment for a three-year term to begin September 1, 1988; and
> 4. A summary of Gavett's payroll record for 1988.

[3]** At a hearing on October 12, the court heard testimony from witnesses presented by both Gannett and the University. The University submitted a settlement agreement between the University and Gavett for in camera review by the court. The question before the court was whether the settlement agreement, or any part of it, was excepted from the rule of disclosure prescribed by the Freedom of Access Act. On October 13, the court ordered the agreement disclosed but stayed execution of its order pending appeal. Appeals by the intervenors and the University have been consolidated. n2

> n2 In this opinion appellants will be referred to collectively as "the University."

The Freedom of Access Act provides generally that public records are to be available for public inspection, *1 M.R.S.A. § 408* (1979), and that the Act should be "liberally construed and applied" to promote its underlying purpose. *Id.* § 401 (1979). We have held that "a corollary to such liberal construction of the Act is necessarily a strict construction of any exceptions to the required public disclosure." *Moffett v. City of Portland, 400 A.2d 340, 348 (Me. 1979).* The Act contains two exceptions to disclosure that the **[**4]** University contends protect the settlement agreement here at issue.

I.

Exceptions for Certain Personnel Records

First, the Act provides an exception to disclosure for records designated confidential by statute. *1 M.R.S.A. § 402(3)(A)* (1979). The University argues that *5 M.R.S.A. § 7070* (Pamph. 1988), which protects certain personnel records of public employees, contains two exceptions to the rule of public disclosure applicable to the settlement agreement. We conclude that one of these exceptions does indeed protect one sentence of the agreement from disclosure, but reject the applicability of the other exception.

Section 7070(2)(A) provides an exception to disclosure for public employee personnel records containing "medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders . . . ." This statutory exception protecting medical information "of any kind" is broadly drawn. Indeed, it would be difficult to draft the exception any more broadly. Even with the rule of strict construction that we must apply to exceptions to the Freedom of Access Act, we conclude that, when a document objectively viewed describes expressly **[**5]** or by clear implication aspects of an employee's medical condition or medical treatment, it contains medical information within the meaning of the statutory exception. Applying these principles to the settlement agreement here at issue, we conclude that the second sentence of paragraph 3 contains such medical information and that section 7070(2)(A) protects that **[*472]** part of the agreement from disclosure. The sentence must therefore be excised from the public record made available to Gannett. *See Wiggins v. McDevitt, 473 A.2d 420, 422 (Me. 1984).*

The other personnel records exception that the University asserts is set forth in *5 M.R.S.A. § 7070(2)(E).* That section preserves the confidentiality of

> complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action shall no longer be confidential after it is completed . . . .

In contrast to the broadly drawn exception for medical information, section 7070(2)(E) is narrowly drawn. The University contends that paragraphs 3 and 5 of the **[**6]** agreement contain information pertaining to misconduct. However, the statute does not protect all information pertaining to misconduct. Standing alone these paragraphs cannot be said to contain any complaint, charge, or accusation of misconduct, reply thereto, or information that may result in disciplinary action. The Superior Court properly determined that no part of the settlement agreement was protected from disclosure by section 7070(2)(E).

II.

Alleged Privileged Status of Settlement Agreement

Finally, the University argues that the settlement agreement falls within a privilege against discovery or use as evidence and that it is therefore protected from disclosure under section 402(3)(B) of the Freedom of

Access Act. *1 M.R.S.A. § 402(3)(B)* (1979). That section excepts from disclosure

> 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 . . . .

The University contends that Rule 408(a) of the Maine Rules of Evidence, which generally provides that evidence relating to settlements is not **[**7]** admissible to prove liability, constitutes such a privilege against discovery or use as evidence. n3

> n3 M.R. Evid. 408(a) provides:
>
> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromise or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is also not admissible on any substantive issue in dispute between the parties.

We reject the University's argument. As we stated in *Moffett v. City of Portland*, in determining whether a particular record is protected under section 402(3)(B), the court considers

> whether by reason of a privilege [the record] would be inadmissible as evidence in a court proceeding in the State of Maine. In addition to the privilege against self-incrimination declared by the Fifth Amendment to the United States Constitution, various privileges codified in Article V of the Maine Rules of Evidence and others provided by statute are "recognized by the courts of **[**8]** this State."

400 A.2d at 346. Rule 408 represents a policy choice to exclude evidence relating to settlements as irrelevant on the issue of liability. It does not make such evidence privileged. Rule 408 comes under Article IV of the Rules of Evidence, entitled "Relevancy and Its Limits." It is Article V of the Rules, entitled "Privileges," that sets forth those privileges against discovery that are contained in the Rules of Evidence.

Furthermore, Rule 408 in terms bars the admissibility of settlement agreements only on substantive issues in dispute between the parties to the agreement. That is not what we are here involved with. This case is not a dispute between the University and Gavett, but rather a dispute between the two of them and Gannett. The inadmissibility in evidence of settlement agreements **[*473]** has as its policy objective the encouragement of out-of-court disposition of disputes by the parties themselves. *See* Field & Murray, *Maine Evidence* § 408.1, at 127-28 (2d ed. 1987). That objective is in no way compromised by our holding that the public has a right to know the terms upon which a public employer has settled with a resigning contract employee.

All concurring.

SETTLEMENT AGREEMENT

AGREEMENT **[**9]** made by, between and among the University of Maine System, acting through the University of Maine, with principal offices in Bangor, Maine (hereinafter "University"), the Associated Faculties of the University of Maine System, Maine Teachers Association/National Education Association, an employee organization with a place of business in Bangor, Maine (hereinafter "Association") and Peter M. Gavett, Head Coach of Women's Basketball and Lecturer in Physical Education and Athletics at the University of Maine, (hereinafter "Peter M. Gavett").

For valuable consideration, and in consideration of the mutual promises and covenants contained herein, the University, the Association and Peter M. Gavett hereby agree as follows:

> 1. Peter M. Gavett will resign his employment with the University by his submission of a written resignation immediately upon execution of this Agreement, which resignation shall be effective at 5:00 p.m. (D.S.T.) June 27, 1988.
>
> 2. Peter M. Gavett will vacate his office at the University of Maine and remove all his personal belongings from the University of Maine campus by July 5, 1988.

3. Peter M. Gavett will have no access to the Memorial Gymnasium/Fieldhouse facility **[**10]** on the University of Maine campus for a period of one year, from July 5, 1988. [sentence deleted]

4. University will pay to Peter M. Gavett the gross lump sum of Thirty-Six Thousand Dollars ($ 36,000) being the equivalent of one year of future salary determined and calculated as of June 27, 1988. From said gross amount, University will make required deductions for Social Security, FICA taxes, Federal and State of Maine withholding taxes.

5. Peter M. Gavett shall not initiate social, verbal or written contact with any woman who is currently a member of the University of Maine women's basketball team or any woman who has been a member of the team during the last two years except with the prior approval of the Athletic Director.

[*474] 6. In consideration for lump sum payment, under section 4 above, Peter M. Gavett releases and discharges University from any and all demands, claims, or actions of every nature which he, his heirs or assigns, may have against the University in existence or having accrued as of the 27th of June, 1988.

The University, Association and Peter M. Gavett agree that neither they, nor any of their officers, employees or representatives will disclose or communicate **[**11]** to anyone any portion or condition of this Settlement Agreement or the underlying reasons required to divulge information pursuant to a duly authorized court subpoena, summons or judicial order.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, this 25th day of June, 1988.

Peter M. Gavett

University of Maine System

By: Dale W. Lick

Associated Faculties of the University of Maine System/MTA, NEA

By: David C. Rankin

LEXSEE 596 A2D 619

LEWISTON DAILY SUN, d/b/a Sun-Journal/Sunday v. CITY OF LEWISTON and LAURENT F. GILBERT, SR.

Decision No. 5921, Law Docket No. AND-91-422

Supreme Judicial Court of Maine

596 A.2d 619; 1991 Me. LEXIS 219; 19 Media L. Rep. 1315

September 6, 1991, Argued

September 11, 1991, Decided

DISPOSITION: [1]**

Judgment vacated.

LexisNexis(R) Headnotes

COUNSEL:

Attorneys for the Plaintiff: Charles H. Abbott, Esq., Bryan M. Dench, Esq. (orally), SKELTON, TAINTOR & ABBOTT, Auburn, Maine.

Attorney for the Defendants: Peter B. Dublin, Esq. (orally), ROCHELEAU, FOURNIER & LEBEL, Lewiston, Maine.

JUDGES:

McKusick, C.J., and Roberts, Wathen, Glassman, Clifford, and Collins, JJ., concur.

OPINIONBY:

McKUSICK

OPINION:

[*620] On August 23, 1991, the Superior Court (Androscoggin County, Cole, J.), acting pursuant to the Freedom of Access Act, *1 M.R.S.A. § § 401*-410 (1989 & Supp. 1990), ordered the City of Lewiston and its Chief of Police to provide the Lewiston Daily Sun (the "newspaper") documents or excerpts revealing the identity of the police officer who fired shots injuring a Lewiston resident on August 13, 1991. On appeal we vacate that order. At the current stage of the ongoing disciplinary and criminal investigations of the shooting incident, the City's records from which the newspaper seeks information are declared confidential by two other statutes that read directly on the present fact situation. See *30-A M.R.S.A. § 2702(1)(B)(5)* (Pamph. 1990) (municipal employee personnel records); *16 M.R.S.A. § 614(1)(A)* (Supp. 1990) ("Criminal History Record **[**2]** Information Act").

On August 13, 1991, the Lewiston police were called to the Tall Pines apartment complex in response to a reported domestic disturbance. There, in a confrontation with a Tall Pines resident, Michael Roy, the police fired two shots, seriously wounding Mr. Roy. The Attorney General, the Maine State Police, and the Lewiston Police Department undertook a criminal investigation of the whole incident, as well as an internal affairs disciplinary investigation of the conduct of the police officers involved in it. The newspaper has had access to the police log providing basic information about the incident. The City, however, denied the newspaper's request pursuant to the Freedom of Access Act for identification of the specific officer who fired the shots, on the ground that the records of the ongoing investigations are rendered confidential by other statutes. The newspaper promptly filed a complaint in the Superior Court appealing that denial pursuant to section 409 of the Freedom of Access Act and seeking access to the investigative records to the extent necessary to identify the officer. The court gave the parties an expedited hearing as provided by section 409. **[**3]** The parties submitted the case to the court on an evidentiary record consisting of the affidavit of an official of the newspaper and the affidavit of the Lewiston Chief of Police. That evidence established:

> The identity of the officer who fired the shots which struck Mr. Roy is contained solely within the documents and materials which relate to either the criminal investigation which is ongoing in connection with the incident in question, or the internal affairs investigations conducted by the Lewiston Police Depart-

> ment and the Office of the Attorney General with regard to complaints or allegations that the officer used excessive force under the circumstances.

The Superior Court, without making express findings of fact, held that the newspaper was entitled to the requested information under the Freedom of Access Act. The City promptly appealed. At the newspaper's request, we have given the City's appeal an expedited hearing.

In the circumstances here presented, the legislature has provided that the newspaper has no right of access to the records of the City containing the requested information. The newspaper's rights under the Freedom of Access Act are limited by the **[**4]** exception stated in the Act for any records **[*621]** declared confidential by other statutes. First, section 402(3)(A) of the Act, in defining the "public records" that must be open to public access, expressly excepts "records that have been designated confidential by statute." Moreover, section 408 giving "every person . . . the right to inspect and copy any public record" commences with the limiting language: "Except as otherwise provided by statute." Pursuant to that twice-stated exception to the Freedom of Access Act, two other statutes, which relate specifically to the records of municipal employee disciplinary investigations and of criminal investigations, prevent the City from releasing the records.

The first of those special statutes that control this appeal is *30-A M.R.S.A. § 2702*, a section entitled "Personnel Records" appearing in a subchapter of the municipal laws entitled "Municipal Employment." Section 2702 reads in pertinent part as follows:

> **1. Confidential records.** The following records are confidential and not open to public inspection. They are not "public records" as defined in Title 1, section 402, subsection 3. These records include:
>
> **B.** Municipal records **[**5]** pertaining to an identifiable employee and containing the following:
>
> **(5)** Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after it is completed. . . .

The records to which the newspaper seeks access plainly fall within section 2072's definition of "confidential records." They pertain to an identifiable employee of the City, the officer who shot Mr. Roy, and they contain "information . . . that may result in disciplinary action" against that officer. It is no answer to say that all the newspaper wants is a name; what it wants is the name of the police officer who the City's internal affairs investigative records show was responsible for shooting Mr. Roy. The very first question to determine in the disciplinary investigation is which of the several police officers at the scene did the shooting. In any event, the legislative mandate of confidentiality for municipal employee disciplinary records does not permit the partial opening **[**6]** of such records that is urged by the newspaper. It is evident on the face of section 2702 that the legislature believed the public interest is best served by protecting municipal employees from public disclosure of any of their personnel records except the final written report of any disciplinary action taken against them. Section 2702 gives that protection to the police officer who is the subject of the ongoing disciplinary investigation of the Tall Pines incident.

The second of the confidential records statutes that control this appeal is *16 M.R.S.A. § 614*, a section entitled "Limitation on dissemination of intelligence and investigative information" appearing in the Criminal History Record Information Act. Section 614 reads in pertinent part as follows:

> Reports or records in the custody of a local, county or district criminal justice agency . . . containing intelligence and investigative information shall be confidential and shall not be disseminated, if public release or inspection of the report or record may:
>
> **A.** Interfere with law enforcement proceedings; [or]
>
> **B.** Result in public dissemination of prejudicial information concerning an accused person **[**7]** or concerning the prosecution's evidence that will interfere with the ability of a court to impanel an impartial jury. . . .

(Emphasis added.) To the extent the information sought by the newspaper is contained in the City's files on the ongoing criminal investigation of the Tall Pines incident, the legislature has in section 614 directed that it shall not be disseminated if public release may interfere with law

enforcement proceedings. On the issue of **[*622]** the effect of such release, the only relevant evidence before the trial court and now before us on appeal is the affidavit of the Lewiston Chief of Police stating that "disclosure of the information sought by the [newspaper] would interfere with all of the ongoing investigations, including the criminal investigations." (Emphasis added.) In the absence of any contradictory evidence, or even any testing of the Police Chief's testimony through cross-examination, no court is justified in finding the negative of the statutory predicate for confidentiality of the City's records of the Tall Pines criminal investigation -- particularly because that predicate requires only that public release may interfere with law enforcement **[**8]** proceedings and the consequences of an erroneous public release are irreversible. Since the records of the ongoing investigation are confidential under the first branch of section 614, we need not consider the City's assertion that they are also confidential under the second branch on the ground that public release would interfere with getting an impartial jury for any resulting criminal trial.

This case highlights the conflict that exists between the public interest in open access to governmental records, on the one hand, and the public interest in protecting the integrity of criminal investigations and in preventing unfair prejudice to public employees, on the other. It is the function of the legislature, and not of the courts, to resolve that conflict and it has done so. In the particular factual circumstances presented by the newspaper's request for information from the City's records, the legislature has resolved those conflicting public interests in favor of confidentiality.

Judgment vacated.

LEXSEE 661 A.2D 1133

LISA CAMPBELL v. TOWN OF MACHIAS, et al.

Decision No. 7337, Law Docket No. Was-94-658

SUPREME JUDICIAL COURT OF MAINE

661 A.2d 1133; 1995 Me. LEXIS 157

March 13, 1995, Argued
July 19, 1995, Decided

DISPOSITION: [1]**

Judgment affirmed.

LexisNexis(R) Headnotes

COUNSEL:

Attorney for Plaintiff: Ralph A. Dyer, Esq. (orally), LAW OFFICES OF RALPH A. DYER, P.A., Portland, Maine.

Attorneys for Defendant: William B. Talbot, Esq. (orally), Carletta M. Bassano, Esq., TALBOT & TALBOT, Machias, Maine.

JUDGES: Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, RUDMAN, DANA and LIPEZ, JJ. All concurring.

OPINIONBY: LIPEZ

OPINION: [*1134] LIPEZ, J.

Lisa Campbell appeals from the judgment entered in the Superior Court (Washington County, *Alexander, J.)* denying her access to documents in the possession of the Machias Police Department. She contends that the department was obliged to grant her access to the documents under Maine's Freedom of Access Act, *1 M.R.S.A. § § 401*-410 (1989 & Supp. 1994) [hereinafter "Act"]. We disagree, and accordingly affirm the judgment.

Background

Lisa Campbell met with an officer of Machias Savings Bank in January of 1993 to discuss a delinquent loan. Her loan file was missing from the bank after Campbell left the meeting. The bank filed a complaint with the Machias Police Department against Campbell for theft of the file. A Machias police officer investigated the matter and submitted a report to the Department, **[**2]** which forwarded it to the Office of the District Attorney for Prosecutorial District VII (Hancock and Washington Counties).

On or about August 25, 1993, Campbell went to the Machias Police Department and asked to review all of the documents relating to the bank's complaint against her. The Chief of Police would not allow her to see the records because the investigation was ongoing. Campbell's attorney thereafter made a written request for the documents. The Department did not respond to his request. The attorney sent another letter that also was not answered.

The Chief delivered Campbell's written requests to the District Attorney's office in Machias and requested guidance. n1 He received no instruction prior to leaving for a training program on October 11, 1993. In the meantime, the Machias Police Department received a third written request from Campbell's attorney for access to the records. This request was identified as a request pursuant to the Freedom of Access Act.

n1 Pursuant to *16 M.R.S.A. § 614(2)(A)* (1983), intelligence and investigative information may be disseminated if authorized by the District Attorney for the district in which the subject of the investigation will be tried.

[3]**

Campbell's attorney called the Department on October 19, 1993, to inquire about the status of the request. He was informed that he would have to wait until the Chief returned for an answer. Shortly thereafter, counsel for Campbell wrote to the District Attorney requesting that he initiate a complaint against the Chief for an alleged violation of the Act. n2

n2 In making this request, counsel for Campbell evidently relied on *1 M.R.S.A. § 410*, that provides:

> For every willful violation of this subchapter, the State government agency or local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture of not more than $ 500 may be adjudged.

[*1135] The Chief returned to work on October 25, 1993. The third written request was brought to his attention for the first time. He was served with the complaint in this proceeding almost simultaneously and, therefore, took no action on the request.

In November, an assistant district attorney wrote **[**4]** to Campbell's attorney to inform him that no complaint would be initiated against the Chief because the office considered the documents in question to contain confidential intelligence and investigative information, and their release might interfere with law enforcement activities. Several months later, the District Attorney wrote to the Chief and stated that he should not furnish the documents to Campbell or her attorney. The District Attorney reiterated his position that the documents were confidential and that there was a reasonable possibility that the dissemination would interfere with future prosecution of the case. To date, no criminal proceedings have been filed against Campbell. The District Attorney's office has not made a final determination on prosecution.

On the basis of stipulated facts, the trial court entered judgment for the Town. Thereafter, the District Attorney disclosed the contents of his investigative file to Campbell in response to a subpoena is sued by the United States District Court in an action brought by Campbell against Machias Savings Bank.

Mootness

The disclosures by the District Attorney do not make this case moot. First, the Act requires a prompt **[**5]** response from the governmental body from which information is sought. *1 M.R.S.A. § 409(1)*. n3 A governmental body cannot moot a claim of violation of the Act by making disclosure long after the original request. Second, Campbell claims that disclosure by the District Attorney was incomplete. The record reveals that she requested documents which she has not received. There is still a live controversy between the parties. *See Dyer v. Town of Cumberland, 632 A.2d 145 (Me. 1993).*

n3 *1 M.R.S.A. § 409(1)* provides in pertinent part:

> **1. Records.** If any body or agency or official, who has custody or control of any public record, shall refuse permission to so inspect or copy or abstract a public record, this denial shall be made by the body or agency or official in writing, stating the reason for the denial, within 5 working days of the request for inspection by any person. Any person aggrieved by denial may appeal therefrom, within 5 working days of the receipt of the written notice of denial, to any Superior Court within the State. If a court, after a trial de novo, determines such denial was not for just and proper cause, it shall enter an order for disclosure.

Campbell did not pursue an appeal. That fact does not affect her right to bring this action. The proceedings authorized by § 409 are not exclusive of any other civil remedy provided by law. *1 M.R.S.A. § 409(3)*. Therefore, failure to appeal pursuant to § 409(1) does not bar an independent action for disclosure.

[6]**

Waiver

Contrary to Campbell's contention, the failure to respond to a Maine Freedom of Access request within the time frame set forth in the statute does not constitute a waiver of the right to withhold the documents at issue. Such a failure to respond is deemed a denial of the request for the documents. *See, e.g., Hill v. Mamoulides, 482 So. 2d 26, 29 (La. App. 1986); Pennington v. Washtenaw County Sheriff, 125 Mich. App. 556, 336 N.W.2d 828, 832 (Mich. App. 1983); see also 37A AM. JUR. 2D Freedom of Information Acts § 430* (1994).

Investigative Records Exception

Campbell submits that she has a right under the Act to examine the documents in possession or control of the Machias Police Department relating to the complaint filed against her by Machias Savings Bank. She contends that the requested information is not excepted by the Act. The Town argues that the records have been designated by statute as confidential and are excepted from the Act.

The Act provides that:

> *Except as otherwise provided by statute,* every person shall have the right to inspect and copy any public record during **[*1136]** the regular business hours of the custodian or location of **[**7]** such record. . . .

1 M.R.S.A. § 408 (emphasis added). A provision of the Criminal History Record Information Act, 16 M.R.S.A. § 611-622 (1983 & Supp. 1994), states:

> Reports or records in the custody of a local, county or district criminal Justice agency . . . containing intelligence and investigative information are confidential and may not be disseminated if there is a *reasonable possibility* that public release or inspection of the reports or records would:
>
> A. Interfere with law enforcement proceedings; . . . .

16 M.R.S.A. § 614(1)(A) (emphasis added). The language of this exception in the Maine Act is nearly identical to the corresponding provision of the federal Freedom of Information Act provision:

> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
>
> > (A) *could reasonably be expected* to interfere with enforcement proceedings . . . .

5 U.S.C. § 552(b)(7) (Pamph. 1995) (emphasis added). Cases arising under the federal act are useful in analyzing the scope of Maine's act.

Under the federal act, information that will **[**8]** prematurely reveal the scope, nature or direction of the government's case may be withheld. *Alyeska Pipeline Service Co. v. United States EPA, 272 U.S. App. D.C. 355, 856 F.2d 309;* 312-13 (D.C. Cir. 1988) (government's case concerned numerous violations of environmental protection statutes). Information that would allow the target of a criminal investigation to construct defenses or to fabricate alibis, or information that creates the possibility of harassment or intimidation of witnesses, may also be withheld. *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 239, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978)* (government's case concerned unfair labor practices). Finally, information that could result in the destruction of evidence may be withheld pursuant to this exception. *Lewis v. IRS, 823 F.2d 375, 378 (9th Cir. 1987)* (government's case concerned investigation of failure to file income tax returns). *See also* 37A AM. JUR 2D § 303.

In his letter to the Chief, the District Attorney advised that the records Campbell was requesting should not be disclosed because more evidence might be developed. He did not want to compromise the case by providing discovery prior to a formal **[**9]** charge being lodged. He was also concerned that disclosure could interfere with the collection of evidence and might result in the harassment of witnesses. n4

n4 The letter states, in relevant part:

> Under the Criminal History Record Information Act (*16 M.R.S.A. § 611-* § 622) and especially section 614, your reports are confidential and may not be disseminated if there is a reasonably possibility that public release or inspection of the reports or records would interfere with law enforcement proceedings.
>
> Although we are not authorizing criminal prosecution at this time, that does not mean that prosecution will not be commenced in the future. More evidence may come to light tying in Ms. Campbell with the theft of her records. Furnishing what in essence is discovery before a formal charge is filed could compromise our case, interfere with the ferreting out of more evidence, and result in harassment of witnesses.

We reject Campbell's contention, based on *North v. Walsh, 279 U.S. App. D.C. 373,* **[**10]** *881 F.2d 1088*

(D.C. Cir. 1989), that the Town failed to make a particularized showing sufficient to fall within the investigatory records exception. The *North* case contemplates the kind of showing approved in the foregoing federal cases. n5

n5 North includes this analysis of section 7(A) of the federal act:

> case law illustrates the type of 'interference' at which section 7(A) is directed. In the seminal case, *NLRB v. Robbins Tire & Rubber Co.,* the Supreme court held that exemption 7(A) permitted the National Labor Relations Board to withhold potential witnesses' statements collected during an unfair labor practice investigation at least until completion of the Board's hearing. *437 U.S. at 236, 98 S. Ct. at 2324.* ... Similarly, in *Alyeska Pipeline Service Co. v. United States EPA, 272 U.S. App. D.C. 355, 856 F.2d 309 (D.C.Cir. 1988),* this court held that exemption 7(A) permitted the EPA to withhold documents related to an ongoing investigation from the investigation's target because disclosure would reveal the scope and direction of the investigation and could allow the target to destroy or alter evidence, fabricate fraudulent alibis, and intimidate witnesses. *Id.* at 312-13; *see also, e.g., Lewis v. IRS, 823 F.2d 375, 378 (9th Cir. 1987)* (exempting from disclosure documents relating to criminal investigation because release of those documents would reveal scope of IRS's case against defendant and names of witnesses and might lead to tampering with evidence). . . .
>
> *North, 881 F.2d at 1097-98.*

[11]**

[*1137] Finally, the fact that two years have passed since the initial filing of the criminal complaint in this case does not compel disclosure. "A record of investigation which qualifies as a confidential law enforcement investigatory record does not forfeit its statutory protection merely because there has been a passage of time with no forthcoming enforcement action." 37A AM. JUR. 2D § 299. *See, e.g., State ex rel. Polovischak v. Mayfield, 50 Ohio St. 3d 51, 552 N.E.2d 635 (Ohio 1990)* (investigation began 4 years prior to court action with no enforcement action taken though case still open). "If the investigation is open or there is a reasonable possibility of future law enforcement proceedings at the time of the request, the documents are exempt." *Church of Scientology of Texas v. IRS, 816 F. Supp. 1138, 1157 (W.D. Tex. 1993).* The trial court properly determined that the Town did not act improperly in refusing to deliver the requested documents to Campbell or her attorney.

The entry is:

Judgment affirmed.

All concurring.

LEXSEE 682 A.2D 672

KATHRYN E. COOK v. LISBON SCHOOL COMMITTEE

Decision No. 7766, Law Docket No. And-95-759

SUPREME JUDICIAL COURT OF MAINE

682 A.2d 672; 1996 Me. LEXIS 199

June 12, 1996, Argued
August 12, 1996, Decided

DISPOSITION: [1]**

Summary judgment in favor of the School Committee on Counts I, II, IV, and VI of Cook's complaint affirmed. Summary judgment in favor of School Committee on Count V of Cook's complaint vacated and remanded for the entry of a judgment in favor of Cook on Count V.

LexisNexis(R) Headnotes

COUNSEL:

Attorneys for Plaintiff: Bryan M. Dench, Esq. (orally), Jonathan R. Doolittle, Esq., Ronald P. Lebel, Esq., SKELTON, TAINTOR & ABBOTT, Auburn, Maine.

Attorneys for Defendants: Bruce W. Smith, Esq. (orally), Amy K. Tchao, Esq., DRUMMOND, WOODSUM & MacMAHON, Portland, Maine.

JUDGES: Before WATHEN, C.J., and ROBERTS, GLASSMAN, RUDMAN, and LIPEZ, JJ. All concurring.

OPINIONBY: RUDMAN

OPINION: [*674] RUDMAN, J.

Kathryn E. Cook appeals from a summary judgment entered in the Superior Court (Androscoggin County, *Saufley, J.*) in favor of the Lisbon School Committee on her complaint alleging violations of the Teacher Employment Statute, *20-A M.R.S.A. § 13201* (1993), her constitutional right to procedural due process, and the Freedom of Access Act, *1 M.R.S.A. § § 405*-410 (1989 & Supp. 1995) arising from the School Committee's decision not to extend her contract as Director of Special Education. We affirm in part and vacate in part the **[**2]** summary judgment entered in favor of the defendants.

Beginning in August 1990, Kathryn Cook was employed by the School Committee as Director of Special Education pursuant to a series of personal one-year contracts, the last of which expired on June 30, 1995. These contracts incorporated the collective bargaining agreement between the School Committee and the Lisbon Association and Supervisory Association (LASEA). The contract provided in pertinent part that it would

> be automatically extended for one year at the end of each contract year unless the board notifies the LASEA member in writing on or before March 1st of each year of its intent not to extend the contract. The LASEA member shall be entitled to a written statement of the reasons for the non-extension.
>
> If, in the final year of the Contract, the LASEA member is notified on or before March 1st of the school board's intention **[*675]** to nonrenew, the administrator shall have the right to receive a written statement of the reasons for nonrenewal.
>
> A LASEA member who has been employed for more than two years and who receives a notice of nonrenewal may request a hearing within 15 days of the receipt of notice to nonrenew.

From **[**3]** August 1990 until August 1994 Cook was reappointed annually to her post as Director of Special Education pursuant to the contract's renewal provision. As the 1994 school year got under way, however, the relationship between Cook and the Lisbon School Superintendent began to deteriorate. In September of 1994, the Superintendent sent a letter to Cook advising

her that she was recommending Cook's dismissal for cause and placing Cook on administrative leave.

At the time the Superintendent sent this letter to Cook the School Committee conducted three executive sessions at which, Cook alleges, her dismissal was discussed in her absence. The Superintendent subsequently decided not to recommend Cook's dismissal but rather to recommend that Cook's contract not be renewed or extended after it expired on June 30, 1995.

On January 19, 1995, at a public meeting that Cook and her counsel attended, the School Committee followed the Superintendent's recommendation and voted not to renew or extend Cook's contract beyond its June 30, 1995, termination date. Approximately two weeks later, a letter signed by the Superintendent notified Cook in writing of the School Committee's nonrenewal decision and **[**4]** detailed twenty reasons that formed the basis of this decision.

On February 16, 1995, Cook submitted a written request to the School Committee for inspection of public records pursuant to *1 M.R.S.A. § 408* (1989) and requested a hearing on the nonrenewal of her employment contract before a "board of three arbitrators." The following day Cook filed a complaint seeking review of governmental action pursuant to Rule 80B alleging violations of *20-A M.R.S.A. § 13201* (1993), of *26 M.R.S.A. § 964* (1988), n1 and of her procedural due process rights. The School Committee scheduled a hearing but refused Cook's request that the hearing take place before a panel of arbitrators. Cook ultimately refused to participate in the hearing. Despite two additional requests, Cook received no response to her requests for inspection of public records until the School Committee supplied her the requested documents on May 8, 1995.

n1 Cook does not contest the summary judgment entered in favor of the Lisbon School Committee on Count III of her complaint, which alleged a violation of *26 M.R.S.A. § 964* (1988).

[5]**

In March 1995 Cook amended her complaint to include three counts alleging violations of the Freedom of Access Act. Subsequently both parties moved for summary judgments. After a hearing on the cross-motions for a summary judgment, the court entered a judgment in favor of the School Committee and against Cook on all counts. This appeal followed.

In reviewing the grant of a motion for a summary judgment, we examine the evidence in the light most favorable to the nonprevailing party and determine whether the trial court committed an error of law. *Enerquin Air, Inc. v. State Tax Assessor, 670 A.2d 926, 928 (Me. 1996).* "Rule 56 was intended to permit the *prompt disposition* of cases in which the dispute is solely dependent on an issue of law." *Tisei v. Town of Ogunquit, 491 A.2d 564, 569 (Me. 1985).* A summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, establish that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law. M.R. Civ. P. 56(c).

I

20-A M.R.S.A. § 13201 (1993)

Cook contends that because she is certified by the state **[**6]** of Maine as a teacher, she is entitled to the employment protections accorded teachers by *20-A M.R.S.A. § 13201* (1993). We disagree.

[*676] Section 13201, entitled "Nomination and election of teachers; teacher contracts," deals at length with the hiring, employment, and termination of "teachers." Section 13201 requires that a teacher's contract, after an initial probationary period, be for at least two years and that a teacher on a continuing contract must receive at least six months notice prior to the terminal date of her employment contract before nonrenewal. Despite its repeated use of the term "teacher," however, the statute does not define the term.

The meaning of statutory language is a question of law. *International Paper v. Town of Jay, 665 A.2d 998, 1002 (Me. 1995).* In construing a statute we look first to the plain meaning of the statutory language to give effect to legislative intent, and if the meaning of the statute is clear on its face, then we need not look beyond the words themselves. *Pelletier v. Fort Kent Golf Club, 662 A.2d 220, 223 (Me. 1995).* Thus, if the text of the statute given its plain meaning answers the interpretative question raised by the parties, **[**7]** the language must prevail and no further inquiry is required.

In this case, while we need not decide the exact parameters of the term "teacher," Cook's service as a Special Education Director is not within the plain meaning of section 13201's use of the term. The plain, common, and ordinary meaning of "teacher" does not encompass Cook's service as the Director of Special Education. The common meaning of teacher is "one who teaches or instructs, especially one whose occupation is to instruct." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2119 (1911). Cook's job description is couched almost entirely in terms of managerial and supervisory duties and requires her neither to be assigned to a classroom nor to instruct or have contact with students. There is no indication that the Legislature intended the statute to employ the broader definition of "teacher" advanced by

Cook. Under these circumstances, the common and ordinary meaning of the challenged word must prevail. The trial court did not err in finding that the provisions of section 13201 do not apply to Cook.

II

Denial of Procedural Due Process

Cook has not demonstrated a protected property interest in her continued employment such **[**8]** that it was error for the court to grant a summary judgment in favor of the School Committee on her count alleging a violation of her procedural due process rights.

A property interest in continued employment may be established by contract or by proof of an objectively reasonable expectation of continued employment. *Mercier v. Town of Fairfield, 628 A.2d 1053, 1055 (Me. 1993)* (citing *Hammond v. Temporary Compensation Review Bd., 473 A.2d 1267, 1271 (Me. 1984)).* If a person is hired for a government position which is clearly terminable at the will of her superiors, the employee does not have a property interest in the position. Thus, a public employee has no property interest sufficient to invoke the Fourteenth Amendment's due process guarantees unless the applicable statute or employment contract requires that employment may be terminated only on a showing of "cause." *Bishop v. Wood, 426 U.S. 341, 345-47, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976); Arnett v. Kennedy, 416 U.S. 134, 167 n.2, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974); Perkins v. Board of Directors, S.A.D. #13, 686 F.2d 49, 52 (1st Cir. 1982).*

While Cook's contract required "cause" for dismissal during **[**9]** the term of the contract, the portion of the contract discussing nonrenewal and nonextension contained no such provision. Thus, Cook has no cognizable claim to continued employment that is protected by the Due Process Clause of the Fourteenth Amendment. The court properly granted a summary judgment in favor of the School Committee on Cook's claim for a violation of her due process rights.

III

The Freedom of Access Act

1 M.R.S.A. § 407 (1989)

Cook next challenges the School Committee's nonrenewal decision on the **[*677]** ground that the letter sent to her by the School Committee did not constitute a statement of the reasons for her nonrenewal "on the record," as required by *1 M.R.S.A. § 407(2)* (1989).

Section 402(2)(C) provides that proceedings before a School Committee are public proceedings, *see Marxsen v. Board of Directors, M.S.A.D. No. 5, 591 A.2d 867, 870 (Me. 1991),* and the requirement of a record therefore is imposed by section 407(2):

> Dismissal or refusal to renew contract. Every agency shall make a written record of every decision involving the dismissal or the refusal to renew the contract of any public official, employee or appointee. The agency shall, **[**10]** except in case of probationary employees, *set forth in the record the reason or reasons for its decision* and make findings of fact, in writing, sufficient to appraise [sic] the individual concerned and any interested member of the public of the basis for the decision. A written record or a copy thereof shall be kept by the agency and made available to any interested member of the public who may wish to review it.

(emphasis added). The basic purpose of the Freedom of Access Act, as expressed in its introductory section, is to protect the public's right to obtain information about their government and governmental policies, to know what their government is doing, and to prevent the mischief of arbitrary and self-serving governmental action. *1 M.R.S.A. § 401* (1989). To accomplish these ends, we have stated that "under *1 M.R.S.A. § 407*, agencies are required to make written findings of fact sufficient to apprise an applicant or any other member of the public the basis for its decision." *Edwards v. Town of York, 597 A.2d 412, 413 (Me. 1991).* However, while "this statute does not require the [agency] to include a complete factual record with its decision, it does require **[**11]** a statement of facts sufficient to show a rational basis for the decision." *Your Home, Inc. v. City of Portland, 432 A.2d 1250, 1257 (Me. 1981).*

Cook's contract required that an administrator whose contract was not renewed receive "a written statement of the reasons for nonrenewal." Pursuant to this contract provision the School Committee, through the Superintendent, sent to Cook a letter that detailed twenty reasons for its decision not to renew her contract. While the Committee's reasons were not set forth in the manner in which a court would typically make findings, the reasons presented in the letter were sufficient to demonstrate that the School Committee had an adequate and rational basis for its decision and to inform Cook and members of the public of the basis for the School Committee's action. The court did not err in concluding that the School Committee had complied substantially with the statutory findings requirement of section 407(2) and properly

granted a summary judgment in favor of the School Committee on Cook's claim for violation of section 407 of the Freedom of Access Act. *Cf. Cunningham v. Kittery Planning Bd., 400 A.2d 1070, 1079 (Me. 1979)* (affirming **[**12]** trial court decision when trial judge concluded that although form of agency's findings was unsatisfactory, findings in their entirety demonstrated that agency had substantially complied with statutory findings requirement).

IV

1 M.R.S.A. § 405(6)(A)(2) (1989)

Cook next argues that the court erred in granting a summary judgment in favor of the School Committee because a genuine issue of material fact exists with respect to whether the School Committee violated *1 M.R.S.A. § 405(6)(A)(2)* (1989) by discussing in executive sessions the substance of the allegations levied against her without affording her the opportunity to be present.

Title *1 M.R.S.A. § 405(6)(A)(2)* (1989) provides:

> Those bodies or agencies falling within this subchapter may hold executive sessions subject to the following conditions.
>
> . . .
>
> 6. Permitted deliberation. Deliberations may be conducted in executive session on the following matters and no others:
>
> > (A) Discussion or consideration of the employment, appointment, assignment, **[*678]** duties, promotion, demotion, compensation, evaluation, disciplining, resignation or dismissal of an individual or group of public officials, appointees or **[**13]** employees of the body or agency or the investigation or hearing of charges or complaints against a person or persons subject to the following conditions:
> >
> > . . .
> >
> > (2) Any person charged or investigated shall be permitted to be present at an executive session if that person desires;

Cook alleges that the School Committee violated this provision by considering and discussing her employment, evaluation, and dismissal during executive sessions without providing her with the opportunity to attend these sessions. She argues that as a consequence of this violation she is entitled to the remedial measures set out in section 409(2). Section 409(2) provides:

> Actions. If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action shall be illegal and the officials responsible shall be subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for **[**14]** the action to be null and void.

In support of its motion for a summary judgment on this count, the School Committee submitted the affidavits of four of its five members, the Superintendent of Schools, and the School Committee's attorney. All of these affidavits stated that, although the School Committee had met in executive session to discuss Cook's dismissal, the discussions centered on the procedures for nonrenewal and dismissal of Cook and not the substance of the allegations against Cook. Cook countered with an affidavit of her own, stating that the remaining member of the School Committee had told her that she refused to sign an affidavit stating that the School Committee had not discussed in executive session substantive issues relating to Cook's dismissal because "her recollection and notes revealed otherwise."

Cook seeks to have us vacate the court's grant of a summary judgment on this count based on the existence of a factual dispute with respect to what was discussed during the School Committee's executive sessions. The content of these discussions, however, although perhaps in dispute, is not material to the relief sought by Cook.

Section 409 provides in pertinent **[**15]** part:

> If any body or agency *approves* any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action shall be illegal and the officials responsible shall be subject to the penalties hereinafter provided.

(emphasis added). Cook's complaint does not allege, nor do her affidavits establish, that her dismissal was *approved* in executive session. To the contrary, the allegations contained in her complaint and the uncontroverted statements contained in the affidavits of the members of the School Committee establish that the School Committee voted to refuse to extend or renew Cook's contract on January 19, 1995, at the public School Committee meeting attended by Cook and her counsel. Moreover, the supplemental affidavit submitted by Cook, even when read in a light most favorable to her, raises an issue of whether her termination was improperly *discussed* in executive session. Such discussions are not material to Cook's entitlement to the relief outlined in section 409, which by its terms is limited to the illegal *approval* of official actions in executive session. Cook has failed to **[**16]** generate a genuine issue of material fact with respect to whether the School Committee approved her termination in executive session in violation of sections 405 and 409. The court properly granted a summary judgment in favor of the School Committee on Cook's claim for violation of *1 M.R.S.A. § 405(6)(A)(2)* (1989).

V

1 M.R.S.A. § 408 (1989)

Finally, Cook contends that because the School Committee repeatedly failed to **[*679]** provide to her the records she requested pursuant to the Freedom of Access Act, the court erred in granting a summary judgment in favor of the School Committee on the count of her complaint alleging a violation of *1 M.R.S.A. § 408* (1989). We agree.

Title *1 M.R.S.A. § 408* states in part:

> Except as otherwise provided by statute, every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or location of such record . . . .

And section 409 provides in part:

> If any body or agency or official, who has custody or control of any public record, shall refuse permission to so inspect or copy or abstract a public record, this denial shall be made by the body or agency or official in writing **[**17]** stating the reason for the denial, within 5 working days of the request for inspection by any person. Any person aggrieved by denial may appeal therefrom within 5 working days of the receipt of the written notice of denial, to any Superior Court within the State. If a court, after a trial de novo, determines that such denial was not for a just and proper cause, it shall enter an order for disclosure.

Interpreting these provisions, we have stated that because the act mandates a prompt response from the agency, "[a] governmental body *cannot* moot a claim of violation of the Act by making disclosure long after the original request." *Campbell v. Town of Machias, 661 A.2d 1133, 1135 (Me. 1995)* (emphasis added). Rather, the failure to respond in the time period established by section 409 "is deemed a denial of the request for the documents." *Id.*

In granting a summary judgment in favor of the School Committee, the court, although recognizing that the School Committee had an affirmative obligation to respond to Cook's request for records and that it had failed to meet this obligation, concluded that "no sanctionable violation of section 409 [had] been demonstrated." Contrary **[**18]** to the court's analysis, the School Committee's failure to respond to Cook's request for documents is a sanctionable violation of section 409, and the School Committee's eventual production of the requested documents does not alter this result.

The undisputed facts of this case establish the following. Cook first requested the public documents on February 16, 1995. Her request was identified as a request pursuant to the Freedom of Access Act. She received no response to this request or to a subsequent request, and on March 17, 1995, she amended her complaint to include an allegation that the School Committee had violated section 408. No copies of the requested records were provided to Cook until May 8, 1995. n2

> n2 The present case is factually distinguishable from *Guy Gannett Publishing Co. v. Maine Dep't of Safety, 555 A.2d 474, 475 (Me. 1989).* In *Gannett,* the defendants raised as an affirmative defense Gannett's failure to file its action within five days of the governmental agencies' denial.

The School Committee, however, did not raise this defense.

More importantly, however, the 5-day limit in section 409(1) does not apply in this instance. Section 409(1) states in pertinent part:

> Any person aggrieved by denial may appeal therefrom, *within 5 working days of receipt of the written notice of denial,* to any Superior Court within the State.

(emphasis added).

Hence, by its terms the provision applies only when a written notice of denial is received by the citizen who requested access. The statute, however, specifies no time limit when a de facto denial occurs as a result of a governmental agency's failure to fulfill its statutory duty. That is exactly the situation we are now faced with: Cook received no written notice of denial. M.R. Civ. P. 80 B states in pertinent part:

> The time within which review may be sought shall be as provided by statute *except that if no time limit is specified by statute,* the complaint shall be filed within 30 days after notice of any action or refusal to act of which review is sought . . .

(emphasis added).

In the absence of written response in this case, section 409(1)'s 5-day limitation is not implicated and, therefore, the appellant is permitted the 30-day period of time normally afforded to persons by Rule 80B when the controlling statutory provision is silent as to the time for filing an appeal. In the present case the governmental agency's failure to act occurred on February 21, 1995 and Cook filed her amended complaint on March 17, 1995. Hence, Cook's complaint was timely filed.

[19]**

[*680] The School Committee's failure to respond to Cook's request for documents is deemed a denial of the request for documents and their subsequent production does not moot the alleged violation. *Campbell, 661 A.2d at 1135.* Pursuant to section 409, there would normally be a trial de novo to determine whether such denial was for a "just and proper cause." *1 M.R.S.A. § 409.* The School Committee asserts that no violation of *1 M.R.S.A. § 408* occurred because it never actually refused to provide Cook with the requested records and because "Cook never made an attempt 'to inspect and copy'" the requested records. These arguments misapprehend the School Committee's duties pursuant to sections 408 and 409. Pursuant to section 409, Cook was entitled to a response to her request within 5 working days. It is undisputed that the School Committee did not comply with this mandate. The School Committee's silence is treated as a de facto denial, and the Freedom of Access Act places no affirmative duty on Cook, after properly requesting her records, to then make an "attempt to 'inspect and copy'" the records in order to assert her rights pursuant to the Act. Moreover, the School Committee makes no **[**20]** claim that the initially withheld records were confidential or otherwise protected from disclosure. As a matter of law, the School Committee's justifications for not promptly replying to Cook's Freedom of Access Act request do not constitute a "just and proper cause" for denying a citizen access to requested public records, and Cook is entitled to the entry of a summary judgment in her favor and an assessment of costs against the School Committee on this count.

The School Committee resists the entry of a summary judgment in favor of Cook on this ground by arguing that Cook is entitled to no further relief because she has obtained the records she sought and only the Attorney General or his representative can pursue the imposition of a civil penalty for a violation of the Freedom of Access Act. Although the School Committee is correct that only the Attorney General or his representative may enforce the Freedom of Access Act by seeking imposition of a fine pursuant to section 410, *see 17-A M.R.S.A. § 4-B* (Supp. 1995) ("All civil violations are enforceable by the Attorney General . . . in a civil action to recover . . . a fine, penalty or other sanction . . . ."), the School Committee **[**21]** is wrong in its assertion that Cook, having been provided access to the documents, is entitled to no other relief. It would be contrary to the purposes of the Freedom of Access Act to permit a governmental body to avoid the payment of court costs for a violation of the Act merely by producing the improperly retained documents after the requesting party had undertaken the additional time and expense of filing an appeal of the denial in the Superior Court. n3 As the prevailing party on this count, she is entitled to costs. *See 14 M.R.S.A. § 1501* (1980) ("In all actions, the party prevailing recovers costs unless otherwise specially provided."). We vacate the court's grant of a summary judgment in favor of the School Committee on Cook's claim for violation of sec-

tion 408 of the Freedom of Access Act and remand for the entry of a summary judgment in favor of Cook.

n3 The School Committee repeatedly and erroneously asserts that Cook is not entitled to costs because "there is nothing the Freedom of Access law which authorizes the award of costs . . . ." This line of argument stands on its head the accepted practice in Maine. Pursuant to *14 M.R.S.A. § 1501* (1980) and M.R. Civ. P. 54(d), costs are allowed to the prevailing party unless otherwise specially precluded. Thus, contrary to the School Committee's argument, the Freedom of Access Act's silence on the issue of costs does not mean that costs may not be awarded to the prevailing party. Rather, the Act's failure to specifically exclude the award of costs to the prevailing party indicates that a prevailing party may recover costs pursuant to Maine law and the rules of civil procedure. Moreover, the entry of a judgment for Cook on her section 408 claim does not reflect the creation of a new remedy for Cook, as the School Committee argues. Rather, that judgment protects the integrity of the remedy of disclosure provided by the Legislature for the failure of a public body to meet the section 408 obligation.

[22]**

The entry is:

Summary judgment in favor of the School Committee on Counts I, II, IV, and VI of Cook's complaint affirmed. Summary judgment in favor of School Committee on Count V of Cook's complaint vacated and **[*681]** remanded for the entry of a judgment in favor of Cook on Count V.

All concurring.

LEXSEE 682 A2D 227

BANGOR PUBLISHING CO. v. TOWN OF BUCKSPORT et al.

Decision No. 7770, Law Docket No. KEN-95-193

SUPREME JUDICIAL COURT OF MAINE

682 A.2d 227; 1996 Me. LEXIS 194

June 10, 1996, Argued
August 16, 1996, Decided

DISPOSITION: [1]**

Judgment affirmed.

LexisNexis(R) Headnotes

COUNSEL:

Attorneys for the Plaintiff: Bernard J. Kubetz, Esq., Thad B. Zmistowski, Esq. (orally), EATON, PEABODY, BRADFORD & VEAGUE, Bangor, Maine.

Attorneys for the Defendants: Catherine R. Connors, Esq. (orally), PIERCE, ATWOOD, Portland, Maine, Michelle M. Robert, Esq., Department of Attorney General, Augusta, Maine, Robert J. Crawford, Esq., BERNSTEIN, SHUR, SAWYER & NELSON, Portland, Maine.

JUDGES: Before WATHEN, C.J., and ROBERTS, GLASSMAN, RUDMAN, and LIPEZ, JJ. All concurring.

OPINIONBY: ROBERTS

OPINION: [*228] ROBERTS, J.

Bangor Publishing Company appeals from the judgment entered in the Superior Court (Kennebec County. Alexander. J.) in favor of the defendants, the Town of Bucksport, Champion International Corporation, and the State Board of Property Tax Review. The court held that Bangor Publishing has no right, pursuant to the Freedom of Access Act, *1 M.R.S.A. § § 401*-410 (1989 & Supp. 1995) (the Act), to compel disclosure of documents filed by Champion in tax abatement proceedings before the Town and the Board because a prior court protective order provided that the documents were exempt from disclosure. Bangor Publishing argues that the court erred in holding **[**2]** that the protective order constituted just and proper cause for the Town and the Board to deny disclosure of the information, and in finding that Champion did not waive the trade secret privilege established in the prior order. We affirm the judgment.

In 1992 Champion sought an abatement of its property taxes on a mill it owns and operates in Bucksport. The abatement was denied by the Bucksport assessor. Champion sought review of the assessment at the local level, but was denied relief. Champion then appealed to the State Board of Property Tax Review. n1

n1 The parties settled the tax appeal after the Board's ruling.

In January and March 1994, the Town's assessor sent to Champion a 63-paragraph "Property Tax Information Request," seeking information to assist him in assessing the Bucksport mill for the 1994 tax year. See generally *Champion Int'l Corp. v. Town of Bucksport, 667 A.2d 1376, 1377 (Me. 1995).* Champion believed It was required, pursuant to *36 M.R.S.A. § 706* (1990). to respond to the request **[**3]** or risk the loss of its right to apply for an abatement. Id.

In February 1994 Champion entered into a confidentiality agreement with the Town, the assessor, and the Town's appraisal experts. They agreed that certain business information sought by the Town in the course of the tax appeal proceedings would not be publicly disclosed. Champion requested that the Board be included as a party to the confidentiality agreement. The Board informed Champion that it did not have the authority to protect documents from disclosure pursuant to the Act. The Board advised Champion to obtain a court order mandating the sealing of specific documents. Naming the Board, the assessor, and the Town as parties, Champion sought such an order in the Superior Court. In November

1994, the court (Mills, J.) granted Champion's request and entered a protective order pursuant to M.R. Civ. P. 26(c)(7). The order states:

> The Court finds that the documents and other information listed in Attachment A, which attachment is attached to and made a part of this Order, are confidential and contain trade secrets and other business sensitive information; that the submission of the documents and other information **[**4]** listed in Attachment A is necessary for the Parties full presentation of their respective positions in the State Board Docket No. 93-98 proceedings; and that Champion has shown good cause for nondisclosure of the **[*229]** documents and other information listed in Attachment A.

The order specifically states that the documents are privileged pursuant to M.R. Evid. 507 n2 and are not "public records" pursuant to the Act.

n2 M.R. Evid. 507 states:

> A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and furtherance of justice may require.

Although Bangor Publishing learned of the protective order two weeks after it was issued, it has not directly challenged **[**5]** the order. Instead, in January 1995, it submitted written requests pursuant to the Act to disclose the documents held by the Town and the Board. Bangor Publishing was given access to those documents for which no claim of confidentiality had been made. The Town denied the request for access to any documents designated as confidential based on the confidentiality agreement. The Board denied the request for access to any documents found privileged by the protective order. Bangor Publishing then brought separate actions, pursuant to *1 M.R.S.A. § 409* (1989), n3 against the Town and the Board to compel disclosure. Champion intervened in the actions, which were later consolidated.

n3 *1 M.R.S.A. § 409* (1989) provides in part:

> **1. Records.** If any body or agency or official, who has custody or control of any public record, shall refuse permission to so inspect or copy or abstract a public record, this denial shall be made by the body or agency or official in writing, stating the reason for the denial, within 5 working days of the request for inspection by any person. Any person aggrieved by denial may appeal therefrom, within 5 working days of the receipt of the written notice of denial, to any Superior Court within the State. If a court, after a trial de novo, determines such denial was not for just and proper cause, it shall enter an order for disclosure. Appeals shall be privileged in respect to their assignment for trial over all other actions except writs of habeas corpus and actions brought by the State against individuals.

[6]**

After a hearing in February 1995, the court (Alexander, J.) granted judgment in favor of the Town, Champion, and the Board. The court held that Bangor Publishing's actions were improper collateral attacks on the protective order and that Champion did not waive any privilege established by the protective order by disclosing the documents to the Town or the Board because such disclosure was a result of compulsion. This appeal followed.

The issue before us is whether documents may be obtained pursuant to the Act when the documents have been ruled exempt from disclosure by a protective order. Bangor Publishing argues that the court erred in holding that the protective order constituted just and proper cause for the Town and the Board to deny disclosure of the information, suggesting that the purpose of the Act would be frustrated if governmental entities were allowed to conspire with taxpayers to obtain a preemptive court ruling prohibiting access to public documents. Bangor Publishing contends that it should not be re-

quired to seek a removal of the protective order prior to bringing its actions because (1) it would disturb the expedited enforcement procedure set forth in the Act **[**7]** and (2) it would cause an impermissible shift in the burden of proof by placing on Bangor Publishing what should be the agency's burden, namely, to show that the denial of access was for just and proper cause. We disagree.

Contrary to Bangor Publishing's contentions, the actions are Impermissible collateral attacks on a valid protective order. Bangor Publishing could have intervened in the protective order action to assert its interest. The protective order, as it stands, is just and proper cause for the nondisclosure of the documents. The court specifically found that the documents are privileged trade secrets and are not "public records" pursuant to the Act.

In *Campbell v. Town of Machias, 661 A.2d 1133, 1136 (Me. 1995),* we stated that cases arising under the federal Freedom of Information Act, *5 U.S.C.A. § 552* (West 1996) (the Federal Act), are useful in analyzing the scope of our Act, We are assisted by the Supreme Court's analysis of a similar issue **[*230]** concerning the Federal Act in *GTE Sylvania, Inc. v. Consumers Union of the United States, 445 U.S. 375, 63 L. Ed. 2d 467, 100 S. Ct. 1194 (1980).* The Court was asked to decide whether a court of appeals erred in holding **[**8]** that persons seeking information may obtain documents under the Federal Act when the agency with possession of the documents has been enjoined from disclosing them by a federal district court. In concluding that the court of appeals erred, the Court stated that "there is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents." *GTE Sylvania, 445 U.S. at 387.* The Court held that because a court of competent jurisdiction enjoined the release of the information, the agency did not "improperly" n4 withhold the information within the meaning of the Federal Act; rather, it was required to obey the injunction out of respect for the judicial process. Id.

n4 The Federal Act has a provision stating that district courts have jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld," *5 U.S.C.A. § 552*(a)(4)(B) (West 1996), which is similar to section 409 of Maine's Act giving the Superior court jurisdiction to compel disclosure of documents if the request was denied without "just and proper cause."

[9]**

The Town and the Board in the instant case properly refused to disclose the documents that had been ruled exempt by the protective order. Both were parties to the protective order; thus each would be in contempt for violating a court order if they disclosed the confidential documents.

Bangor Publishing attempts to distinguish GTE Sylvania on three grounds. First, it argues that in that case the information was submitted to the agency by compulsion, whereas in the instant case Champion was under no compulsion to submit the tax information. In view of the Superior Court's finding that the Town compelled Champion to disclose the tax information, that argument is without merit. We reject Bangor Publishing's contention that the submission of materials necessary to the Board's adjudication of Champion's appeal was not compulsion because Champion had voluntarily appealed the denial of its tax abatement request. Moreover, the court's finding is supported by the record and recognizes the reality of Champion's situation: if Champion had not complied with the Town's request for information, it would have risked losing its right to apply for an abatement Although we decided in Champion **[**10]** *Int'l Corp. v. Town of Bucksport, 667 A.2d at 1377,* that Champion had not violated section 706 and did not lose the right to seek an abatement of 1994 taxes by its failure to give a complete response to the assessor, our decision was rendered more than a year after Champion had furnished information to the Town.

Second, Bangor Publishing argues that in GTE Sylvania the agency did not exercise discretion in denying access to the documents, whereas in the instant case the Board did exercise such discretion. Again, this argument is without merit. In this case, the Board took no position on the propriety of designating Champion's documents as confidential, Rather, it merely complied with a court order prohibiting disclosure. Contrary to Bangor Publishing's argument, the Board did not exercise discretion in refusing to disclose the documents. *GTE Sylvania, 445 U.S. at 386.*

Finally, Bangor Publishing argues that in GTE Sylvania the persons seeking information chose not to participate in the proceedings that resulted in an injunction prohibiting disclosure, while in the instant case Bangor Publishing did not participate in the protective order proceeding because it had no **[**11]** notice of the proceeding and because it lacked standing to intervene. Bangor Publishing, however, could file a motion to intervene as a third party in the protective order pursuant to M.R. Civ. P. 24(a). n5 See, e.g., **[*231]** *Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3rd Cir. 1994)* (newspaper could intervene for limited purpose of modifying or va-

cating confidentiality order even after underlying dispute between the parties has long been settled).

n5 M.R. Civ. P. 24(a) provides:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In order for a nonparty to intervene as a matter of right, **[**12]** it must satisfy three criteria: (1) it must claim an interest in the property or transaction that is the subject of the action; (2) it must be so situated that the disposition of the action may impair or impede its ability to protect its interests; and (3) its interest must not be adequately represented by the existing parties to the action. *Doe v. Roe, 495 A.2d 1235, 1237 (Me. 1985).* In that case, Bangor Publishing sought disclosure of an impounded settlement agreement concerning private litigation. *Id. at 1237-38.* We held that Bangor Publishing did not have an interest sufficient to intervene as of right pursuant to M.R. Civ. P. 24(a) to obtain disclosure of the impounded settlement agreement. Although Bangor Publishing was interested in discovering and publishing the identities of the parties and the terms of the settlement, neither it nor the public had a direct interest at stake in the underlying personal injury claim itself. Id. In Doe v. Roe. Bangor Publishing was not asserting a right of disclosure pursuant to the Act; in the present case it is. Thus it is likely that Bangor Publishing could satisfy the criteria for intervention in the protective order action. **[**13]**

The court correctly determined that the protective order constituted just and proper cause for the Town and the Board to deny disclosure of the information. n6 Our conclusion is supported by GTE Sylvania and avoids the disservice to the orderly administration of justice that would result if the Town and the Board were subject to conflicting orders from the court.

n6 Because we conclude that the protective order constituted just and proper cause for the Town and the Board to deny disclosure, we do not reach Champion's alternative arguments for affirming the judgment pursuant to the Uniform Trade Secrets Act, *10 M.R.S.A. § § 1541*-1548 (Supp. 1995).

The entry is:

Judgment affirmed.

All concurring.

LEXSEE 2000 ME 126

SPRINGFIELD TERMINAL RAILWAY COMPANY v. DEPARTMENT OF TRANSPORTATION

Ken-99-743

SUPREME JUDICIAL COURT OF MAINE

2000 ME 126; 754 A.2d 353; 2000 Me. LEXIS 133

April 3, 2000, Argued
June 30, 2000, Decided

DISPOSITION: [*1]**

Judgment affirmed.

LexisNexis(R) Headnotes

COUNSEL: Attorney for plaintiff: Thad B. Zmistowski, Esq., Eaton Peabody Bradford & Veague, P.A., Bangor, ME.

Attorneys for defendant: Andrew Ketterer, Attorney General, Christopher C. Jernigan, Asst. Attorney General (orally), Augusta, ME, James E. Smith, Chief Counsel, Department of Transportation, Augusta, ME.

JUDGES: Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER, and CALKINS, JJ.

OPINIONBY: CLIFFORD

OPINION: [354]**

CLIFFORD, J.

[*P1] Springfield Terminal Railway Company appeals from a judgment entered in the Superior Court (Kennebec County, Studstrup, J.) in favor of the Department of Transportation affirming the Department's decision to refuse to produce thirteen documents pursuant to the Freedom of Access Act. See *1 M.R.S.A. § 408* (1989). n1 Springfield argues that the trial court erred in deciding that those documents were not "public records" as defined by *1 M.R.S.A. § 402(3)* (Supp. 1999). n2 Finding no error, we affirm the judgment.

n1 Title 1, section 408 provides, in part: Except as otherwise provided by statute, every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or location of such record. *1 M.R.S.A. § 408* (1989).

[*2]**

n2 Title 1, section 402(3) provides, in part: The term "public records" means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained ... that is in the possession or custody of an agency or public official of this State ... and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except: A. Records that have been designated confidential by statute; 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. *1 M.R.S.A. § 402(3)* (Supp. 1999).

[*P2] Prior to 1991, Guilford Transportation Industries, Inc., the parent company of Springfield, owned a 19 mile stretch of railroad track between Brunswick and **[**355]** Lewiston known as the "Lewiston Lower Road" branch. In 1991, the State purchased from Guilford **[***3]** the right of way and track materials on the 9.4 mile segment of the track between Brunswick and Lisbon Falls. Guilford retained a rail freight easement which apparently gave it an exclusive right to carry freight on that segment of track.

[*P3] In June of 1997, a representative of Grimmel Industries, a scrap metal business located in Topsham, contacted the Department seeking its assistance in obtaining rail service. Grimmel was located along the State-owned portion of the track, and Guilford had refused to provide the rail service Grimmel had requested. The Department began negotiations with Guilford with the goal of providing rail freight service along the Lewiston Lower Road. Ultimately, the parties agreed that (1) Guilford would abandon the entire Lewiston Lower Road, (2) the Department and Guilford would negotiate for the State's purchase of the portion of line not owned by the State, and (3) the State would spend funds to rehabilitate and reopen the line. Though the dates are not made clear by the testimony, it appears that this agreement was made orally in early January of 1998.

[*P4] In June of 1998, Guilford filed for abandonment of the Lewiston Lower Road with the Surface **[***4]** Transportation Board (STB), a federal agency. Immediately thereafter, the Department began to appraise the segment of the line still owned by Guilford so the parties could negotiate a price for its sale. In early February 1999, however, Guilford "postponed indefinitely" any negotiations regarding the sale of its track.

[*P5] On August 31, 1999, Guilford submitted a motion to the STB to withdraw its abandonment of the Lewiston Lower Road. The Department has opposed that motion, which was still pending before the STB at the time of this appeal. The Department also continued with its $ 250,000 plan to rehabilitate the track that it owned to allow a carrier other than Guilford to provide service along the Lewiston Lower Road. The Department also intends, sometime in the future, to construct a short segment of track to connect the Lewiston Lower Road tracks with the St. Lawrence & Atlantic Railroad Company tracks located in Lewiston to increase the efficiency of Maine's rail infrastructure.

[*P6] By letter dated June 4, 1999, Springfield requested, pursuant to *1 M.R.S.A. § 408* (1989), that the Department make available for inspection various records pertaining to the Department's **[***5]** involvement in the Lewiston Lower Road project. The Department complied with that request but withheld 13 documents on the basis that they were subject to attorney client privilege, constituted attorney work product, and/or were not public records as defined by *1 M.R.S.A. § 402* (Supp. 1999). The Department described the withheld documents as follows:

1. E-mail inquiry to counsel;
2. Right of Way records;
3. Letter by Chief Counsel;
4. Business materials prepared for the Legislature;
5. Two Memorandums concerning Right of Way;
6. Hand written note on Right of Way issues;
7. Inquiry memo to Chief Counsel;
8. Memo to Chief Counsel;
9. Memo from Chief Counsel to Office of Freight Transportation;
10. Memo from counsel;
11. Memo from counsel;
12. Memo from counsel;
13. Memo from counsel. n3

n3 Because the Department made document 4 available to Springfield in September of 1999, that document is no longer at issue.

[*P7] **[**356]** In June of 1999, Springfield brought this action seeking disclosure **[***6]** of the withheld documents. See *1 M.R.S.A. § 409* (Supp. 1999) (allowing parties who are denied access to records by an agency to appeal the denial to the Superior Court). By agreement of counsel, the Department submitted the withheld documents to the Superior Court for in camera inspection. After examining the documents and considering the briefs of the parties, the Superior Court held that documents 2, 5, and 6 were not public records because they were records relating to engineering costs of projects that were to be put out to bid, making them confidential pursuant to *23 M.R.S.A. § 63* (1992). See *1 M.R.S.A. § 402(3) (A)* (Supp. 1999). The court also held that documents 1, 3, and 7 through 13 were work product created in anticipation of litigation, the litigation being the Department's opposition, in the STB abandonment proceedings, to Guilford's motion to withdraw its proposed abandonment of the Lewiston Lower Road. See *1 M.R.S.A. § 402(3) (B)* (Supp. 1999). Finally, the court found that documents 6, 7, and 8 were also subject to the attorney-client privilege. Springfield appealed to this Court.

I.

[*P8] We must construe the provisions of the Freedom of Access Act to determine **[***7]** if certain documents are "public records" as defined by the Act. Statutory construction being an issue of law, we review the trial court's construction of the Act de novo. See *Doe v. Department of Mental Health, 1997 ME 195, P8, 699 A.2d 422, 424.* We construe statutes by applying the plain meaning of the statute in an attempt to give effect to the Legislature's intent. See id. "In addition, because

the Freedom of Access Act mandates that its provisions 'shall be liberally construed,'" id. (quoting *1 M.R.S.A. § 401* (1989)), "'we must interpret strictly any statutory exceptions to its requirements,'" id. (quoting *Bangor Publ'g Co. v. City of Bangor, 544 A.2d 733, 736 (Me. 1988)).*

[*P9] The burden of proof falls on the agency to establish "just and proper cause" for the denial of a Freedom of Access Act request. See *1 M.R.S.A. § 409* (1989) (stating that, on appeal to the Superior Court, the court must enter an order for disclosure if it determines "denial was not for just and proper cause"); *Boyle v. Division of Community Servs., 592 A.2d 489, 490 (Me. 1991)* (implying in its analysis that the burden was on the agency).

A. The Documents **[***8]** Numbered 2, 5, and 6.

[*P10] The Freedom of Access Act protects from disclosure "records that have been designated confidential by statute." See *1 M.R.S.A. § 402(3)(A)* (Supp. 1999). The trial court concluded that *23 M.R.S.A. § 63* (1992) designated documents 2, 5, and 6 as confidential. Title 23, section 63 provides, in part:

> The records and correspondence of the right-of-way division of the department relating to negotiations for and appraisals of property, pending the final settlement for all claims on the project to which they relate and the records and data of the said department relating to engineering estimates of costs on projects to be put out to bid, shall be confidential, and shall not be open for public inspection.

23 M.R.S.A. § 63.

[*P11] Having reviewed these documents in camera, we agree with the Superior Court's conclusion that they are protected from disclosure by *23 M.R.S.A. § 63.* Document 2 consists of notes regarding appraisals of property and engineering estimates of costs on projects relating to the Lewiston Lower Road. Documents 5 and 6 also relate, in their entirety, to property appraisals regarding the Lewiston Lower Road project. **[***9]** Because all three documents **[**357]** relate to property appraisals and engineering costs, they are confidential. n4

> n4 While we have held that protected information can be excised from a document to allow that document to be disclosed, see *Guy Gannett Publ'g Co. v. University of Me., 555 A.2d 470, 471-72 (Me. 1989),* documents 2, 5, and 6 contain only protected information. Accordingly, the trial court correctly concluded that the Department need not disclose any portion of those documents.

B. The Documents Numbered 1, 3, and 7-13.

[*P12] The Department contends, and the trial court held, that documents 1, 3, and 7-13 are protected from disclosure by the work product doctrine. Springfield argues that the documents are not protected because they were not prepared in anticipation of litigation. We agree with the Department.

[*P13] Documents which "would be within the scope of a privilege against discovery" are not public records subject to disclosure. See *1 M.R.S.A. § 402(3)(B)* (Supp. 1999). One **[***10]** such privilege is the work product doctrine.

> [A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

M.R. Civ. P. 26(b) (3).

[*P14] In the few cases in which this issue has been addressed, we have conducted our own in camera review of the challenged material to determine whether the trial court committed legal error in determining whether a document is protected work product. See *Boccaleri v. Maine Med. Ctr., 534 A.2d 671, 672-73 (Me. 1987); New England Tel. & Tel. Co. v. Public Utils. Comm'n, 448 A.2d 272, 283 (Me. 1982).* **[***11]**

[*P15] Rule 26(b) (3), which is identical to *Fed. R. Civ. P. 26(b) (3),* contemplates a preliminary analysis by the trial court to determine whether the party seeking to

protect the material from disclosure has met its burden of establishing that the document is work product. See M.R. Civ. P. 26(b) (3). If that burden is met, the burden then shifts to the party seeking disclosure to demonstrate that it has substantial need of the materials and cannot obtain the document otherwise without undue hardship. See id. Finally, even if the party seeking disclosure can establish need and hardship, documents, or parts of documents, containing "mental impressions, conclusions, opinions, or legal theories of an attorney" shall not be disclosed. See id.

[*P16] A document is protected as work product only if it was created because of the party's subjective anticipation of future litigation. See M.R. Evid. 26(b) (3); *Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1260 (3d Cir. 1993)* (holding that "only by looking to the state of mind of the party preparing the document or . . . the party ordering the preparation of a document" can the court determine whether the document **[***12]** was prepared in anticipation of litigation). Yet, subjective belief alone is not enough. The preparer's anticipation of litigation must also be "objectively reasonable." See *Martin v. Bally's Park Place Hotel & Casino, 983 F.2d at 1260.*

[*P17] Moreover, the document must also be of a type that can be considered work product. "A party generally **[**358]** must show that the documents were prepared principally or exclusively to assist in anticipated or ongoing litigation." *United States v. Construction Prods. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996).* "'The test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.'" n5 *In re Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979)* (quoting 8 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 2024, at 198 (1970)), quoted in *Martin v. Bally's Park Place Hotel & Casino, 983 F.2d at 1260;* see also *State Farm Fire & Cas. Co. v. Perrigan, 102 F.R.D. 235, 238 (W.D. Va. 1984).*

n5 The test we adopt in this case does not affect the procedural rule we adopted in *Harriman v. Maddocks, 518 A.2d 1027 (Me. 1986).* In Harriman, we were called on to decide whether a claims adjuster's file was prepared in anticipation of litigation, and we held that "'a document prepared in the regular course of business may be prepared in anticipation of litigation when the party's business is to prepare for litigation.'" *Id. at 1034* (quoting *Ashmead v. Harris, 336 N.W.2d 197, 200 (Iowa 1983)).* We recognized that such a rule "will almost always result in a preliminary finding that the claims file documents [of an insurance adjuster] were prepared in anticipation of litigation," but we concluded that because M.R. Civ. P. 26(b)(3) allowed discovery of those documents upon a showing of substantial need and hardship, our determination was "consonant with both the language and spirit of the rule." See id. Our determination in Harriman rested on the proposition that where a party's business is to prepare for litigation, the nature of the party's business acts as a proxy for a factual determination that the documents were prepared in anticipation of litigation. Accordingly, in that case involving a party whose business is to prepare for litigation, we rejected the test we adopt in this case because "that approach will often involve the motion justice in a complex and time-consuming procedure that will require extensive factfinding ... and would ... further delay ... the litigation process." See *518 A.2d at 1033.* In most cases, however, including the case at bar, the parties are not in the business of preparing for litigation, and resort to factfinding is essential to determine whether the documents at issue were prepared in anticipation of litigation.

[*13]**

[*P18] Finally, the test should be applied in light of the purpose of the rule, which is to "'promote the adversary system by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation.'" See *Martin v. Bally's Park Place Hotel & Casino, 983 F.2d at 1265* (Nygaard, J., concurring) (quoting *Westinghouse Elec. Corp. v. Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991))* (alterations omitted). "Our adversary system depends on the effective assistance of lawyers, fostered by the privacy of communications between lawyer and client and the privacy in development of legal theories, opinions, and strategies for the client." *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc., 967 F.2d 980, 983 (4th Cir. 1992).* Moreover, it is not just the work of the attorney that is protected. Also protected are documents created by the party or the party's representatives, as long as they are created in anticipation of litigation. See M.R. Civ. P. 26(b) (3).

[*P19] Some courts have found that litigation need only be "'identifiable' in order to trigger work product protection." See *Martin v. Bally's Park Place Hotel & Casino, 983 F.2d at 1260* **[***14]** (quoting 4 James W. Moore et al., Moore's Federal Practice P26.64[2], at 26-352 (1991)). "A remote possibility of litigation is insufficient," however, "and some courts even have found the

likelihood of litigation to be a deficient showing, requiring a substantial probability with commencement imminent." 4 Moore supra, P26.64[2], at 26-353 (1987). Because the purpose of the rule is to protect those communications that were legitimately made in anticipation of trial, the party seeking to prevent disclosure should be able to demonstrate that its expectation of litigation is reasonable. A good formulation of this reasonableness test can be found in National Union Fire Insurance:

[359]** The document must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation.

National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc., 967 F.2d at 984.

1. Documents 1, 7, and 8

[*P20] Documents 1, 7, and 8 are communications from Department officials to its chief counsel regarding possible eminent domain proceedings. They were drafted after **[***15]** Guilford orally agreed to abandon the Lower Lewiston Road, and each document was created in anticipation of future eminent domain litigation. Indeed, they were created for the purpose of determining whether eminent domain proceedings could be brought at all. n6

n6 Though the trial court found that the documents were prepared in anticipation of future proceedings before the STB, the documents themselves make it clear that they were prepared in anticipation of future eminent domain proceedings.

[*P21] When the Department sought advice regarding whether or not the law allowed it to bring an eminent domain proceeding against Guilford, it adequately identified the prospect that litigation would be necessary to restore rail service to the Lewiston Lower Road. That it hoped that legal action would not be necessary does nothing to alter the fact that the Department's belief in the necessity of a legal solution was strong enough to submit the idea to outside counsel.

[*P22] Moreover, the Department's anticipation **[***16]** of litigation was reasonable. The key factor to consider in making that analysis is the lack of any binding written agreement for the sale of Guilford's interest in the Lewiston Lower Road. While Guilford orally agreed to abandon the line and to negotiate with the Department, it was in no way bound to do so. Consequently, it was reasonable for the Department to expect that the negotiations would be unsuccessful and that it would likely be forced to resort to any eminent domain power it might have in order to acquire the property. Because the Department prepared documents 1, 7, and 8 in reasonable anticipation of litigation, we conclude that those documents are protected from disclosure by the work product doctrine.

2. Documents 9-13

[*P23] Documents 9-13 are authored by the Department's chief counsel and outside counsel, and they are responses to the requests for legal advice contained in Document Nos. 1, 7, and 8. Not only do those documents contain advice regarding the mechanics and possible outcomes of various forms of future litigation, they also contain, almost exclusively, the "mental impressions, conclusions, opinions, or legal theories of an attorney" and are, therefore, **[***17]** protected from disclosure by M.R. Evid. 26(b) (3).

3. Document No. 3

[*P24] Document 3 is a letter from the Department's chief counsel to outside counsel seeking advice on yet another legal alternative to a negotiated solution with Springfield. Accordingly, as with documents 1, 7, and 8, this communication is protected work product. n7

n7 Because we conclude that the documents are protected from disclosure by either 22 M.R.S.A. § 63 (1992) or the work product doctrine, we do not address the Department's alternative arguments for non-disclosure.

The entry is:

Judgment affirmed.

LEXSEE 2001 ME 59

TOWN OF BURLINGTON v. HOSPITAL ADMINISTRATIVE DISTRICT NO. 1 et al.

PEN-00-426

SUPREME JUDICIAL COURT OF MAINE

2001 ME 59; 769 A.2d 857; 2001 Me. LEXIS 61

February 13, 2001, Argued
April 12, 2001, Decided

DISPOSITION: [*1]**

Judgment affirmed.

LexisNexis(R) Headnotes

COUNSEL: Attorney for plaintiff: Wayne R. Foote, Esq., (orally), Foote & Temple, Bangor, ME.

Attorneys for defendants: Michael A. Duddy, Esq., (orally), Kelly, Remmel & Zimmerman, Portland, ME.

JUDGES: Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER, and CALKINS, JJ. Concurring: ALEXANDER, J.

OPINIONBY: CALKINS

OPINION: [859]**

CALKINS, J. **[*P1]** Hospital Administrative District No. 1 (HAD # 1), Ronald Victory, Cedric Russell, and Quorum Health Resources, LLC, (collectively, the hospital parties) appeal from the judgment of the Superior Court (Penobscot County, Hjelm, J.) ordering them to disclose certain records to the Town of Burlington. HAD # 1 operates the Penobscot Valley Hospital in Lincoln, Maine. Victory is the chief executive officer of HAD # 1, and Russell is president of the board of HAD # 1. HAD # 1 contracts with Quorum, a Delaware corporation, to manage the hospital.

[*P2] The judgment was issued after trial of two consolidated actions. The first was brought by the Town, pursuant to Maine's Freedom of Access Act (FOAA), *1 M.R.S.A. § 409* (1989), seeking disclosure of certain records from the hospital parties. The second **[***2]** is a declaratory judgment action by HAD # 1 against Ronald Minott, a selectman of the Town, seeking a declaration as to whether it is required to produce the documents requested by the Town. The Superior Court concluded that FOAA and section 10-A (P.L. 1993, ch. 707, § S-1) of the enabling legislation for HAD # 1 require the hospital parties to disclose the requested information. The hospital parties contend that FOAA is not applicable because HAD # 1 is not a public agency or political subdivision; the requested documents are not public records; and the trade secret exception of FOAA exempts the disclosure. The hospital parties further argue that section 10-A of the enabling legislation is unconstitutional. We agree with the Superior Court that the hospital parties are required to disclose the records requested by the Town, and we affirm.

I. BACKGROUND

[*P3] The Legislature created HAD # 1 in 1967 by a private and special law, P. & S.L. 1967, ch. 58. This enabling legislation provides that the inhabitants of fourteen towns "are constituted and confirmed a body politic and corporate . . . in order to provide for the health, welfare and public benefit of the inhabitants of the **[***3]** district." P. & S.L. 1999, ch. 84, § A-1, repealing and replacing P. & S.L. 1967, ch. 58, § 1.n1 The law further states that "the hospital district shall maintain and operate a hospital or critical access system . . . and generally provide for the health, welfare and public benefit of the inhabitants of the district." Id. HAD # 1 owns and operates Penobscot Valley Hospital, a small hospital offering acute care, diagnostic services, and an ambulance service. Quorum manages HAD # 1 under a management services agreement, and it employs Victory.

n1 As originally enacted, the private and special law stated "the hospital administrative district shall have any power or powers, privileges or authority exercised or capable of exercise by a public agency of this State." P. & S.L. 1967,

ch. 58, § 1. Shortly after enactment, a 1967 amendment to the law, P. & S.L. 1967, ch. 211, repealed the prior law in its entirety, including the language authorizing HAD # 1 to exercise the powers and privileges of a public agency; modified and added language; and re-enacted the enabling charter. The enabling legislation has been amended many times since then.

[***4]

[*P4] HAD # 1 is governed by a board of directors who are elected by the voters in the towns in the district. Id. § A-2, repealing and replacing P. & S.L. 1967, ch. 58, § 2. When there is a vacancy on the board the municipal officers of the town in which the vacancy occurred appoint a member. Id. The enabling legislation declares that HAD # 1 is a quasi-municipal corporation for purposes of *30-A M.R.S.A. § 5701* (1996) . Id. § A-5, amending P. & S.L. 1967, ch. 58, § 3. Section 5701 provides [**860] that the property of residents located within the boundaries of a quasi-municipal corporation can be taken to pay any debt of the corporation. n2 See *Casco N. Bank v. Bd. of Trs. of Van Buren Hosp. Dist., 601 A.2d 1085, 1086 n.1, 1088 (Me. 1992)* (stating that judgment creditor of hospital was entitled to execute on property within Van Buren under *30-A M.R.S.A. § 5701* because hospital district's enabling act declared that the district was a "quasi-municipal corporation"). n3

n2 Section 5701 states in relevant part: "The personal property of the residents and the real estate within the boundaries of a municipality, village or other quasi-municipal corporation may be taken to pay any debt due from the body corporate."

[***5]

n3 The Van Buren Hospital District was established by the Legislature under an enabling act similar to that of HAD # 1. P. & S.L. 1955, ch. 54.

[*P5] HAD # 1's enabling legislation gives it the authority to issue bonds. Id. § A-3, amending P. & S.L. 1967, ch. 58, § 3. When the directors of HAD # 1 authorize the issuance of any bonds, the inhabitants of the towns in the district are to be notified of the vote authorizing the bonds through publication in a newspaper with circulation in the district. Id. § A-7, repealing and replacing P. & S.L. 1967, ch. 58, § 4. Ten percent or more of the voters may request that the bond question be submitted to the voters of the district, in which event a special meeting of voters must be held. Id. The enabling legislation also gives HAD # 1 the ability to obtain money through taxation. Id. § A-11, amending P. & S.L. 1967, ch. 58, § 9. The directors are given the same authority to collect district taxes as county officials have to collect county taxes. Id. HAD # 1 has issued bonds, but it has never taxed the communities within its district. HAD [***6] # 1 obtains its operating revenues from the sale of services, charges to patients, vending machines, and donations.

[*P6] HAD # 1 is required to produce an annual written report to the inhabitants of the district "showing the financial condition of the district and other matters pertaining to the district and showing the inhabitants of the district how said directors are fulfilling the duties and obligations of the respective trusts." Id. Upon dissolution of HAD # 1, all of its property is to be liquidated and the proceeds distributed to the towns in the district. P. & S.L. 1967, ch. 211, § 11. HAD # 1 is a "political subdivision" for purposes of the Maine Tort Claims Act, *14 M.R.S.A § 8102(3)* (Supp. 2000), which means that it has the same immunity from tort claims as municipalities. n4

n4 It is also apolitical subdivision for purposes of participation in public self-funded insurance pools. *30-A M.R.S.A. § 2252* (Supp. 2000).

[*P7] In 1993 the [***7] Legislature amended the enabling legislation of HAD # 1 by adding a new section:

> Sec. 10-A. Public records. The administrative records of the district, including the financial and compensation records of any agent employed by, under contract with or utilized in any other managerial capacity by, the district to administer that district, are public records within the meaning of the Maine Revised Statutes, Title 1, chapter 13.

P.L. 1993, ch. 707, § S-1. The statutory reference in section 10-A is to FOAA. HAD # 1 claims that it was not aware of section 10-A until approximately five years after its enactment.

[*P8] In the spring of 1999, the Town requested certain financial information from HAD # 1. In response to the request, HAD # 1 provided information regarding [**861] outstanding bonds but did not provide other information. The requests that remain unsatisfied are for the contract between HAD # 1 and Quorum and for the

1998 compensation records for Victory and the hospital's chief financial officer, also a Quorum employee.

[*P9] Because the Town would make the records available to the public once it obtained them, the hospital parties do not want to disclose the records. **[***8]** They claim that the Penobscot Valley Hospital competes for patients and personnel from surrounding hospitals. They argue that the compensation of management employees must be kept confidential because release of the records would damage their ability to compete and effectively manage the hospital.

[*P10] The Superior Court found that legislation proposed in 1999 prompted the Town to seek the information from the hospital parties. The proposed legislation would have Increased the bonding authority of HAD # 1, changed the manner of issuing bonds, and amended the administrative framework. The legislation, however, was not enacted.

[*P11] In its thorough decision, the Superior Court ruled that section 10-A of HAD # 1's enabling legislation made the documents requested by the Town "public records" within the meaning of FOAA. n5 The Superior Court rejected the hospital parties' argument that the records are "trade secrets" exempted from disclosure by *1 M.R.S.A. § 402(3)(B)* (Supp. 2000). Furthermore, the court concluded that section 10-A does not violate the Maine Constitution. n6

n5 During trial the parties stipulated that if the court ordered HAD # 1 to disclose the records, Quorum would comply with regard to the documents in its possession.

[*9]**

n6 The hospital parties did not argue that section 10-A violates the federal constitution.

II. APPLICABILITY OF FOAA

[*P12] This case involves the construction of two statutory schemes. Statutory construction is an issue of law; therefore, we review the Superior Court's construction of the statutes *de novo. Springfield Terminal Ry. Co. v. Dep't of Transp., 2000 ME 126, P8, 754 A.2d 353, 356.*

[*P13] The first statutory scheme at issue is FOAA. FOAA mandates a liberal construction "to promote its underlying purposes and policies . . . ." *1 M.R.S.A. § 401* (1989). The purpose of FOAA is to open public proceedings and require that public actions and records be available to the public. Id. The burden of proof is on the agency or political subdivision to establish just and proper cause for the denial of a FOAA request. *Springfield Terminal, 2000 ME 126, P9, 754 A.2d at 356;* see also *1 M.R.S.A. § 409(1)* (1989).

[*P14] FOAA provides that every person has the right to inspect and copy any public record. *1 M.R.S.A. § 408* **[***10]** (1989). FOAA defines "public record" as:

> Any written [or] printed . . . matter . . . that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, . . . and has been received or prepared for use in connection with the transaction of public or governmental business . . . .

Id. § 402(3) (Supp. 2000). To determine whether the requested documents are public, records we first look to whether HAD # 1 is an agency or political subdivision. n7 **[**862]** Because the definitional provisions of FOAA do not explicitly state that hospital districts come within its coverage, we turn to the second statutory scheme at issue in the case, the enabling statute for HAD # 1, to glean whether it provides that HAD # 1 is an agency or political subdivision.

n7 In addition to the definition of "public record," the definitional section of FOAA lists various boards, agencies and other entities whose proceedings must be open to the public. *1 M.R.S.A. § 402(2)* (Supp. 2000). Although the list of these entities is not directly applicable to this case because this case concerns records, not proceedings, the list is illustrative of the breadth of organizations covered by FOAA. Subsection 402(2)(C) includes "any board, commission, agency or authority of any county, municipality, school district or any regional or other political or administrative subdivision." See *Lewiston Daily Sun, Inc. v. City of Auburn, 544 A.2d 335, 336-38 (Me. 1988)* (holding that a municipal committee comes within FOAA even though "committee" is not included in list in § 402 (2)).

[*11]**

[*P15] We have recited at length the authority given to HAD # 1 in the enabling legislation. On the basis of the burdens and duties granted to HAD # 1 by the Maine Legislature, we conclude that HAD # 1 functions as a political subdivision because it has many of the same characteristics of a political subdivision. It is a "body politic" and a creature of the Legislature. We

found the term "body politic and corporate" to be significant in determining that a transit district is apolitical subdivision for purposes of the *Maine Tort Claims Act. Young v. Greater Portland Transit Dist., 535 A.2d 417, 418 (Me. 1987).* HAD # 1 is charged with carrying out a public purpose, that is, providing for the health care of the inhabitants of the district. It has the power to raise revenue through the issuance of bonds and levying taxes. The towns in the district are responsible for the debts of the district. HAD # 1 is governed by a board of directors elected by the qualified voters of the towns in the district. Upon dissolution of the district, its assets revert to the towns. The significant powers and duties granted to HAD # 1 by the Legislature are characteristics generally reserved **[***12]** for political subdivisions.

[*P16] When determining whether an entity is a public agency or body for purposes of public disclosure laws, other jurisdictions have looked to the function that the entity performs. See, e.g., *Conn. Humane Soc'y v. Freedom of Info. Comm'n, 218 Conn. 757, 591 A.2d 395, 398 (Conn. 1991)* (holding that humane society is not equivalent of public agency); *Mem'l Hosp.-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 380 (Fla. 1999)* (holding hospital system functioned as public agency); n8 *News & Observer Publ'g Co. v. Wake County Hosp. Sys., Inc., 55 N.C. App. 1, 284 S.E.2d 542, 549 (N.C. Ct. App. 1981)* (holding expense and other records of hospital subject to disclosure); n9 *Cleveland* **[**863]** *Newspapers, Inc. v. Bradley County Mem'l Hosp. Bd. of Dirs., 621 S.W.2d 763, 766 (Tenn. Ct. App. 1981)* (holding payroll records of hospital created by private legislation subject to disclosure). n10 Factors which courts generally consider include: (1) whether the entity is performing a governmental function; (2) whether the funding of the entity is governmental; (3) the extent of governmental involvement or control; **[***13]** and (4) whether the entity was created by private or legislative action. *Conn. Humane Soc'y, 591 A.2d at 397.* See also *Telford v. Thurston County Bd. of Comm'rs, 95 Wn. App. 149, 974 P.2d 886, 893-95 (Wash. Ct. App. 1999)* and cases cited therein. The courts do not require that an entity conform to all factors, but that the factors be considered and weighed. n11 *Conn. Humane Soc'y, 591 A.2d at 397; Telford, 974 P.2d at 894.*

n8 In Memorial Hospital-West Volusia, Inc., the Florida Supreme Court relied upon the following facts in concluding that the hospital system functioned as a public entity: (1) the hospital's facilities were transferred to it by the West Volusia Hospital Authority which was created by the Florida Legislature; (2) the Authority had the power to construct a hospital; (3) it had the ability to issue bonds and levy taxes; (4) the Authority and a private hospital corporation established the entity at issue and the Authority leased the hospital facilities to the entity. *Mem'l Hosp.-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 377-79 (Fla. 1999).*

[*14]**

n9 In News & Observer Publishing, county commissioners created the Wake County Hospital Authority to establish a hospital. Later, the commissioners converted the Authority to the nonprofit Wake County Hospital System and leased the hospital facilities to the System. In finding the System to be a public agency or subdivision, the North Carolina Court of Appeals relied upon the following: (1) upon dissolution, the System's assets would be transferred to the county; (2) the commissioners retained the right to approve the System's budget; (3) the county could audit the System; (4) the System could issue bonds; and (5) the lease of the facilities to the System was $ 1.00 per year. *News & Observer Publ'g Co. v. Wake County Hosp. Sys., Inc., 55 N.C. App. 1, 284 S.E.2d 542, 544-45 (N.C. Ct. App. 1981).*

n10 In Cleveland Newspapers, the hospital was created by state legislation which authorized the issuance of bonds; bonds had been issued, although the hospital was now self- supporting; the board of directors served without pay and a majority were named by city and county commissioners; annual audits and reports were submitted to the county court; and the hospital claimed governmental immunity in tort actions. *Cleveland Newspapers, Inc. v. Bradley County Mem'l Hosp. Bd. of Dirs., 621 S.W.2d 763, 764 (Tenn. Ct. App. 1981).* But see Memphis Publ'g Co. v. Shelby County ' *Health Care Corp., 799 S.W.2d 225, 228-30 (Tenn. Ct. App. 1990)* (holding hospital and health care corporation were not subject to disclosure law; distinguishing Bradley County Memorial Hospital on grounds that Bradley Hospital was a creature of state legislation and immune in tort actions).

[*15]**

n11 Some courts use additional factors such as the level of public funding, see *Mem'l Hosp.-West, 729 So. 2d at 376 n.5,* and status of the entity's employees, see *Marks v. McKenzie High Sch. Fact-Finding Team, 319 Ore. 451, 878 P.2d 417, 423 (Ore. 1994).*

[*P17] What the above-cited cases have in common is an inspection of the functions of the entity under examination and a determination of whether, on balance, the entity functions as a public agency. Our review of the functions of HAD # 1 convinces us that it functions as a political subdivision. First, it performs what has been viewed as a governmental function, that of providing health care. Second, although tax-generated funds are not currently used to finance the operations of HAD # 1, it has issued bonds under its legislative authority, and it has the power to tax. Furthermore, the towns in the district are ultimately responsible for the debts of HAD # 1, and its assets will revert to the towns upon dissolution. Third, the control of HAD # 1 is in the hands of citizens elected from each town in the district. [***16] The number of directors and manner of election is directed by statute. Finally, it was created by the Maine Legislature. Because HAD # 1 functions as a political subdivision, we conclude that it meets the definition of "political subdivision" in FOAA.

[*P18] Having concluded that HAD # 1 is a political subdivision for the purposes of FOAA, we next determine whether the records requested from HAD # 1 by the Town come within the definition of "public records" in section 402(3) of FOAA. Records that are "received or prepared for use in connection with the transaction of public or governmental business" are public records. *1 M.R.S.A. § 402(3)*. We conclude that the contract with Quorum is a document connected with public business; the contract relates to the management of a hospital which was constructed and is maintained for the benefit of the public with the use of fund-raising authority [**864] granted by the Legislature, which authority is exercised by elected citizens. For the same reason, we conclude that the compensation records of the management employees are records prepared for public business.

[*P19] Although section 10-A, added to HAD # 1's enabling legislation, [***17] defines HAD # 1's administrative records as "public records" for purposes of FOAA, we do not rely on it but instead rely upon the general legislation of FOAA. We chose not to rely on section 10-A for two reasons: (1) HAD # 1's enabling legislation sufficiently details, its governmental functions for us to conclude that it is a political subdivision for purposes of FOAA and that the requested records are public records; and (2) the hospital parties have challenged the constitutionality of section 10-A, and we decline to rule on the constitutionality of an enactment when it is not essential to do so. "As a general rule courts should endeavor to resolve the controversies before them without deciding constitutional issues, reaching such an issue only ' [if] it is entirely necessary to a decision on the cause in which it is raised. *Osier v. Osier, 410 A.2d 1027, 1029 (Me. 1980)* (quoting *State v. Good, 308 A.2d 576, 579 (1973)*). We simply note that section 10-A is not inconsistent with our interpretation of the enabling act as granting sufficient governmental powers on HAD # 1 to classify it as a political subdivision for purposes of FOAA. n12

n12 The Superior Court concluded that section 10-A reached Quorum and its employees even if they otherwise would not be considered a public agency or public officials. Early in this litigation Quorum contended that it was not required to disclose any documents in its possession because it is not a public agency and its employees are not public officials. We do not decide whether Quorum is required to disclose records because it stipulated at trial that it would provide access to any records in its possession that the court ordered HAD # 1 to disclose.

[***18]

III. TRADE SECRET EXEMPTION

[*P20] The hospital parties argue that the requested records are protected trade secrets and exempt under FOAA. Trade secrets are not expressly exempted by the terms of FOAA, but public 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" are exempt from disclosure. *1 M.R.S.A. § 402(3)(B)*. Therefore, because there is a privilege to refuse to disclose trade secrets, under M.R. Evid. R. 507, HAD # 1 can refuse to disclose them. See *Bangor Publ'g Co. v. Town of Bucksport, 682 A.2d 227, 229 (Me. 1996)* (holding FOAA did not require town to disclose information which Superior Court had protected as trade secret).

[*P21] The term "trade secret" is not defined in Rule 507. The definition contained within the Uniform Trade Secrets Act is a useful guidepost. The Act defines a trade secret as "information" that "derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure [***19] . . . ." *10 M.R.S.A. § 1542(4)(A)* (1997). Furthermore, the information must be the subject of reasonable efforts to maintain its secrecy. Id. § 1542(4)(B).

[*P22] Because the hospital parties have not suggested how the Quorum contract would meet a definition of a trade secret, we assume that they have limited their trade secrets argument to the compensation records. At trial the hospital parties contended that they would have difficulty attracting management employees [**865] and that the present employees would be recruited by

other hospitals if the compensation information became known. The Superior Court made a factual determination that the requested documents are not protected trade secrets. The court found that there was no evidence that the compensation records were the subject of efforts to maintain their secrecy. It found that the employees who are receiving the compensation are under no duty to keep the information secret. Factual findings are reviewed for clear error, and there is no clear error in the Superior Court's factual determination. See *Rich v. Fuller, 666 A.2d 71, 74 (Me. 1995)*. Because the compensation records at issue have **[***20]** not been the subject of efforts to maintain their secrecy, they are not trade secrets, and the exemption in section 402(3)(B) of FOAA is not applicable to the compensation records of Victory and the chief financial officer of the hospital.

The entry is:

Judgment affirmed.

CONCURBY: ALEXANDER

CONCUR: ALEXANDER, J., concurring.

[*P23] I concur that the Freedom of Access Act should be broadly construed to allow access to all documents relating to public contracts that are within a public agency's possession and control, unless subject to an exemption in the law. However, I want to emphasize that by contracting with a public agency, a private contractor does not open all of its private documents, not shared with the public agency, to public access. If the Quorum compensation records are shared with or approved by HAD # 1, they are public records; but if they are private to Quorum and its employees, and are not disclosed to HAD # 1, they would not be subject to public disclosure under the Freedom of Access Act, absent the stipulation noted in footnote 12 of the Court's opinion or the special provisions of section 10-A.

LEXSEE 541 US 157

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, Petitioner v. ALLAN J. FAVISH et al.

No. 02-954

SUPREME COURT OF THE UNITED STATES

541 U.S. 157; 124 S. Ct. 1570; 158 L. Ed. 2d 319; 2004 U.S. LEXIS 2546; 72 U.S.L.W. 4265; 32 Media L. Rep. 1545; 17 Fla. L. Weekly Fed. S 208

December 3, 2003, Argued
March 30, 2004, Decided

NOTICE:
The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: US Supreme Court rehearing denied by *Nat'l Archives & Records Admin. v. Favish, 158 L. Ed. 2d 759, 124 S. Ct. 2198, 2004 U.S. LEXIS 3640 (U.S., May 17, 2004)*
On remand at, Remanded by *Favish v. Nat'l Archives & Records Admin., 368 F.3d 1072, 2004 U.S. App. LEXIS 9830 (9th Cir., May 20, 2004)*

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. *Favish v. Office of Indep. Counsel, 37 Fed. Appx. 863, 2002 U.S. App. LEXIS 10895 (2002)*

DISPOSITION: Reversed and remanded.

LexisNexis(R) Headnotes

SYLLABUS:

Skeptical about five Government investigations' conclusions that Vincent Foster, Jr., deputy counsel to President Clinton, committed suicide, respondent Favish filed a *Freedom of Information Act* (FOIA) request for, among other things, 10 death-scene photographs of Foster's body. The Office of Independent Counsel (OIC) refused the request, invoking FOIA Exemption 7(C), which excuses from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy," *5 U.S.C. § 552(b)(7)(C) [5 USCS § 552(b) (7)(C)]*. Favish sued to compel production. In upholding OIC's exemption claim, the District Court balanced the Foster family's privacy interest against any public interest in disclosure, holding that the former could be infringed by disclosure and that Favish had not shown how disclosure would advance his investigation, especially in light of the exhaustive investigation that had already occurred. The Ninth Circuit reversed, finding that Favish need not show knowledge of agency misfeasance to support his request, and remanded the case for the interests to be balanced consistent with its opinion. On remand, the District Court ordered the release of five of the photographs. The Ninth Circuit affirmed as to the release of four.

Held:

1. FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images. Favish's contention that Exemption 7(C)'s personal privacy right is confined to the right to control information about oneself is too narrow an interpretation of *Department of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 103 L. Ed. 2d 774, 109 S. Ct. 1468*, which held that the personal privacy concept must encompass an individual's control of information about himself, but had no occasion to consider whether those whose personal data are not in the requested materials also have a recognized privacy interest under the exemption. It did explain, however, that Exemption 7(C)'s concept of privacy is not a limited or cramped notion. The exemption is in marked contrast to Exemption 6, which requires withholding of personnel and medical files only if disclosure "would constitute a clearly unwarranted invasion of personal privacy." Exemption 7(C)'s comparative breadth--it does not include "clearly" and uses "could reasonably be expected to constitute" instead of "would constitute"--is no drafting accident, but is the result of specific amendments to an existing statute. Because law enforcement documents often have information about persons whose link to the

official inquiry may be the result of mere happenstance, there is special reason to protect $=P1391 *326 intimate personal data, to which the public does not have a general right of access in the ordinary course. The modifier "personal" before "privacy" does not bolster Favish's view that the family has no privacy interest in a decedent's pictures. Foster's relatives invoke that interest to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of Foster's reputation or some other interest personal to him. It is proper to conclude that Congress intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and cultural traditions. This does not mean that the family is in the same position as the individual who is the disclosure's subject. However, this Court has little difficulty in finding in case law and traditions the right of family members to direct and control disposition of a deceased's body and to limit attempts to exploit pictures of the deceased's remains for public purposes. The well-established cultural tradition of acknowledging a family's control over the body and the deceased's death images has long been recognized at common law. In enacting FOIA and amending Exemption 7(C) to extend its terms, Congress legislated against this background and the Attorney General's consistent interpretation of the exemption. The exemption protects a statutory privacy right that goes beyond the common law and the Constitution, see *id., 489 U.S. 749, at 762, n. 13, 103 L. Ed. 2d 774, 109 S. Ct. 1468*. It would be anomalous to hold in this case that the statute provides less protection than does the common law. The statute must also be understood in light of the consequences that would follow from Favish's position. Since FOIA withholding cannot be predicated on the requester's identity, violent criminals, who often make FOIA requests, would be able to obtain autopsies, photographs, and records of their deceased victims at the expense of surviving family members' personal privacy.

2. The Foster family's privacy interest outweighs the public interest in disclosure. As a general rule, citizens seeking documents subject to FOIA disclosure are not required to explain why they seek the information. However, when Exemption 7(C)'s privacy concerns are present, the requester must show that public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and that the information is likely to advance that interest. The Court does not in this single decision attempt to define the reasons that will suffice, or the necessary nexus between the requested information and the public interest served by disclosure, but there must be some stability with respect to both the specific category of privacy interests protected and the specific category of public interests that could outweigh the privacy claim. Here, the Ninth Circuit correctly ruled that the family has a privacy interest protected by the statute and recognized as significant the asserted public interest in uncovering deficiencies or misfeasance in the Government's investigations into Foster's death, but it erred in defining the showing Favish must make to establish his public interest claim. By requiring no particular evidence of some actual misfeasance or other impropriety, that court's holding leaves Exemption **[***327]** 7(C) with little force or content. Under its rationale, the invasion of privacy would be extensive, since once disclosed, information belongs to the general public. Thus, where there is a privacy interest protected by Exemption 7(C) and the public interest asserted is to show that responsible officials acted negligently or otherwise improperly in performing their duties, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred. When the presumption of legitimacy accorded to the Government's official conduct is applicable, clear evidence is usually required to displace it. Given FOIA's pro-disclosure purpose, however, a less stringent standard is more faithful to the statutory scheme. Only when the FOIA requester has produced evidence sufficient to warrant a belief by a reasonable person that the alleged Government impropriety might have occurred will there be a counterweight on the FOIA scale for a court to balance against the cognizable privacy interests in the requested documents. Favish has produced no evidence to put that balance into play. The District Court's first order--before it was set aside by the Ninth Circuit and superseded by the District Court's remand order--followed the correct approach.

37 Fed. Appx. 863, reversed and remanded.

COUNSEL:

Patricia A. Millett argued the cause for petitioner.

James Hamilton argued the cause for respondents Shelia Foster Anthony and Lisa Foster Moody in support of petitioner.

Allan J. Favish argued the cause for respondent Allan J. Favish.

JUDGES: Kennedy, J., delivered the opinion for a unanimous Court.

OPINIONBY: KENNEDY

OPINION: [*160] [1573]** Justice **Kennedy** delivered the opinion of the Court.

[*LEdHR1A]** [1A] **[***LEdHR2A]** [2A] This case requires us to interpret the Freedom of Information Act (FOIA), *5 U.S.C. § 552* [*5 USCS § 552*]. **[**1574]**

FOIA does not apply if the requested data fall within one or more exemptions. Exemption 7(C) excuses from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *§ 552(b)(7)(C).*

In *Department of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989)*, we considered the scope of *Exemption 7(C)* and held that release of the document at issue would be a prohibited invasion of the personal privacy of the person to whom the document referred. The principal document involved was the criminal record, or rap sheet, of the person who himself objected to the disclosure. Here, the information pertains to an official investigation into the circumstances surrounding an apparent suicide. The initial question is whether the exemption extends to the decedent's family when the family objects to the release of photographs showing the condition of the body at the scene of death. If we find the decedent's family does have a personal privacy interest recognized by the statute, we must then consider whether that privacy claim is outweighed by the public interest in disclosure.

I

Vincent Foster, Jr., deputy counsel to President Clinton, was found dead in Fort Marcy Park, located just outside **[*161]** Washington, D. C. The United States Park Police conducted the initial investigation and took color photographs of the death scene, **[***328]** including 10 pictures of Foster's body. The investigation concluded that Foster committed suicide by shooting himself with a revolver. Subsequent investigations by the Federal Bureau of Investigation, committees of the Senate and the House of Representatives, and independent counsels Robert Fiske and Kenneth Starr reached the same conclusion. Despite the unanimous finding of these five investigations, a citizen interested in the matter, Allan Favish, remained skeptical. Favish is now a respondent in this proceeding. In an earlier proceeding, Favish was the associate counsel for Accuracy in Media (AIM), which applied under FOIA for Foster's death-scene photographs. After the National Park Service, which then maintained custody of the pictures, resisted disclosure, Favish filed suit on behalf of AIM in the District Court for the District of Columbia to compel production. The District Court granted summary judgment against AIM. The Court of Appeals for the District of Columbia unanimously affirmed. *Accuracy in Media, Inc. v. National Park Serv., 338 U.S. App. D.C. 330, 194 F.3d 120 (1999).*

Still convinced that the Government's investigations were "'grossly incomplete and untrustworthy,'" App. to Pet. for Cert. 57a, Favish filed the present FOIA request in his own name, seeking, among other things, 11 pictures, 1 showing Foster's eyeglasses and 10 depicting various parts of Foster's body. Like the National Park Service, the Office of Independent Counsel (OIC) refused the request under *Exemption 7(C).*

[*LEdHR1B]** [1B] Again, Favish sued to compel production, this time in the United States District Court for the Central District of California. As a preliminary matter, the District Court held that the decision of the Court of Appeals for the District of Columbia did not have collateral estoppel effect on Favish's California lawsuit brought in his personal capacity. On the merits, the court granted partial summary judgment to OIC. With the exception of the picture showing Foster's eyeglasses, **[*162]** the court upheld OIC's claim of exemption. Relying on the so-called *Vaughn* index provided by the Government--a **[**1575]** narrative description of the withheld photos, see *Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (CADC 1973)* --the court held, first, that Foster's surviving family members enjoy personal privacy interests that could be infringed by disclosure of the photographs. App. to Pet. for Cert. 56a. It then found, with respect to the asserted public interest, that "[Favish] has not sufficiently explained how disclosure of these photographs will advance his investigation into Foster's death." *Id.,* at 59a. Any purported public interest in disclosure, moreover, "is lessened because of the exhaustive investigation that has already occurred regarding Foster's death." *Id.,* at 58a. Balancing the competing interests, the court concluded that "the privacy interests of the Foster family members outweigh the public interest in disclosure." *Id.,* at 59a.

On the first appeal to the Court of Appeals for the Ninth Circuit, the majority reversed and remanded, over Judge Pregerson's dissent. *217 F.3d 1168 (2000).* In the majority's view, although evidence or knowledge of misfeasance by the investigative agency may "enhanc[e] the urgency of the [FOIA] request," "[n]othing in the statutory command conditions [disclosure] on the requesting **[***329]** party showing that he has knowledge of misfeasance by the agency." *Id., at 1172-1173.* Furthermore, because "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts," the FOIA request "is in complete conformity with the statutory purpose that the public know what its government is up to." *Ibid.* This was so, the Court of Appeals held, even in the face of five previous investigations into Foster's death: "Nothing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations. . . . [I]t is a feature of famous cases that they generate controversy, suspicion, and the desire to second guess the authorities." *Id., at 1173.* As the majority read the statute, there is "a

right to look, a **[*163]** right to speculate and argue again, a right of public scrutiny." *Ibid.*

The Court of Appeals, however, agreed with the District Court that the exemption recognizes the Foster family members' right to personal privacy. Although the pictures contain no information about Foster's relatives, the statute's protection "extends to the memory of the deceased held by those tied closely to the deceased by blood or love. " *Ibid.* Nevertheless, the majority held that the District Court erred in balancing the relevant interests based only on the *Vaughn* index. While "the [D]istrict [C]ourt has discretion to decide a FOIA case on the basis of affidavits, and affidavits are in some cases sufficient," "the agency affidavits are insufficiently detailed." *Id., at 1174.* It remanded the case to the District Court to examine the photos *in camera* and, "consistent with [the Court of Appeals'] opinion," "balance the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." *Ibid.*

[*LEdHR1C]** [1C] **[***LEdHR2B]** [2B] On remand, the District Court ordered release of the following five photographs:

> ". The photograph identified as '3--VF's [Vincent Foster's] body looking down from top of berm' must be released, as the photograph is not so explicit as to overcome the public interest.
>
> ". The photograph entitled '5--VF's body--focusing on Rt. side of shoulder arm' is again of such a nature as to be discoverable in that it is not focused in such a manner as to unnecessarily impact the privacy interests of the family.
>
> ". The photograph entitled '1--Right hand showing gun & thumb in guard' is **[**1576]** discoverable as it may be probative of the public's right to know.
>
> **[*164]** ". The photograph entitled '4--VF's body focusing on right side and arm' is discoverable.
>
> ". The photograph entitled '5--VF's body--focus on top of head thru heavy foliage' is discoverable."
>
> App. to Pet. for Cert. 45a.

On the second appeal to the same panel, the majority, again over Judge Pregerson's dissent, affirmed in part. *37 Fed. Appx. 863 (2002).* Without providing any explanation, it upheld the release of all the pictures, "except that photo 3--VF's body looking down from top of berm is to be withheld." *Id., at 864.*

We granted OIC's petition for a writ of certiorari to resolve a conflict **[***330]** in the Courts of Appeals over the proper interpretation of *Exemption 7(C). 538 U.S. 1012, 155 L. Ed. 2d 847, 123 S. Ct. 1928 (2003).* The only documents at issue in this case are the four photographs the Court of Appeals ordered released in its 2002 unpublished opinion. We reverse.

The OIC terminated its operations on March 23, 2004, see *28 U.S.C. § 596(b)(2)[28 USCS § 596(b)(2)]*, and transferred all records--including the photographs that are the subject of Favish's FOIA request--to the National Archives and Records Administration, see *§ 594(k)(1).* The National Archives and Records Administration has been substituted as petitioner in the caption of this case. As all the actions relevant to our disposition of the case took place before March 23, 2004, we continue to refer to petitioner as OIC in this opinion.

II

[*LEdHR1D]** [1D] It is common ground among the parties that the death-scene photographs in OIC's possession are "records or information compiled for law enforcement purposes" as that phrase is used in *Exemption 7(C).* App. 87. This leads to the question whether disclosure of the four photographs "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

[*LEdHR2C]** [2C] **[***LEdHR3]** [3] **[*165]** Favish contends the family has no personal privacy interest covered by *Exemption 7(C).* His argument rests on the proposition that the information is only about the decedent, not his family. FOIA's right to personal privacy, in his view, means only "the right to control information about oneself." Brief for Respondent Favish 4. He quotes from our decision in *Reporters Committee*, where, in holding that a person has a privacy interest sufficient to prevent disclosure of his own rap sheet, we said "the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *489 U.S. 749, at 763, 103 L. Ed. 2d 774, 109 S. Ct. 1468.* This means, Favish says, that the individual who is the subject of the information is the only one with a privacy interest.

We disagree. The right to personal privacy is not confined, as Favish argues, to the "right to control information about oneself." Brief for Respondent Favish 4. Favish misreads the quoted sentence in *Reporters Committee* and adopts too narrow an interpretation of the case's holding. To say that the concept of personal privacy must "encompass" the individual's control of information about himself does not mean it cannot encompass other personal privacy interests as well. *Reporters Committee* had no occasion to consider whether individuals whose personal data are not contained in the re-

quested materials also have a recognized privacy interest under *Exemption 7(C)*.

[*LEdHR2D]** [2D] **[***LEdHR4]** [4] *Reporters Committee* explained, however, that the concept of personal privacy **[**1577]** under Exemption 7(C) is not some limited or "cramped notion" of that idea. *489 U.S., at 763, 103 L. Ed. 2d 774, 109 S. Ct. 1468.* Records or information are not to be released under the Act if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(7)[5 USCS § 552(b)(7)]*. This provision is in marked contrast to the language in Exemption 6, pertaining to "personnel and medical files," where withholding is required only if disclosure "would constitute a clearly unwarranted invasion of personal privacy." **[***331]** *§ 552(b)(6)*. The adverb "clearly," found in *Exemption* **[*166]** *6*, is not used in *Exemption 7(C)*. In addition, "whereas *Exemption 6* refers to disclosures that 'would constitute' an invasion of privacy, *Exemption 7(C)* encompasses any disclosure that 'could reasonably be expected to constitute' such an invasion." *Reporters Committee, 489 U.S. 749, at 756, 103 L. Ed. 2d 774, 109 S. Ct. 1468. Exemption 7(C)*'s comparative breadth is no mere accident in drafting. We know Congress gave special consideration to the language in *Exemption 7(C)* because it was the result of specific amendments to an existing statute. See *id., 489 U.S. 749, at 756, n. 9, 777, n. 22, 103 L. Ed. 2d 774, 109 S. Ct. 1468.*

Law enforcement documents obtained by Government investigators often contain information about persons interviewed as witnesses or initial suspects but whose link to the official inquiry may be the result of mere happenstance. There is special reason, therefore, to give protection to this intimate personal data, to which the public does not have a general right of access in the ordinary course. *Id., 489 U.S. 749, at 773, 103 L. Ed. 2d 774, 109 S. Ct. 1468.* In this class of cases where the subject of the documents "is a private citizen," "the privacy interest . . . is at its apex." *Id., 489 U.S. 749, at 780, 103 L. Ed. 2d 774, 109 S. Ct. 1468.*

[*LEdHR2E]** [2E] Certain *amici* in support of Favish rely on the modifier "personal" before the word "privacy" to bolster their view that the family has no privacy interest in the pictures of the decedent. This, too, misapprehends the family's position and the scope of protection the exemption provides. The family does not invoke *Exemption 7(C)* on behalf of Vincent Foster in its capacity as his next friend for fear that the pictures may reveal private information about Foster to the detriment of his own posthumous reputation or some other interest personal to him. If that were the case, a different set of considerations would control. Foster's relatives instead invoke their own right and interest to personal privacy. They seek to be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased.

[*167] In a sworn declaration filed with the District Court, Foster's sister, Sheila Foster Anthony, stated that the family had been harassed by, and deluged with requests from, "[p]olitical and commercial opportunists" who sought to profit from Foster's suicide. App. 94. In particular, she was "horrified and devastated by [a] photograph [already] leaked to the press." *Ibid.* "Every time I see it," Sheila Foster Anthony wrote, "I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life." *Ibid.* She opposed the disclosure of the disputed pictures because "I fear that the release of [additional] photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage." *Id.,* at 95. "[R]eleasing any photographs," Sheila Foster Anthony continued, "would constitute a painful unwarranted invasion of my privacy, my mother's privacy, my sister's privacy, and the privacy of Lisa Foster Moody **[**1578]** (Vince's widow), her **[***332]** three children, and other members of the Foster family." *Id.,* at 93.

As we shall explain below, we think it proper to conclude from Congress' use of the term "personal privacy" that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions. This does not mean that the family is in the same position as the individual who is the subject of the disclosure. We have little difficulty, however, in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes.

Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. See generally **[*168]** 26 Encyclopaedia Britannica 851 (15th ed. 1985) (noting that "[t]he ritual burial of the dead" has been practiced "from the very dawn of human culture and . . . in most parts of the world"); 5 Encyclopedia of Religion 450 (1987) ("[F]uneral rites . . . are the conscious cultural forms of one of our most ancient, universal, and unconscious impulses"). They are a sign of the respect a society shows for the deceased and for the surviving family members. The power of Sophocles' story in Antigone maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother. See Antigone of Sophocles, 8 Harvard Classics: Nine Greek Dramas 255

(C. Eliot ed. 1909). The outrage at seeing the bodies of American soldiers mutilated and dragged through the streets is but a modern instance of the same understanding of the interests decent people have for those whom they have lost. Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.

In addition this well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law. Indeed, this right to privacy has much deeper roots in the common law than the rap sheets held to be protected from disclosure in *Reporters Committee.* An early decision by the New York Court of Appeals is typical:

> "It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, **[*169]** and to prevent a violation of their own rights in the character and memory of the deceased." *Schuyler v. Curtis, 147 N. Y. 434, 447, 42 N. E. 22, 25 (1895).*

See also *Reid v. Pierce County, 136 Wn. 2d 195, 212, 961 P.2d 333, 342 (1998)* ("[T]he immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the **[***333]** deceased"); *McCambridge v. Little Rock, 298 Ark. 219, 231-232, 766 S.W.2d 909, 915 (1989)* (recognizing the privacy interest of the murder victim's mother in crime scene photographs); *Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S. E. 194 (1930) (per curiam)* (recognizing parents' right of privacy in photographs of their deceased **[**1579]** child's body); *Restatement (Second) of Torts § 652D*, p 387 (1977) (recognizing that publication of a photograph of a deceased infant--a hypothetical "child with two heads"--over the objection of the mother would result in an "inva[sion]" of the mother's "privacy").

We can assume Congress legislated against this background of law, scholarship, and history when it enacted FOIA and when it amended Exemption 7(C) to extend its terms. Those enactments were also against the background of the Attorney General's consistent interpretation of the exemption to protect "members of the family of the person to whom the information pertains," U. S. Dept. of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 36 (June 1967), and to require consideration of the privacy of "relatives or descendants" and the "possible adverse effects [from disclosure] upon [the individual] or his family," U. S. Dept. of Justice Memorandum on the 1974 Amendments to the Freedom of Information Act 9-10 (Feb. 1975), reprinted in House Committee on Government Operations and Senate Committee on the Judiciary, Freedom of Information Act and Amendments of 1974 (Pub. L. 93-502), Source Book, App. 5, pp 519-520, 94th Cong., 1st Sess. (Joint Comm. Print. 1975).

[*170] We have observed that the statutory privacy right protected by *Exemption 7(C)* goes beyond the common law and the Constitution. See *Reporters Committee, 489 U.S. 749, at 762, n. 13, 103 L. Ed. 2d 774, 109 S. Ct. 1468* (contrasting the scope of the privacy protection under FOIA with the analogous protection under the common law and the Constitution); see also *Marzen v. Department of Health and Human Servs., 825 F.2d 1148, 1152 (CA7 1987)* ("[T]he privacy interest protected under FOIA extends beyond the common law"). It would be anomalous to hold in the instant case that the statute provides even less protection than does the common law.

[*LEdHR2F]** [2F] **[***LEdHR5A]** [5A] The statutory scheme must be understood, moreover, in light of the consequences that would follow were we to adopt Favish's position. As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester. See *Reporters Committee, supra, 489 U.S. 749, at 771, 103 L. Ed. 2d 774, 109 S. Ct. 1468.* We are advised by the Government that child molesters, rapists, murderers, and other violent criminals often make FOIA requests for autopsies, photographs, and records of their deceased victims. Our holding ensures that the privacy interests of surviving family members would allow the Government to deny these gruesome requests in appropriate cases. We find it inconceivable that Congress could have intended a definition of "personal privacy" so narrow that it would allow convicted felons to obtain these materials without limitations at the expense of surviving family members' personal privacy.

[*LEdHR1E]** [1E] **[***LEdHR2G]** [2G] For these reasons, in agreement with the Courts of Appeals for both the District of Columbia and the Ninth Circuit, see *Accuracy in* **[***334]** *Media v. National Park Serv., 338 U.S. App. D.C. 330, 194 F.3d 120 (CADC 1999); 217 F.3d 1168 (CA9 2000)*, we hold that FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene

images. Our holding is consistent with the unanimous view of the Courts of Appeals and other lower courts that have addressed the question. See, *e.g., New York Times Co. v.* **[*171]** *National Aeronautics and Space Admin., 782 F. Supp. 628, 631, 632 (CADC 1991)* (sustaining a privacy claim under the narrower Exemption 6 with respect to an audiotape of the Space Shuttle Challenger astronauts' last words, because "[e]xposure to the voice of a beloved family member **[**1580]** immediately prior to that family member's death . . . would cause the Challenger families pain" and inflict "a disruption [to] their peace of mind every time a portion of the tape is played within the hearing"), on remand from *287 U.S. App. D.C. 208, 920 F2d 1002 (CADC 1990)*; *Katz v. National Archives and Records Admin., 862 F. Supp. 476, 485 (DC 1994)* (exempting from FOIA disclosure autopsy X-rays and photographs of President Kennedy on the ground that their release would cause "additional anguish" to the surviving family), aff'd on other grounds *314 U.S. App. D.C. 387, 68 F.3d 1438 (CADC 1995)*; *Lesar v. United States Dep't of Justice, 204 U.S. App. D.C. 200, 636 F.2d 472, 487 (CADC 1980)* (recognizing, with respect to the assassination of Dr. Martin Luther King, Jr., his survivors' privacy interests in avoiding "annoyance or harassment"). Neither the deceased's former status as a public official, nor the fact that other pictures had been made public, detracts from the weighty privacy interests involved.

III

[*LEdHR1F]** [1F] **[***LEdHR6A]** [6A] Our ruling that the personal privacy protected by *Exemption 7(C)* extends to family members who object to the disclosure of graphic details surrounding their relative's death does not end the case. Although this privacy interest is within the terms of the exemption, the statute directs nondisclosure only where the information "could reasonably be expected to constitute an unwarranted invasion" of the family's personal privacy. The term "unwarranted" requires us to balance the family's privacy interest against the public interest in disclosure. See *Reporters Committee, 489 U.S. 749, at 762, 103 L. Ed. 2d 774, 109 S. Ct. 1468.*

[*LEdHR5B]** [5B] **[***LEdHR7]** [7] FOIA is often explained as a means for citizens to know "what the Government is up to." *Id., 489 U.S. 749, at 773, 103 L. Ed. 2d 774, 109 S. Ct. 1468.* This **[*172]** phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy. The statement confirms that, as a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose. Furthermore, as we have noted, the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.

[*LEdHR6B]** [6B] **[***LEdHR8]** [8] When disclosure touches upon certain areas defined in the exemptions, however, the statute recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it. In the case of *Exemption 7(C)*, the statute requires us to protect, in the proper degree, the **[***335]** personal privacy of citizens against the uncontrolled release of information compiled through the power of the state. The statutory direction that the information not be released if the invasion of personal privacy could reasonably be expected to be unwarranted requires the courts to balance the competing interests in privacy and disclosure. To effect this balance and to give practical meaning to the exemption, the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable.

[*LEdHR6C]** [6C] Where the privacy concerns addressed by *Exemption 7(C)* are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is **[**1581]** likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.

[*LEdHR1G]** [1G] **[***LEdHR9A]** [9A] We do not in this single decision attempt to define the reasons that will suffice, or the necessary nexus between the **[*173]** requested information and the asserted public interest that would be advanced by disclosure. On the other hand, there must be some stability with respect to both the specific category of personal privacy interests protected by the statute and the specific category of public interests that could outweigh the privacy claim. Otherwise, courts will be left to balance in an ad hoc manner with little or no real guidance. *Id., 489 U.S. 749, at 776, 103 L. Ed. 2d 774, 109 S. Ct. 1468.* In the case of photographic images and other data pertaining to an individual who died under mysterious circumstances, the justification most likely to satisfy *Exemption 7(C)*'s public interest requirement is that the information is necessary to show the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties.

The Court of Appeals was correct to rule that the family has a privacy interest protected by the statute and to recognize as significant the asserted public interest in uncovering deficiencies or misfeasance in the Govern-

ment's investigations into Foster's death. It erred, however, in defining the showing Favish must make to substantiate his public interest claim. It stated that "[n]othing in the statutory command conditions [disclosure] on the requesting party showing that he has knowledge of misfeasance by the agency" and that "[n]othing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations." *217 F.3d at, 1172-1173.* The court went on to hold that, because Favish has "tender[ed] evidence and argument which, if believed, would justify his doubts," the FOIA request "is in complete conformity with the statutory purpose that the public know what its government is up to." *Id., at 1173.* This was insufficient. The Court of Appeals required no particular showing that any evidence points with credibility to some actual misfeasance or other impropriety. The court's holding leaves *Exemption 7(C)* with little force or content. By requiring courts to engage in a state of suspended disbelief **[*174]** with regard to even the most incredible allegations, the panel transformed *Exemption 7(C)* into nothing more than a rule of pleading. The invasion of privacy **[***336]** under its rationale would be extensive. It must be remembered that once there is disclosure, the information belongs to the general public. There is no mechanism under FOIA for a protective order allowing only the requester to see whether the information bears out his theory, or for proscribing its general dissemination.

[*LEdHR1H]** [1H] **[***LEdHR9B]** [9B] **[***LEdHR10]** [10] We hold that, where there is a privacy interest protected by *Exemption 7(C)* and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred. In *United States Dep't of State v. Ray, 502 U.S. 164, 116 L. Ed. 2d 526, 112 S. Ct. 541 (1991)*, we held there is a presumption of legitimacy accorded to the Government's official conduct. *Id., 502 U.S. 64, at 178-179, 116 L. Ed. 2d 526, 112 S. Ct. 541.* The presumption perhaps is less a rule of evidence than a general working principle. However the rule is characterized, where the presumption is applicable, clear evidence is usually required to displace it. Cf. **[**1582]** *United States v. Armstrong, 517 U.S. 456, 464, 134 L. Ed. 2d 687, 116 S. Ct. 1480 (1996)* ("'[I]n the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties.'"); *United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 71 L. Ed. 131, 47 S. Ct. 1 (1926)* ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"). Given FOIA's prodisclosure purpose, however, the less stringent standard we adopt today is more faithful to the statutory scheme. Only when the FOIA requester has produced evidence sufficient to satisfy this standard will there exist a counterweight on the FOIA scale **[*175]** for the court to balance against the cognizable privacy interests in the requested records. Allegations of government misconduct are "'easy to allege and hard to disprove,'" *Crawford-El v. Britton, 523 U.S. 574, 585, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998)*, so courts must insist on a meaningful evidentiary showing. It would be quite extraordinary to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion. As we have noted, the balancing exercise in some other case might require us to make a somewhat more precise determination regarding the significance of the public interest and the historical importance of the events in question. We might need to consider the nexus required between the requested documents and the purported public interest served by disclosure. We need not do so here, however. Favish has not produced any evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred to put the balance into play.

[*LEdHR1I]** [1I] The Court of Appeals erred in its interpretation of *Exemption 7(C)*. The District Court's first order in March 1998--before its decision was set aside by the Court of Appeals and superseded by the District Court's own order on remand--followed the **[***337]** correct approach. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to grant OIC's motion for summary judgment with respect to the four photographs in dispute.

It is so ordered.

REFERENCES: Go To Full Text Opinion

Go to Supreme Court Brief(s)

Go to Supreme Court Transcripts

Go To Beginning of Case

22A Am Jur 2d, Dead Bodies § 85; 37A Am Jur 2d, Freedom of Information Acts § § 299, 300, 309-318

5 USCS § 552(b)(7)(C)

L Ed Digest, Administrative Law § 65.7

L Ed Index, Dead Bodies; Freedom of Information Act; Pictures and Photographs

Annotation References

Supreme Court's construction and application of Freedom of Information Act (FOIA) (*5 USCS § 552*). *149 L Ed 2d 1113.*

Supreme Court's views as to the federal legal aspects of the right of privacy. *43 L Ed 2d 871.*

Supreme Court's view as to weight and effect to be given, on subsequent judicial construction, to prior administrative construction of statute. *39 L Ed 2d 942.*

When are government records "personnel files" exempt from disclosure under Freedom of Information Act provision (*5 USCS § 552(b)(6)*) exempting certain "personnel," medical, and similar files. *104 ALR Fed 757.*

When are government records "medical files" exempt from disclosure under Freedom of Information Act provision (*5 USCS § 552(b)(6)*) exempting certain personnel, "medical," and similar files. *104 ALR Fed 734.*

What constitutes "unwarranted invasion of personal privacy" for purposes of law enforcement investigatory records exemption of Freedom of Information Act (*5 USCS § 552(b)(7)(C)*). *52 ALR Fed 181.*

Invasion of privacy by publication dealing with one other than plaintiff. *18 ALR3d 873.*

LEXSEE 2005 ME 12

MEDICAL MUTUAL INSURANCE COMPANY OF MAINE et al. v. BUREAU OF INSURANCE et al.

Cum-04-371

SUPREME JUDICIAL COURT OF MAINE

2005 ME 12; 866 A.2d 117; 2005 Me. LEXIS 14

November 18, 2004, Argued
January 19, 2005, Decided

PRIOR HISTORY: *Medical Mut. Ins. Co. v. Me. Bureau of Ins., 2003 Me. Super. LEXIS 264 (Me. Super. Ct., Dec. 12, 2003)*

DISPOSITION: **[***1]** Judgment affirmed.

LexisNexis(R) Headnotes

COUNSEL: Attorneys for appellants: William S. Harwood, Esq. (orally). William C. Knowles, Esq. Scott D. Anderson, Esq. Verrill & Dana, LLP, Portland, ME.

Attorneys for appellees: G. Steven Rowe, Attorney General, Paul Stern, Deputy Atty. Gen., Thomas C. Sturtevant, Jr., Asst. Atty. Gen., (orally) Augusta, ME.

JUDGES: Panel: CLIFFORD, RUDMAN, ALEXANDER, CALKINS, and LEVY, JJ. TCALKINS, J.

OPINIONBY: CALKINS

OPINION:

[*P1] **[**119]** Medical Mutual Insurance Company of Maine and some of its employees, officers, and directors appeal from a judgment of the Superior Court (Cumberland County, *Cole, J.*) affirming the decision of the Superintendent of Insurance to permit the public disclosure of certain compensation information contained in an annual statement that Medical Mutual was required to file with the Superintendent. Medical Mutual contends that the compensation information was excepted from the statutory definition of public records in the *Maine Freedom of Access Act* (FOAA). *1 M.R.S.A. § 402(3)* (Supp. 2004). We disagree with the contention, and we affirm the judgment.

I. BACKGROUND

[*P2] Medical Mutual is an insurer and is required to file annual statements with the Superintendent **[***2]** of Insurance. *24-A M.R.S.A. § 423* (2000). Starting in 2003, the Bureau of Insurance required Medical Mutual to include information on the salaries of its board of directors and senior management in a supplemental exhibit attached to its annual statement. Medical Mutual supplied the requested salary information, but asked that it be kept confidential.

[*P3] One of Medical Mutual's policyholders requested the salary information from the Bureau. The Bureau notified Medical Mutual of the request and stated it was treating the policyholder's request as a FOAA request. It gave Medical Mutual an opportunity to provide legal authority as to why the salary information should not be provided. After receiving Medical Mutual's detailed response, the Superintendent issued a decision stating that the information was public and would be released for inspection and copying by the public in two weeks.

[*P4] Medical Mutual filed a complaint in the Superior Court appealing the Superintendent's decision pursuant to M.R. Civ. P. 80C and seeking a declaratory judgment and an injunction. The Bureau agreed not to release the information pending the disposition of the action. The court dismissed **[***3]** the claims for injunctive and declaratory relief and affirmed the Superintendent's decision in the Rule 80C appeal.

II. DISCUSSION

A. Standard of Review

[*P5] When the Superior Court acts as an intermediate appellate court reviewing a decision of an administrative agency, we review the decision of the agency directly. *Hannum v. Bd. of Envtl. Prot., 2003 ME 123, P 11, 832 A.2d 765, 768.* Statutory construction is a ques-

tion of law, and, therefore, we review the Superintendent's construction of the FOAA de novo. *Great N. Paper, Inc. v. Penobscot Nation, 2001 ME 68, P 14, 770 A.2d 574, 580.* In construing a statute, we give effect to the Legislature's intent first by **[**120]** looking to the statute's plain meaning. *2001 ME 68 at P 15, 770 A.2d at 580.* If there is any ambiguity, we look beyond the plain language of the statute to the legislative history to determine the intent of the Legislature. *Id.* The FOAA must be "liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent." *1 M.R.S.A. § 401* (1989). That declaration of legislative intent expresses the purpose to open to the public **[***4]** the conduct of public proceedings and the records of public activities. *Id.* As a result, we strictly interpret any statutory exceptions to the FOAA. *Springfield Terminal Ry. Co. v. Dep't of Transp., 2000 ME 126, P 8, 754 A.2d 353, 356.*

[*P6] Public records are subject to the right of the public to inspect and copy. *1 M.R.S.A. § 408(1)* (Supp. 2004). The party seeking the denial of a request to inspect and copy a record pursuant to *section 408(1)* has the burden to demonstrate the basis for the denial. *Town of Burlington v. Hosp. Admin. Dist. No. 1, 2001 ME 59, P 13, 769 A.2d 857, 861.* This means that Medical Mutual must show that the salary information is not a public record as that term is defined in *1 M.R.S.A. § 402(3).*

[*P7] Medical Mutual contends that the salary information comes within two of the public records exceptions. First, it claims that the salary information is a record that has been "designated confidential by statute," and as such it is excluded from the definition of public records. *1 M.R.S.A. § 402(3)(A).* Second, it contends that the salary information is a record "that would be within the scope of a privilege against **[***5]** discovery . . . [if it were sought in the course of a court proceeding," *id. § 402(3)(B),* and is thereby excluded from the definition.

B. Records Made Confidential by Statute

[*P8] Medical Mutual argues that a provision of the *Maine Business Corporation Act* (MBCA), specifically *13-C M.R.S.A. § 1602(4)(A)* (Supp. 2004), designates the salary information as confidential, thereby excluding it from the definition of public records. However, nothing in *section 1602(4)(A)* provides that the salary information is confidential. The statute generally provides for the inspection and copying of corporate records by a shareholder, 13-C M.R.S.A. § 1602(3) (Supp. 2004), but to inspect and copy certain records, such as accounting records, the shareholder's demand must be "made in good faith and for a proper purpose," *13-C M.R.S.A. § 1602(4)(A).* Medical Mutual claims that the policyholder, who sought the document from the Bureau and who stands in the same position as a shareholder, would not have been able to obtain the document from Medical Mutual because he did not show a proper purpose, and, therefore, he should not be able to inspect and copy the same document under the FOAA **[***6]** that he is not able to inspect and copy under the MBCA.

[*P9] Nonetheless, the plain language of *section 1602* does not provide that the requested document is confidential, nor does *section 1602* implicitly require salary information supplied in a report to the Superintendent to be confidential. The difficulty in Medical Mutual's argument in this regard is even more obvious when the MBCA is compared with other statutes that make certain records confidential. *See, e.g., 23 M.R.S.A. § 63* (Supp. 2004) (providing that certain records of the right-of-way divisions of the Department of Transportation "are confidential and may not be open for public inspection"); *30-A M.R.S.A. § 2702(1)* (1996 & Supp. 2004) (providing that certain municipal **[**121]** personnel records "are confidential and not open to public inspection").

C. Records That Would Be Privileged

[*P10] The FOAA excepts from its definition of "public records" those "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." *1 M.R.S.A.* **[***7]** *§ 402(3)(B).* This exception applies

> to a record falling within the scope of any evidentiary privilege recognized in the courts of Maine, and at the same time in effect incorporates by reference the special rules that have been developed by constitutions, statutes, rules of court, and judicial decisions to define the scope of the particular privilege.

Moffett v. City of Portland, 400 A.2d 340, 346 (Me. 1979) (emphasis omitted).

[*P11] Certain privileges suffice to remove records from the FOAA definition of "public records." *See, e.g., id. at 345-48* (Fifth Amendment privilege against self-incrimination); *Hosp. Admin. Dist. No. 1, 2001 ME 59, PP 20-22, 769 A.2d at 864-65* (M.R. Evid. 507 trade secret privilege). Likewise, if information is the subject of a protective order in a court proceeding, the FOAA does not compel an agency to disclose that information. *Bangor Publ'g Co. v. Town of Bucksport, 682 A.2d 227, 229-30 (Me. 1996).*

[*P12] Medical Mutual relies on M.R. Civ. P. 26(c) in its argument that the salary information is not a public record because it is information that would be

within the [***8] scope of a privilege against discovery in a court proceeding. The Rule provides that a court

> may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including without limitation one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

M.R. Civ. P. 26(c).

[*P13] Medical Mutual contends that the salary information is a trade secret and that it would be entitled to a court order protecting it from disclosure if the information were sought in civil litigation. For purposes of the section 401(3)(B) exception, we have used the definition of "trade secret" in the *Uniform Trade Secrets Act*: "'information' that 'derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure.'" *Hosp. Admin. Dist. No. 1, 2001 ME 59, P 21, 769 A.2d at 864* (quoting *10 M.R.S.A. § 1542(4)(A)* (1997)).

[*P14] Medical [***9] Mutual has not shown that the salary information comes within the definition of a trade secret; that is, it failed to demonstrate to the Superintendent that the salary information had independent economic value from not being generally known and failed to show that it is in fact subject to secrecy. The only information it provided to the Superintendent to support its trade secret claim was a corporate policy that prohibits the corporation from disclosing compensation information. That policy does not prohibit employees from disclosing their own salaries. *See Hosp. Admin. Dist. No. 1, 2001 ME 59, P 22, 769 A.2d at 865* (affirming the trial court's finding that compensation information was not a trade secret when [**122] "employees . . . receiving the compensation [were under no duty to keep the information secret"). Medical Mutual failed to meet its burden of showing a trade secret or other privilege that would entitle it to a discretionary protective order if it were asked to disclose the information in discovery.

[*P15] In sum, we conclude that the salary information requested is a public record. The records are not made confidential by statute, *1 M.R.S.A. § 402(3)(A)*, [***10] and would not be privileged against discovery in a court proceeding, *id. § 402(3)(B)*. n1

> n1 We do not discuss the remaining issues raised by Medical Mutual. We have considered its arguments that the Superintendent's decision does not contain sufficient findings and is rule-making without adhering to rule-making requirements, but we find them to be without merit. Likewise, its argument that the Superintendent relies on instructions from the National Association of Insurance Commissioners in concluding that the salary information had to be disclosed to the public is without foundation.

The entry is:

Judgment affirmed.

LEXSEE 2005 ME. LEXIS 56

BLETHEN MAINE NEWSPAPERS, INC. v. STATE OF MAINE et al.

Docket: Ken-03-697

SUPREME JUDICIAL COURT OF MAINE

2005 ME 56; 871 A.2d 523; 2005 Me. LEXIS 56; 33 Media L. Rep. 1616

May 13, 2004, Argued
April 22, 2005, Decided

PRIOR HISTORY: *Blethen Me. Newspapers, Inc. v. State, 2002 Me. Super. LEXIS 156 (Me. Super. Ct., Sept. 11, 2002)*

DISPOSITION: **[***1]** Judgment affirmed in part, and vacated in part, and remanded for further proceedings consistent with this opinion.

LexisNexis(R) Headnotes

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For amici curiae: Frederick C. Moore, Esq., Thomas R. Kelly, Esq., Robinson Kriger & McCallum, Portland, ME, Keith R. Varner, Esq., Lipman, Katz & McKee, P.A, Augusta, ME.

JUDGES: Panel: SAUFLEY, C.J., and CLIFFORD, RUDMAN, DANA, ALEXANDER, CALKINS, * and LEVY, JJ. Majority: DANA, CALKINS, and LEVY, JJ. Concurrence: SAUFLEY, C.J. Dissent: CLIFFORD, RUDMAN, and ALEXANDER, JJ. Dissent: ALEXANDER, J.

* Although not present at oral argument, Justice Calkins participated in this opinion. See M.R. App. P. 12(a) (stating that a "qualified justice may participate in a decision even though not present at oral argument").

OPINIONBY: LEVY

OPINION: **[**525]** LEVY, J.

[*P1] This case requires us to address the unique nature of investigatory records held by a government **[***2]** prosecutor and the circumstances in which those records must be disclosed pursuant to Maine's Freedom of Access Act (FOAA), *1 M.R.S.A. § § 401-410* (1989 & Supp. 2004).

[*P2] Blethen Maine Newspapers requested Maine's Attorney General to disclose investigative records related to allegations of sexual abuse by eighteen deceased Roman Catholic priests. The Attorney General ultimately denied the request based on his conclusion that "disclosure of the investigative records relating to the deceased priests would "constitute an unwarranted invasion of personal privacy' within the meaning of *16 M.R.S.A. § 614* [(Supp. 2004) of the Criminal History Record Information Act." Blethen sought judicial review of the Attorney General's decision pursuant to M.R. Civ. P. 80B, and the Superior Court (Kennebec County, *Studstrup, J.*) vacated the Attorney General's denial of the request and ordered full disclosure of the records. We affirm the court's judgment to the extent that it ordered the disclosure of the records, but conclude that the court should have also ordered the records redacted so as to eliminate the names and other identifying information **[***3]** of the living persons who are cited in the records. We therefore vacate the judgment and remand for further proceedings so that the records will be subject to redaction before their disclosure.

I. CASE HISTORY

[*P3] Blethen, the publisher of several Maine newspapers, filed a FOAA request with the Attorney General in June 2002 seeking records pertaining to the Attorney General's investigation of alleged sexual

[526]** abuse by eighteen deceased priests. FOAA prescribes that, "except as otherwise provided by statute, every person has the right to inspect and copy any public record." *1 M.R.S.A. § 408(1)* (Supp. 2004). It also provides that "records that have been designated confidential by statute" are an exception to the definition of "public records" and are not subject to disclosure. *1 M.R.S.A. § 402(3)(A)* (Supp. 2004).

[*P4] The Attorney General denied Blethen's request, having concluded that the records were exempt from disclosure under FOAA because they were confidential pursuant to the Criminal History Record Information Act, *16 M.R.S.A. § § 611-622* (1983 & Supp. 2004). The Act provides, in pertinent **[***4]** part:

> Reports or records that contain intelligence and investigative information and that are prepared by, prepared at the direction of or kept in the custody of a . . . county, . . . criminal justice agency . . . or the Department of the Attorney General . . . are confidential and may not be disseminated if there is a reasonable possibility that public release or inspection of the reports or records would:
>
> **A.** Interfere with law enforcement proceedings; or
>
> . . . .
>
> **C.** Constitute an unwarranted invasion of personal privacy.

16 M.R.S.A. § 614 (1)(A), (C).

[*P5] The Attorney General concluded that release of the records would both interfere with law enforcement proceedings and constitute an unwarranted invasion of the personal privacy of the victims, the deceased priests, and the priests' families and congregations. n1 In response, Blethen suggested that the State redact portions of the records, noting that "it would defeat the purposes of the right to know law if an otherwise public record could be withheld merely because some portion of that record is appropriately confidential." The Attorney General denied **[***5]** this request as well.

n1 In his letter dated June 13, 2002, Attorney General G. Steven Rowe set forth his reasons for denying Blethen's request:

> First, we are at the preliminary stages of our investigation in which the dissemination of information presents the potential for interfering with law enforcement proceedings. All information, including information about conduct occurring outside the statute of limitations, has the potential through investigation to lead to prosecutable offenses. For example, some of the victims making allegations against the deceased priests may be witnesses or victims in cases involving priests who are still living. Second, even in those cases in which we decide not to take further action, the records may be exempt from disclosure if disclosure would "constitute an unwarranted invasion of personal privacy." We have not at this time conducted any independent investigation or verification of the information from the Diocese or the allegations from victims. Accordingly, dissemination of that information at this early stage in the investigation would, in our view, constitute an unwarranted invasion of the personal privacy of not only the alleged victims, but the deceased priests, their families and the congregations that put their trust in the priests.

[*6]**

[*P6] Blethen sought judicial review of the Attorney General's action by filing an appeal with the Superior Court pursuant to M.R. Civ. P. 80B. The court affirmed the Attorney General's decision in part, finding that disclosure of information contained in the records might affect ongoing investigations and that, pursuant to *section 614(1)(A)*, it was reasonably possible that disclosure of the information would interfere with law enforcement proceedings. The court did not determine whether there was a reasonable possibility that disclosure would also constitute an "unwarranted invasion **[**527]** of personal privacy" pursuant to *section 614(1)(C)*, but retained jurisdiction of the matter. The court ordered the State to

report "the status of the documents in question for law enforcement purposes" to it and Blethen in six months so that it could revisit the privacy question once the ongoing investigations were concluded.

[*P7] The Attorney General subsequently reported to the court and Blethen that the investigations would no longer be negatively affected by disclosure of the records related to the deceased priests. However, the Attorney General requested that the parties be afforded **[***7]** the opportunity to brief the second issue: whether the records remained confidential pursuant to *section 614(1)(C)*'s "unwarranted invasion of personal privacy" exception.

[*P8] After the parties' submission of their briefs and a nontestimonial hearing, the court issued its decision in which it analyzed the records pursuant to *section 614(1)(C)* and concluded that they should be fully disclosed. The court found that "there may be some residual privacy interest of named victims and witnesses, but due to the manner in which this information has been handled, that interest has been reduced for purposes of balancing against the public interest in disclosure." With respect to the deceased priests, the court concluded it need not decide whether they have any residual privacy rights because the public interest in disclosure of the records outweighs any personal privacy rights.

[*P9] The court concluded that the privacy interests of the alleged victims and witnesses, and the residual privacy interests of the deceased priests, if any, were exceeded by the public's interest in disclosure of the information because it pertained to possible criminal activity and the extent to which those **[***8]** activities were investigated by public officials: "Any residual personal privacy rights which could be claimed for those named in any capacity in the documents . . . must bend to the public interest and no exceptions to release of these public documents exist under the FOAA." The court also declined to require redaction of the names of the alleged victims and other identifying information because of "how much information would have to be taken out and the extent to which this information is likely already known, at least at a local level." The State appeals from the judgment.

II. DISCUSSION

[*P10] The State asserts that the court erred in ordering the release of the records because there is a reasonable possibility that public disclosure will constitute an unwarranted invasion of the personal privacy of the alleged victims, witnesses, and deceased priests identified in the records. Accordingly, the State contends that the records must remain confidential pursuant to *16 M.R.S.A. § 614(1)(C)*. We review the Superior Court's factual findings for clear error and its determinations of law, including the construction of FOAA, de novo. *Town of Burlington v. Hosp. Admin. Dist. No. 1, 2001 ME 59, PP 12, 22, 769 A.2d 857, 861, 865.* **[***9]**

[*P11] *Section 614(1)* of the Criminal History Record Information Act, entitled "Limitation on dissemination of intelligence and investigative information," identifies eleven categories of information excepted from FOAA's presumption favoring disclosure. n2 "Reports or records that contain **[**528]** intelligence and investigative information" are "confidential and may not be disseminated if there is a reasonable possibility that public release or inspection of the reports or records" will give rise to one or more of the exceptions set out in the statute. n3 *16 M.R.S.A. § 614(1).*

n2 Title *16 M.R.S.A. § 614(1)* (Supp. 2004) provides as follows:

> **1. Limitation on dissemination of intelligence and investigative information.** Reports or records that contain intelligence and investigative information and that are prepared by, prepared at the direction of or kept in the custody of a local, county or district criminal justice agency; the Bureau of State Police; the Department of the Attorney General; the Maine Drug Enforcement Agency; the Office of State Fire Marshal; the Department of Corrections; the criminal law enforcement units of the Department of Marine Resources or the Department of Inland Fisheries and Wildlife; or the Department of Conservation, Division of Forest Protection when the reports or records pertain to arson are confidential and may not be disseminated if there is a reasonable possibility that public release or inspection of the reports or records would:
>
> **A.** Interfere with law enforcement proceedings;
>
> **B.** Result in public dissemination of prejudicial information concerning an accused person or

concerning the prosecution's evidence that will interfere with the ability of a court to impanel an impartial jury;

C. Constitute an unwarranted invasion of personal privacy;

D. Disclose the identity of a confidential source;

E. Disclose confidential information furnished only by the confidential source;

F. Disclose trade secrets or other confidential commercial or financial information designated as such by the owner or source of the information or by the Department of the Attorney General;

G. Disclose investigative techniques and procedures or security plans and procedures not generally known by the general public;

H. Endanger the life or physical safety of any individual, including law enforcement personnel;

I. Disclose conduct or statements made or documents submitted by any person in the course of any mediation or arbitration conducted under the auspices of the Department of the Attorney General;

J. Disclose information designated confidential by some other statute; or

K. Identify the source of complaints made to the Department of the Attorney General involving violations of consumer or antitrust laws.

[*10]**

n3 Not all of the public records subject to the Criminal History Record Information Act are presumed to be confidential. Section 612-A of the Act provides that "every criminal justice agency that maintains a facility for pretrial detention" must record certain information regarding the identity of, arrest of, and charges against every person delivered for pretrial detention, and that, except as to juveniles, the information constitutes a public record. *16 M.R.S.A. § 612-A* (Supp. 2004). Unlike *section 614*, *section 612-A* does not contain a confidentiality requirement.

[*P12] The eleven exceptions contained in *section 614(1)* reflect several important policy objectives. These include (1) protecting the integrity of criminal prosecutions and the constitutional right of those charged with crimes to a fair and impartial jury; n4 (2) maintaining individual privacy and avoiding the harm that can result from an unjustified disclosure of sensitive personal or commercial information; n5 and (3) ensuring the safety of the public and law enforcement personnel. n6 *Section 614(1)* **[***11]** denotes the bounds within which public officials use and disseminate intelligence and investigative information.

n4 *16 M.R.S.A. § 614(1)(A), (B), (D), (E), (G), (K).*

n5 *Id. § 614(1)(C), (F), (I), (J).*

n6 *Id. § 614(1)(H).*

[*P13] Our focus in the present case is on the privacy exception set forth in *section 614(1)(C)*, which is similar to its federal counterpart in the Freedom of Information Act (FOIA), *5 U.S.C.A. § 552(b)(7)(C) (1996)*, that exempts from disclosure "records or information compiled for law enforcement purposes" if disclosure "could **[**529]** reasonably be expected to constitute an unwarranted invasion of personal privacy." Cases decided pursuant to FOIA inform our analysis of *Maine's FOAA. Campbell v. Town of Machias, 661 A.2d 1133, 1136 (Me. 1995).*

[*P14] The Superior Court employed the balancing test developed by the United States Supreme Court for applying the FOIA's privacy exception, which requires courts **[***12]** to identify and then balance the private and public interests at play to determine whether disclosure will constitute an unwarranted invasion of personal privacy. *See Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172, 158 L. Ed. 2d 319, 124 S. Ct. 1570 (2004)*; *United States Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 495, 127 L. Ed. 2d 325, 114 S. Ct. 1006 (1994)*; *United States Dep't of State v. Ray, 502 U.S. 164, 175, 116 L. Ed. 2d 526, 112 S. Ct. 541 (1991)*; *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989).* The disclosure of investigative records is not permitted if the invasion of personal privacy is determined to be unwarranted when weighed against the identified public interest that will be served by disclosure. Thus, we examine, in turn, (1) the personal privacy interests of the alleged victims, witnesses, and deceased priests in maintaining the confidentiality of the records sought by Blethen; (2) the public interest supporting disclosure of the records; and (3) the balancing of the private and public interests.

A. Personal Privacy Interests

[*P15] The personal privacy **[***13]** interests protected by the privacy exception are twofold. First, an individual has an interest in avoiding disclosure of personal matters, *Reporters Comm., 489 U.S. at 762*; second, an individual has an interest in controlling the dissemination of personal information. *Fed. Labor Relations Auth., 510 U.S. at 500.* Intelligence and investigative information is an exception to FOAA's general policy requiring disclosure because such information often involves sensitive personal information that may or may not have been verified by public officials. Few people wish to be publicly associated with investigations of alleged criminal conduct, whether as a perpetrator, witness, or victim. *See Mack v. Dep't of the Navy, 259 F. Supp. 2d 99, 106 (D.D.C. 2003)* (recognizing that "individuals have a strong privacy interest in avoiding unwarranted association with alleged criminal activity"). People who are identified in criminal investigation reports have a substantial interest in keeping their identities closed to the public, regardless of how they are characterized in the record. *See SafeCard Servs., Inc. v. SEC, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1205 (D.C. Cir. 1991)*; **[***14]** *Fitzgibbon v. CIA, 286 U.S. App. D.C. 13, 911 F.2d 755, 767 (D.C. Cir. 1990).* For these reasons, the United States Supreme Court has recognized that when the subject of a law enforcement record is a private individual, the privacy interest protected by the privacy exception is at its apex. *Favish, 541 U.S. at 166*; *Reporters Comm., 489 U.S. at 780.*

[*P16] The Superior Court concluded that the privacy rights of the alleged victims, witnesses, and priests have been dissipated or extinguished by (1) the information's prior public disclosure; (2) the manner in which the information came into the possession of the Attorney General; and (3) the death of the priests who are the subjects of the allegations.

1. Prior Public Disclosure

[*P17] Three of the fourteen files submitted for in camera inspection by the court **[**530]** reference the prior public disclosure of certain allegations contained in the files. n7 The remaining files contain no indication of prior public disclosure, apart from the report of the allegations directly to the Diocese, a District Attorney, or the Attorney General by individuals professing knowledge of the alleged **[***15]** abuse.

n7 The records submitted for in camera inspection contain fourteen files, one per priest, and a separate document summarizing the allegations relating to those fourteen priests, as well as four additional priests for whom individual files were not provided. The summary does not include the dates of death for the four priests for whom a file was not provided.

[*P18] The prior public disclosure of information does not generally extinguish privacy interests in the nondisclosure of the same information organized and contained in the investigative records of a law enforcement agency. *See Reporters Comm., 489 U.S. at 770.* A person's interest in controlling the dissemination of information about oneself is an integral part of the right to privacy. *Mack, 259 F. Supp. 2d at 109.* In *Reporters Committee*, the United States Supreme Court rejected the notion that a personal privacy interest does not attach to

an individual's interest in keeping private a criminal "rap [***16] sheet" containing information that was already available to the public from other sources. *489 U.S. at 762-71*. "The fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *Id. at 770* (quotation marks omitted).

[*P19] Here, the prior disclosure of allegations contained in two of the fourteen files detailing allegations of sexual abuse by the deceased priests does not extinguish the interests of the various individuals named in the records in controlling the separate dissemination of the information as it is organized and portrayed in the Attorney General's investigative records.

2. The Manner in Which the Information Came into the Possession of the Attorney General

[*P20] The Attorney General came into possession of the information concerning the deceased priests from three sources: (1) reports made by the Diocese based on information it received from current or former church members; (2) reports made by a county prosecuting attorney based on information she received from members of the public; and (3) reports the Attorney General received directly [***17] from members of the public. As the Superior Court observed, none of the reports were made under the protection of the confessional: "To the extent that the alleged victims or others working on their behalf have stepped forward and lodged their complaints, their expectation of continued privacy would be diminished to the extent that the investigation being sought would require disclosure."

[*P21] The privacy interests reposed in the records are diminished to the extent the information was voluntarily reported to church and public authorities with the expectation that it would be used to investigate possible wrongdoing. Moreover, the Attorney General does not claim that any of the individuals who reported the information to authorities did so under circumstances where there was an express or implied understanding that their identity or the identity of others named in the records would remain confidential. *See Keys v. United States Dep't of Justice, 265 U.S. App. D.C. 189, 830 F.2d 337, 345 (D.C. Cir. 1987)*. Accordingly, the manner in which the information was reported dissipated the privacy interests. n8

n8 Contrary to the dissenting opinions, our decision does not stand for the proposition that a person who reports information in confidence has little or no privacy interests protected by *section 614(1)(C)*. Our analysis in the present case is based on the fact that it is not claimed that the individuals who reported the information sought by Blethen did so with an expectation of confidentiality.

[***18]

[**531] 3. Privacy Interests of Deceased Persons and Their Families

[*P22] The Superior Court did not determine whether the deceased priests should be deemed to have a residual privacy interest in the records because of the "clear affirmative answer" it reached regarding the public interest in disclosure of the records. Before us, Blethen asserts that the privacy interests of the deceased priests named in the Attorney General's records and their immediate family members terminated with the priests' deaths.

[*P23] We have not previously considered whether the privacy interests protected by *section 614(1)(C)* continue after a person's death. The two federal circuit courts of appeals that have considered this issue in connection with the FOIA have reached different conclusions. *Compare Campbell v. United States Dep't of Justice, 334 U.S. App. D.C. 20, 164 F.3d 20, 33 (D.C. Cir. 1998)* (concluding that deceased persons have "reputational interests and family-related privacy expectations [that survive death"), *with McDonnell v. United States, 4 F.3d 1227, 1261 (3d Cir. 1993)* (holding that deceased persons have "no privacy interest subject to invasion **[***19]** by disclosure"). More recently, the United States Supreme Court recognized in *Favish* that the relatives of a deceased person may invoke their own interest in personal privacy in connection with the FOIA's personal privacy exception: "We think it proper to conclude from Congress' use of the term "personal privacy' that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions." *541 U.S. at 167*. n9

n9 *National Archives & Records Administration v. Favish, 541 U.S. 157, 158 L. Ed. 2d 319, 124 S. Ct. 1570 (2004)*, was decided subsequent to the Superior Court's judgment in this case. In *Favish*, the Court determined that the FOIA's privacy exemption required that photographs of the corpse of former White House Deputy Counsel Vincent Foster, Jr., not be subject to public disclosure based on the privacy interests of Foster's surviving family members. *Id. at 160-61, 168-69*. The Court stated that the privacy right asserted by the Foster family was their own right "to be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their

> own peace of mind and tranquility, not for the sake of the deceased." *Id. at 166.*

[*20]**

[*P24] Our in camera inspection of the records reveals that the passage of time has substantially dissipated or extinguished the privacy interests of the deceased priests, if any, and of their relatives. The length of time from both the alleged misconduct by the priests and their deaths is measured in decades, not years. The median number of years since the priests' deaths is twenty-five, and the average number of years since the acts of alleged abuse exceeds forty. The earliest acts of abuse are alleged to have occurred in the 1930s, and the most recent acts of abuse are alleged to have occurred not later than 1983.

[*P25] The disclosure of allegations that might damage a deceased person's reputation and adversely affect the peace of mind of his or her family in the years immediately following death will have considerably less effect many years later. As measured by the passage of time from both the deaths of the priests and the alleged acts of abuse, any residual privacy interests of the deceased priests and their immediate **[**532]** family members in this case are, at most, minimal. Accordingly, we need not separately determine whether the deceased priests have privacy interests **[***21]** within the ambit of *section 614(1)(C)* that survive their deaths.

4. Conclusions Regarding Privacy Interests

[*P26] The privacy interests of the living individuals named in the Attorney General's records are substantial based on the sensitive nature of the events described in the records. Although these interests were not diminished by the prior public disclosure of some of the allegations, the manner in which the information was reported to church and public officials diminished any expectation of continued privacy in the information. In addition, the passage of time has largely extinguished the residual privacy interests of the deceased priests, if any, and of their immediate family members.

B. Public Interest in Disclosure

[*P27] The Superior Court concluded that the public's interest in disclosure of information pertaining to possible criminal activity by the deceased priests and how the allegations were investigated exceeded the privacy interests of the alleged victims and witnesses, and any residual privacy interests of the deceased priests. In its complaint, Blethen asserted that it "has been engaged in ongoing investigations into allegations of sexual abuse by **[***22]** members of the catholic clergy in the State of Maine" and that "there is great public interest in disclosure of the scope and extent of alleged sexual abuse by the clergy."

[*P28] With respect to the FOIA, a possible invasion of privacy is warranted only if disclosure will advance its central purpose. "Whether disclosure . . . is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny[, . . . rather than on the particular purpose for which the document is being requested." *Reporters Comm., 489 U.S. at 772* (quotation marks omitted). This standard is known as the "central purpose" doctrine. *See* Christopher P. Beall, Note, *The Exaltation of Privacy Doctrines Over Public Information Law, 45 Duke L.J. 1249, 1258 (1996).*

[*P29] In *Reporters Committee*, the United States Supreme Court held that the public interest in disclosure of the criminal records of an organized crime figure did not warrant the invasion of privacy that would result. *489 U.S. at 780.* The focus is "on the citizens' right **[***23]** to be informed about "what their government is up to."' *Id. at 773.* "That purpose . . . is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id.* The Court concluded that, because "the basic purpose of the [FOIA is to open agency action to the light of public scrutiny," a request that is directed at information about the persons who are the subjects of files rather than at information about the government's "own conduct" is not within the sphere of the public interest protected by the FOIA. *Id. at 774* (quotation marks omitted).

[*P30] More recently, the Court held in *Favish* that when the privacy exception is applicable, the party seeking disclosure of information must establish two elements: "First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own **[**533]** sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted." *541 U.S. at 172.* **[***24]** The Court did not, however, "in this single decision attempt to define the reasons that will suffice, or the necessary nexus between the requested information and the asserted public interest that would be advanced by disclosure." *Id. at 172-73.* Instead, it specifically held:

> In the case of photographic images and other data pertaining to an individual who died under mysterious circumstances, the justification most likely to satisfy [the privacy exemption's public interest re-

> quirement is that the information is necessary to show the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties.

Id. at 173. Further, the Court added, "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id. at 174.*

[*P31] Maine's FOAA, like the FOIA, is intended to address the public's right to hold the government accountable. n10 There is, however, no basis in the text of FOAA or the public policy it implements to cause us to engraft *Favish's* requirement of evidentiary **[***25]** proof of governmental impropriety to justify the public disclosure of photographic images of a corpse onto a request for written investigative records involving events that occurred many years ago. The *Favish* standard focuses on the unique and important privacy interest embodied in our "cultural tradition acknowledging a family's control over the body and death images of the deceased [that has long been recognized at common law." *541 U.S. at 168.* The Court recognized the personal stake of family members "in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased." *Id.* In contrast, the records requested in this case involve allegations of abuse alleged to have occurred twenty to seventy years ago. The threat of the unwarranted public exploitation of grieving family members that was central to the outcome in *Favish* is not present here.

> n10 *1 M.R.S.A. § 401* (1989). *See also* Charles J. Wichmann III, Note, *Ridding FOIA of Those "Unanticipated Consequences": Repaving a Necessary Road to Freedom, 47 Duke L.J. 1213, 1217 (1998).*

[*26]**

[*P32] FOAA's central purpose of ensuring the public's right to hold the government accountable would be unnecessarily burdened if we adopted *Favish's* evidentiary requirement for purposes of a case such as this, involving a request for written investigative records concerning events that occurred two or more decades ago. Maine's FOAA directs that it is to "be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent." *1 M.R.S.A. § 401* (1989). The public's interest in knowing what its government is up to surely extends beyond the specific concern of governmental impropriety considered in *Favish*. The records sought by Blethen are necessary for the public to understand why the Attorney General exercised his discretion not to pursue criminal prosecutions in connection with the sexual abuse allegations. An informed citizenry has no less of an interest in information that might document governmental efficiency or effectiveness than it does in information documenting governmental negligence or malfeasance. Absent **[**534]** the unique cultural and familial interests confronted in *Favish* **[***27]** , the public's interest in knowing what its government is up to encompasses a broader universe of concerns than simply the possibility of governmental wrongdoing.

[*P33] We conclude that, under the circumstances presented by this case, the central purpose doctrine's two-pronged formulation provides the proper standard for determining whether Blethen has established a public interest that warrants an invasion of personal privacy. Accordingly, we must ask whether Blethen has demonstrated that the public interest is a significant one and whether the information sought is likely to advance that interest.

[*P34] Blethen asserts in its complaint the existence of a "crisis as a result of allegations of sexual abuse of children and young people by some priests and bishops." It cites the United States Conference of Catholic Bishops' Charter for the Protection of Children and Young People as having recognized that ""secrecy has created an atmosphere that has inhibited the healing process, and, in some cases, enabled sexually abusive behavior to be repeated."' Blethen claims that the information it seeks is directly associated with "great public interest in the disclosure of the scope **[***28]** and extent of alleged sexual abuse by the clergy," and that the information pertains to investigations conducted by the Attorney General and one or more District Attorneys. The Attorney General has not taken issue with any of these representations, either before the Superior Court or before us.

[*P35] Blethen's assertions establish a direct nexus between the records sought and a substantial governmental activity involving a matter of great importance to an informed citizenry. The public interest sought to be advanced is significant because the request is not for information for its own sake, nor for information associated with an isolated case. Rather, the information is sought for the sake of evaluating a comprehensive investigation undertaken by the government in response to an alleged pattern of conduct that spans several decades involving the sexual abuse of children by members of the clergy. In addition, the information sought by Blethen is likely to advance that public interest, as demonstrated by the fact that the records were the basis for the Attorney General's decision not to initiate criminal prosecutions.

n11 We conclude, as did the Superior Court, that Blethen's **[***29]** request satisfies the requirement of a substantial public interest that may warrant the invasion of personal privacy.

> n11 In fact, the Attorney General had previously denied the release of the records on the specific grounds that "information contained in the reports might lead to prosecutions that are still viable or affect ongoing violations." Six months later, the Attorney General reported to the Superior Court that no criminal charges would be filed.

C. Balancing of the Private and Public Interests

[*P36] The Superior Court concluded, in effect, that any residual personal privacy rights that could be claimed by those named in the documents sought by Blethen are nominal and "must bend to the public interest." The court declined to redact the names of living persons and other identifying information because of "how much information would have to be taken out and the extent to which this information is likely already known, at least at a local level." We have concluded that although the privacy rights **[***30]** of the deceased priests and their families are, at most, minimal, the residual personal privacy rights of the living individuals named in **[**535]** the records persist, albeit tempered by the manner in which the information was reported to public and church officials.

[*P37] An additional analytical step is required in evaluating the privacy interests of the living individuals named in the records. If all identifying information concerning such individuals can be redacted from the records prior to disclosure and redaction does not prevent the public interest in disclosure from being fully realized, the privacy interests of the living individuals in the redacted documents become greatly reduced. The effectiveness of redaction of the records in this case was suggested by Blethen in the body of its complaint: "Information directly identifying alleged victims can be redacted consistent with the Law Court's interpretation of the FOAA." Before us, Blethen supports the Superior Court's decision not to require redaction, but also acknowledges that "limited redaction, if necessary, is an eminently appropriate alternative to complete non-disclosure in this case given the extraordinary public interests. **[***31]** "

[*P38] Maine courts can require redaction of records in connection with FOAA requests. *Springfield Terminal Ry. Co. v. Dep't of Transp., 2000 ME 126, P 11 n.4, 754 A.2d 353, 357* (stating that "we have held that protected information can be excised from a document to allow that document to be disclosed"). Blethen does not allege, nor has it been demonstrated, that the identification of the individuals named in the records, other than the deceased priests, is required to fulfill the public interest asserted in support of disclosure.

[*P39] The Superior Court ultimately decided against the redaction of the records sought by Blethen for two reasons: a lot of information would have to be taken out of the records, and some of the identifying information may have previously been publicly disclosed. The degree of "cutting and pasting" required to redact documents cannot justify bypassing redaction unless it is demonstrated to be truly impractical or onerous. The records at issue consist of eighty-two pages, and the elimination of the names and all identifying information (e.g., places of residence; names of family members, friends, treatment providers, and others; **[***32]** addresses; and phone numbers) associated with the persons named in the records, other than the deceased priests, is neither impractical nor onerous. In addition, for the reasons stated earlier, the prior public disclosure of several of the allegations does not vitiate the need to protect the privacy rights of the individuals named in the records through redaction if that can be achieved without undermining the public interest served by disclosure.

[*P40] Accordingly, we conclude that the public interest in the disclosure of the records is substantial and that the public interest supporting disclosure can be realized even with the redaction of all identifying information regarding the persons identified in the records other than the deceased priests. On balance, the identified public interest exceeds the privacy interests associated with the records once they are redacted. We therefore affirm the court's determination that the records requested by Blethen should be disclosed, but we vacate that portion of its decision that decided against redaction of the records prior to their disclosure. This matter is remanded for the entry of a new judgment that provides for disclosure **[***33]** of the records after redaction of the names and other identifying information of persons named in the records other than the deceased priests.

The entry is:

> **[**536]** Judgment affirmed in part, and vacated in part, and remanded for further proceedings consistent with this opinion.

CONCURBY: SAUFLEY

CONCUR: SAUFLEY, C.J., concurring.

[*P41] I concur in the result of the above opinion, but, because I disagree with its rejection of the principles outlined in *National Archives and Records Administration v. Favish, 541 U.S. 157, 158 L. Ed. 2d 319, 124 S. Ct. 1570 (2004)*, I write separately.

[*P42] Any analysis of the records request in this case must begin with the acknowledgment that criminal investigation records, such as the records at issue here, are not subsumed within the general sunshine laws, and, in contrast to most government records, are *not* available for public review unless certain conditions have been met. It is in minimizing this distinction that the Court's opinion goes astray.

[*P43] Although most public records and procedures are open to the public as a matter of declared state policy, *1 M.R.S.A. § 401* (1989), a clear exception **[***34]** to that policy applies to certain investigative information kept in the custody of a criminal justice agency. *1 M.R.S.A. § 402(3)(A)* (Supp. 2004); *16 M.R.S.A. § 614(1)* (Supp. 2004). Those records are "*confidential* and may not be disseminated" if any one of eleven reasons for maintaining that confidentiality is demonstrated. *16 M.R.S.A. § 614(1)(A)-(K)* (emphasis added). Unlike many other governmental records, and for the policy reasons stated in the dissenting opinion, the Legislature did not intend for such investigatory information to be *presumed* accessible to the public pursuant to Maine's Freedom of Access Act (FOAA), *1 M.R.S.A. § § 401-410* (1989 & Supp. 2004).

[*P44] The distinction between ordinary public records and criminal investigation records has an historical basis. The reluctance to release investigatory records, which contain personal and private information about individual citizens gathered through the power of the State, has been addressed in a similar context in federal law. As the Supreme Court has concluded regarding public access to prosecutorial records, the central purpose **[***35]** of the Freedom of Information Act (FOIA), *5 U.S.C.A. § 552* (1996 & Supp. 2004), is to ensure that the government's activities are open to scrutiny, not to make available information about private citizens. *See, e.g., United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989).*

[*P45] There are few discernable differences between treatment of criminal investigatory records pursuant to FOIA and the treatment of the same records pursuant to Maine's parallel FOAA statute, and the associated statutes. n12 In interpreting FOIA, the Supreme Court in *Favish* recognized the unique nature of investigatory records in criminal cases and emphasized the prohibition on their release unless there are allegations and evidence of government misconduct that warrant disclosure of the information. *541 U.S. at 173-74.*

n12 *Compare 5 U.S.C.A. § 552(b)(7)(C) (1996)* (stating that "this section does not apply to matters that . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy") with *16 M.R.S.A. § 614 (1)(C)* (Supp. 2004) (stating that such records "may not be disseminated if there is a reasonable possibility that public release . . . would . . . constitute an unwarranted invasion of personal privacy").

[*36]**

[*P46] I would, as the dissent does, apply the teachings of *Favish* to the analysis before us. That is, I would conclude that in the absence of an allegation of governmental wrongdoing, the interests in protection **[**537]** of the witnesses, alleged victims, informants, and others who have been the subject of investigation would outweigh the public's interest in the disclosure of the records.

[*P47] The question then is whether there exists in the case before us a credible allegation of governmental misconduct. Admittedly, Blethen does not specifically articulate that allegation in detail, given that the complaint and briefs in the present case were filed prior to the Supreme Court's announcement of its decision in *Favish*. Nonetheless, I would conclude that the serious allegations of child sexual abuse, involving many children, made or alleged to have occurred over decades, without prosecution, is equivalent to an allegation of governmental misconduct in the present case. The number of alleged separate incidents, perpetrators, and child victims, as well as the many decades over which the allegations span, are substantial. Hence, I would conclude that the present case, unique **[***37]** in its factual background, presents a sufficient allegation of governmental wrongdoing to require a balancing against the private interests to be protected. n13

n13 Ordinarily, I would require compliance with the *Favish* standards of good faith allegations and *evidence of* governmental negligence or impropriety before affirming a decision that releases information excepted under FOAA. *Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174, 158 L. Ed. 2d 319, 124 S. Ct. 1570 (2004)*. The present case, however, poses special circumstances warranting greater flexibility in applying the FOAA analysis.

[*P48] Engaging in that balancing test, I conclude that the public's interest in the records must prevail. The personal privacy of all witnesses and alleged victims will have been protected by the redaction of any information that could identify those individuals. The only remaining question of privacy relates then to the priests who were the focus of the reports, each of whom is now long deceased. **[***38]** In this highly unusual setting, where the only remaining privacy interests have all but evaporated over time, the reasons for allowing the prosecutor to withhold the records from the public have been greatly diminished. n14

n14 It is important to recall that in the present case the prosecutor has not asserted any reasonable possibility that the release of the information will interfere with law enforcement. *See 16 M.R.S.A. § 614(1)(A)* (Supp. 2004). Indeed, the Attorney General has concluded that, among the eleven reasons legislatively set forth for maintaining the confidentiality of prosecutorial records, *see 16 M.R.S.A. § 614(1)(A)-(K)* (Supp. 2004), the only reason that the court should consider denying Blethen's request is the potential that dissemination could create "an unwarranted invasion of personal privacy," *id. § 614(1)(C)*. The Attorney General does posit that the possible invasion of privacy in this case could have a chilling effect on future investigations. The absence of any argument related to interference with prosecutions, however, necessarily focuses our analysis on the sole issue of invasion of personal privacy.

[*39]**

[*P49] In this unique setting, where the Court has protected the privacy of the alleged victims and there is no reasonable possibility that the release will interfere with law enforcement, the determination that the records may be released as redacted does not present the dangerous implications regarding law enforcement that the dissent addresses. Given the unique facts of the present case, the holding today has limited precedential force and should not have the chilling effect on prosecutorial investigations that the dissent suggests.

[*P50] Accordingly, I agree that, with appropriate protections for the personal privacy of alleged victims and witnesses, the release of these records is appropriate.

DISSENTBY: CLIFFORD

DISSENT:

[538]** CLIFFORD, J., with whom RUDMAN and ALEXANDER, JJ., join, dissenting.

[*P51] Sound public policy requires that most of the information contained in the investigative files currently in the possession of the Attorney General should be, and, pursuant to a correct interpretation of the relevant statutory law, is protected from public dissemination. Maine's Criminal History Record Information Act, *16 M.R.S.A. § 614(1)(C)* **[***40]** (Supp. 2004), protects the information contained in those files because there is more than a "reasonable possibility" that its public release would "constitute an unwarranted invasion of personal privacy."

[*P52] In my view, the Court erroneously concludes that the personal privacy interests in the information contained in the files have been seriously diminished by the way the incidents of alleged abuse have been reported. Moreover, the Court departs dramatically from precedent and employs much too lenient a standard in concluding that there is a significant public interest that outweighs the privacy interests involved and warrants disclosure of the information. Accordingly, I respectfully dissent.

[*P53] *Section 614(1)* of the Criminal History Record Information Act expressly excepts certain information from public disclosure pursuant to Maine's Freedom of Access Act (FOAA), *1 M.R.S.A. §§ 401-410* (1989 & Supp. 2004). n15 Pursuant to *section 614(1)(A)* and *(C)*, if the information to be disclosed contains "intelligence and investigative information" and is confidential, it may not be released as long as there is a "reasonable possibility" that public **[***41]** release or inspection will interfere **[**539]** with law enforcement or will "constitute an unwarranted invasion of personal privacy."

n15 Title *16 M.R.S.A. § 614(1)* provides:

> **1. Limitation on dissemination of intelligence and investigative information.** Reports or records that contain intelligence and investigative information and that are prepared by, prepared at the direction of or kept in the custody of a local, county or district criminal justice agency; the Bureau of State Police; the Department of the Attorney General; the Maine Drug Enforcement Agency; the Office of State Fire Marshal; the Department of Corrections; the criminal law enforcement units of the Department of Marine Re-

sources or the Department of Inland Fisheries and Wildlife; or the Department of Conservation, Division of Forest Protection when the reports or records pertain to arson are confidential and may not be disseminated if there is a reasonable possibility that public release or inspection of the reports or records would:

> **A.** Interfere with law enforcement proceedings;
>
> **B.** Result in public dissemination of prejudicial information concerning an accused person or concerning the prosecution's evidence that will interfere with the ability of a court to impanel an impartial jury;
>
> **C.** Constitute an unwarranted invasion of personal privacy;
>
> **D.** Disclose the identity of a confidential source;
>
> **E.** Disclose confidential information furnished only by the confidential source;
>
> **F.** Disclose trade secrets or other confidential commercial or financial information designated as such by the owner or source of the information or by the Department of the Attorney General;
>
> **G.** Disclose investigative techniques and procedures or security plans and procedures not generally known by the general public;
>
> **H.** Endanger the life or physical safety of any individual, including law enforcement personnel;
>
> **I.** Disclose conduct or statements made or documents submitted by any person in the course of any mediation or arbitration conducted under the auspices of the Department of the Attorney General;
>
> **J.** Disclose information designated confidential by some other statute; or
>
> **K.** Identify the source of complaints made to the Department of the Attorney General involving violations of consumer or antitrust laws.

16 M.R.S.A. § 614(1) (Supp. 2004).

[*42]**

[*P54] The language of our Criminal History Record Information Act excepting criminal history information from public disclosure is nearly identical to the language in the federal Freedom of Information Act (FOIA), *5 U.S.C.A. § 552(b)(7)(C) (1996)*. In interpreting FOAA to determine when information in the possession of public officials should or should not be released, we have said that we are guided by cases construing the federal

FOIA counterpart. n16 *Campbell v. Town of Machias, 661 A.2d 1133, 1136 (Me. 1995).*

n16 The language of the federal statute prevents disclosure if disclosure "*could reasonably be expected to* constitute an unwarranted invasion of personal privacy." *5 U.S.C.A. § 552(b)(7)(C) (1996)* (emphasis added). The language of our statute is more protective of privacy rights, prohibiting release of the information if there is only a "*reasonable possibility*" that disclosure will "constitute an unwarranted invasion of personal privacy." *16 M.R.S.A. § 614(1)(C)* (emphasis added).

[*43]**

[*P55] The language of the federal statute and our statute, as well as corresponding precedent, instructs that we should balance the private interests against the public interests that may be involved in deciding whether disclosure would constitute an unwarranted invasion of personal privacy. *See Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171-72, 158 L. Ed. 2d 319, 124 S. Ct. 1570 (2004)*; *United States Dep't of Def. v. FLRA, 510 U.S. 487, 495, 127 L. Ed. 2d 325, 114 S. Ct. 1006 (1994)*; *United States Dep't of State v. Ray, 502 U.S. 164, 175, 116 L. Ed. 2d 526, 112 S. Ct. 541 (1991)*; *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989).*

[*P56] In the present case, the information in the subject files contains the identities of the alleged victims of sexual abuse by priests of the Roman Catholic Diocese of Maine and the names of the accused priests. Federal courts have wisely observed that people do not want their names connected with criminal investigations, *Mack v. Dep't of the Navy, 259 F. Supp. 2d 99, 106 (D.D.C. 2003)*, and that the disclosure of names of potential witnesses **[***44]** in criminal cases carries "the potential for future harassment," *Neely v. FBI, 208 F.3d 461, 464-65 (4th Cir. 2000).* Such disclosure, not only of names, but also of the substance of their statements, carries the potential for future humiliation and embarrassment. *Id. at 465.* Except for those persons who have voluntarily made their allegations public, the victims and witnesses whose names are contained in the files have a "substantial interest" in not having their names released to the public. *Davis v. United States Dep't of Justice, 296 U.S. App. D.C. 405, 968 F.2d 1276, 1281 (D.C. Cir. 1992)* (quotation marks omitted).

[*P57] Title *16 M.R.S.A. § 614(1)(C)* reflects the Legislature's recognition of the great harm that can result from unwarranted public dissemination of information collected by law enforcement agencies. By its very nature, intelligence and investigative information is often sensitive and implicates the privacy and other fundamental rights of the individuals affected by it. The means by which intelligence and investigative information is collected is essential to the relationship between **[***45]** the government and its citizenry. Collection of such information depends upon the willingness of private citizens to voluntarily provide information, as well as the unique power of the government to compel citizens to disclose information through the exercise of its warrant and subpoena authority. The use and dissemination of intelligence and investigative information by **[**540]** prosecutors and law enforcement agencies are vital to effective law enforcement and to the protection of individual rights.

[*P58] I disagree with the Court's conclusion that the privacy interests of the people who reported the incidents, but who did not do so publicly, are diminished to any substantial degree. Although there has been some public disclosure of some of the names contained in the records, n17 most of the information, including the most private facts such as the names of victims, witnesses, and accused perpetrators, has not yet been publicly disclosed. Further, almost all of the reports were made to the Diocese and not to prosecutors, n18 and thus most of those who came forward to report alleged abuse did not do so with the certain expectation that prosecution would ensue. In my view, the privacy **[***46]** interests of those who made the reports have *not* been diminished to any substantial degree by the way the incidents were reported. Although the Court ultimately orders the names of the alleged victims to be redacted, it does so *not* because their privacy rights outweigh what the Court concludes is in the public interest, but rather, because *in the present case* it is neither impractical nor onerous to do so, and what the Court depicts as the public interest will not be undermined by the redaction.

n17 A few of the complaining witnesses whose names are included in the files at issue in the present case have made their allegations public.

n18 The information was provided to the Attorney General by the Diocese without regard to whether the alleged acts were criminal pursuant to Maine law, whether the statute of limitations had run, how long ago the alleged acts may have occurred, or whether the allegations were credible.

[*P59] The federal courts have concluded that there are some "reputational **[***47]** interests and fam-

ily-related privacy expectations [that] survive death," *Campbell v. United States Dep't of Justice, 334 U.S. App. D.C. 20, 164 F.3d 20, 33 (D.C. Cir. 1998)*. I agree, and would not conclude that such interests in this case have been completely extinguished. In *Favish*, the United States Supreme Court recently recognized the privacy interest of a deceased person's immediate family members and what the survivors describe as the right, "to be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased." *Favish, 541 U.S. at 166*. Although I agree that the privacy interests of the families of the deceased priests have significantly diminished over time, I would *not* conclude that such residual privacy interests are so minimal that their names can be subjected to disclosure without any substantial showing of a significant public interest to make such disclosure "warranted" within the meaning of *16 M.R.S.A. § 614(1)(C)*. If there is no public interest that would be served by disclosure of the names, there **[***48]** is *no* balancing to be done because the existence of some privacy interest must necessarily outweigh no public interest. *Computer Prof'ls for Soc. Responsibility v. United States Secret Serv., 315 U.S. App. D.C. 258, 72 F.3d 897, 905 (D.C. Cir. 1996)*.

[*P60] The Court additionally errs in the present case by concluding that there is a public interest within the meaning of our jurisprudence that is to be balanced against those privacy interests, much less a *significant* public interest that compels disclosure. The Court reaches this conclusion only by straying far from the case law that we have said we should rely on to interpret FOAA.

[*P61] That it is a newspaper publisher that seeks the information does not establish **[**541]** the existence of a public interest sufficient to warrant an invasion of personal privacy. The existence of a public interest in the disclosure of investigation records does not turn on the identity of the person or organization requesting the information. *FLRA, 510 U.S. at 499*. If investigative records are subject to disclosure, they are subject to disclosure to anyone who requests them. n19 *Favish, 541 U.S. at 172*. **[***49]**

> n19 This could include not only members of print and other media, but also individual curiosity seekers or other people or organizations in what the *Favish* opinion characterizes as "a sensation-seeking culture." *Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 160-61, 166-67, 158 L. Ed. 2d 319, 124 S. Ct. 1570 (2004)*.

[*P62] The decision of whether a possible invasion of privacy is warranted turns on the nature of the requested information and whether its disclosure will advance the central purpose for the disclosure of investigative records. In weighing whether the public interest justifies such an invasion of privacy, a court should determine whether the disclosure of the investigative records would serve the central purpose of FOAA:

> Although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's *central purpose* is to ensure that the *Government's* **[***50]** activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.

Reporters Comm., 489 U.S. at 774 (emphasis added).

[*P63] The Supreme Court made clear in *Reporters Committee* that the purpose of the FOIA is to serve the public interest in determining the existence or extent of any *government* impropriety. *See id.* Thus, the requested disclosure of private information that implicates no wrongdoing on the part of a governmental entity generates insufficient public interest and therefore falls well outside the scope and application of FOAA. A public interest sufficient to overcome the privacy interest protected by the privacy exemption cannot be established unless there is a claim of governmental wrongdoing and evidence to support that claim. *See Computer Prof'ls for Soc. Responsibility, 315 U.S. App. D.C. 258, 72 F.3d 897 at 905*.

[*P64] To allow disclosure in the absence of such evidence establishing governmental wrongdoing would render the exception to disclosure established by *section 614(1)(C)* ineffective. **[***51]** Law enforcement investigatory records would become subject to disclosure based only on a claim that there is a general public interest in the subject of an investigative record. General public interest in an investigation--i.e., that the subject has become the focus of public attention or concern--does not comport with FOAA's central purpose. Such a relaxed standard will be impractical to implement in view of the hundreds or possibly thousands of law enforcement investigations that are of interest to the general public, and which lead to the filing of so many criminal cases in our courts each year. If such a low threshold for disclosure is adopted as the standard for determining

whether sensitive confidential information is to be disclosed, the chilling effect on the willingness of individuals to cooperate in criminal investigations could be substantial. If victims and witnesses, understandably reluctant to participate in criminal investigations, come to understand that confidential records documenting their cooperation will be readily subject to disclosure to anyone who can establish a general **[**542]** public interest in the subject, that cooperation will be vastly more difficult to achieve. **[***52]**

[*P65] Accordingly, to establish the existence of a public interest that would warrant disclosure of the names in the files in the present case, Blethen should be required to produce evidence "that would warrant a belief by a reasonable person that . . . alleged Government impropriety might have occurred." *Favish, 541 U.S. at 174*. This it has failed to do. Blethen's Rule 80B complaint alleges only that "there is a great public interest in disclosure of the scope and extent of alleged sexual abuse by the clergy." The complaint does not assert any government impropriety, nor does the record suggest or address any impropriety in the investigation conducted by the Attorney General or other governmental agencies. Most of the records were turned over voluntarily to the Attorney General, or to the District Attorney, not by the people asserting the abuse, but rather by the Diocese. Although, as suggested by Blethen, the records may be relevant to whether the Diocese of Portland mishandled allegations of sexual abuse by its priests, the Diocese is a private actor. The disclosure of records that may reflect on the conduct of the Diocese does not fall within FOAA's central **[***53]** purpose of subjecting government activities to public scrutiny.

[*P66] Blethen failed to allege, and certainly has not established, that any government impropriety has occurred. In my view, the Court deviates from established precedent to improperly conclude that general public curiosity meets the "substantial public interest" standard, and is sufficient to warrant the invasion of the privacy interests concerned.

[*P67] Even though the Court comes to a final conclusion that the names of the witnesses making the allegations should be redacted prior to disclosure of all the other information in the files, it does so only after determining that the redaction can be easily accomplished. The protection of the privacy interests of witnesses who come forward in criminal investigations should not depend on the broad discretion of a trial court to determine, perhaps years later, whether the act of redacting the names of those witnesses before the files containing their names are released is "impractical" or "onerous," or whether redaction will undermine a vague and general public interest. Such a standard has serious implications for the ability of law enforcement agencies to gather **[***54]** investigatory information.

[*P68] Police and prosecutors will not be able to give complete assurance of confidentiality to persons contemplating reporting crimes and evidence of crimes. Knowledge that criminal investigative files may be released and publicized on demand by any organization or person will have the effect of deterring the reporting of criminal activity out of fear that, even if prosecution is not initiated, humiliating and embarrassing events in personal lives may be revealed years later. Especially affected will be victims of traumatic and sensitive crimes, such as sexual assault.

[*P69] I would vacate the judgment and remand for the entry of a judgment
in favor of the State of Maine and the Department of the Attorney General.

ALEXANDER, J., dissenting.

[*P70] I join Justice Clifford's dissent. I respectfully dissent separately to emphasize what serious changes we are adopting in practices regarding confidentiality of criminal investigations.

[*P71] In our democracy we hope that there is a substantial public interest in government integrity, prompt reporting and successful prosecution of crime, respecting **[**543]** the rights of the accused, and protecting **[***55]** the privacy of sex crime victims. That substantial public interest does not create a license for newspapers, or anyone else, to review old case files n20 and publicize or use them as they see fit. The Court's opinion n21 focuses on the fact that some of the cases involve sexual abuse that occurred several decades ago, but the precedent it establishes is by no means limited to decades old cases. In fact, the files at issue were developed by the Attorney General's office rather recently, and it would seem that there would be an even greater public interest in disclosure, if the Court's reasoning is followed, if the unprosecuted events had occurred more recently in time.

n20 The Court's opinion addresses unprosecuted cases. The statute the Court interprets, *16 M.R.S.A. § 614(1)*, is not so limited and applies to any information in police and prosecutor's files.

n21 References to "the Court's opinion" are to the opinion of the three Justice plurality whose result, but not reasoning, is joined by the Chief Justice.

[*56]**

[*P72] The Court's opinion holds that disclosure of the criminal investigative records sought by the newspapers "is likely to advance that public interest, as demonstrated by the fact that the records were the basis for the Attorney General's decision not to initiate criminal prosecutions." In essence the Court is saying that once a decision not to prosecute is reached, the "public interest" may be invoked to justify turnover of investigative records to the press, and anyone else who asks, regardless of the risk of harm or embarrassment to victims, to individuals who may have been wrongly or mistakenly accused, or to witnesses who have reported relevant information.

[*P73] As Justice Clifford points out, with this change in the law, criminal investigators can no longer assure confidentiality, absent necessary disclosure during prosecution, to persons reporting embarrassing and humiliating events in their lives. Without the protections that the assurance of confidentiality has previously provided, victims and witnesses may be deterred from reporting evidence of crimes, particularly if the revelation of that evidence could cause harm or embarrassment to themselves or people **[***57]** they care about. To this extent, the newspapers' success today may work against the public interest, deterring victims from reporting events of sexual abuse or violence out of fear of later revelation of their reports in the press.

[*P74] The Court's opinion also suggests no mechanism in the disclosure process to protect an individual who, years ago, may have been wrongly or mistakenly accused. Persons wrongly or mistakenly accused of crimes risk being pilloried in public by newspapers reporting accusations that competent, professional prosecutors have determined do not constitute prosecutable offenses.

[*P75] The protections provided by a court-ordered redaction, focused on by the Court, are illusory. Redaction is a choice for the court; it may or may not be ordered when disclosure is sought one year or twenty years later. If it is too "onerous," to use the Court's language, it need not be ordered at all. Redaction cannot be promised to a victim contemplating reporting a crime and would probably provide no protections for an individual wrongly or mistakenly accused of criminal activity.

[*P76] The Legislature could not have intended this result when it adopted the **[***58]** exceptions to the confidentiality of criminal investigative information in *section 614*. **[**544]** Nothing in the history of the legislation suggests that the Legislature intended that when a prosecutor reaches a difficult decision not to prosecute, the "public interest" may be invoked by anyone to require that the prosecutor's investigative records be turned over to the press on demand for any use, responsible or salacious, that anyone chooses to make of the record.

Freedom of Access Law

VA Togus

PRESENTERS:

Linda Pistner, Chief Deputy Attorney General – Moderator
Janine Massey, Assistant Attorney General
Leanne Robbin, Assistant Attorney General
Diane Sleek, Assistant Attorney General
Thomas Sturtevant, Assistant Attorney General

September 30, 2005 – 1:00 p.m. to 4:30 p.m.

1. Overall the seminar was: ___Excellent ___Good ___Fair ___Poor

2. What was the most useful information in this seminar and why?_____

_____

_____

_____

3. Was any topic or information omitted that you wish had been included? If yes, explain.

_____

_____

_____

4. Additional comments about today's seminar? _____

_____

_____

_____

5. What seminars would you like to see presented? Do you have suggestions for presenters?

_____

_____

_____

_____
Name (optional)

THANK YOU!