

**RIGHT TO KNOW ADVISORY COMMITTEE
PUBLIC RECORDS EXCEPTIONS REVIEW SUBCOMMITTEE**

AGENDA

September 14, 2016

10:00 a.m.

Room 438, State House, Augusta

Convene

1. Welcome and Introductions
2. Continue review of public records exceptions enacted after 2004 and before 2013:
discussion and recommendations to the full Advisory Committee

Adjourn

PUBLIC RECORDS EXCEPTIONS SUBCOMMITTEE

Maine Freedom of Access Act - public records exceptions

Enacted 2005 - 2012

(Revised 9/14/2016)

| Ref. # | M.R.S. TITLE | § | Sub-§ | DESCRIPTION | DEPARTMENT/AGENCY | SUBCOMMITTEE RECOMMENDATIONS |
|--------|--------------|-------|-------|---|--|---|
| 2 | 1 | 402 | 3 | Title 1, section 402, subsection 3, paragraph C-1, relating to legislative working papers | Legislative Council, Executive Director | 5-1 No Modification; amendments |
| 13 | 5 | 1541 | 10-B | Title 5, section 1541, subsection 10-B, relating to internal audit working papers of the State Controller | Department of Administrative and Financial Services - Office of the State Controller | Tabled to check again with FOAA contact |
| 37 | 12 | 8005 | 4 | Title 12, section 8005, subsection 4, relating to forest management information designated confidential by agency furnishing the information | Department of Agriculture, Conservation and Forestry | 5-1 No Modification |
| 43 | 20-A | 13004 | 2-A | Title 20-A, section 13004, subsection 2-A, relating to complaints, charges and accusations concerning certification and registration of educational personnel | Department of Education | Review with full Advisory Committee |

| Ref. # | M.R.S. TITLE | § | Sub-§ | DESCRIPTION | DEPARTMENT/AGENCY | SUBCOMMITTEE RECOMMENDATIONS |
|--------|--------------|--------|-------|--|--|---|
| 51 | 22 | 2153-A | | Title 22, section 2153-A, relating to information provided to the Department of Health and Human Services by the U.S. Department of Agriculture and the U.S. Food and Drug Administration that is confidential under federal law | Department of Health and Human Services | Tabled 8/17; review response from ACF on 9/14 |
| 54 | 25 | 4202 | | Title 25, section 4202, relating to records and information connected in any way with the work of a critical incident stress management team for law enforcement personnel | Department of Public Safety | |
| 56 | 29-A | 2251 | 7-A | Title 29-A, section 2251, subsection 7-A, relating to personally identifying accident report data contained in an accident report database | Department of Public Safety | |
| 57 | 29-A | 2117-A | 4 | Title 29-A, section 2117-A, relating to data collected or retained through the use of an automated license plate recognition system | Department of Public Safety; Department of Transportation | |

| Ref. # | M.R.S. TITLE | § | Sub-§ | DESCRIPTION | DEPARTMENT/AGENCY | SUBCOMMITTEE RECOMMENDATIONS |
|--------|--------------|------|-------|--|-----------------------------|------------------------------|
| 58 | 32 | 91-B | 1 | Title 32, section 91-B, subsection 1, relating to quality assurance activities of an emergency medical services quality assurance committee | Department of Public Safety | |
| 59 | 32 | 91-B | 1 | Title 32, section 91-B, subsection 1, paragraph A, relating to personal contact information and personal health information of applicant for credentialing by Emergency Medical Services Board | Department of Public Safety | |
| 60 | 32 | 91-B | 1 | Title 32, section 91-B, subsection 1, paragraph B, relating to information about a person receiving emergency medical services as part of an application for credentialing by Emergency Medical Services Board | Department of Public Safety | |
| 61 | 32 | 91-B | 1 | Title 32, section 91-B, subsection 1, paragraph C, relating to information submitted to the trauma incidence registry under section 87-B | Department of Public Safety | |

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|--------|--------------|-------|-------|---|--|------------------------------|
| 62 | 32 | 91-B | 1 | Title 32, section 91-B, subsection 1, paragraph D, relating to examination questions used for credentialing by Emergency Medical Services Board | Department of Public Safety | |
| 64 | 34-A | 11221 | 13 | Title 34-A, section 11221, subsection 13, relating to disclosure of certain sex offender registry information | Department of Public Safety | |
| 65 | 34-A | 11221 | 9-A | Title 34-A, section 11221, subsection 9-A, relating to certain sex offender registry information | Department of Public Safety | |
| 66 | 34-B | 1931 | 6 | Title 34-B, section 1931, subsection 6, relating to the records of the Mental Health Homicide, Suicide and Aggravated Assault Review Board | Mental Health Homicide, Suicide, and Aggravated Assault Review Board (MHSAARB) | |
| 67 | 34-B | 3864 | 12 | Title 34-B, section 3864, subsection 12, relating to abstract of involuntary commitment order provided to State Bureau of Identification | Department of Public Safety | |

| Ref. # | M.R.S. TITLE | § | Sub-§ | DESCRIPTION | DEPARTMENT/AGENCY | SUBCOMMITTEE RECOMMENDATIONS |
|--------|--------------|-------|-------|---|-------------------|------------------------------|
| 69 | 35-A | 10106 | | Title 35-A, section 10106 relating to records of the Efficiency Maine Trust and its board | Efficiency Maine | |

STATUTE: 5 MRSA § 1541, sub-§ 10-B

AGENCY: Dept. of Administrative and Financial Services – State Controller

CONTACT PERSON: Rob Weaver

CONTACT PERSON'S EMAIL ADDRESS: robert.weaver@maine.gov

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

The OSC rarely has had need to deny records requests related to ongoing internal audits and/or investigations, under this exception. This is likely due to the limited number of investigations/audit underway at any point in time and the timing of interest by outside parties typically occurs after the official report has been released.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

The OSC supports the continuation of this exception and believes it is critical to accomplishing the objectives of the internal audit division.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered? **The OSC has not experienced problems in applying this exception and believes it is clear that the records described are confidential. The language is sufficiently clear to describe the applicable records.**

4. Does your agency recommend changes to this exception?

The OSC does not recommend any changes to the exception or the language covering this exception.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

Other audit and investigative agencies internal to State Government, including the Office of the State Auditor, the Office of Program Evaluation and Government Accountability and the Office of the Attorney General.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

The OSC believes that this exception is critical to ensure that ongoing internal audits and investigations are not jeopardized as a result of the release of working papers used to document and support these investigative activities.

It is also necessary to ensure that data on individuals that could reasonably be used to determine the identity of an individual supplying data for an audit are private if the data supplied by the individual were needed for an audit and the individual would not have provided the data to the auditor without an assurance that the individual's identity would remain private, or the auditor reasonably believes that the subject would not have provided the data. Over the years, State employees and other survey respondents have indicated that they would not feel they can be candid in surveys and interviews about the problems they perceive in their agencies if those documents were not considered protected.

STATUTE: 22 MRSA § 2153-A

AGENCY: Dept. of Agriculture, Conservation and Forestry

CONTACT PERSON: Mari Wells-Eager

CONTACT PERSON'S EMAIL ADDRESS: mari.wells@maine.gov

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).
Not often. Quality Assurance and Regulations doesn't receive many FOAA requests.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.
Absolutely must support, must comply with federal regulation.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?
Yes.

4. Does your agency recommend changes to this exception?
No

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.
Ron Dyer 287-7522

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

Fouts, Henry

From: Ayotte, Shannon <Shannon.Ayotte@maine.gov>
Sent: Monday, August 22, 2016 10:28 AM
To: Nale, Craig
Subject: RE: Right to Know FOAA Question
Attachments: Ref51 with answers.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Responding on Mari's behalf,

Yes, we still need to follow this confidentiality exception as we must follow the federal requirements and sign confidentiality agreements with them each year. See answers on the form attached.

From: Nale, Craig [<mailto:Craig.Nale@legislature.maine.gov>]
Sent: Tuesday, August 16, 2016 12:08 PM
To: Ayotte, Shannon
Subject: Right to Know FOAA Question

Hi Shannon,

I'm just following up on this as we prepare materials for tomorrow's Right to Know Advisory Committee meeting.

Thanks again,
Craig

From: Nale, Craig
Sent: Monday, August 15, 2016 11:37 AM
To: Ayotte, Shannon
Subject: RE: FOAA Question

Hi Shannon,

The exception is at 22 MRSA § 2153-A. The questionnaire originally sent to Ms. Wells-Eager is attached. I think the questions are fully outlined below and in the attachment, but I'm happy to talk anytime.

Thanks,
Craig

From: Ayotte, Shannon [<mailto:Shannon.Ayotte@maine.gov>]
Sent: Monday, August 15, 2016 11:34 AM
To: Nale, Craig
Subject: RE: FOAA Question

I am researching this for Mari Wells-Eagar. What specific exception is this?

From: Wells, Mari
Sent: Monday, August 15, 2016 11:14 AM
To: Ayotte, Shannon
Subject: FW: FOAA Question

From: Nale, Craig [<mailto:Craig.Nale@legislature.maine.gov>]
Sent: Thursday, August 11, 2016 10:44 AM
To: Wells, Mari
Subject: FW: FOAA Question

Hi Mari,

In connection with the review of existing public records by the Right to Know Advisory Committee, I sent the email below last year to gather more information about the exception cited in the attached questionnaire. I don't believe there was any resolution to this issue. Any help with the question below would be greatly appreciated before the Advisory Committee takes the issue up again next week.

Thanks again,
Craig

From: Nale, Craig
Sent: Tuesday, October 20, 2015 11:51 AM
To: Wells, Mari
Subject: FOAA Question

Hi Mari:

The attached questionnaire was sent to Kevin Wells at the Department of Health and Human Services, but he thought it might be better directed to the DACF. My reading of the statute is that DACF must promulgate the regulations that determine whether documents are confidential, but that DHHS would maintain the documents and therefore respond to FOAA requests for those documents.

Would you mind taking a look either responding to the questionnaire or help clarify who maintains these documents?

I'm happy to discuss further with you or anyone from DACF. Thanks very much,

Craig

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STATE OF MAINE
RIGHT TO KNOW ADVISORY COMMITTEE

September 12, 2016

Chandler E. Woodcock, Commissioner
Department of Inland Fisheries and Wildlife
41 State House Station
Augusta, ME 04333

Dear Commissioner Woodcock:

The Right to Know Advisory Committee recently considered a request by the Department of Inland Fisheries and Wildlife to consider a revision to the language of Title 12, section 10110 of the Maine Revised Statutes. We thank you and your staff for your input; however, we are concerned about the scope of the proposed amendment and feel this matter may be better resolved by the Joint Standing Committee on Inland Fisheries and Wildlife of the Legislature.

The Advisory Committee first sought input from the Department on this provision of law, which pertains to the confidentiality of email address submitted to the Department, as part of our annual review of existing public records exceptions. The Department initially supported the continuation of the exception without change, but we sought further guidance about the merits of a blanket confidentiality provision for email address versus providing confidentiality only upon request.

The resulting proposed amendment provided confidentiality for email address submitted as part of an application for any license, permit or registration issued by the Department unless the applicant clearly indicated that the email address is not confidential. In addition, the proposed amendment included new exceptions to email confidentiality for contractors or other State agencies performing marketing services for the Department or conducting fish and game management research. A copy of the draft amendment the Advisory Committee considered is attached for your reference.

While we support the default confidentiality of email addresses for license, permit and registration applicants, as well as the possibility of a person indicating that his or her email address is not confidential, we do not feel we have sufficient information or understanding of the scope of the proposed exceptions to make a recommendation on that portion of your proposal.

We hope you will consider submitting a bill to effect changes to this provision to the 128th Legislature.

Sincerely,

Sen. David C. Burns, Chair
Right to Know Advisory Committee

29-A M.R.S.A. §1301, sub §6-A is amended to read:

6-A. Confidentiality. Except as ~~authorized under~~ required by 18 United States Code, Section 2721(b), the Secretary of State may not disseminate information collected under subsection 6, ~~to any~~ entity without specific authorization from the Legislature. For every willful violation of this subsection, a person commits a civil violation for which a fine of not more than \$500 may be adjudged.

Right to Know Advisory Committee
Subcommittee on Review of Existing Public Records Exceptions
***DRAFT* Proposed Bill to Implement the Recommendation of the Efficiency Maine Trust**

An Act to Implement Recommendations of the Right to Know Advisory Committee
Regarding Public Records Exceptions

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

Sec. 1. 35-A MRS §10106, sub-§1, ¶A is amended to read:

A. A record obtained or developed by the trust that:

- (1) A person, including the trust, to whom the record belongs or pertains has requested be designated confidential;
- (2) The board has determined contains information that gives the owner or a user an opportunity to obtain business or competitive advantage over another person who does not have access to the information, except through the trust's records, or access to which by others would result in a business or competitive disadvantage, loss of business or other significant detriment, other than loss or denial of financial assistance from the trust, to any person to whom the record belongs or pertains;
- (3) Contains information about the energy usage profile of an identifiable customer of a transmission and distribution utility in the State or an identifiable customer of a distributor of heating fuel or other energy source; ~~and~~ or
- (4) Contains the social security number, address, telephone number or e-mail address of a customer that has participated or may participate in a program of the trust; and

SUMMARY

This bill changes the criteria for designation of records of the Efficiency Maine Trust as confidential from requiring that each of four criteria be met to instead require that one of the four criteria be met, including: that a person to whom the record belongs has requested it be designated confidential; that the Efficiency Maine Trust Board has determined the record contains proprietary information, access to which would result in some competitive disadvantage to any person to whom the record belongs or pertains; that the record contains information about the energy usage profile of an identifiable individual; or that the record contains the social security number, address, telephone number or e-mail address of a customer that has participated or may participate in a program of the Efficiency Maine Trust.

