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A Section-By-Section Analysis of Maine's Freedom of Access Act

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A SECTION-BY-SECTION ANALYSIS OF MAINE'S FREEDOM OF ACCESS ACT

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.[1]

INTRODUCTION

There seems to be no absolute freedom of information. Even President Lyndon B. Johnson's declaration made on July 4, 1966, as he signed the Freedom of Information Act (FOIA) into law, indicates the limitations accompanying most right-to-know laws from their inception. A delicate balance must be struck between the public's access to public business and the public interest, between the public's access and a person's right to privacy, and, at the federal level, between the public's access and national security.

Maine also crafted a limited freedom of information law, the Freedom of Access Act ("FOAA" or "the Act"),[2] seven years before the FOIA, in which executive sessions were the legislative trade-off for its enactment.[3] Yet, from 1959 until 1975, the year it was drastically amended, access in Maine was more expansive than at any other time in its history. Not only was the statute liberally drafted, but there were fewer statutory exceptions, the back-door way of limiting public access to records. Those exceptions have swollen to more than one hundred, severely curtailing public access to what would otherwise be public business.

Indeed, the prophesy of the late media sage and newspaper columnist Walter Lippmann, written more than forty years before President Johnson's comments, haunts us today:

> At different times and for different subjects some men impose and other men accept a particular standard of secrecy. The frontier between what is concealed because publication is not, as we say, 'compatible with public interest' fades gradually into what is concealed because it is believed to be none of the public's business.[4]

This Comment will analyze the evolution of this "standard of se-

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1. Federal Freedom of Information Act's bill-signing statement of President Lyndon B. Johnson on July 4, 1966, *quoted in* H.R. REP. No. 1419, 92d Cong., 2d Sess., pt.1 at 1. The bill went into effect on July 4, 1967.

2. *See* Appendix for text of the FOAA, ME. REV. STAT. ANN. tit. 1, §§ 401-410 (1989 & Supp. 1990-1991).

3. Memorandum of Professor Brooks W. Hamilton, Chairman, Maine Joint Committee on Freedom of Information (May 7, 1959) (on file with author).

4. W. LIPPMANN, PUBLIC OPINION 44 (1922).

crecy" in Maine, gauged by the state's right-to-know law,[5] from common law to the most recent amendments made in the Freedom of Access Act in 1989. Part II will take a brief historical look at the common law right to public access in England and in the United States as a backdrop to Maine's enactment of the Act in 1959. Part III's overview of the Act will lead into Part IV's section-by-section analysis of all ten sections, via legislative history, of the numerous attorney general opinions issued, some Superior Court decisions and all of the Law Court cases that pertain to the Act. Finally, Part V will suggest some of the problems posed by the current Act and will propose possible measures the Legislature can take to make the Maine Act fully divorced from any "standard of secrecy."

I. HISTORICAL VIEW OF THE RIGHT TO KNOW

All fifty states now have some kind of freedom of information law. Although Maine's law was enacted in 1959, seven years before the federal FOIA was adopted, it was not among the earliest as to public records: Louisiana was the first to enact such a law in 1940.[6] However, not until 1983 did Mississippi enact a law.[7]

A distinction must be made between open records and open meetings laws. The federal FOIA, for example, grants access to records while a separate law, known as the Government in the Sunshine Act,[8] grants access to agency meetings. Some states follow the federal model, but in Maine the distinctions are assigned to different sections of the FOAA's ten sections. Thus, the title Freedom of Access refers to access to both records and to meetings.

With respect to governmental records, the notion of freedom of information statutes in this country originated in England, where the need for public records in judicial proceedings opened the door, albeit slightly, to public access of public records.[9] This was accom-

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5. Maine's FOAA, called the "Right to Know" statute when it was enacted in 1959, was probably derived from the title of the book H. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS (1953), which began as a report to the American Society of Newspaper Editors. The author, Harold Cross, a former New York lawyer who retired to the Skowhegan, Maine, area was instrumental in lobbying for and drafting Maine's first statute.

6. 1940 La. Acts 195 (codified at LA. REV. STAT. ANN. § 44:1 to 44:42 (West 1982)).

7. 1983 Miss. Laws 424 (codified at MISS. CODE ANN. § 25-61-1 to 25-61-17 (Supp. 1989)).

8. 5 U.S.C.A. § 552b (1977).

9. H. CROSS, *supra* note 5, at 25. The United States Supreme Court has never interpreted the first amendment as providing for access to government information other than criminal proceedings and judicial records. *See infra* notes 232-33. However, it has been argued by first amendment commentators that effective operation of the democratic process requires openness:

> This is not an area where the courts, applying First Amendment doctrines, can be of much assistance. But the principle which should be followed by the legislature and executive is plain: the maximum amount of information

plished via court order for a record in the possession of a party to the case or by writ of mandamus for a record in another's possession.[10] Although the English door-opening was a grant of inspection in the case of a particular need, namely litigation, it was not accompanied by the assumption that all other needs were thereby excluded. Yet, by the time the practice wended its way to the United States, it was interpreted by some American courts as the sole purpose for gaining access to records.[11] This narrow litigation-only interest was broadened, but the requirement that the requester of a public record have some specific interest in the document sought prevailed for many years.[12]

Title abstract and title insurance companies provided the impetus for opening vast amounts of public records, including wills, taxes, judgments, liens, deeds and mortgages, even though it was for business reasons rather than for use in litigation or for altruistic causes, such as policing of government actions.[13] Ironically, newspapers were slow in seeking access to public records.[14]

In Maine, up to the time of the FOAA's enactment, a public record was one "required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law [or] made by a public officer authorized to perform that function."[15] However, "public" under common law, did not mean open to inspection by citizens, unless expressly allowed by statute,[16] the converse of the Act's mandate to-

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should be disclosed. Implementation of the principle is difficult and little progress has been made in developing techniques for its realization in practice.

T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 112 (1963).

10. For a history of English procedure regarding public records, see State *ex rel.* Ferry v. Williams, 41 N.J.L. 332, 334-37 (1879); Nowack v. Auditor General, 243 Mich. 200, 205-206, 219 N.W. 749, 750-51 (1928). *See generally* H. CROSS, *supra* note 5, at 25-33.

11. *See, e.g.*, H. CROSS, *supra* note 5, at 25-33.

12. *See, e.g.*, 53 C.J. *Records* § 40(1) (1931) ("At common law a person may inspect public records in which he has an interest or make copies or memoranda thereof when a necessity for such inspection is shown and the purpose does not seem to be improper. . . ."), *cited in* H. CROSS, *supra* note 5, at 29.

13. H. CROSS, *supra* note 5, at 28. The effect the federal FOIA would have on business was not anticipated prior to adoption, but it is estimated that FOIA requests by business outpace all other categories of requests. Stevenson, *Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4*, 34 ADMIN. L. REV. 207 (1982).

14. H. CROSS, *supra* note 5, at 29. A congressional study conducted between 1972 and 1984 revealed that media use of the federal FOIA accounted for only six percent of all requests made. *The Freedom of Information Reform Act: Hearings on S. 774 Before the Subcomm. on Govt. Information, Justice and Agriculture of the House Comm. on Govt. Oper.*, 98th Cong., 2d Sess. 699 (1984) (statement of H. Relyea, Specialist in American National Govt., Congressional Research Service, Library of Congress).

15. Op. Me. Att'y Gen. (1944), *reprinted in* 1943-1944 Me. Att'y Gen. Rep. 111.

16. *Id.*; Op. Me. Att'y Gen. (1951), *reprinted in* 1951-1954 Me. Att'y Gen. Rep. 70

day, where all records are public unless excepted.

Maine's first case regarding public records, *Hawes v. White*,[17] in 1876, reflects the early prevailing attitude that the requester have a specific interest in the public records. In that case the petitioners, county commissioners, succeeded in obtaining a writ of mandamus compelling the register of deeds to allow them access to records in order that they might change the books to a new indexing system. The court granted the writ to the commissioners for the narrow purpose of complying with their duties: "[t]he petitioners have sufficient interest in the subject matter to authorize them to petition for the writ."[18]

Furthermore, only records that were "required by law," so-called "public records," like the deeds in *Hawes*, could be accessed by that limited group of requesters who had the requisite special interest. In Maine, the 1883 Revised Statutes' codification of such required-by-law records ranged from those to be kept by the poundkeeper[19] to those of the licensed liquor agent.[20] Today, the Maine Act gives the right of access to "every person."[21] In addition, the common law restriction of right of access accorded to only those persons with specific purposes is obsolete.[22]

England's legacy regarding open meetings nowhere approaches the relative openness of its access to records history. The Parliament closed its proceedings to any outsiders from the beginning, originally for the purpose of excluding the King, but later for the purpose of harboring comments and final actions from constituents.[23] At the

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("The fact that records are public does not, however, subject such records to the inspection of all persons.").

17. 66 Me. 305 (1876).

18. *Id.* at 306.

19. R.S. tit. II, ch. 23, § 6 (1883):

> Each pound-keeper, in a book provided by the town, shall record at length all certificates received from persons committing beasts to the pound, or finding stray beasts, . . . and shall note therein when a beast was impounded . . . and said book shall be delivered to his successor in office, . . . and be open to the inspection of all persons interested.

20. R.S. tit. II, ch. 27, § 19 (1883):

> Agents of towns authorized to sell intoxicating liquors, shall keep a record in a suitable book, of the amount of intoxicating liquors purchased by them . . . . [T]hey shall also keep a record of the kind and quantity of liquors sold by them, the date of sale and the price, the name of the purchaser and the price for which it was sold; specifying in case such sale is made to the municipal officers of any other town, the name of such town, which record shall be open to inspection.

21. ME. REV. STAT. ANN. tit. 1, § 408 (1989).

22. *See infra* notes 196-202 and accompanying text for a discussion of limited access to commercial information.

23. T.P. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 618 (1896) (" 'To print or publish the speeches of gentlemen in this House,' said Mr. Pulteney in 1738, 'looks very like making them accountable without doors for what they say within.' ")

turn of the nineteenth century, representatives of the press were the least welcome of any of Parliament's non-members.[24] Finally, in the mid-1800's the exclusionary rules deteriorated to the point where both the press and "strangers," those who were not Parliamentary members, were able to observe the formerly closed proceedings.[25]

In the American colonies, the legislatures, pursuant to English dictates, continued the tradition of closed proceedings. Victims of an unfree press, like Peter Zenger, spurred the inclusion of press freedom into the Bill of Rights, leading to the notion of a more open government.

In Maine, as early as 1822, Laws of the State of Maine provided for public notice of meetings,[26] and in 1883 warrants to call town meetings were required to "specify the time and place at which the meeting shall he [sic] held; and in distinct articles shall state the business to be acted upon at such meeting; and no other business shall be there acted upon."[27] Today, not only is an entire section of the Act devoted to public notice, but all "public proceedings" are open to the public for whatever reason.[28]

II. How to Use the FOAA

The declaration of public policy, that government open its records and its proceedings to the public, applies to the state and all its subdivisions and to governmental associations.[29] Yet, despite the inclusion of all levels of government, not all branches are under the Act's purview. The judicial branch is glaringly absent from the provisions of the FOAA, although the public's access to criminal trials was affirmed by the United States Supreme Court's 1980 decision in *Richmond Newspapers, Inc. v. Virginia*.[30]

The key section of the Act is the definitions provision,[31] since it defines the scope of the Act, not only the phrases. For instance, the

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(quoting Cobbett's Parliamentary History 806). *See generally* H. Cross, *supra* note 5, at 179-82.

24. *Id.* at 619-21.

25. *Id.* at 621. Press galleries were established in 1834, and in 1845 "strangers" were officially allowed to observe. *Id.*

26. 1822 Me. Laws 114, § 5 provided:

> *Be it further enacted*, That when there shall be occasion of a town meeting, the Constable or Constables, or such other person as shall be appointed for that purpose by warrant from the Selectmen . . . shall summon and notify the inhabitants of such town, . . . the manner of summoning the inhabitants to be such as the town shall agree upon . . . .

27. R.S., ch. 3, § 5 (1883).

28. Me. Rev. Stat. Ann. tit. 1, § 406 (1989). For a further discussion of the public notice provision, see *infra* notes 272-78 and accompanying text.

29. *Id.* at § 402(2) (Supp. 1989-1990).

30. 448 U.S. 555 (1980). For a more detailed discussion of access to governmental proceedings, see *infra* notes 60-90 and acompanying text.

31. Me. Rev. Stat. Ann. tit. 1, § 402 (1989 and Supp. 1989-1990).

"public records" definition appears expansive, but a careful reading reveals it is composed of three elements which must exist before inspection may be had. A public record must be: (1) matter, (2) in the custody of an agency or public official at all governmental levels, and (3) received or prepared for use in connection with governmental business or containing information relating to the transaction of public or governmental business.[32] Even if the document sought meets those criteria, it must still escape the swinging axe of the seven exemptions to the definition. It is in the first of these exemptions where the "confidential-by-statute" creature lurks,[33] encompassing in its mighty jaws more than one hundred such statutes.

When a document clears all of these hurdles, it then meets the "public records" definition and "every person shall have the right to inspect and copy" it.[34] However, if inspection of a document requires translation from one medium to another, the requester may have to pay the agency in advance for the cost of that service.

Once a public record is requested and paid for, if necessary, an agency is not required to respond within a designated period unless the response is a denial, in which case the agency must so notify the requester in writing within five working days of the request.[35] But if the requester is unhappy with the denial, an appeal must be filed in any superior court in Maine within five working days of the receipt of the denial. After a trial *de novo*, which takes precedence over all cases on the docket except *habeas corpus* and actions brought by the state against individuals, the court will order disclosure if it determines "such denial was not for just and proper cause."[36] The penalty for a "willful violation" of the FOAA, a civil violation, carries a fine not to exceed $500 and to be paid to the state by the agency, and not by the official responsible.[37]

As to the meetings provisions of the FOAA, their scope also depends upon the "public proceedings" definition. Governmental meetings are open to the public unless an executive session is called and the statute's many conditions are met. Executive sessions can be held only if agreed to by three-fifths of the members of an entity, if a motion indicates the "precise nature of the business" of the session, and if no final approval of official actions are taken in the executive session.[38] Any person charged or investigated during the executive session, as well as any person bringing such charge, is permitted to attend. If an entity violates the conditions of the exec-

32. *Id.* § 402(3).
33. *Id.* § 402(3)(A).
34. *Id.* § 408.
35. *Id.* § 409.
36. *Id.* § 409(1).
37. *Id.* § 410.
38. *Id.* § 405.

Maine's FOAA purposive statements have indisputably commanded the attention of the courts[49] and the attorney general[50] in interpreting the statute. Further guidance is provided in section 401's rule of construction, also added in 1975, that the Act "shall be liberally construed and applied to promote its underlying purposes and policies."[51] The Law Court first acknowledged this legislatively mandated rule in *Moffett v. City of Portland*,[52] adding the corollary that any exceptions to the Act's disclosure requirements must be strictly construed.[53]

The potency of the liberal construction rule's effect is demonstrated in several attorney general opinions, where it is cited as the factor that tips the scale in favor of disclosure.[54] For example, in the attorney general opinion concerning a Department of Educational and Cultural Services investigation into alleged wrongdoing at the Baxter School for the Deaf,[55] the liberal construction directive was decisive in ruling that the report was open to public inspection: "In light of these specific instructions, both by clear terms of the statute and by the courts, to protect the public's right to access to the workings of its government, close questions must be resolved, wherever

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(2d ed. 1986) ("However hungry for statutory guidance, [judges] will not be significantly helped by expanding the kind of legislative ineptitudes that unfocused and loosely conceived policy announcements inevitably constitute.").

But cf. Professor Llewellyn ("*[S]ound* recitals of situation and purpose constitute one of the great drafting devices and one of the vital drafting arts . . . .") *Id.* at 284.

49. *See, e.g.*, Moffett v. City of Portland, 400 A.2d 340, 347-48 (Me. 1979) ("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 public."); Sulloway v. Inhabitants of Kittery, No. CV-60-73, slip op. at 3 (Me. Super. Ct., York Cty., May 21, 1974) ("Obviously these purposes are that the *actions* of public bodies be taken openly and that their *deliberations* be conducted openly.").

50. *See, e.g.*, Op. Me. Att'y Gen. 2 (June 3, 1977) ("It is clear from this statement that the Legislature's primary concern was that decisions which will affect the public should be arrived at openly and with full disclosure of the materials being considered and the decisions which are made.").

Although opinions of the attorney general are not binding, they are sought by state agencies and legislators seeking clarification of the FOAA. Of the nearly 50 attorney general opinions rendered regarding the Act, almost all have been addressed to governmental agencies.

51. P.L. 1975, ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 401 (1989)).

52. 400 A.2d 340 (Me. 1979).

53. *Id.* at 348. *See* Department of Air Force v. Rose, 425 U.S. 352, 361 (1976) for use of the same corollary in construing the federal FOIA.

54. Op. Me. Att'y Gen. 87-11, 3 (state Regional Planning Commissions are subject to the FOAA) ("Weighing these factors, and bearing in mind that in enacting the Freedom of Access Law the Legislature provided that the law 'shall be liberally construed . . . .' "); Op. Me. Att'y Gen. 79-144, 3 (names of petroleum products retailers receiving fuel from the state under the "set-aside" program and the amounts they receive are subject to disclosure under the FOAA) ("In view of this, and in view of the fact the Freedom of Access Law is to be liberally construed. . . .").

55. Op. Me. Att'y Gen. 82-42, 5.

utive session by taking a final action, any person learning of this conduct may file an appeal in a superior court within the thirty-day period mandated by Rule 80B of the Maine Rules of Civil Procedure, since no appeals period is provided for in the FOAA.[39] If the action is found to be illegally taken, the action is ordered to be "null and void," and the entity, not the officials responsible, is subject to the civil penalty of up to $500.[40]

Members of the public who attend the non-executive session meetings are permitted by the FOAA "to make written, taped or filmed records of the proceedings, or to live broadcast the same."[41] Public notice for public proceedings must be given in "ample time to allow public attendance."[42] There are no express appeals processes in the FOAA, beyond that for the executive sessions, for violations of any other open meetings provisions.

III. SECTION-BY-SECTION ANALYSIS

A. Section 401: Declaration of Public Policy; Rules of Construction

The FOAA's preamble, whose essence has remained largely unmodified since 1959,[43] expressly states the Legislature's intent: "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."[44] A third sentence, added in 1975,[45] warns against circumventing the spirit of the FOAA by holding clandestine meetings on private property without notice and opportunity for public attendance.[46] This policy addition was apparently designed to accompany the more stringent executive sessions section, amended in 1975.[47]

Although the merits of public policy clauses are debated,[48]

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39. *See infra* notes 324-27 and accompanying text.

40. ME. REV. STAT. ANN. tit. 1, § 409(2) (1989).

41. *Id.* § 404.

42. *Id.* § 406.

43. P.L. 1959, ch. 219, *repealed and replaced by* P.L. 1975, ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 401 (1989)).

44. ME. REV. STAT. ANN. tit. 1, § 401 (1989).

45. P.L. 1975, ch. 758.

46. P.L. 1975, ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 401 (1989)).

47. The executive sessions section was fortified by requiring that a 3/5 vote, rather than a majority, is needed to call an executive session. Moreover, the motion for an executive session must specify "the precise nature" of matters to be considered therein. P.L. 1975, ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 405 (1989)). For further discussion of the executive sessions provision, see *infra* notes 245-71 and accompanying text.

48. *See, e.g.*, R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING § 13.5, at 287

possible, in favor of public disclosure."[56]

B. Section 402: Definitions

1. Section 402(1): "Conditional Approval"

Included in section 402(1) since 1975,[57] the definition of "conditional approval" assists in the execution of section 407(1), which requires every agency to make a written record of decisions regarding licenses and employee dismissal.[58] Conditional approval is "[a]pproval 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."[59]

2. Section 402(2): "Public Proceedings"

The term "public proceedings" is defined to assist in the execution of sections 403 through 406, all of which pertain to open meetings. While the original definition, as enacted in 1959, subjected administrative and legislative bodies of the state, counties, municipalities and "any other political subdivision of the State" to provisions of the Act, it limited the Act's application to meetings of only those entities "composed of three or more members, *with which function it is charged under any statute or under any rule or regulation. . . .*"[60] Thus, from 1959 until major revision of the Act in 1975—nearly one-half of its existence—the FOAA gave public access to meetings of only permanent bodies whose decision-making sprang from statute, rule or regulation. Excluded from the Act, then, were meetings of ad hoc committees or commissions whose functions were limited to advice or investigation.[61]

The Legislature's removal in 1975 of this constricting "statute, rule or regulation" language from the public proceedings definition furnished latitude for later judicial determination of which entities are bound by the FOAA. Indeed, although the Law Court has had only one occasion[62] to determine which entities are bound by the

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56. *Id.* at 5. *See also* Op. Me. Att'y Gen. 80-95, 5 ("Thus, all questions as to [the Act's] applicability should be resolved in favor of the public's right to access.").

57. P.L. 1975, ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 402(1) (1989)).

58. *See infra* notes 279-83 and accompanying text for discussion of ME. REV. STAT. ANN. tit. 1, § 407(1) (1989).

59. ME. REV. STAT. ANN. tit. 1, § 402(1) (1989).

60. P.L. 1959, ch. 219, *repealed and replaced by* P.L. 1975, ch. 758 (emphasis added).

61. The Law Court, in Lewiston Daily Sun v. City of Auburn, 544 A.2d 335 (Me. 1988), recognized the constraints created by the original definition. The court noted that it was much narrower in scope than the present definition, and that the earlier version applied "only to those permanent bodies that possessed actual decisionmaking authority and had been specifically charged by statute or rule to act." *Id.* at 337.

62. *Id.* at 335.

Act, it did so broadly. In *Lewiston Daily Sun v. City of Auburn*, the court held that meetings of the City of Auburn's special civil service study committee constituted "public proceedings."[63] The committee, which had no budget and whose seven unpaid members were appointed by the mayor at the direction of the city council, was assigned to investigate alleged wrongdoing on the city's Civil Service Commission and to make recommendations to resolve any problems found.[64] The special committee's "close link" with the council and mayor, and its "investigatory functions that if not delegated to it would have been exercised directly by the city's governing authorities," brought it within the ambit of section 402(2), according to the court, despite statutory silence regarding a municipal "committee."[65]

The city argued that the Legislature never intended the scope of the statute to include an entity such as the Auburn Civil Service Study Committee, because subsection 402(2)(C) does not mention the term "committee" in its litany of municipal bodies.[66] Moreover, the city pointed to the subsection's express inclusion of the "committees and subcommittees" of the Legislature[67] and the boards of trustees of the University of Maine, the Maine Maritime Academy and the Maine Vocational-Technical Institute System.[68] The court, however, dismissed this form-over-substance argument; it could not prevail in light of the Act's mandate of liberal construction.[69]

The court's dicta in dismissing the city's second argument, that the committee was merely ad hoc and therefore temporary, provides further guidance as to which entities are bound by the Act. The court noted that the permanence of an entity is irrelevant to applicability of the FOAA after the Legislature's 1975 removal of the restriction that the bodies must function pursuant to statute, rule or regulation. It is sufficient that the committee was performing an investigatory function which affected " 'any or all citizens' of the City

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63. *Id.*

64. The committee's first meeting was, in fact, open to the public. But members voted to hold all future sessions in private. *Id.* at 336.

65. *Id.* at 335.

66. ME. REV. STAT. ANN. tit. 1, § 402(2)(C) (Supp. 1989-1990) provides that the transactions of "any board, commission, agency or authority of any . . . municipality" is encompassed by the "public proceedings" definition.

67. ME. REV. STAT. ANN. tit. 1, § 402(2)(A) (1989).

68. ME. REV. STAT. ANN. tit. 1, § 402(2)(B) (Supp. 1989-1990).

69. Lewiston Daily Sun v. City of Auburn, 544 A.2d at 337 ("Considered in isolation, such appellations when attached to a particular public entity reflect little more than the arbitrary decision of those who created the entity.").

However, the dissent noted that "the legislature was obviously aware of the distinction between a board, commission, agency or authority and this type of ad hoc committee," and that the omission of "committee" from the list of municipal entities was deliberate. *Id.* at 339 (Clifford, J., and Glassman, J., dissenting). Furthermore, the dissent argued that this ad hoc committee's limited advisory function, its lack of public funding, and its temporariness of term exclude it from provisions of the Act. *Id.*

of Auburn."[70]

Although the court declined to address the Act's applicability to meetings held by committees "completely disassociated from municipal governing entities," it provided numerous examples of how the City of Auburn had clearly associated itself with the special committee in question, thereby bringing it within the FOAA.[71] These recent liberal guidelines produced by the Law Court provide needed direction for the superior courts[72] and should steer the state's attorney general away from the conservative tack it has taken in several opinions issued on the same question.

As recently as 1985, three years before *Lewiston Daily Sun*, but ten years after section 402(2) was amended to delete the restrictive "statute, rule or regulation" language, the attorney general ruled that the Blue Ribbon Commission on Corrections was not subject to the FOAA,[73] a result that would be untenable after *Lewiston*

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70. *Id.* at 338 (quoting ME. REV. STAT. ANN. tit. 1, § 402(2) (Supp. 1989-1990)).

71. Lewiston Daily Sun v. City of Auburn, 544 A.2d at 338. The court was especially concerned with the committee's lack of autonomy, as evidenced by its "significant links" with the Auburn mayor and city council:

> The mayor created the committee on the order of the city council and appointed all of its members. He attended the committee's first meeting and there charged the committee to investigate the problems that were plaguing the City's Civil Service Commission. He told the committee it could interview whomever it pleased, but recommended that it question certain named individuals. He asked the committee to make recommendations to him and the city council on how best to resolve the Civil Service Commission's problems and even on whether that commission should be continued or abolished. He also stated his belief that the committee could hold its meetings in private. The committee had available to it as well the legal advice of the city attorney on whether its meetings were covered by the Act. As the committee's investigation progressed, the city council voted to direct the mayor to invite certain individuals to be interviewed by the committee. Finally, after the Superior Court temporarily enjoined it from further closed meetings, the committee voted to suspend its meetings "pending the outcome of present litigation *or direction from [the mayor] and/or the City Council.*"

Id.

72. At least one lower court decision relied on the Law Court's guidance in *Lewiston Daily Sun*. In Guy Gannett Publishing v. City of Augusta, No. CV-88-383 (Me. Super. Ct., Ken. Cty., Oct. 25, 1988), the court ruled that the 10-member ad hoc committee of the Augusta Boards of Trade, formed to consider the city's parking problems, was engaged in "deliberations [that] involve at least three high ranking officials in City government, are conducted on city premises, involve an important investigatory function affecting any or all citizens of the City of Augusta, and have an impact on the expenditure of significant public monies." *Id.* at 3-4.

Moreover, employing the language of *Lewiston Daily Sun*, the court cautioned against bypassing the FOAA by delegating "the function to another entity created expressly for the purposes of performing this function." *Id.* at 4 (citing Lewiston Daily Sun v. City of Auburn, 544 A.2d at 338).

73. Op. Me. Att'y Gen. 85-19.

Daily Sun.[74] That attorney general opinion, several others before it,[75] and even one as recent as 1987,[76] relied on what should now be an obsolete six-step inquiry.[77] The test necessarily narrows the scope of section 402(2) by focusing on the mere status of the entity as a "state agency or authority"[78] rather than looking to the "transac-

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74. The Blue Ribbon Commission on Corrections had a $25,000 budget and its members were compensated for expenses in attending the meetings, far more than was available to the volunteer members of the budgetless Auburn Civil Service Study Committee in *Lewiston Daily Sun*. But, like the special study committee, the Blue Ribbon Commission on Corrections' term was not permanent and its functions were advisory. Nevertheless, in *Lewiston Daily Sun* the Law Court found these characteristics irrelevant in light of the Legislature's 1975 removal of the requirement that entities exercise some legislative or administrative authority. Lewiston Daily Sun v. City of Auburn, 544 A.2d at 338.

75. Op. Me. Att'y Gen. (July 12, 1976) (Governor's Tax Policy Committee is not a state agency because it is composed of private officials giving private advice without statutory authorization); Op. Me. Att'y Gen. (Dec. 15, 1976) (Citizen's Dickey-Lincoln Project Impact Review Committee is not a state agency because it basically consists of private individuals and is advisory); Op. Me. Att'y Gen. (May 17, 1977) (Joint Select Committee on State Policy for Preservation, Development and Utilization of Historical and Cultural Resources is an advisory committee of the Legislature, but is statutorily created and its members receive expenses); Op. Me. Att'y Gen. (July 26, 1978) (Maine Potato Council is not a state agency because it was not intended by the Legislature to be a state agency even though it is funded through the potato tax and it expends state tax monies); and Op. Me. Att'y Gen. 80-95 (Interrelations Committee of School Administrative District No. 53 and Maine Central Institute is a local agency, because despite its advisory function, the "transactions of *any* functions" language of section 402(2) prevails in light of the vital area of education).

76. Op. Me. Att'y Gen. 87-11, 3 (Regional Planning Commissions are subject to the FOAA).

77. The test inquires whether the entity: (1) is created by statute; (2) has an indefinite term; (3) is comprised of a membership that is prescribed by statute; (4) receives public funds; (5) has a membership that is compensated above its expenses; and (6) exercises governmental, rather than advisory, power. Op. Me. Att'y Gen. 85-19, 2. "The more that these questions are answered in the affirmative, the more likely that the agency will be deemed to be subject to the Freedom of Access Law." Op. Me. Att'y Gen. 87-11, 3.

See also supra notes 63-70 and accompanying text for *Lewiston Daily Sun's* consideration and rejection of almost all of the above features.

78. The genesis of this six-part test is in Op. Me. Att'y Gen. (July 12, 1976) (meetings of Governor's Tax Policy Committee not subject to the FOAA), where the central issue was whether the entity constituted a "board or commission of any state agency or authority," as found in ME. REV. STAT. ANN. tit. 1, § 402(2)(B) (1989). Because "state agency" is not defined in the FOAA, the opinion relied on the Administrative Code, which defines state agency as a body "authorized by law to make rules or to adjudicate contested cases." ME. REV. STAT. ANN. tit. 5, § 2301-1 (1964), *repealed and replaced by* ME. REV. STAT. ANN. tit. 5, §§ 8001 to 11008 (1989). Thus, the opinion, while purporting to recognize the Legislature's abandonment of the "statute, rule or regulation" language, plainly ignored that change by incorporating a definition of agency that brought back the old language.

By the time of the Blue Ribbon Commission on Corrections opinion in 1985, the attorney general opinions had distilled the question simply to whether a given entity was a "state agency or authority" rather than determining whether the entity per-

tions of any functions affecting any or all citizens" of the entity in question.

The Legislature further broadened the scope of "public proceedings" with removal of the quantity of membership requirement in 1973,[79] presumably to bring entities otherwise subject to the FOAA into compliance regardless of size. In addition, the Legislature's practice, starting in 1975, of enumerating specific entities encompassed within the "public proceedings" definition, served to augment the scope of section 402(2). Thus, the present definition expressly includes: the Legislature and its committees and subcommittees;[80] any board or commission of any state agency or authority; the Board of Trustees and its committees and subcommittees of the University of Maine System, Maine Maritime Academy, and the Maine Vocational-Technical Institute;[81] any board, commission, agency or authority of any county, municipality, school district or regional, political or administrative subdivision;[82] and the full membership meetings of any association whose membership is composed exclusively of counties, municipalities, school administrative units or other political or administrative subdivisions.[83]

Of the above enumerated entities, only the committees and subcommittees of the Board of Trustees of the higher educational institutions created any legislative debate. The controversy began when the University of Maine System Board of Trustees began excluding the press and public from some subcommittee meetings.[84] The attorney general's office, upon the request of a legislator, ruled that these committees and subcommittees were in violation of the FOAA.[85] Consequently, the legislator sought to clarify the ambiguity of section 402(2)(B) by specifically including these entities. The few legis-

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formed any "functions affecting any or all citizens of the State." Op. Me. Att'y Gen. 85-19, 2.

79. P.L. 1973, ch. 433.

80. P.L. 1975, ch. 758.

81. P.L. 1975, ch. 758, *amended by* P.L. 1977, ch. 164, and P.L. 1989, ch. 358.

82. P.L. 1975, ch. 758.

83. P.L. 1989, ch. 358.

84. The Board did this based on an interpretation that absence of "committees and subcommittees" from section 402(2)(B) exempted these entities from the FOAA. Legis. Rec. 697 (1977).

85. Senator Curtis, whose district of Penobscot includes the University of Maine at Orono, requested the opinion. Legis. Rec. 697 (1977). In that opinion, the attorney general advised that liberal construction of the Act demands that committees and subcommittees of the Board of Trustees be subject to the open meetings provision. Op. Me. Att'y Gen. (Nov. 23, 1976) 1. However, the opinion noted the apparent discrepancy in the Act regarding these committees and subcommittees: they were not expressly included in the open meetings provision but were expressly exempt from the public records provision, § 402(3)(E). *Id.* at 3. Therefore, "it may be appropriate for the Legislature to clarify these matters . . . regarding the rights of public access to the business of committees and subcommittees of the University of Maine and the Maine Maritime Academy." *Id.*

lators aligning with the Board position feared that open subcommittee meetings would "inhibit discussion" and discourage would-be trustees from seeking those positions.[86] A majority of legislators favored inclusion of the subcommittees of the boards, noting that decisions regarding the "expenditure of millions of [tax] dollars" should be open to the public.[87] Moreover, the Legislature has ventured beyond the FOAA in enacting statutes that mandate specific entities to hold their meetings in public: governmental ethics and election practices commission,[88] health care financing commission,[89] and regional planning commissions.[90]

3. *Section 402(3): Public Records*

The Legislature has tinkered frequently with the "public records"

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86. Legis. Rec. 697 (1977). Senator Hewes of Cumberland contrasted the temperament of legislators with that of possible future trustees:

> Now we in the Legislature perhaps have thicker skins than some of the Trustees. I know a gentleman that has given a great deal of money for a new hockey rink at Orono at the University of Maine. Men like that perhaps would be on the Trustees, and yet would not like to have everything that they say be open to the public, to second guessing or to something that you can take out of context.

Id.

Furthermore, Senator Hewes drew Maine's private institutions into the debate:

> I personally feel that others [sic] schools, Colby, Bowdoin or Bates, private schools who do not have to have all of their sub-committee meetings open to the public, perhaps will get ideas presented at the sub-committee meetings that will be beneficial to their respective colleges.

Id.

The Senate vote was 26 to 2 in favor of including the subcommittees in the public proceedings definition. *Id.* at 698.

87. *Id.* at 697. Senator Curtis, sponsor of the bill to include the boards' subcommittees in the definition of public proceedings, and supported by university students and state newspapers, attempted to assuage opponents:

> I have discussed this Bill and its concept with Members of the Board of Trustees, although not all of them, and I have found them, those that I have discussed it with, to be in agreement with the general concept, especially when I assured them that although the terms of the Freedom of Access Law would apply under this Bill clearly to the sub-committees of the Board of Trustees, so would the exceptions which are provided.

Id.

The most ardent support of inclusion of the committees and subcommittees outside of the Legislature came from the press. *See, e.g., Those Committees*, Bangor Daily News, Mar. 25, 1977 (editorial); *Trustees: Opening the Meetings*, Portland Press Herald, May 23, 1984 (editorial).

88. ME. REV. STAT. ANN. tit. 1, § 1005 (1989). However, the public is excluded if six of the seven members vote to close the meeting. *Id.*

89. ME. REV. STAT. ANN. tit. 22, § 383(2) (Supp. 1989-1990).

90. ME. REV. STAT. ANN. tit. 30-A, § 2324 (Supp. 1989-1990). Although section 402(2) expressly includes the "commission" of any "regional" subdivision, the regional planning commission law goes a step further by deeming the minutes of the proceedings as a "public record." *Id.*

definition over the last thirty years, drastically curtailing accessibility to public documents. The original 1959 statute's right to public inspection of *all* public records, "including any minutes of meetings of such bodies or agencies as are required by law,"[91] has been transformed beyond recognition to the present definition, last amended in 1989,[92] which includes seven enumerated exemptions. The 1959 enactment was an extraordinary departure from common law:

> As far as records are concerned . . . in the past almost every . . . agency or department has held it to be its own right to decide what records . . . it will make public or will withhold. . . . *This cannot be the case any more.* We have the attourney [sic] general's opinion and Harold Cross' opinion that our law means that *any* record not specifically exempt by *statute* is now a public record.[93]

The language in Maine's 1959 statute, allowing inspection of all records in government custody regardless of their source or the reason for their creation or acquisition, is considered the most liberal drafting form of a public records provision[94] and exists today in only a handful of states, including Iowa[95] and New York.[96] One of the most restrictive definitions, on the other hand, mandates that public records are only those "directed to be made or received by any statute."[97] This language, briefly included in the FOAA in 1975, when eliminated by emergency legislation,[98] is used by a minority of states today.[99] The language currently found in the statute of Maine, and

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91. P.L. 1959, ch. 219.

92. P.L. 1989, ch. 358. Although the Legislature broadened the public records definition to include information in the possession of custody of an "association" composed of governmental entities, it added two exemptions: confidential records of these associations and any of their materials regarding their positions on insurance legislation.

93. Memorandum of Professor Brooks W. Hamilton, Chairman, Maine Joint Committee on Freedom of Information (May 7, 1959) (on file with the author) (emphasis in original).

94. Braverman & Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 733 (1981).

95. IOWA CODE ANN. § 22.1 (West 1989) (" '[P]ublic records' includes all records, documents . . . of or belonging to this state or any county, city, township, school corporation, political subdivision . . . .").

96. N.Y. PUB. OFF. LAW § 86 (McKinney 1988) (" 'Record' means any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature . . . .").

97. But the most restrictive statutes are those that allow "public interest nondisclosure," or complete agency discretion in denying access to information the agency believes is counter to the public interest. *See* Braverman & Heppler, *supra* note 94, at 736-37.

98. P.L. 1975, ch. 483 ("public records shall mean any writing . . . under or required or directed to be made or received by any statute or by any rule or regulation . . . ."), *repealed and replaced by* P.L. 1975, ch. 623.

99. Although the Law Court was never confronted with this restrictive phrasing, other state courts interpreting similar "required to be kept by law" definitions con-

the second most liberal public records definition,[100] provides that a public record is one whose origins are "in connection with" governmental business or "contains" such information.

Maine's current statutory definition of "public records" is composed of three elements: (1)"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," (2) that is in the possession or custody of an agency or public official of the state or any of its political subdivisions or an association composed of such entities, and (3) has been received or prepared for use in, or contains information relating to, the transaction of public or governmental business.[101]

a. Section 402(3): Physical Description of a Public Record

The first element, a physical description of a public record, has seemingly changed only slightly since it was first defined in 1975 as "any writing or printing or any material in any electronic or other form of tape, in any form necessary . . . ."[102] However, absence in the current statute of the "in any form necessary" language can only serve to limit accessibility to what is expressly delineated, a legitimate concern in this era of ever-burgeoning forms of communication.[103] The computer, the major tool of record storage today, is only

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strue it to include only agency-prepared records and not those transmitted to the agency by private individuals. *See, e.g.*, Trenton Times Corp. v. Board of Educ. of Trenton, 138 N.J. Super. 357, 360, 351 A.2d 30, 31-32 (App. Div. 1976); Wayside Farms, Inc. v. State, 50 Ohio Misc. 13, 16, 364 N.E.2d 297, 299 (1977).

This restrictive language harks back to common law days in Maine, when the attorney general's office advised the Board of Nursing that the flow of information *into* the Board was not public information, while that flowing *from* the Board was. Op. Me. Att'y Gen. (1961), *reprinted in* 1961-1962 Me. Att'y Gen. Ann. Rep. 83. Thus, applications, transcripts of high school and school of nursing and letters of reference would be confidential while the examination records with achievement grades would be public records since they were records made by the board. *Id.*

100. *See* Braverman & Heppler, *supra* note 94, at 733-34.

101. ME. REV. STAT. ANN. tit. 1, § 402(3) (Supp. 1989-1990).

102. P.L. 1975, ch. 483, *repealed and replaced by* P.L. 1975, ch. 623, emergency legislation (deleting the "in any form necessary" language).

103. *Cf.* MD. STATE GOV'T CODE ANN. § 10-611 (1984) (emphasis added):

> Definitions . . . . (f)Public Record — (1) "Public record" means the original or any copy of any documentary material that: . . . (ii)is *in any form*, including:
>
> 1. a card;
> 2. a computerized record;
> 3. correspondence;
> 4. a drawing;
> 5. film or microfilm;
> 6. a form;
> 7. a map;

obliquely included in Maine's Act under "electronic data compilation."[104] Yet, computer record-keeping appears to be the new battlefield for unwilling agencies and a public demanding information.[105]

The computer-records issue has never been before the Law Court, but the attorney general's office, in an opinion to Maine's Secretary of State regarding disclosure of names and addresses of driver licensees, was not hindered by the physical description language in the Act.[106] The attorney general interpreted the statute to include computerized records, because the computer tape sought, was an "electronic data compilation" and therefore accessible.[107]

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8. a photograph or photostat;
9. a recording; or
10. a tape . . . .

104. ME. REV. STAT. ANN. tit. 1, § 402(3) (1989). Most states and the federal FOIA do not specifically refer to computer records in their definitions of public records. For a look at the problems computer-generated records present to the requester, see *Electronic Access to Government Information*, A Report by the American Society of Newspaper Editors (April 1990).

105. The battle has already begun at the federal level where it is settled that "computer-stored records, whether stored in the central processing unit, on magnetic tape or in some other form, are still 'records' for purposes of the FOIA." Long v. IRS, 596 F.2d 362, 365 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). However, the United States Supreme Court, in United States Department of Justice v. Reporters Committee for Freedom of the Press, 109 S.Ct. 1468 (1989), cast doubt on the status of such records. In that case, a unanimous Court ruled that the FBI did not have to disclose computerized rap sheets—the criminal history of an individual—even though that information was compiled from the public records of state and local law enforcement agencies. The Court denied public record status to rap sheets because of their privacy interest to individuals. "The substantial character of that interest is affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains the age of 80, when the FBI's rap sheets are discarded." *Id.* at 1480. Moreover, the Court noted: "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 1477.

In Maine, a person is now guilty of criminal invasion of computer privacy if he intentionally accesses any computer resource knowing that the person is not authorized to do so. P.L. 1990, ch. 620 (codified at ME. REV. STAT. ANN. tit. 17-A, § 432) (Supp. 1990-1991).

The original bill sought to include a provision making it a crime to "disclose[] or take[] data, programs or supporting documentation which is a trade secret . . . or is confidential as provided by law . . . ." L.D. 627 (114th Legis. 1989). Thus, any member of the public who received information inadvertently given them by a custodian of such record could conceivably be charged with such a crime.

106. Op. Me. Att'y Gen. 79-161.

107. *Id.* The requester in this case was Datatron, which sought only the names and addresses of Maine licensees for commercial purposes. However, complete reports of a driver's record, including convictions, adjudications, accidents, and suspensions, are available to anyone requesting such information at a cost of $4.00. ME. REV. STAT. ANN. tit. 29, § 57-A (Supp. 1989-1990).

Ironically, access to the computer tape was not even the central issue in the Data-

b. Section 402(3): Possession or Custody of an Agency or Public Official

The second element's most troublesome aspect is determining the meaning of "agency" and "public official," since records in their possession or custody may be accessible. Accordingly, interpretation of the public records provision, void of precise guidance, has led to anomalous results in attorney general opinions.

For example, in ruling that the Blue Ribbon Commission on Corrections was not subject to the FOAA's public proceedings provision, the attorney general reasoned that the commission was also exempt from the public records provision because it was not a "state agency or authority."[108] However, the opinion deemed those records at the next step, transmission to the governor, as public records, because they "would then be in the possession of a 'public official of this State.' "[109] Thus, it appears that records in the hands of an entity not meeting the public proceedings definition metamorphose into public records once in the custody of a bona fide public official.[110]

The Law Court, aside from originally establishing, in *State v. Brown*,[111] and reaffirming in *Wiggins v. McDevitt*,[112] that a deputy sheriff is a public officer, has provided no direction in determining "agency" or "public official."

c. Section 402(3): "Received or Prepared for Use in" or "Containing Information" Relating to Public Business

The third element, the origin of public records, limits inspection to records (1) "received or prepared for use in connection with the transaction of public or governmental business," or (2) "contain[ing] information relating to the transaction of public or governmental

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tron request. The real issue was the cost of copying such data, a problem falling under ME. REV. STAT. ANN. tit. 1, § 408 (1989).

108. Op. Me. Att'y Gen. 85-19.

109. *Id.* at 4.

110. A further sampling of attorney general opinions indicates a reliance on this "metamorphisis-of-materials" test. In Op. Me. Att'y Gen. 79-139, 2, the attorney general advised that although the Budworm Policy Review Committee's meetings were not open to the public, their written records and materials were available for inspection once transmitted to the Conservation Commissioner. Likewise, in Op. Me. Att'y Gen. 1 (July 12, 1976), the attorney general noted that although the Governor's Tax Policy Committee was not subject to the open meetings provision of the Act, its recommendations "finally accepted by the Governor would again be the subject of public scrutiny . . . ."

See also Op. Me. Att'y Gen (Dec. 15, 1976) for similar treatment of the Citizen's Dickey-Lincoln Project Impact Review Committee.

For a proposal to eliminate these unwarranted results by bringing all advisory entities within the scope of the FOAA, see *infra* notes 350-59 and accompanying text.

111. 129 Me. 169, 151 A. 9 (1930) (deputy sheriff is a public officer).

112. 473 A.2d 420, 421 (Me. 1984) (part-time deputy sheriff is public officer).

business."[113]

However, it is the "containing" language of section 402(3) that makes possible broad constructions of public record. Indeed, the Law Court has so liberally construed this as to include the personal tax return of a public official. In *Wiggins v. McDevitt*,[114] the plaintiff, editor and publisher of the weekly Ellsworth American, sought access only to information that would reveal the fees received by defendant deputy sheriff in his service of civil process.[115] The court held that the defendant's only record of these fees, his personal copy of his individual income tax return, was open to inspection.[116] Despite the "attenuated relationship" between the tax return and the defendant's public duty, the court found not that the return was prepared in connection with the transaction of public or governmental business, but that it *contained* information *"relating* to the transaction of public business."[117] Furthermore, the court dismissed the defendant's argument that an alternative source of the service of process fees information lay in the files of courts throughout the state: section 402(3)'s definition "does not turn on the availability of other sources for the information sought."[118]

In addition, the court rejected the lower court's finding that tax

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113. ME. REV. STAT. ANN. tit. 1, § 402(3) (1989).

114. Wiggins v. McDevitt, 473 A.2d at 420.

115. *Id.* Maine law provided for sheriffs and deputy sheriffs to serve civil process and listed the fees for various types of service. ME. REV. STAT. ANN. tit. 30, § 1051 (1978), *repealed by* P.L. 1987 ch. 737, Part A, § 1. Deputies who were not salaried or who did not receive per diem pay could collect from the litigants and retain these fees. ME. REV. STAT. ANN. tit. 30, § 2(4)(B) (1978), *repealed by* P.L. 1987, ch. 737, Part A, § 1.

The procedure for collection required the person serving process to make a return that included the fee charged for service and mileage. Once completed, the return was to be delivered to the litigant or his attorney for payment to the sheriff who then files the return in the appropriate court. Wiggins v. McDevitt, 473 A.2d at 421. *Id.*

Here, the editor sent a letter to the Hancock County sheriff and the defendant, a part-time deputy sheriff, requesting examination of "public records" of the service of process fees received. The defendant sent the editor a written denial, within the statutory response time, stating that he was not a public official, the records sought were not "public," and all of the information was available at courthouses in Maine and wherever returns of service had been filed.

116. Wiggins v. McDevitt, 473 A.2d at 424. However, only the portion that revealed income resulting from his official duties could be disclosed. *Id.* For further insight into how the Law Court grants access to segregable portions of otherwise confidential information, see Guy Gannett Publishing Co. v. University of Maine, 555 A.2d 470, 471-72 (Me. 1989).

117. *Id.* at 422 ("A liberal construction of the language of section 402(3) permits no other conclusion.").

118. *Id.* Although based on a federal statute, the result in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), where a comprehensive computerized rap sheet was held not accessible even though all the information could be amassed from the public records of state and local law enforcement agencies, provides an interesting contrast.

returns are confidential by statute and thereby exempt from the FOAA under section 402(3)(A).[119] Those statutes, the court noted, make confidential the returns that are *filed* and prevents disclosure only of these filed copies, not disclosure by the taxpayer of his own copy.[120]

Four years later, in *Bangor Publishing Co. v. City of Bangor*,[121] the Law Court again liberally construed the public records definition, this time to include the names and addresses of unsuccessful applicants for the chief of police position. Although the Legislature later "overturned" the court and created statutory confidentiality for these applicants,[122] the court's unanimous opinion is instructive in how the public records definition is interpreted.

In that case the court noted that the city conceded, "as it must," that the information sought and "contained" in the applications was "information relating to the transaction of public or governmental business."[123] Despite the city's assurances in public advertisements of the position that all information received would be confidential, the court held that the names and addresses were public records.[124]

d. Section 402(3)(A)-(G): Exemptions

Once the public records definition has been satisfied, there is the additional barrier of exemptions. Section 402(3) comprises seven enumerated exceptions; however, the first, records designated confidential by statute, incorporates well over one hundred statutory exceptions.[125]

Although not expressly included in the original 1959 statute, the

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119. Wiggins v. McDevitt, 473 A.2d at 423. The superior court judge had relied on both federal statute, 26 U.S.C.A. § 6103 (1989), and state statute, ME. REV. STAT. ANN. tit. 36, § 191 (1978 & Supp. 1982-1983). *Id.*

120. Wiggins v. McDevitt, 473 A.2d at 423. The dissent argued that the "Court's mechanical interpretation" of the statute was overbroad and exceeded the legislative purpose. *Id.* at 424 (Roberts, J., dissenting). "Even a private diary, assuming it contained information relating to the transaction of public business, would be subject to citizen inspection." *Id.* at 425.

121. 544 A.2d 733 (Me. 1988).

122. P.L. 1989, ch. 402 (codified at ME. REV. STAT. ANN. tit. 5, § 7070(1) (Supp. 1989-1990); ME. REV. STAT. ANN. tit. 30-A, §§ 503(1) and 2702(1) (Supp. 1989-1990)).

For a more detailed discussion of this exemption to the public records provision, *see infra* notes 160-163 and accompanying text.

123. *Id.* at 735. For a discussion of this case from the argument of confidentiality under the Civil Service Applicants Law, see *infra* notes 157-159 and accompanying text.

124. *Id.* at 736. *Cf.* Moffett v. City of Portland, 400 A.2d 340, 348 (Me. 1979) ("[C]ontracted-for confidentiality requires more than merely closing sessions at which interrogation of police officers is conducted; it also requires protection for any transcript made of the interrogation.").

125. For a list of confidential information, ranging from sardine council records to marijuana therapeutic research, see the "Confidential Or Privileged Information" entry in the index of the Maine Revised Statutes Annotated.

"except as otherwise provided by statute" was an implicit limitation on access to public records.[126] In 1975, with the creation of a public records definition, that exception was expressly added.[127] Later that year, the first two of the substantive exceptions arrived, with other clarifications of the Act, via emergency legislation: records within the scope of privilege against discovery and legislative records and reports.[128] It was the latter exemption that sparked the most extensive recorded debate in the history of the FOAA. The debate was a struggle between legislators who wanted to hold out the Legislature as an exemplar of open government[129] and those who feared intrusion not of constituents but of lobbyists.[130] The proponents of the

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126. In his May 7, 1959 memorandum to the Joint Committee on FOI, written shortly after the FOAA was enacted, Professor Hamilton explained some of the bargaining involved in passing the bill:

> Furthermore, it seemed to me that any State government agency which is responsible for personal records that shouldn't be public ought to have that responsibility spelled out in the law governing it. This might mean a lot of small law changes, but it really makes more sense. Also, it gives us a chance to know exactly what is, and what isn't, public record in any agency. Anything that isn't specifically exempt, is now public. . . .
>
> . . . In some cases I had to convince [state department heads] to agree to limit their exemptions drastically. In the end I came up with a series of agreements, some to withdraw entirely, all to agree *not* to amend our FOI bill, all to be satisfied with exemption of certain specific records.

Id. at 2.

127. P.L. 1975, ch. 483, § 3, *repealed and replaced by* P.L. 1975, ch. 623, § 1.

128. P.L. 1975, ch. 623, § 1.

129. Rep. Perkins of South Portland argued that holding public office can involve sacrifices:

> We were elected Representatives and Senators, if you will, chosen by the people to represent their interests in a public capacity and when we were elected we gave up a certain privilege, if you will, and that privilege was a luxury of remaining private citizens to the extent of our legislative capacities here. It seems to me that if any one of my constituents so chooses to come up here and go through the legislative research office, looking at my papers, I have absolutely nothing to hide.

Legis. Rec. B2298 (1975).

130. Rep. Tierney of Durham, later attorney general, led the charge against opening the records of the Legislative Research Office, which is responsible for assisting in the drafting of bills:

> Now, no constituent of mine has ever tried to see my file. It is not a question of your constituents driving here to Augusta and asking to see your file. The people who want to see the file are the lobbyists . . . . It is that simple. I don't blame the lobbyists for wanting to know absolutely everything in there . . . . It seems to me that as I am working out in my own mind what I want for the content of the bill or content of an amendment that that and the working papers which go into that input deserve to be confidential. When I make that amendment and put it on the floor of this House, then it is for the people and at that time, of course, I do have nothing to hide.

Legis. Rec. B2299 (1975).

confidentiality exemption for legislative working papers prevailed,[131] thereby creating an area of confidentiality for themselves that no other legislative body at any other level of Maine government, county or local, enjoyed at the time.

Again in 1975, the Legislature expanded the circle of confidentiality to include two additional categories of exemptions: material prepared for and used in negotiations by a public employer and working papers of the subcommittees of the Board of Trustees of the University of Maine System and the Maine Maritime Academy or of those institutions' faculty and administrative committees.[132]

But what confidentiality the Legislature gives, it can also revoke. In 1977, the Legislature not only eliminated the exemption granted two years earlier to the Boards of Trustees, and their committees and subcommittees, but it expressly severed them from the new 402(3)(E).[133] This new pared-down exception, however, continued to protect the working papers of all faculty and all of the administrative committees of the two institutions, except for the Administrative Council of the University of Maine, a body comprised of the presidents of each campus within the system and responsible for allocation of monies appropriated by the Legislature to the university as a whole.[134]

Further expansion of the exemptions in 1989, to include the working papers and insurance-related materials of local and county gov-

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131. The vote in the House was 92 for exemption and 36 against. Legis. Rec. B2300 (1975).

132. P.L. 1975, ch. 758.

133. P.L. 1977, ch. 164, § 2. At the same time the Legislature revoked confidentiality status of the Boards of Trustees, it expressly included them within the public proceedings provision. P.L. 1977, ch. 164, § 1. *See also supra* notes 84-87 and accompanying text.

The attorney general advised as far back as 1976 that liberal construction of the Act demands that committees and subcommittees of the Board of Trustees be subject to the open records and open meetings provisions. Op. Me. Att'y Gen. (Nov. 23, 1976). "Rather, it must be assumed that committees and subcommittees of boards of trustees, as official groups acting under authority of the board of trustees, must be subject to the same rules of freedom of access as the board of trustees themselves." *Id.* at 2. The opinion added that "[i]t may be appropriate for the Legislature to clarify these matters . . . regarding the rights of public access to the business of committees and subcommittees of the University of Maine and Maine Maritime Academy." *Id.* at 3. Thus, the attorney general's call for legislative clarification did not go unanswered.

134. P.L. 1977, ch. 164, § 2. The new law also specifically included the Administrative Council in the public proceedings definition, thereby unquestionably bringing this entity fully under the aegis of the Act. P.L. 1977, ch. 164, § 1. Ten years later, however, the express inclusion of the Administrative Council was deleted. P.L. 1987, ch. 402, § 1. The Legislature eliminated all statutory reference to the Administrative Council because "the existing language is obsolete in that the council as a body no longer carries out the functions foreseen when the university system was created." L.D. 227, Statement of Fact (113th Legis. 1987), *enacted as* P.L. 1987, ch. 20.

ernment associations,[135] has swelled the current enumerated exemptions to seven: (1) records that have been designated confidential by statute;[136] (2) 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;[137] (3) 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 or any of its committees during the biennium in which the proposal or report is prepared;[138] (4) 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;[139] (5) records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Vocational-Technical Institute System and the University of Maine System, but not including their boards of trustees, or their committees and subcommittees;[140] (6) records, working papers, interoffice and intraoffice memoranda used by or prepared for local or county government associations;[141] and (7) 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 a local or county government association.[142]

In spite of the ever-growing litany of exceptions to the public records definition and the resulting erosion of the FOAA, the remaining provision that can be employed to limit the scope of these exceptions is the liberal construction mandate. Thus, both the Law Court and the attorney general have managed to find accessibility of public records in a few close-call cases.[143]

(i.) Section 402(3)(A): Records Designated Confidential by Statute

Akin to the federal FOIA's third exemption,[144] Maine's FOAA sec-

135. P.L. 1989, ch. 358 (codified at ME. REV. STAT. ANN. tit. 1, § 402(3)(F), (G) (Supp. 1989-1990)).
136. *Id.* § 402(3)(A).
137. *Id.* § 402(3)(B).
138. *Id.* § 402(3)(C).
139. *Id.* § 402(3)(D).
140. *Id.* § 402(3)(E).
141. *Id.* § 402(3)(F).
142. *Id.* § 402(3)(G).
143. *See supra* notes 49, 54-56 and accompanying text.
144. 5 U.S.C.A. § 552(b)(3) (1977). ("This section does not apply to matters that

tion 402(3)(A) protects from disclosure any record designated as confidential by statute. The confidentiality statutes that generate the greatest number of attorney general opinions and most celebrated Law Court decisions are those dealing with the files of public employees. Providing an exemption nearly identical to the federal FOIA's sixth exemption,[145] the Maine Civil Service Law contains four additional exceptions to the rule of public disclosure as to personal information, two of which have drawn the greatest scrutiny.[146]

The first such exception is for those portions of public employee personnel records that include "medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders."[147] The second exception protects from disclosure "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.[148] However, if disciplinary action is taken, the final written decision relating to that action is no longer confidential after it is completed.[149]

The Law Court recently addressed these personnel file exceptions in *Guy Gannett Publishing Co. v. University of Maine.*[150] In this case, the publishing company sought access to the University's settlement agreement with the former women's basketball coach.[151] Af-

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are . . . (3) specifically exempted from disclosure by statute, . . . 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.").

145. 5 U.S.C.A. § 552(b)(6) (1977) ("personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

146. ME. REV. STAT. ANN. tit. 5, § 7070(2)(A)-(E) (1989). The Civil Service Law expressly refers to the FOAA's § 402(3) in providing confidentiality and an exemption to the "public records" definition for five areas of personnel information. *Id.* § 7070(4). This comment will discuss only two of those areas: public employee records that include medical information; and records that include complaints, charges or accusations of misconduct or information that could lead to disciplinary action. Furthermore, there will be a discussion of § 7070's confidentiality provisions for applicants for public sector jobs. The three personnel exemptions not discussed in detail in this comment are: performance evaluations and personal references submitted in confidence; information pertaining to the credit worthiness of a named employee; and information pertaining to the personal history, general character or conduct of members of an employee's immediate family.

147. ME. REV. STAT. ANN. tit. 5, § 7070(2)(A) (1989).

148. *Id.* § 7070(2)(E).

149. *Id.*

150. 555 A.2d 470 (Me. 1989).

151. The settlement agreement was signed on June 25, 1988 by Coach Peter M. Gavett, University of Maine President Dale Lick and Associated Faculties of the University of Maine System President David Rankin. It provided that Gavett: resign; vacate his office; refrain from entering the University's gymnasium for one year; receive a lump sum of $36,000; avoid all contact with present or former members of the women's basketball team; and discharge the University from all claims or actions. *Id.*

ter analyzing the two exceptions in the Civil Service Law discussed above, the court modified the lower court's order of disclosure of the entire settlement by excising one sentence pertaining to "medical information."[152] The Law Court noted that the "broadly drawn" medical exception must encompass express and implied descriptions of an employee's "medical condition" or "medical treatment," despite the narrow construction required for FOAA exceptions.[153]

Yet, while respecting the broad nature of the medical exception, the court complied with the narrow scope of the "complaints, charges, or accusations" exception: "[s]tanding 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."[154]

Public sector job *applicants*, as well as employees, are provided statutory confidentiality.[155] Although the status of applicant-pro-

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at 473-74.

Gavett, who intervened as defendant in this action along with the Maine Teachers Association, resigned his position a few months after he had accepted a three-year reappointment. *Id.* at 471. This unexpected resignation prompted Gannett to make a series of FOAA requests to the University. *Id.* The University, arguing that it was not required to disclose such information, denied all requests, and Gannett filed this action in Superior Court after the University's final denial in August. *Id.* As a result, the University released only four documents tangentially related to Gavett's reappointment and resignation. *Id.* Gannett's further request led to the University's in camera submission of the settlement agreement. *Id.*

152. *Id.* at 471-72. The superior court, after in camera review of the settlement, ordered disclosure of the entire agreement, but stayed the order pending appeal. *Id.* at 471.

153. *Id.* at 471.

154. *Id.* at 472.

155. There are civil service applicant statutes for each level of government: state (ME. REV. STAT. ANN. tit. 5, § 7070(1) (Supp. 1989-1990)); county (ME. REV. STAT. ANN. tit. 30-A, § 503(1) (Supp. 1989-1990)); and municipal (ME. REV. STAT. ANN. tit. 30-A, § 2702(1) (Supp. 1989-1990)). After the 1989 emergency legislation, they are all identical and provide that public sector employee information is open to public inspection:

> A. Except as provided in this [paragraph], applications, resumes, letters and notes of reference, working papers, research materials, records, examinations and any other documents or records and the information they contain, solicited or prepared either by the applicant or the [government] for use in the examination or evaluation of applicants for positions as [government] employees.
>
> (1) Notwithstanding any confidentiality provision other than this [paragraph], applications, resumes, and letters and notes of reference, other than those letters and notes of reference expressly submitted in confidence, pertaining to the applicant hired are public records after the applicant is hired.
>
> (2) Telephone numbers are not public records if they are designated as "unlisted" or "unpublished" in an application, resume or letter or note of reference.

ME. REV. STAT. ANN. tit. 5, § 7070(1) (Supp. 1989-1990); tit. 30-A, §§ 503(1) and 2702(1) (Supp. 1989-1990).

vided information is not a new issue,[156] it has received much recent attention from the press, the courts and the Legislature.

The Bangor Daily News, in *Bangor Publishing Co. v. City of Bangor*,[157] initiated the applicant-information frenzy in 1988 with its request to the City of Bangor for the names and addresses of unsuccessful applicants for the job of chief of police. The City argued that the sources of the information sought, applications and resumes, were exempt from disclosure because they were statutorily confidential as "working papers, research materials, records and the examinations prepared for and used specifically in the examination or evaluation of applicants for employment by that municipality."[158] The Law Court rejected this argument, noting that the confidentiality statute enumerates only employer-generated materials, "in essence the municipality's own work product as opposed to documents sent by applicants to enter themselves in the competitive application process."[159]

The court's holding in *Bangor Publishing* in favor of disclosure spawned L.D. 1328, "An Act Providing Confidentiality for Public Sector Job Applicants," whose statement of fact cited the Law Court's decision as the reason for this clarifying legislation.[160] The concern of the bill's sponsors was the court's affirmation of a no-confidentiality-status of applications and resumes, a deterrent to "well qualified applicants who would otherwise apply for government positions."[161] Thus, after no fewer than four amendments, the bill was enacted to grant confidentiality to both applicant and government-generated materials used in the "examination or evaluation" of applicants for government positions. However, upon hiring, an applicant's application, resume and letters and notes of reference become public records and open to inspection.[162] Telephone num-

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156. *See, e.g.*, Op. Me. Att'y Gen. (1961), *reprinted in* 1961-1962 Me. Att'y Gen. Ann. Rep. 82-83 (applications, transcripts of high school and school of nursing, and letters of reference furnished to the Maine State Board of Nursing are confidential); Op. Me. Att'y Gen. (June 3, 1977) (applications and reference forms sent to the Department of Education and Cultural Services are not public records if they are received for use in a teacher placement clearinghouse as opposed to use by local school districts for the hiring process).

157. 544 A.2d 733 (Me. 1988).

158. ME. REV. STAT. ANN. tit. 30, § 2257 (1978), *repealed and replaced by* ME. REV. STAT. ANN. tit. 30-A, § 2702(1) (Supp. 1989-1990)).

159. Bangor Publishing Co. v. City of Bangor, 544 A.2d at 736.

160. L.D. 1328, Statement of Fact (114th Legis. 1989).

161. *Id.* Emergency Preamble.

162. P.L. 1989, ch. 402, §§ 1-3. However, letters and notes of reference remain confidential if they were expressly submitted in confidence.

The minority report of the judiciary committee attempted to make the materials of applicants public records once they were *interviewed* for the job. Comm. Amend. B to L.D. 1328, No. S-233 (114th Legis. 1989). One amendment even attempted to make public the records of those applicants interviewed for "major policy-influencing posi-

bers designated in such materials as "unlisted" or "unpublished" are not public records.[163]

Yet, while the Legislature's actions severely limit public scrutiny of the way taxpayer-paid government employees are hired, it has not deterred the enthusiasm of the press: less than four months later, Guy Gannett Publishing Co. was in superior court unsuccessfully seeking access to applications for the position of superintendent of the Falmouth school system.[164]

Confidentiality statutes extend beyond the public employment arena, creating further public-access-versus-privacy issues, although not as many find their way to the courts. One such issue, whether an adopted child may gain access, from the Department of Human Services, to the identity of her putative father, did make it to the Law Court. In *Rossignol v. Commissioner of Human Services*,[165] the plaintiff, nearly forty years after she was placed for adoption through the Department, identified her natural mother through files located at the Kennebec County Probate Court.[166] Unable to identify her father, she sought access to the Department's records under the Freedom of Access Act. The Department denied the request on confidentiality grounds, pursuant to statute: "All department records which contain personally identifying information and are created or obtained *in connection with the department's child protective activities and activities related to a child while in the care or custody of the department* are confidential . . . ."[167] Both the superior court and the Law Court, without mention of the narrow construction normally given to exceptions, upheld the Department's denial based on the plaintiff's statutory "care or custody" status for the first two years of her life.

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tions." Comm. Amend. A to L.D. 1328, No. S-256 (114th Legis. 1989).

163. P.L. 1989, ch. 402, §§ 1-3.

164. Guy Gannett Publishing Co. v. Falmouth School Dept., No. CV-89-553 (Me. Super. Ct., Cum. Cty., Oct. 13, 1989). The court ruled that the school department was correct in denying access to the applications, since they were confidential under ME. REV. STAT. ANN. tit. 20-A, § 6101 (1983), the statute applicable to school employees. This statute, the court noted, protects "all information" used in hiring, including the school department's work product and information submitted by the applicants. *Id.* at 4. Therefore, the school records statute was clearly distinct from the narrower municipal employees statute in *Bangor Publishing*, which protected only the city's materials and not all information used in evaluating applicants. *Id.* at 4-5.

165. 495 A.2d 788 (Me. 1985).

166. *Id.* at 789. The plaintiff apparently learned that her natural mother gave the Department, at about the same time that she surrendered her child, information identifying the probable father, who was not believed to be her mother's husband. *Id.*

167. ME. REV. STAT. ANN. tit. 22, § 4008(1) (Supp. 1989-1990) (emphasis added). However, the Department did release sketchy information to the plaintiff about her father without identifying him: "unmarried, one of several brothers and sisters, a large, husky man with dark hair who appeared to be physically well and 'smart.'" Rossignol v. Commissioner of Human Services, 495 A.2d at 790.

Conversely, two years ago the Law Court ruled that a plaintiff's request for documents relating to her application to the Home Energy Assistance Program, otherwise confidential, "are not confidential as to her on her own demand that [the Division of Community Services] produce them."[168] The controlling statute here, however, expressly provides that any person protected by the confidentiality provision has a right to waive that status in writing.[169]

Although the issue of privacy is broader than this Comment can accommodate, privacy acts warrant mention—even though Maine does not have one—because they are often confused with freedom of information acts. While the latter are broad access statutes and can be employed by any person for purposes of obtaining any information deemed a public record, privacy acts permit access only to *personal* records in the custody of the government. A requester under a privacy act, such as the federal Privacy Act of 1974, must be the subject of the record or the subject's legal guardian.[170]

In an attempt to implement a Maine privacy law similar to the federal one, the Joint Standing Committee on Legal Affairs was directed in 1975 to conduct a study of record-keeping practices of public and private agencies and their effects on individuals' privacy.[171] In its final report, the committee concluded that the results of its questionnaire to state agencies and its meetings with department heads, the Maine Civil Liberties Union and others "did not justify . . . extensive and detailed [privacy] legislation at this time."[172] Although the committee noted that "[t]he potential for harm to individual rights exists even in as small and rural a state as Maine," it apparently relied heavily on the existing confidentiality statutes to protect the privacy of Maine citizens.[173]

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168. Alexander v. Division of Community Services, 556 A.2d 222, 223 (Me. 1989).

169. ME. REV. STAT. ANN. tit. 5, § 3523(3) (1989).

170. The federal Privacy Act of 1974, 5 U.S.C.A. § 552a (1977), enacted only a few months after the federal FOIA amendments, was intended to prevent, among other things, secret record-keeping on United States citizens. Thus, under the Act, subjects of government records can request amendment of any records that are not "accurate, relevant, timely, or complete." *Id.* at § 552a (d)(2)(B)(i). For an excellent guide on how information can be accessed using these two acts at the federal level, see C. MARWICK, YOUR RIGHT TO GOVERNMENT INFORMATION (1985).

171. The committee was directed by H.P. 1597 (1975), a joint order, to report the results of its study, along with recommendations and proposed legislation to the next session of the Legislature. The order cited the growing use of computers, extensive record-keeping, sales of mailing lists, and the practice of denying individuals the right to see or correct their own records as reasons for the study. *Id.*

172. JOINT STANDING COMMITTEE ON LEGAL AFFAIRS, REPORT ON RECORD-KEEPING AND THE RIGHT OF PRIVACY, at 6 (1977) [hereinafter REPORT ON RECORD-KEEPING]. However, the committee did introduce a bill, enacted in 1975, that allowed state, county, municipal, and private employees (or former employees) to review their personnel files. P.L. 1975, ch. 694.

173. REPORT ON RECORD-KEEPING, *supra* note 172, at 4, 6. *See also* Op. Me. Att'y Gen. 82-46 (Department of Mental Health advocate's report that includes informa-

What is not clear in Maine, even after *Gannett Publishing*, *Bangor Publishing*, and *Rossignol*, is whether the statutorily created confidential exemptions are permissive or mandatory in nature. In other words, there is no indication whether the agency or public official with custody of such confidential information has any discretion in disclosure or nondisclosure. This vagueness derives from the "except" language that precedes the exemptions, as well as a general lack of legislative history and case law in Maine.

Some state legislatures have clearly indicated the nature of their public records exemptions in order to provide guidance to agencies.[174] As for the federal FOIA, it was the United States Supreme Court, in *Chrysler Corp. v. Brown*,[175] that held exemptions are permissive rather than mandatory. Thus, exemptions under the federal law, unless a statute clearly removes all discretion, serve as mere license to agencies to refuse disclosure if they so choose. On the other hand, an agency may determine that disclosure is proper.

Despite a lack of legislative guidance, Maine's attorney general, in an opinion to the Commissioner of the Department of Educational and Cultural Services, boldly ventured into the issue.[176] The opinion analyzed the "complaints, charges or accusations" exception of the Civil Service Law, the same one addressed in *Gannett Publishing*,[177] and advised that the confidentiality status was only permissive.[178] According to the attorney general, therefore, the custodian of the

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tion about a client is confidential under the former ME. REV. STAT. ANN. tit. 34, § 1-B (1978), which was "intended as a broad exception to the general rule of freedom of access.").

174. *E.g.*, N.Y. PUB. OFF. LAW § 87(2) (McKinney 1988) ("such agency *may* deny access to records or portions thereof. . .") (emphasis added). Other states expressly mandate confidentiality. *See, e.g.*, KY. REV. STAT. ANN. § 61.878(1) (1986) ("shall be subject to inspection only upon order of a court . . ."); ILL. ANN. STAT. ch. 116, para. 207 (Smith-Hurd 1988) ("The following *shall* be exempt from inspection and copying . . .") (emphasis added).

175. 441 U.S. 281, 290-94 (1979).

176. Op. Me. Att'y Gen. 82-42. In another opinion, the attorney general advised that the state auditor, in his discretion, may keep confidential "to some extent reports containing evidences of improper or incompetent financial administration." Op. Me. Att'y Gen. 2 (July 31, 1978). Otherwise, reports of the Department of Audit are public records. *Id.*

177. At the time of the attorney general opinion on this matter, however, the law was codified as ME. REV. STAT. ANN. tit. 5, § 551 (1964) and was titled the "Maine Personnel Law."

178. The attorney general's analysis applies to "declared confidential by statute" exceptions and not to the substantive exceptions to 402(3), which are clearly permissive in nature. Op. Me. Att'y Gen. 82-42, 9 n.10. However, the attorney general cautioned that its analysis applied only to confidentiality statutes where legislative intention as to permissive or mandatory was absent. *Id.* at 10. *See e.g.*, Dunn & Theobald, Inc. v. Cohen, 402 A.2d 603, 605-606 (Me. 1979) ("We have some doubt whether the Attorney General could waive the confidential status of investigative reports in the face of the legislative mandate.").

confidential records determines whether information may be kept confidential, but only after conducting a three-part inquiry "to ascertain whether such disclosure would be incompatible with one of the evident purposes" of the confidentiality statute.[179] The inquiry focuses on the three groups the Legislature apparently intended to protect: those who are the subject of the "complaints, charges or accusations of misconduct"; those who make such charges; and those who might be the victims of the alleged misconduct.[180] Applying the three-pronged analysis to the information in question, a Department of Education report regarding the alleged physical and sexual abuse of students at the Baxter School for the Deaf, it was the opinion of the the attorney general that disclosure was permitted in the discretion of the Department. Although disclosure posed a potential adverse effect on the victims, the opinion advised that their identities could be protected by deleting their names.[181] Crucial to the opinion was the oft-repeated principle that the Legislature intended public scrutiny of the results of an agency's policy decisions: "To find otherwise would be to read so much into the word 'misconduct' as to seriously negate the overall purpose of the Freedom of Access Law, which is to insure that such scrutiny is possible."[182]

Although the Law Court has not directly addressed the permissive-mandatory question as to exemptions, it has held that statutorily confidential information must be provided to the courts and to special legislative investigatory committees. In *Maine Sugar Industries v. Maine Industrial Building Authority*,[183] two corporations doing business in Maine, both with substantial loans guaranteed by the defendant Authority, sought a so-called reverse-FOIA declaratory judgment and injunctive relief *prohibiting* disclosure of information it had previously submitted to the Authority. This informa-

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179. Op. Me. Att'y Gen. 82-42, at 11.

180. *Id.* at 10.

181. This opinion dealt only with disclosure of Section XII(B), a sensitive segment of a Department of Education report, which evaluated the role of the Department in responding to the charges at the Baxter School. *Id.* at 1. The rest of the report had been publicly released on July 14, 1982, about four weeks before this opinion was issued. Thus, the attorney general's analysis found that the July 12, 1982, release of its own report on the matter and the attendant press coverage had tempered any possible adverse effects on those charged and on those who brought charges of misconduct. *Id.* at 11.

A follow-up opinion was issued one week later, on August 25, 1982, in response to the Department's submission of additional information that had not been disclosed in the earlier Department report. Op. Me. Att'y Gen. 82-44. As to the victims, the attorney general advised that the names of those who were subjects of complaints and of those who made complaints be deleted, as well as certain other phrases in the report that might reveal confidential information not previously released. Op. Me. Att'y Gen. 82-44, at 5-8.

182. Op. Me. Att'y Gen. 82-42, at 10-11.

183. 264 A.2d 1 (Me. 1970).

tion was requested by a special interim legislative committee, which had been furnished with subpoena power and had been established to investigate alleged questionable loan applications and financial problems of the plaintiff corporations.[184] The corporations brought suit in order to prevent disclosure of records they contended were confidential by statute. The statute forbade any Authority employee from divulging information supplied by a mortgagee.[185]

The court held that this secrecy statute must be construed as prohibiting voluntary disclosure by the agency, but not when requested by a court of competent jurisdiction or by a special interim legislative investigating committee.[186] Despite the potential injury that disclosure might create for the corporations, the court's balancing analysis favored disclosure: the risk is "outweighed by the public interest in having the Legislature fully informed as to matters which involve the use of public funds and the credit of the State . . . ."[187]

Another "confidential by statute" category, seldom litigated in Maine, involves investigative records of law enforcement officers and agencies. In *Dunn & Theobald, Inc. v. Cohen*,[188] the plaintiffs sought access, under the FOAA, to investigative records of the attorney general. They hoped to use this information in a libel suit commenced against the Bangor Daily News, which had published a story concerning the events covered in the attorney general's investigation.[189] The attorney general denied access based on statutory confi-

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184. *Id.* at 3-4.

185. ME. REV. STAT. ANN. tit. 10, § 852 (1980) ("No member of the authority . . . shall divulge or disclose any information obtained from the records and files . . . in support of an application for mortgage insurance."). However, this statute was amended by P.L. 1969, ch. 584, § 1 ("Nothing in this section shall be construed to prohibit the disclosure of information. . .to a special interim legislative investigating committee . . . ."), which was to become effective May 9, 1970, almost six weeks after the Law Court issued its opinion.

The Law Court interpreted both versions of the statute as requiring disclosure to a legislative investigative committee. Maine Sugar Indus., Inc. v. Maine Indus. Bldg. Auth., 264 A.2d at 6.

186. Maine Sugar Indus., Inc. v. Maine Indus. Bldg. Auth., 264 A.2d at 6.

187. *Id.* The attorney general's office, relying heavily on *Maine Sugar Industries*, has directed that otherwise confidential records be disclosed to the state auditor of Maine Guaranty Authority files, Op. Me. Att'y Gen. (July 10, 1978), and to court proceedings requiring examination of Employment Security Commission records, Op. Me. Att'y Gen. (April 21, 1977).

But see Op. Me. Att'y Gen. 80-59, 3 where the attorney general ruled that a Public Utilities commissioner was not permitted to reveal confidential personnel information at a public hearing, pursuant to ME. REV. STAT. ANN. tit. 5, § 554 (1964) (governmental employee confidentiality). Moreover, although the Legislature as a whole has investigatory powers, its committees do not, unless granted such powers by the Legislature, pursuant to ME. REV. STAT. ANN. tit. 3, § 401 (1989). Op. Me. Att'y Gen. 80-59, at 4.

188. 402 A.2d 603 (Me. 1979).

189. *Id.* at 604.

dentiality: "Notwithstanding any other provision of law, all complaints and investigative records of the Department of the Attorney General shall be and are declared to be confidential."[190]

Relying on the "notwithstanding" preface to the statute, the Law Court rejected this as an FOAA case, thereby disposing of the strict-construction-of-exceptions principle. Rather, it upheld the denial of access to attorney general investigative records by "considering the meaning of . . . this remedial legislation broadly in accordance with the fair and ordinary meaning of its language."[191] Furthermore, the attorney general's report to a state senator regarding results of the investigation did not waive the confidentiality status of the records.[192]

Police departments, custodians of the vast majority of investigative records, have been only obliquely referred to with regard to the FOAA. In an opinion regarding the public's access to names of persons holding license plate numbers, the attorney general advised that municipal and state police departments must disclose such information in their "possession or custody."[193] Furthermore, the only exception to disclosure would be the "very unique case" in which the identity of a motor vehicle registrant alone constitutes "investigative information."[194]

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190. ME. REV. STAT. ANN. tit. 5, § 200-D (1989). This confidentiality provision became effective April 1, 1976, nearly two years after the attorney general conducted its investigation against plaintiffs. Dunn & Theobald, Inc. v. Cohen, 402 A.2d at 604. The Law Court rejected the plaintiffs' argument that employing the new provision would be impermissible retroactive application: "By its language it was concerned with any and all of the Attorney General's investigative records, whenever created . . . ." *Id.* at 605.

191. Dunn & Theobald v. Cohen, 402 A.2d at 605. A superior court's more recent analysis of the same statute reached the same result. In Ricci v. Bernstein, Shur, Sawyer & Nelson, No. CV-84-1310 (Me. Super. Ct., Cum. Cty., Nov. 14, 1988), the attorney general was granted his motion to quash subpoenas directed to him and others regarding an investigation conducted in connection with events involved in this superior court case and other suits against the defendant law firm. Noting that the Legislature "chose not to provide for court ordered access to the attorney general's investigative files," the court denied the plaintiff's subpoena request. *Id.* at 2.

192. Dunn & Theobald v. Cohen, 402 A.2d at 605-606. The court reached this conclusion for two reasons: an attorney general cannot waive the confidentiality of its investigations in light of the legislative mandate, and the attorney general could not waive a right that was not to be created for another two years. *Id.*

193. Op. Me. Att'y Gen. 80-93. The opinion relied on ME. REV. STAT. ANN. tit. 29, § 57 (1978), makes all records of the Secretary of State regarding motor vehicle registration and licenses open to public inspection. *Id.* at 3-4. Accordingly, the attorney general opined that the same records in the possession of the police must also be accessible to the public. *Id.* Moreover, the statutory confidentiality accorded "all criminal and administrative records of the State Police," under ME. REV. STAT. ANN. tit. 25, § 1631, was not meant to encompass records already opened to the public through another state agency. *Id.*

194. *Id.* at 4. The exception is based on title 16, section 614 of the Maine Revised Statutes which provides that "records in the custody of a local, county or district

A final statutory exception to the public records definition is trade secrets and commercial information. Although nearly one-third of the states expressly exempt this information in their freedom of information acts,[195] Maine has a handful of separate statutes prohibiting such disclosure[196] and the Uniform Trade Secrets Act.[197] One such statute, pertaining to agricultural market research and development grants, provides confidentiality to information which the Department of Agriculture has determined "gives the person making the request opportunity to obtain business or competitive advantage over another person who does not have access to the information or will result in loss. . . ."[198]

However, it is not clear how specifically an agency must define the "business advantage" or resulting "loss" before it can deny access to such information in its custody.[199] The only guidance in the area of commercial information, an attorney general ruling to the State Development Office, provides that the information is exempt from the "public records" definition if it can be demonstrated that "it has been carefully guarded by the company as a part of its business operations."[200] Yet, the attorney general cautioned that any information in the "public domain" is almost never eligible for nondisclosure, unless it can be used "to reconstruct confidential business

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criminal justice agency containing intelligence and investigative information shall be confidential" if it meets one of seven criteria, including resulting in the public dissemination of prejudicial information regarding an accused. ME. REV. STAT. ANN. tit. 16, § 614 (1983 & Supp. 1989-1990).

The issue of whether the federal government's original non-law-enforcement motivation in gathering information precludes confidentiality status to those records once the government converts them to law enforcement use was settled last year. The U.S. Supreme Court dismissed the original intention argument and held that *any* record "compiled for law enforcement purposes" was exempt from public disclosure under the federal FOIA. John Doe Agency v. John Doe Corp., 110 S.Ct. 471, 476-77 (1989), *reh'g denied*, 110 S.Ct. 884 (1989).

195. Braverman & Heppler, *supra* note 94, at 741.

196. *See, e.g.*, ME. REV. STAT. ANN. tit. 26, § 1716(3) (1988) (manufacturer, importer, distributor or employer may withhold chemical identity of hazardous chemical on a material safety data sheet); tit. 7, § 401-D(5) (1989) (information relative to agricultural market research or development activities provided to Department of Agriculture prior to formal application is confidential); tit. 12 § 7369(7)(C) (Supp. 1990-1991) (financial information submitted to Department of Conservation by commercial whitewater outfitter is confidential).

197. ME. REV. STAT. ANN. tit. 10, § 1542 (4)(A) & (B) (Supp. 1989-1990) (trade secret is a formula, pattern or process that "derives independent economic value . . . from not being generally known" and "[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy").

198. ME. REV. STAT. ANN. tit. 7, § 401-D(5)(B) (1989).

199. *Cf.* Tex. Att'y Gen. Open Records Decision No. 124 (1976) (an agency's mere allegation that an unknown competitor might gain some unspecified advantage is not enough to prevent disclosure).

200. Op. Me. Att'y Gen. 5 (Sept. 2, 1976).

information."[201] The presence of any such confidential commercial information commingled with public information is not grounds for nondisclosure; the agency should delete protected portions and disclose the remainder.[202]

(ii.) Section 402(3)(B): Records Within the Scope of Privilege Against Discovery or Use as Evidence

Of the six substantive exceptions available to agencies and public officials in denying public inspection of requested information, 402(3)(B) appears to be most often invoked. Determination of whether records fall within this exception is made by inquiry into its inadmissibility as evidence in a court proceeding. It is, therefore, an exception often litigated and often the subject of attorney general opinions.

The Law Court first dealt with the privileged material grounds for denial in *Moffett v. City of Portland*,[203] in which plaintiff city police officers sought to enjoin the city, city manager, and chief of police from disclosing transcripts of eight officers' statements made during an internal police investigation. The injunctions were sought after summaries of interviews with the police officers were released to the press. When the full transcripts were requested by Guy Gannett Publishing, the city attorney agreed to public inspection under the Freedom of Access Act pending an opportunity for the officers to challenge the disclosure. The Law Court agreed with the officers' argument that the statements arising from the investigation, made under threat of "disciplinary action," were protected by the fifth amendment privilege against self-incrimination and upheld the confidentiality status of the information.[204] Despite the principle of strict construction of the Act's exceptions, the court was compelled to abide by the "plain and ordinary meaning of the words selected by the Legislature to define what are not to be 'public records.' "[205]

The University of Maine, in *Guy Gannett Publishing Co. v. University of Maine*,[206] also attempted to deny disclosure of its settlement with the basketball coach on 402(3)(B) grounds. It argued that the settlement agreement enjoyed privilege status pursuant to Rule 408(a) of the Maine Rules of Evidence, which prevents admissibility of settlements to prove liability, and therefore was exempt from

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201. *Id.* (citing Fisher v. Renegotiation Board, 473 F.2d 109 (D.C. Cir. 1972), *on remand*, 355 F. Supp. 1171 (D.C. D.C. 1973)).

202. *Id.* (citing Fisher v. Renegotiation Board, 355 F. Supp. at 1174, and Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970)).

203. 400 A.2d 340 (Me. 1979).

204. *Id.* at 344-45.

205. *Id.* at 348. For a discussion of other aspects of this case, see *supra* notes 49, 52 and accompanying text.

206. 555 A.2d 470, 472-73 (Me. 1979).

public disclosure under 402(3)(B).[207] The Law Court, holding that the agreement was subject to public inspection, rejected the argument on two grounds. First, it noted that Rule 408(a) pertained to relevancy and not to the creation of privileges. Second, the rule's bar to admissibility, applying only to "substantive issues in dispute between the parties to the agreement," was inapplicable here since the settlement was between the University and the coach, parties who were not in dispute.[208] The real dispute, between the publishing company and the University, was not affected by Rule 408. Hence, the evidence exception argument failed: "the public has a right to know the terms upon which a public employer has settled with a resigning contract employee."[209]

Yet another inquiry as to the confidentiality of settlements also resulted in disclosure. This inquiry was directed to the attorney general and concerned the status of conciliation agreements settled under the aegis of the Maine Human Rights Commission, whose proceedings operate according to a statute seemingly in conflict with the FOAA.[210] Analogous to Rule 408 of the Maine Rules of Evidence, the statute forbids disclosure, without the parties' consent, of information generated *during* conciliatory proceedings.[211] Like Rule 408 of the Maine Rules of Evidence, the purpose of the statute is to "promote 'free and open discussion *in negotiations* for settlement.' "[212] However, the attorney general ruled that the statute does

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207. M.R. Evid. 408(a) states:

> 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.

208. Guy Gannett Publishing Co. v. University of Maine, 555 A.2d at 472.

209. *Id.* at 473. Another newspaper's request for access to a settlement, this time between a suspended police officer and the town of Camden, again resulted in disclosure, but the town's argument here was based on a statutory exemption other than section 402(3)(B). Bangor Publishing Co. v. Town of Camden, No. CV-88-163 (Knox Cty., Dec. 12, 1988).

210. Op. Me. Att'y Gen. (May 10, 1977).

211. ME. REV. STAT. ANN. tit. 5, § 4612(3) (1989) provides:

> If the [Human Rights] commission finds reasonable grounds to believe that unlawful discrimination has occurred . . . it shall endeavor to eliminate such discrimination by informal means such as conference, conciliation and persuasion. Nothing said or done as part of such endeavors may be made public without the written consent of the parties to the proceeding, nor used as evidence in any subsequent proceeding, civil or criminal. . . . If the case is disposed of by such informal means in a manner satisfactory to a majority of the commission, it shall dismiss the proceeding.

212. Op. Me. Att'y Gen. 2 (May 10, 1977) (quoting R. FIELD & P. MURRAY, MAINE EVIDENCE, § 408.1 (1976) (emphasis added)).

not prevent public access to the *final* terms of a conciliation agreement.[213]

Because the privilege exemption of section 402(3)(B) is as broad as the scope of "*any* evidentiary privilege recognized in the courts of Maine,"[214] it is inevitable that several such arguments are attempted and do succeed in precluding disclosure of certain information. In *Marquis v. City of Lewiston*,[215] the plaintiff successfully appealed to the superior court to obtain access to a state police reconstruction report of an accident involving the plaintiff and a city police cruiser. However, the court denied her access to the written communications between the city and its attorney, finding that such correspondence was privileged under the work product rule, Rule 26(b)(3) of the Maine Rules of Civil Procedure.[216]

Finally, an evidentiary privilege of great concern to agencies is the "informer privilege," Rule 509 of the Maine Rules of Evidence, which implicates citizens who make complaints regarding alleged violations of law. The rule provides confidentiality of the identity of persons who furnish such information and the privilege extends to representatives of public entities to which the information was provided.[217]

The attorney general, in response to several agency requests, clarified that, although the rules of evidence preempt laws with which they conflict, no conflict exists between the informer privilege and the public records definition.[218] Accordingly, "[i]n the spirit of" the public records definition, the written records of complaints must be open to public inspection; however, the identity of the source of the complaint may be withheld.[219]

C. *Section 403: Meetings to be Open to Public*

While most states had constitutional provisions for qualified access to legislative proceedings,[220] as early as 1944, Maine had a stat-

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213. *Id.*

214. Moffett v. City of Portland, 400 A.2d 340, 346 (Me. 1979).

215. Nos. CV-88-358; 88-513 (Me. Super. Ct., And. Cty., July 19, 1989).

216. "Reports prepared in the ordinary course of business are not protected by work product qualified immunity." *Id.* at 2 (citing 4 J. MOORE, MOORE'S FED. PRACTICE, § 26-354).

217. M.R. Evid. provides:

> (a) **Rule of Privilege.** The United States, a state or subdivision thereof, or any foreign country has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.
>
> (b) **Who May Claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

218. Op. Me. Att'y Gen. 2 (Sept. 29, 1975).

219. *Id.* at 1, 3.

220. In 1953, 33 states had constitutional provisions for access. CROSS, *supra* note

ute which granted near absolute access to the proceedings of the Legislature, albeit only to the press: "Representatives of the Press who shall be actually engaged in sending daily reports of the doings of the legislature . . . [shall] have the privilege of the floor of the senate and house of representatives. . . ."[221] Thus, for government to be open even to the press at the local level depended upon the existence of ordinances.

The special privilege created for the press was greatly expanded by the 1959 original right-to-know statute, which granted the right to attend public meetings at all levels of government to "all persons."[222] This 1959 statutory provision was the basis for the current law:

> 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.[223]

"Open to the public" means that entities within the ambit of the public proceedings definition of section 402(2) must abide by the spirit of the FOAA and conduct their transactions openly, from deliberation to final approval.[224] One attorney general opinion, for example, ruled that decisions reached during telephone meetings by a board of county commissioners, and later approved at its next regularly scheduled meeting, was antithetical to the FOAA.[225] Here, the board was engaged in budgetary decision-making, a public proceeding within the meaning of section 402(2); therefore, such action must be taken publicly, complete with notice to the public of the time and place.[226]

Just as telephone meetings are prohibited, so are "meetings" by correspondence. The attorney general confronted a situation where the chairman of the Commission of Governmental Ethics and Election Practices mailed to fellow members his draft of an advisory

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5, at 183-84.

The common limitations to access are similar to New York's: "when the public welfare shall require secrecy. . . ." N.Y. CONST., art. III, § 10.

221. R.S. ch. 9, §§ 9, 10 (1944).

222. P.L. 1959, ch. 219, § 38.

223. ME. REV. STAT. ANN. tit. 1, § 403 (1989).

224. Section 405, however, does allow executive sessions for specified purposes. ME. REV. STAT. ANN. tit. 1 §§ 402(2), 405 (1989). *See infra* notes 245-71 and accompanying text for a detailed discussion of the executive sessions provision.

225. Op. Me. Att'y Gen. 79-126, 4 ("The underlying purpose of the Freedom of Access Law is to permit and encourage the citizens of this State to attend those meetings at which the public's business will be discussed and to provide an opportunity for them to present their views . . ."). *Id.* at 5.

226. *Id.* at 3.

opinion.[227] This was followed up with a telephone poll of the members as to whether they agreed with the letter. The advisory opinion was adopted, but no meeting was ever held. As a result of its noncompliance with the Act, the attorney general ruled that the Commission's advisory opinion was invalid, as if one had never been issued.[228]

In addition to the limitations imposed by the "public proceedings" definition, the broad nature of the open meetings section is wholly dependent upon statutory exceptions, including the Act's own substantive exemption for executive sessions, which ultimately determine what meetings the public may attend. Foremost among the statutory exceptions is the exclusion of the public from certain judicial proceedings. The concept of a public trial, with roots deep in the common law of England,[229] manifested itself in this country in the sixth amendment's right to a public trial in criminal cases, as well as in the constitutions of almost every state, including Maine.[230] Indeed, the Law Court vigorously reaffirmed this right in Maine nearly 100 years ago:

> It is an undeniable proposition, to start with in this discussion, that courts of justice should be open to the public. That is the rule. History brings us too vivid pictures of the oppressions endured by our English ancestors at the hands of arbitrary courts ever to satisfy the people of this country with courts whose doors are closed against them. They instinctively believe that it is their right to witness trials and proceedings in the courts.[231]

More recently, in a line of cases beginning with *Richmond Newspapers, Inc. v. Virginia*,[232] the Supreme Court held that the public

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227. Op. Me. Att'y Gen. 84-25, 1.

228. *Id.* at 5.

229. As early as 1612, Lord Coke wrote about the "great importance" in ensuring that "all causes ought be heard, ordered, and determined before the judges of the kings courts openly . . . ." COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 103 (1797).

Lt. Col. John Lilburne's plea at his trial in 1649 for high treason includes an argument for an open hearing:

> I have something to say to the court about the first fundamental liberty of an Englishman in order to his trial; which is, That by the laws of this land all courts of justice always ought to be free and open for all sorts of peaceable people to see, behold and hear, and have free access unto . . . and yet, Sir, as I came in, I found the gates shut and guarded, which is contrary both to law and justice.

Trial of Lieutenant-Colonel John Lilburne, 4 Corbett's St. Tr. 1270, 1273 (Commission of Oyer & Terminer, England, 1649), *quoted in* H. CROSS, *supra* note 5, at 155.

230. ME. CONST. art. I, § 6.

231. Williamson v. Lacy, 86 Me. 80, 82-83, 29 A. 943, 944 (1893), *cited in* H. CROSS, *supra* note 5, at 156.

232. 448 U.S. 555 (1980). The progeny of *Richmond Newspapers* are: Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (first amendment right of access to sex offense trials during the testimony of minor victims); Press-Enterprise Co.

and press have a right under the first amendment to attend criminal trials.

Despite forceful justifications for open judicial proceedings,[233] as well as constitutional, statutory and common law provisions, access to the courts by the public is not absolute. Maine's Legislature has adopted three categories of statutory limitations to the broad rule of openness: divorce and custody proceedings;[234] most juvenile proceedings;[235] and the exclusion of minors as spectators at certain judicial proceedings.[236]

As to the public's right to attend governmental meetings other than judicial proceedings, there are statutes outside the Act that regulate whether an entity's meetings are open: confirmation hearings of judicial officers,[237] legislative committee hearings,[238] and the taking of testimony during legislative investigating committee hearings.[239]

In conclusion, a person in Maine who wishes to attend governmental meetings must first determine the applicability of the "public proceedings" definition of section 402(2) and then consider the statutory exceptions to the seemingly broad right to access given in section 403.

D. Section 404: Recorded or Live Broadcasts Authorized

Section 404 was added in 1969,[240] ten years after the statute was

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v. Superior Court, 464 U.S. 501 (1984) (first amendment right of access to *voir dire* proceedings of potential jurors); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (first amendment right of access to pretrial criminal proceedings).

233. For a historical look at the justifications for open criminal proceedings, from deterrence of judicial abuse to public awareness. *See* D. O'BRIEN, THE PUBLIC'S RIGHT TO KNOW 125-49 (1981).

See also 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1834 at 438 (Chadbourn rev. ed. 1976). A higher quality of testimony is the effect of publicity. First, it discourages witnesses from falsifying by "inducing the fear of disclosure." Second, it puts on notice those possible witnesses who would otherwise go unknown to the parties. Furthermore, there are reasons beyond evidentiary grounds: (1) officers of the court are "strongly moved to a strict conscientiousness in the performance of duty," thereby creating fewer abuses than likely in a secret proceeding; (2) persons who are not directly involved in a proceeding may somehow be implicated and should have the opportunity to protect themselves if so affected; and (3) respect for the law grows and "a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.").

234. ME. REV. STAT. ANN. tit. 19, § 695 (Supp. 1989).

235. ME. REV. STAT. ANN. tit. 15, § 3307(2) (Supp. 1989).

236. ME. REV. STAT. ANN. tit. 14, § 1401 (1989).

237. ME. REV. STAT. ANN. tit. 3, § 151 (1989).

238. ME. REV. STAT. ANN. tit. 3, § 165(3) (1989) ("A committee may hold either public or private hearings and may hold executive sessions . . .").

239. ME. REV. STAT. ANN. tit. 3, § 427 (1989) (all testimony shall be taken in open session unless a witness requests otherwise).

240. P.L. 1969, ch. 293.

first enacted. This section, only slightly modified since its inception,[241] permits all persons to not only attend public proceedings but to "make written, taped or filmed records of the proceedings, or to live broadcast the same," as long as it does not interfere with the "orderly conduct of the proceedings."[242] Furthermore, the entity may formulate rules and regulations regarding the taping or filming of its proceedings, as long as they are "reasonable" and do not "defeat the purpose of this subchapter."[243] Despite the perceived victory gained by the proponents of the FOAA with the addition of section 404, no Maine case law exists pertaining to the taping, filming or live broadcasting of public proceedings.[244]

E. Section 405: Executive Sessions

Were it not for this provision, the entire FOAA may never have been enacted in 1959, according to a chief lobbyist for the statute, because it was the executive sessions' rein on absolute accessibility to governmental meetings that enticed legislators to adopt the rest of the Act's more liberal provisions.[245] Yet, despite the attractiveness of executive sessions in 1959 to those leery of open government, even that original provision did not grant license to cloak govern-

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241. In 1975, a preface was added to the section: "In order to facilitate the public policy so declared by the Legislature of opening the public's business to public scrutiny . . . ." P.L. 1975, ch. 483, *repealed and replaced by* P.L. 1975, ch. 758.

242. ME. REV. STAT. ANN. tit. 1, § 404 (1989).

243. *Id.*

244. However, in 1988, 76-year-old John Smith was arrested and jailed for refusing to stop tape recording the Town of Lyman's selectmen's meeting. *Lyman Man Jailed For Taping Meeting*, Portland Press Herald, Apr. 23, 1988, at 1, 16. The York County District Attorney later dropped the charge of violating ME. REV. STAT. ANN. tit. 17A, § 751, which provides that a person is guilty of obstructing government administration "if he uses force, violence or intimidation or engages in any criminal act with intent to interfere with a public servant performing . . . an official function." *DA Drops Charges Against Man Who Taped Selectman's Meeting*, Portland Press Herald, May 7, 1988, at 1, 20.

Smith, in turn, threatened to file suit against the Town and eventually settled for $15,000, which he put in a trust fund: each year the York County college-bound high school student who writes the best first amendment essay wins a $1,000 award, *An 'Old Crank,'* editorial, Portland Press Herald, Mar. 19, 1989, at 24A.

245. Taped interview with Professor Hamilton, chairman of the Freedom of Information Committee that lobbied for the 1959 Act (1990) (on file with author).

According to Hamilton, after a hearing on the original draft of the bill, written by Harold Cross and Hamilton, the chairman of the Legislature's Judiciary Committee warned that absence of an executive sessions provision "would make passage [of the bill] tough." Cross then wrote a limited executive sessions provision that was accepted by the Legislature verbatim.

However, shortly after enactment, Hamilton viewed this executive sessions provision as one that the public and press could live with: "If this executive sessions provision is abused, I feel you will have only yourselves to blame, because adequate publicity will probably bring most any public group to heel." Memorandum to Maine Joint Committee on Freedom of Information from Brooks Hamilton (May 7, 1959).

mental decision-making in secrecy. The 1959 executive sessions section required that (1) no ordinance, order, rule, resolution, regulation, contract, appointment or any other official action could be finally approved at executive sessions, (2) executive sessions could be called only by a majority vote of the entity's members, and (3) such sessions could not be used "to defeat the purposes" of the Act's other provisions.[246] However, the Legislature reserved the broadest powers in calling executive sessions by exempting its own committees from the requirements of this section.[247]

In 1975 this special treatment given to the Legislature was repealed, and the conditions for executive sessions were drastically tightened, creating many of the procedural features found in the statute today.[248] Consequently, a three-fifths vote, rather than a simple majority vote, is required as is a motion detailing the "precise nature" of the business to be discussed in the executive session.[249] Moreover, "[n]o other matters may be considered in that particular executive session."[250]

The Legislature's 1975 fine-tuning of the substantive portions of the executive sessions section were the last changes to date,[251] leaving only six areas of discussion permissible in executive sessions: (1) discussion or consideration of almost every aspect of a civil servant's employment if public discussion "could be reasonably expected to cause damage to the reputation or the individual's right to privacy would be violated," provided that the person charged or investigated and the person bringing charges are allowed to attend;[252] (2) discussion or consideration by a school board of suspension or expulsion of a public school student or a private school student, whose education is paid from public funds, provided that the student, his attorney and his parents are permitted to attend;[253] (3) discussion or consideration of the condition, acquisition or use of property attached to

246. P.L. 1959, ch. 219 § 39.

247. *Id.* ("The conditions of this section shall not apply to executive sessions of committees of the Maine Legislature.").

248. P.L. 1975, ch. 483.

249. ME. REV. STAT. ANN. tit. 1, § 405(3), (4) (1989).

250. ME. REV. STAT. ANN. tit. 1, § 405(5) (1989). This "no-other-matters" language, surviving a 1975 House amendment to repeal it by a 118 to 11 vote, was hailed by proponents as necessary to curb the 1959 law which permitted executive sessions for "virtually any purpose." 1 Legis. Rec. 1975, B-1122-23. Those who favored deleting the "no-other-matters" language argued that the three-fifths vote and the motion requirements were ample protection of the public's right to know. *Id.*

251. P.L. 1975, ch. 422, *repealed and replaced by* P.L. 1975, ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 405 (1989)).

252. ME. REV. STAT. ANN. tit. 1, § 405(6)(A) (1989). However, any public employee charged or investigated may request in writing that the meeting be open and the agency must comply. *Id.* § 405(6)(A)(3). In addition, this section does not apply to discussion of a budget or budget proposal. *Id.* at § 405(6)(A).

253. ME. REV. STAT. ANN. tit. 1, § 405(6)(B) (1989).

real property, or disposition of publicly held property or economic development, only if "premature disclosures would prejudice" the body's competitive or bargaining position;[254] (4) discussions of labor contracts and proposals and meetings between a public agency and its negotiators, and negotiations between representatives of the agency and public employees when both parties agree;[255] (5) discussions between a body and its attorney concerning the legal rights and duties of the body or agency, pending or contemplated litigation, settlement offers and matters where the attorney's duty conflicts with the FOAA or where premature disclosure would "clearly place the State, municipality or other public agency or person at a substantial disadvantage;"[256] and (6) discussions of information in records deemed confidential by statute.[257]

The attorney general has issued several opinions regarding executive sessions, of which two in particular clearly respected the spirit of the FOAA. In the first, the attorney general advised that while the motion to go into executive session, specifying the topics to be discussed, is a public record, the minutes and other records of these closed sessions are not.[258] Moreover, in the second opinion the attorney general ruled that a governmental body cannot circumvent the executive sessions requirements by holding a secret ballot during an open session.[259]

But in its most flagrant interpretation of the executive sessions provision, the attorney general ruled that the Legislature's Joint Standing Committee on Energy and Natural Resources could conduct an executive session to discuss and consider the appointment of a gubernatorial nominee as commissioner of conservation.[260] Despite this dual-branch situation, where the legislative committee was acting on an executive nomination, the opinion rejected section 402(6)(A)'s restriction that closed sessions are permissible for discussion or consideration of appointees "*of the body or agency.*"[261] Instead, it formulated an alternate construction of the section, whereby the purported public policy of maintaining civil servants' privacy warrants closed meetings to discuss the appointment of a nominee from a coordinate branch of government.[262]

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254. *Id.* § 405(6)(C).

255. *Id.* § 405(6)(D).

256. *Id.* § 405(6)(E).

257. *Id.* § 405(6)(F).

258. Op. Me. Att'y Gen. (June 9, 1978).

259. Op. Me. Att'y Gen. 81-80. The only exception for this, according to the opinion, is where a secret ballot is authorized by constitution or statute. *Id.* at 1, n.2.

260. Op. Me. Att'y Gen. 79-99.

261. *Id.* at 1-2.

262. *Id.* at 2. The opinion also propounded a second justification for this result by relying on section 405(6)(F), the provision that permits executive sessions for the discussion of records not open to the public. One such non-public record, legislators'

The Law Court has also had some opportunities to interpret section 405, but the plaintiffs in both cases were unsuccessful on procedural grounds. In *Bird v. Town of Old Orchard Beach*,[263] the plaintiff attempted to invalidate an action of the town council authorizing a bond issue on the grounds that the actual decision was made in executive session. This argument[264] failed for lack of proof because the plaintiff was unable to contradict a council member's supporting affidavit for the town that an ultimate decision was never made in executive session.[265] The Law Court, therefore, affirmed the summary judgment for the town, but with the caveat that any decision deliberated and decided upon in secret executive session and "perfunctorily enacted" in open session "would be illegal and subject to court order nullifying the same."[266]

In *Colby v. York County Commissioners*,[267] the Law Court dismissed the plaintiff's complaint due to its untimely filing, nearly two years after an alleged abuse of the executive sessions requirements.[268] In this action, plaintiff, who had been discharged as a deputy sheriff, sought reinstatement and back pay based on the county commissioners' failure to hold a public hearing as he had requested in writing.[269] In addition, the plaintiff contended that he and his lawyer were allowed to attend the closed session only during his own testimony, a violation of section 405(6)(A)(2).[270] Once again, however, the court alluded to the consequences for violation of the executive sessions provision if the appeal had been timely: "if error were found the court could reverse, vacate, or modify the decision

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working papers, are exempt from the public records definition in section 402(3)(C). Therefore, according to the opinion, any such documents that legislators have regarding the nomination of the commissioner could be discussed in closed sessions. *Id.* at 2.

But see Op. Me. Att'y Gen. 2 (Apr. 6, 1977) (Milk Commission's meeting with its independent milk expert could arguably violate expert's privacy or damage reputation if his work is found inadequate, but these arguments "are not strong and would be likely to run afoul of a charge" that the executive session was used to defeat the purpose of the FOAA).

263. 426 A.2d 370 (Me. 1981).

264. The primary argument made here by the plaintiff was that the board's decision was ultra vires due to the citizens' rejection of a nearly identical bond issue in an earlier referendum. *Id.* at 371.

265. *Id.* at 376.

266. *Id.* at 375.

267. 442 A.2d 544 (Me. 1982).

268. For further discussion of the appeals time limit, see *infra* notes 306-17 and accompanying text.

269. *Id.* at 545.

270. Review authorized by statute and review by extraordinary writ both afford prompt and effective judicial review of administrative action, but "[w]hen direct review is available pursuant to [M.R.Civ.P.] Rule 80B it is exclusive unless inadequate." *Id.* at 547. Here, the court found that plaintiff should have compelled a record to be established under Rule 80B that would have served as the basis for judicial review. *Id.* at 548.

accordingly."[271]

F. Section 406: Public Notice

The effectiveness of an act that requires meetings to be open to the public but does not require public notice of those meetings is questionable. Yet, for the first sixteen years of the FOAA's life, there was no provision for public notice.

Finally enacted in 1975, the original section 406 provided:

> 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 and the body or agency will deal with the expenditure of public funds or taxation, or will adopt policy at the meeting. This notice shall be given in ample time to allow public attendance. 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.[272]

This provision has undergone only one change, an expansion in 1987, when the budget-and-taxation-only functions were eliminated, mandating public notice of any meeting, regardless of the nature of its transactions.[273] This deletion harmonizes the notice provision and the public proceedings definition of "the transactions of any functions." Moreover, a provision was added requiring that notice "shall be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned."[274]

Although the public notice section is silent as to whether the subject matter of a meeting must be advertised in advance of the meeting, the attorney general has ruled, in accord with the liberal mandate and "obvious spirit" of the Act that an "agency would be well advised to insure that its notice contains information adequate to inform the public of the general subject matter of the meeting."[275] This does not mean, however, that an agency must prepare and disseminate an agenda prior to a meeting.[276]

The Law Court has had only one opportunity to rule on an alleged violation of the Act's notice requirement. In *Milos v. Northport Village Corp.*,[277] the plaintiff sought appeal from a zoning board of appeals action. Here, the court summarily dismissed this tertiary argu-

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271. *Id.* at 548.
272. P.L. 1975, ch. 758, § 406.
273. P.L. 1987, ch. 477, § 4 (codified at ME. REV. STAT. ANN. tit. 1, § 406 (1989)).
274. *Id.*
275. Op. Me. Att'y Gen. 81-80, at 3, 4.
276. *Id.* at 3.
277. 453 A.2d 1178 (Me. 1983).

ment based on the plaintiff's failure to establish such violation.[278]

G. Section 407: Decisions

1. Section 407(1): Conditional Approval or Denial

Added fourteen years after the initial enactment of the FOAA in 1959, section 407(1) today directs governmental entities to make written record of every decision involving the conditional approval or denial of an application, license, certificate or any type of permit.[279] But this written record must state more than conclusory language: it must state the reason for its decision and make written findings of fact "sufficient to appraise [sic] the applicant and any interested member of the public of the basis for the decision."[280]

Section 407, therefore, mandates agencies to make available to the public what the Law Court deems necessary for effective judicial review of administrative decisions.[281] In addition, this section provides the plaintiff seeking judicial review of an agency decision with an alternate argument upon which to base an appeal, namely insufficient findings. For example, in *Shortill v. Inhabitants of the Town of Buxton*,[282] the superior court remanded the case to the town's planning board for further findings, pursuant to section 407(1). However, the court noted that it was not necessary for the board to make "extremely detailed findings," but that it must at least "attempt . . . to answer the opposing arguments of the abutters and state, at least briefly, why the arguments or points of [the defendant] and not the plaintiffs were accepted."[283]

2. Section 407(2): Dismissal or Refusal to Renew Contract

Enacted in 1975,[284] section 407(2) provides that every agency decision involving dismissal or the refusal to renew the contract of any public official, employee or appointee must be substantiated in writing. As in section 407(1), the record must contain justifications and findings of fact sufficient to apprise the individual and any member of the public of the basis of the decision. However, this provision does not apply to probationary employees.[285]

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278. *Id.* at 1180.

279. P.L. 1973, ch. 433, § 2 *repealed and replaced by* P.L. 1975, ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 407 (1989)).

280. ME. REV. STAT. ANN. tit. 1, § 407(1) (1989).

281. Harrington v. Inhabitants of Kennebunk, 459 A.2d 557, 562 (Me. 1983) ("We reaffirm here that 'it is an indispensable prerequisite to effective judicial review that an agency's decision set forth the findings of basic fact as well as the conclusions of ultimate fact and conclusions of law derived therefrom.' ") (quoting Gashgai v. Board of Reg. in Medicine, 390 A.2d 1080, 1085 (Me. 1978)).

282. No. CV-85-584, 4 (Me. Super. Ct., Yor. Cty., Nov. 5, 1986).

283. *Id.* at 3.

284. P.L. 1975, ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 407 (1989)).

285. ME. REV. STAT. ANN. tit. 1, § 407(2) (1989).

Yet, despite the opportunity sections 407(1) and (2) provide for expanded public inspection, the absence of case law and attorney general opinions suggests either that it is under-utilized by the public or that agencies readily accede to such requests.

H. Section 408: Public Records Available for Public Inspection

The 1959 provision, since liberalized to include "every person,"[286] granted the right of inspection only to "[e]very citizen of this State" to inspect and copy all public records during regular business hours of governmental bodies.[287] Notwithstanding the original limitation as to who could access public records, the enactment of the FOAA represented a major stride beyond the common law, when the person seeking inspection was required to have a proper purpose: "the gratification of mere curiosity or motives merely speculative or the creation of scandal will not entitle a person to inspection or to make copies or memoranda."[288]

The advancement of technology in governmental record-keeping prompted legislative catch-up in 1975, with the addition of a provision regarding inspection of "mechanical or electronic data compilations."[289] Whenever inspection of these materials requires translation, the requester "may be required to pay the State in advance for the cost of translation" and may have to wait until that task does not "delay or inconvenience" the agency or official.[290] For example, an agency might charge a requester for transcription of an audio tape to be completed within a time convenient to that entity. However, whether a public record is translated or not, the cost of all copying is borne by the requester.[291]

Although section 408 allows agencies to charge for the cost of copying and translation, it is silent as to how much a requester, whether commercial or noncommercial, must pay for copies of public records. Apparently, the agency has full discretion to collect any amount, since there is not even the guide of "reasonable" or "actual costs" that many other states provide.[292] Moreover, the statute also fails to

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286. P.L. 1975, ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 408 (1989)).

287. P.L. 1959, ch. 219.

288. Op. Me. Att'y Gen. (1944), *reprinted in* 1943-1944 Me. Att'y Gen. Ann. Rep. 111-12 (quoting 53 C.J. *Records* § 40 (1931)).

289. P.L. 1975, ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 408).

290. ME. REV. STAT. ANN. tit. 1, § 408 (1989).

291. *Id.*

292. *See e.g.*, IOWA CODE ANN. § 22.2(3) (West 1989) ("The governing body shall establish reasonable rates and procedures for the retrieval of specified records . . ."); ILL. ANN. STAT. ch. 116, para. 206(a) (Smith-Hurd Supp. 1990) ("Each public body may charge fees reasonably calculated to reimburse its actual cost for reproducing . . ."); MINN. STAT. ANN. § 13.03(3) (West 1988) ("the responsible authority may require the requesting person to pay the actual costs of searching for and retrieving government data . . ."); WASH. REV. CODE ANN. § 42.17.300 (Supp. 1989-1990)

note whether the "cost of copying" provision includes a public employee's time spent searching for a requested record. Despite an area vulnerable to controversy, no case law has emerged from the cost-of-copying issue.

However, in an opinion issued on the subject of fees, the attorney general noted that "costs of developing copies of public records may be an area ripe for rules and regulations."[293] In the meantime, though, the attorney general advised the secretary of state that a "reasonable assessment of the costs attributable to translation or copying" the requested information should be undertaken and changed.[294] The request in this case, a computer tape containing the names and addresses of all licensed drivers in Maine, was made by Datatron, a commercial enterprise. Any fees charged in the past for similar requests would have to be taken into consideration, as long as charges were based on actual costs.[295]

A corollary to the cost-of-search issue is how far a public agency must go in compiling requested information that is scattered throughout numerous files. In *Bangor Publishing Co. v. City of Bangor*,[296] the Law Court acknowledged that a governmental entity is not required to take affirmative steps to gather and compile such information.[297] However, despite the absence of this duty, when a person requests information that is open to inspection, "and a governmental entity knows that it has particular records containing that information, the entity must at least inform the requesting party that the material is available and that he may come in and 'inspect and copy' the information sought."[298]

By the same token, although the custodian of a public record is not required to compile requested information into one tidy document, the custodian is required to provide inspection of such records within its jurisdiction. This is true even if the public official's only source of the requested information is his personal tax return and the information is available, but scattered throughout the superior courts of the state, as were the records of service of process fees collected by the deputy sheriff in *Wiggins v. McDevitt*.[299]

Finally, there is the issue of commingling, when confidential information is interspersed in an otherwise public record. Although com-

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("Agencies may impose a reasonable charge . . .").

293. Op. Me. Att'y Gen. 79-161, at 2. The opinion suggested that the Maine Administrative Procedure Act, ME. REV. STAT. ANN. tit. 5, §§ 8051-8062, permits agencies to promulgate fees charged for copying.

294. *Id.* at 1.

295. *Id.*

296. 544 A.2d 733 (Me. 1988).

297. *Id.* at 736.

298. *Id.*

299. 473 A.2d 420 (Me. 1984). *See supra* notes 114-20 and accompanying text for a more thorough discussion of the case.

mingling can be used as a device of abuse by agencies that attempt to secrete public information behind the cloak of confidentiality, Maine's FOAA does not expressly prohibit this practice. However, the Law Court has interpreted the Maine Act as requiring agencies to release to the public any "segregable portions" of confidential records. In other words, an agency must release any part of a confidential document that is clearly public record. This rule prevailed in *Guy Gannett Publishing Co. v. University of Maine*,[300] where the medical information portion of the settlement agreement was deleted before release, and in *Wiggins*[301] where only pertinent portions of the deputy sheriff's personal tax return could be accessed.

I. Section 409: Appeals

Judicial review of only two kinds of governmental conduct is specific in the Act: denial of public inspection and official action taken in executive session.[302] Yet, this is a leap from the 1959 law, where no express provision for an appeals process existed.[303] In 1975, the Legislature lavished much attention on this area and created an appeals-remedy section nearly identical to the one in the Act today, including a provision for nonexclusivity of the remedy provisions.[304] Since that time, the only modification has been an abbreviation of the time period for agency response and requester appeal.[305] Thus, there are currently three subsections in the appeals provision. The first details the appeals process and remedy where a requester is unlawfully denied access to public records, while the second does the same where an entity unlawfully takes official action during an executive session. The third subsection expressly deems the above proceedings to be nonexclusive of other civil remedies.

1. Section 409(1): Records

Although there is no required response time if an agency chooses to disclose records, an agency or official *denying* a request to inspect public records must do so in writing within five working days of the request and must state the reason for denial.[306] This speedy response time for a denial, however, is counterbalanced by an equally

300. 555 A.2d 470, 472 (Me. 1989).

301. Wiggins v. McDevitt, 473 A.2d at 424.

302. ME. REV. STAT. ANN. tit. 1, § 409 (1989).

303. P.L. 1959, ch. 219. The original Act merely stated: "Nothing contained in [the FOAA] shall be construed as abridging the right of any citizen or citizens to appeal to a court of this State for the enforcement of the rights provided for in [the FOAA]." *Id.* at § 41.

304. P.L. 1975, ch. 483, *repealed and replaced by* P.L. 1975 ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 409 (1989)).

305. P.L. 1987, ch. 477, § 5 (codified at ME. REV. STAT. ANN. tit. 1, § 409(1) (1989)).

306. ME. REV. STAT. ANN. tit. 1, § 409(1) (1989).

speedy appeals period; the requesting person must appeal the denial within five working days of receipt of the written notice of refusal.[307] No other state mandates such a short appeals period.

Thus, the timing in seeking an appeal after an agency denial is crucial. But it can be easily remedied, as the Law Court affirmed in *Bangor Publishing Co. v. City of Bangor*.[308] Under the statute's then ten-day appeal period, Bangor Publishing requested records in April 1987 that were denied in writing on May 1.[309] The newspaper's response to the denial was a renewed request on May 14 and a one-count complaint filed on May 18 seeking review of the May 1 denial. About one week later, on May 26, the City denied the May 14 request, and the newspaper the same day amended its complaint by adding a second count with regard to this second denial. The court noted that the first count should have been dismissed as untimely, but that the amended complaint's second count appealing the second denial was "clearly timely," as it was filed the very day of the denial and before the City had answered the complaint.[310]

Despite the implication in *Bangor Publishing* that there was a no-lose opportunity for a requester to comply with this request-and-denial chronology, the Law Court clarified the rules of the game a year later, in *Guy Gannett Publishing Co. v. Maine Department of Public Safety*.[311] On May 16, 1988, the Kennebec Journal requested inspection of a letter of discipline issued by the defendant agency to an investigator in the state fire marshal's office.[312] Written denial was made on May 24, but not until June 10, seventeen days later, did the newspaper file an appeal. In spite of its acknowledgement of the untimeliness of the appeal,[313] the superior court reviewed the denial, noting that the paper *could have* renewed its request and followed it with a timely appeal, even though it had not done so.[314]

Holding that the action should have been dismissed as untimely, the Law Court noted that the superior court's judicial economy jus-

307. *Id.* The 1987 amendment shortened the appeals period from ten working days to the present five. P.L. 1987, ch. 477, § 5.

308. 544 A.2d 733 (Me. 1988).

309. *Id.* at 734.

310. *Id.* at 735. The court also dismissed the city's argument that the paper's amended complaint should have been in the form of a supplemental pleading, which could have been filed only with court approval under M.R. Civ. P. 15(d), because the second count included matters occurring after the initial filing. *Id.* The court said that this requirement did not apply, under M.R. Civ. P. 15(a), because the defendant had not yet filed a responsive pleading. *Id.*

311. 555 A.2d 474 (Me. 1989).

312. *Id.* at 475.

313. A new five-working-day appeal limit went into effect Sept. 29, 1987. P.L. 1987, ch. 477, § 5.

314. Guy Gannett Publishing Co. v. Maine Dep't of Public Safety, 555 A.2d at 475.

tification "overlooks the plain language of the statute."[315] Moreover, the lower court made a "string of assumptions" that were not guaranteed to follow: that the newspaper would renew its request, the agency would again deny, and the newspaper would attempt another appeal. "It is not for us to speculate on the future action and interaction of the parties."[316]

A further lesson pertaining to timeliness can be gleaned from the court's dismissal of the newspaper's second contention. Here, Gannett argued that the agency's eight-day response time under a statute requiring only five days thereby entitled the newspaper to disregard the Act's appeal period. "If Gannett had any remedy for [the agency]'s violation of section 409(1), it was not to emulate [the agency]'s disregard for the plain requirements of the statute."[317]

Unfortunately for the disciplined public employee in *Maine Department of Public Safety*, the agency had already released the disciplinary letter to Gannett pursuant to the superior court order. That court had stated that it was a "final written decision" in a personnel discipline letter and not confidential pursuant to statute.[318] This premature disclosure, found by the Law Court to be unwarranted, could have been avoided if the superior court had honored the defendant's request for a stay pending appeal. However, the counterparts of the public employee in *Gannett* fared better in *Moffett v. City of Portland*,[319] where, after having been denied a preliminary injunction against disclosure, they appealed to the Law Court and were granted a stay pending appeal.[320]

Yet, despite the potential for the court-ordered release of documents that the Law Court ultimately finds to be excepted from the Act, the records subsection of the appeals provision mandates that the superior court "shall enter an order for disclosure" if it determines the agency's denial was "not for just and proper cause."[321] A trial *de novo*, a standard least deferential to agencies, is available to "any person aggrieved by denial" in any superior court within the state.[322] Furthermore, the superior courts must give FOAA appeals

315. *Id.* at 476.

316. *Id.*

317. *Id.*

318. *Id.* at 475. The applicable statute is codified at ME. REV. STAT. ANN. tit. 5, § 7070(2)(E) (1989). Despite the disclosure, the issue was not moot because Gannett's cross-appeal of a subsequent order denying its motion for contempt contended that an earlier letter, mentioned within the one disclosed, should have also been disclosed by defendant. Guy Gannett v. Maine Dep't of Public Safety, 555 A.2d at 475.

319. 400 A.2d 340 (Me. 1979).

320. Despite the absence of a final judgment, the Law Court took the exceptional measure of permitting appeal due to the possibility that "substantial rights of a party [would] be irreparably lost if review [were] delayed until final judgment." *Id.* at 343, n.8.

321. ME. REV. STAT. ANN. tit. 1, § 409(1) (1989).

322. *Id.*

precedence over all other actions except writs of *habeas corpus* and actions brought by the state against individuals.[323]

2. *Section 409(2): Actions*

This subsection details the appeals process pertaining to executive sessions, but it goes further than the records subsection in directing liability. Any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action taken in an executive session "shall be illegal and the officials responsible shall be subject to penalties hereinafter provided."[324]

As with judicial review of public records, this subsection allows any person to appeal to any superior court in the state for a trial de novo. These appeals also take precedence over all other cases except for writs of *habeas corpus* and actions by the state against individuals.[325] And, if it is found that final action did occur at an executive session, the court "shall enter an order providing for the action to be null and void."[326]

The major difference between the two subsections lies in the time period for appeals. Whereas any person denied access to public records must appeal "within five working days of the receipt of the written notice of denial," any person, "upon learning of any such action" in executive sessions may appeal. Yet, according to the Law Court, absence of a time limit does not mean there is a timeless appeals process, for the limitations of Rule 80B of the Maine Rules of Civil Procedure apply in full force to the judicial review of executive session actions.[327]

3. *Section 409(3): Proceedings Not Exclusive*

This subsection expressly provides for the nonexclusivity of the proceedings described above. Thus, any other civil remedy provided

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323. *Id.*

324. ME. REV. STAT. ANN. tit. 1, § 409(2) (1989). This liability of individual officials, however, is inconsistent with section 410, which mandates that the agency, not the individual employee-violator, is subject to a forfeiture of $500.

325. ME. REV. STAT. ANN. tit. 1, § 409(2) (1989).

326. *Id.*

327. Colby v. York County Comm'r, 442 A.2d 544, 546 (Me. 1982).

Rule 80B(b) of the M.R. Civ. P. prescribes a time limit for review of governmental action: "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 . . . ."

Although section 409 does not provide for appeals of violations of the Freedom of Access Act occurring in an open meeting, the Law Court has addressed time limits in such appeals. In 1985 it held that a plaintiff whose land use permit was revoked must appeal within thirty days of the zoning board of appeals' open meeting, when it took final action, not from the date of the plaintiff's receipt of that decision. Vachon v. Town of Kennebunk, 499 A.2d 140, 142 (Me. 1985).

by law is available.[328]

4. Section 410: Violations

A separate violations section has existed since the original enactment of the FOAA in 1959, but since that time the Legislature has gradually diminished the severity of the consequences for those who would deny access to public records or governmental meetings. The original violations provision mandated that "[a] violation . . . shall be punishable by a fine of not more than $500 or by imprisonment for less than one year."[329]

In the Legislature's 1975 "overhaul" of the FOAA, the violations section was abbreviated to only fourteen words: "A willful violation of any requirement of this subchapter is a Class E crime."[330] Although "Class E crime" was added merely to comply with the state's crime classification,[331] the addition of "willful," a term of art, indicated the Legislature's new lenient attitude toward violators of the open government law: not only would a violation have to occur, but a plaintiff would have to prove that it was a "willful" violation.

In *District Attorney for the Fifth Prosecutorial District v. City of Brewer*,[332] the Law Court noted that the criminal code provides the definition of "willful" for crimes defined outside its code, "unless the context of the statute defining the crime clearly requires otherwise."[333] Because the FOAA does not define "willful," the criminal code's definition applied. Thus, in order to invoke the FOAA's enforcement penalties, the agency or official denying access must be shown to have done so willfully.

Moreover, in *District Attorney* the court affirmed the superior court's dismissal of an action seeking a declaration that the city's past meetings, executive sessions and other actions were violations of the FOAA. The court stated that no issue of law existed as to the construction of "willful"; whether a meeting is in violation of the FOAA and whether the conduct of public officals was willful are factual issues to be decided "on a case-by-case basis."[334] Even if a declaratory judgment could properly be used to determine an issue of fact, the court noted that "in this case doing so serves no useful purpose. Here, the factual determinations concern only past conduct. . . . The Superior Court was not called upon to declare

328. ME. REV. STAT. ANN. tit. 1, § 409(3) (1989).

329. P.L. 1959, ch. 219.

330. P.L. 1975, ch. 758 (codified at ME. REV. STAT. ANN. tit. 1, § 410 (1989)).

331. P.L. 1975, ch. 740, § 14 (codified at ME. REV. STAT. ANN. tit. 17-A, § 4-A (1983)). A Class E crime was one for which punishment did not exceed one year.

332. 543 A.2d 837 (Me. 1988).

333. *Id.* at 838 (quoting ME. REV. STAT. ANN. tit. 17-A, § 6(1) (1983)). This case was decided in 1988, after the most recent amendment to section 410, but the construction of "willful," still present in the FOAA, applies with equal force.

334. *Id.* at 839.

whether a specific act, certain to occur in the future, is a crime."[335]

The most recent amendment, in 1987, designated a violation as a civil infraction rather than a crime, yet maintained "a forfeiture of not more than $500."[336] In addition, for the first time the section expressly named the party liable for the forfeiture: "the state government agency or local government entity whose officer or employee committed the violation."[337] Therefore, unlike other states, Maine shields the violating employee from liability.[338]

IV. Problems and Proposed Solutions

The Legislature's last truly comprehensive reworking of the FOAA occurred in 1975, when it narrowed the public records definition, tightened the restrictions on executive sessions, and added more exceptions than it removed. A renewed scrutiny is needed, although to strengthen it, not to disable its effectiveness in opening government to the people. The Act's most vulnerable spot, the exemption for records "designated confidential by statute," has been the most widely used device for chipping away at the scope of the FOAA.

The following section will suggest a number of areas in the FOAA calling for legislative attention. The solutions offered are drawn from the freedom of information statutes of other states.

A. Make the FOAA User-Friendly

If any right-to-know law is to succeed, the public must know about it and feel at ease employing it to gain access to the government's business. Although freedom of information creates administrative costs, it should not create attorney's fees for a wrongly denied requester. "Every person" has the right to inspect public records and attend public meetings, but if seemingly insurmountable and costly barriers are erected, few persons will attempt to invoke these rights.

1. Clearly Define Which Entities are Subject to the FOAA

In interpreting the scope of "public proceedings" within the meaning of the FOAA, the Law Court in *Lewiston Daily Sun v. City of Auburn*[339] did not hesitate to include the city's special civil service study committee. Although its decision provides some guidelines as to which entities are subject to the Act, the attorney general

335. *Id.*
336. P.L. 1987, ch. 477, § 6 (codified at Me. Rev. Stat. Ann. tit. 1, § 410 (1989)).
337. *Id.*
338. *See* Braverman & Heppler, *supra* note 94, at 755 for a survey of other states' violations provisions.
339. 544 A.2d 335 (Me. 1988).

as well as the public are operating bereft of a "magic formula."[340] Thus, it is crucial that the Legislature clearly define "public proceeding" and also close the loopholes currently available to those eager to carry on the government's business behind closed doors.

First, to insure that the public policy is executed, the meetings of any board, committee, special committee, subcommittee, blue ribbon committee or commission, regardless of appellation affixed and however created or constituted within the executive or legislative branches, must comply with the Act. Other states have recognized the potential for abuse and have included language in their statutory definitions that closes loopholes and broadens the applicability to include entities "however created,"[341] "by whatever name designated,"[342] created by "executive order,"[343] and "specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations."[344]

Second, any entity that is publicly funded, in part or in whole, also must open its meetings and records to the public pursuant to the Act. Several states have included such provisions in their definitions of public body: "supported in whole or in part by tax revenue, or which expend tax revenue";[345] "receiving or expending and supported in whole or in part by public funds";[346] and "expends or disburses any public funds."[347] Such a provision in the Maine statute would have brought the Maine Potato Council, supported by twenty percent of the potato tax,[348] and the Blue Ribbon Commission on Corrections,[349] supported by a $25,000 appropriation from the Legislature, into the ambit of the Act.

Finally, the advisory nature of an entity should not be cause for exemption from public scrutiny. Indeed, the proceedings of advisory bodies yield crucial information upon which formal decisions are made. If advisory entities are allowed to operate in secrecy, the so-called decision-making bodies could be reduced to rubber-stamping functions while the real work is done behind closed doors by "advi-

340. Op. Me. Att'y Gen. 80-95 at 3.

341. MASS. GEN. LAWS ANN. ch. 30A, § 11A (West 1989).

342. IND. CODE ANN. § 5-14-1.5-2(a)(1) (Burns 1987).

343. MISS. CODE ANN. § 25-41-3(a) (Supp. 1989); MD. STATE GOVERNMENT CODE ANN. § 10-501(g)(2)(vi) (1984); IOWA CODE § 21.2(1)(a) (1989).

344. DEL. CODE ANN. tit. 29, § 10002(a) (Supp. 1988).

345. ILL. ANN. STAT. ch. 102, § 41.02 (Smith-Hurd 1987).

346. KAN. STAT. ANN. § 75-4318 (1989).

347. DEL. CODE ANN. tit. 29, § 10002(a) (Supp. 1988). *See also* MISS. CODE ANN. § 25-41-3(a) (Supp. 1989) ("supported wholly or in part by public funds or expends public funds").

348. Op. Me. Att'y Gen. (July 26, 1978). *See also supra* note 75 and accompanying text.

349. Op. Me. Att'y Gen. 85-19. *See also supra* notes 73-74, 108-110 and accompanying text.

sory" bodies.[350] Several states now include provisions in their freedom of information laws to encompass public bodies whose task is solely advisory: any "policy-making entity";[351] "[a]n advisory board, advisory commission, or task force created by the governor or the general assembly to develop and make recommendations on public policy issues";[352] and [a]ny advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency."[353]

Even at the federal level, Congress has enacted the Federal Advisory Committee Act, which regulates "any committee, board, commission, council, conference, panel, task force, or other similar group" that has been created for the purpose of advising or making recommendations to the president, an agency or an official.[354] Notice of the meetings of such bodies must be published in the Federal Register[355] and their meetings[356] and records[357] are open to public scrutiny.[358] Congress apparently comprehended the need to encompass the meetings and records of advisory bodies.[359]

2. *Make Any Exceptions to the FOAA Easy to Locate*

Even if the definition clearly indicates the entities whose meetings and records are subject to the FOAA, there remains a multitude of exemptions to the public records provision, found in section 402(3). Although this section lists seven exemptions, only six are substantive. It is the first, "designated confidential by statute," that could leave the requester in a quandary despite the availability of a partial listing of "confidential" records in the general index of the Maine Revised Statutes Annotated. The FOAA should be as self-contained as possible, facilitating understanding, scope and use by as large a

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350. For a debate of this argument in the context of a similar situation regarding whether the committees and subcommittees of the Boards of Trustees of higher education should be exempt, see *supra* notes 84-87 and accompanying text.

351. MISS. CODE ANN. § 25-41-3(a) (Supp. 1989).

352. IOWA CODE ANN. § 21.2(1)(e) (1989).

353. IND. CODE ANN. § 5-14-1.5-2(a)(5) (Burns 1987).

354. 5 U.S.C.A. app. § 3 (West Supp. 1990).

355. 5 U.S.C.A. app. § 10(a)(2) (West Supp. 1990).

356. *See id.* § 10(c).

357. *See id.* §§ 10(b)-(c).

358. However, this openness does not apply when the president or head of the agency determines that such meetings shall be closed for statutorily enumerated purposes, including national security and personnel matters. 5 U.S.C.A. app. § 10(d) (West Supp. 1990).

359. *See* Washington Legal Found. v. American Bar Ass'n Standing Comm. on Fed. Judiciary, 648 F. Supp. 1353, 1358-59 (D.C. 1986) ("The central purpose of the Act is to 'control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals and groups.' ") (citing HLI Lordship Indus., Inc. v. Committee for Purchase from the Blind, 615 F. Supp. 970, 978 (E.D. Va. 1985)).

segment of the public as possible. For example, most states that contain the "confidential by statute" exemption follow that cursory provision with a list of substantive exemptions that go beyond the FOAA's short list. Iowa has a paradigmatic public records statute in this regard, as it enumerates in detail twenty-six areas of exempted information, nearly identical to those Maine has scattered throughout its fifty-four titles.[360] Following the Iowa model, the Maine Legislature could easily consolidate all of its confidentiality provisions and incorporate them in the FOAA, where they are most pertinent.[361]

3. *Require Each Agency to Index Available Records*

The most effective right-to-know law should assist the public in gaining access to information that is open to the public. The federal FOIA requires each agency to "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 . . . and required . . . to be made available or published."[362]

Only a handful of states track the federal FOIA in this area, Washington's statute being the most explicit: "Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information. . . ."[363] Although extra costs may be incurred in indexing available public records within an agency, the benefits to both the agency and public outweigh the expense an open government brings.

4. *Waive the Copy Fees for Requests Pertaining to the Public Interest*

Maine's FOAA prescribes payment of "the cost of translation" where an agency's records must be changed from its original medium to one amenable to inspection. Yet, beyond that there is no reference as to which party pays copying costs. Most states require that search and copy fees be "reasonable"[364] or "actual costs."[365]

However reasonable, fees build barriers to access of the public's

360. IOWA CODE ANN. § 22.7 (1989 & Supp. 1990).

361. For another example of such consolidation see CONN. GEN. STAT. § 1-19 (1988), which has incorporated by reference all other confidentiality provisions under its exemptions section of its FOI Act.

362. 5 U.S.C.A. § 552(a)(2)(c) (1977).

363. WASH. REV. CODE ANN. § 42.17.260(2) (West Supp. 1990).

364. KY. REV. STAT. ANN. § 61.874 (Michie/Bobbs-Merrill 1986); IOWA CODE ANN. § 22.3 (West 1989).

365. MINN. REV. STAT. ANN. § 13.03(3) (West 1986). Some states mandate that such costs be set by law. *E.g.*, N.J. STAT. ANN. § 47:1A-2 (West 1989). If a price has not been determined, the custodian shall charge 50 cents for each page up to 10 pages and 10 cents for each page over 20. *Id.*

business, and Congress recognized this when it amended the FOIA in 1986, requiring that only persons requesting information for commercial use pay more than "reasonable standard charges" for copying.[366] Representatives of the press and scientific and educational institutions are exempt from commercial status. Noncommercial requests, therefore, are entitled to a reduced fee or a waiver "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."[367]

Connecticut is one of the few states with fee provisions similar to that of the federal FOIA. It provides a waiver of fees for three situations: 1) where the person requesting the records is indigent, 2) where the records requested are not public (search fees are waived), and 3) where an agency determines that "compliance with the applicant's request benefits the general welfare."[368] Although such a provision empowers an agency with great discretion, it does allow for the possibility of reduced or waived fees not presently available in the Maine FOAA. Any provision for fee reduction, however, should expressly include representatives of the press.

B. Make the Appeals Process Less Intimidating and More Rewarding

The cavernous room of a superior court and the attendant need to hire an attorney are intimidating barriers to seeking appeal of a public official's negative response to a request for inspection of a record or access to a meeting. Therefore, until such obstructions are eliminated, the public will take an agency's "no" for an answer rather than go to the expense of appeal.

1. Lengthen the Appeals Period to Thirty Days

Maine's FOAA requires that a requester who has been denied access to inspection of a public record appeal within five working days of receipt of that denial.[369] Such an abbreviated appeals period is not only draconian but it is the most severe of all fifty states' statutes. Moreover, it has led to a comic requester's game of request-

366. Pub. L. No. 99-570, Title 1, sec. 1803, Oct. 27, 1986, 100 Stat. 3207-48 to 49 (codified at 5 U.S.C.A. § 552(a)(4)(A)(ii)(II) (West Supp. 1990) (fees are limited to reasonable standard charges when request is made "by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media . . . ."). Moreover, attorney fees may be awarded to those plaintiffs who successfully appeal an agency's denial of a fee waiver. Ettlinger v. FBI, 596 F. Supp. 867, 879 (D. Mass. 1984).

367. 5 U.S.C.A. § 552(a)(4)(A)(iii) (West Supp. 1990).

368. CONN. GEN. STAT. ANN. 1-15 (West 1988).

369. ME. REV. STAT. ANN. tit. 1, § 409 (1989).

and-re-request, as seen in *Bangor Publishing Co. v. City of Bangor.*[370]

The appeals period for an executive session, although not expressly provided for, has been interpreted to comply with Rule 80B of the Maine Rules of Civil Procedure, which grants a thirty-day period for review "if no time limit is specified by statute." Therefore, the Legislature should either simply delete the "within five working days" language and allow Rule 80B to control or, better, expressly provide for a "within 30 days of receipt of denial" clause to better aid the statute's reader who may be unfamiliar with the rules of civil procedure.

2. *Expressly Provide for Attorney's Fees to be Awarded to a Prevailing Plaintiff*

Persons appealing denials under Maine's FOAA gain the satisfaction of contributing to open government, but they reap no other rewards. Indeed, an appellant never emerges financially better off, since all attorney's fees are borne by the requester. Even though it is possible to request attorney's fees as part of the judgment, there are no assurances unless the Legislature expressly allows for them to be paid by the agency that unduly denied access to the government's business.

Once again, such a requirement may result in additional expenses to the operation of government, but that has not prevented Congress from including in the FOIA the provision that "[t]he 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."[371] Although the court retains discretion in the award of costs and fees, at least it has been noted that the legislative intent to bring such a possibility of recovery is brought to bear.

Other state statutes address the issue in various ways: some allow the court to award attorney's fees only where the agency has acted "unlawfully"[372] or "in bad faith, or in an arbitrary or capricious manner."[373] One state even allows such an award in proportion to the success of the complainant.[374]

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370. 544 A.2d 733 (Me. 1988). For a more detailed discussion of the actions requesters have been forced to take to evade the short appeals period, see *supra* notes 308-17 and accompanying text.

371. 5 U.S.C.A. § 552(a)(4)(E) (1977). A plaintiff may have "substantially prevailed" even where the agency releases the requested information prior to final judgment: "Recent court decisions and the legislative history of section 552(a)(4)(E) support . . . [the conclusion that] a judgment is not an absolute prerequisite to an award of attorney fees." Cuneo v. Rumsfeld, 553 F.2d 1360, 1364 (D.C. Cir. 1977).

372. FLA. STAT. ANN. § 119.12(1) (West Supp. 1990).

373. ARIZ. REV. STAT. ANN. § 39-121.02(B) (West 1985).

374. KY. REV. STAT. ANN. § 61.882(5) (Michie/Bobbs-Merrill 1986). A complainant

The Maine Legislature should address the attorney's fees issue in a manner that will encourage public utilization of the FOAA.

3. *Create an Intermediate Appeals Level between Agency and Superior Court*

Even if a requesting member of the public has some assurance of not having to incur court costs and attorney's fees, the intimidating nature of the adversary system is enough to discourage appeal of agency denials. There are currently two states, Connecticut and New York, that interpose dispute resolution bodies between the agency and the superior court, providing an intermediate safe haven for requesters who would otherwise forego an appeal.[375]

Connecticut's structure, however, represents the model the Maine Legislature should follow. There, a Freedom of Information Commission was created to take appeals from aggrieved requesters. The commission is composed of five members, appointed by the governor, confirmed by either house, and who serve four-year terms.[376] No more than three members may be of the same political party.[377] A person denied the right to inspect a record or attend a meeting may appeal to the commission within thirty days after the denial, and a hearing will be heard within thirty days after receipt of a notice of appeal and decided within sixty days after the hearing.[378] The process is expedited in the case of allegedly unlawful executive sessions: a preliminary hearing is held within seventy-two hours of receipt of a complaint.[379] The commission, enabled by statute to investigate violations, administer oaths, examine witnesses, receive evidence, and subpoena witnesses,[380] issues a decision that is subject to judicial review.[381]

CONCLUSION

The erosion of the public's right to know in Maine is plainly evident when observed over its thirty-year life span, but every legislative amendment that permits the government to operate beyond public scrutiny contributes to long-term destruction. The Legislature in 1959, by embracing the concept of freedom of information,

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requesting ten records and prevailing on five would be awarded half of the attorney's fees. In addition, the court has discretion to award up to $25 for each day the requester was denied access. *Id.*

375. For a thorough examination of proposed utilization of a dispute resolution process with regard to the federal FOIA, see Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1 (1988).

376. CONN. GEN. STAT. ANN. § 1-21j(a) (West 1988).

377. *Id.*

378. CONN. GEN. STAT. ANN. § 1-21i(b) (West Supp. 1990).

379. *Id.*

380. *Id.* § 1-21j(d).

381. *Id.* § 1-21i(d).

boldly rejected the common law notions that public records were only those statutorily deemed as such and that public records could be inspected by only those persons with a particular interest. The tide of the public's right to know has undoubtedly turned since the common law days, but the tide has again ebbed since the inception of the FOAA, a statute initially unfettered by myriad exceptions. The tinkering in 1989 with one of those exceptions, the prohibition of access to the names and addresses of applicants for public sector jobs, is but the most recent example of a grant of secrecy to government transactions.

Beyond legislative repairs, however, the solution to an open government rests with the public, for it is the public's business that is at stake. If the public is unaware of its right to access to government records and meetings or believes it is not empowered to overcome denials to its requests, then even the most literal freedom of information act serves no useful purpose. The greatest tool for prying open governmental business is an educated public, operating within the statutory framework of a liberal freedom of access act.

APPENDIX

ME. REV. STAT. ANN. TIT. 1, §§ 401-410

SUBCHAPTER 1

FREEDOM OF ACCESS

§ 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.

This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.

§ 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.

2. Public proceedings. The term "public proceedings" as used in this subchapter shall mean the transactions of any functions affecting any or all citizens of the State by any of the following:

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

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 Technical College System and any of its committees and subcommittees;

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

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.

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:

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 or 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;

E. Records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Technical 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;

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; and

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.

§ 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.

§ 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.

§ 405. Executive sessions

Those bodies or agencies falling within this subchapter may hold executive sessions subject to the following conditions.

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.

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.

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.

4. Motion contents. A motion to go into executive session shall indicate the precise nature of the business of the executive session.

5. Matters not contained in motion prohibited. No other matters may be considered in that particular executive session.

6. Permitted deliberation. Deliberations may be conducted in

executive sessions on the following matters and no others:

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 that person 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;

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)[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.

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;

D. Negotiations between the representatives of a public employer and public employees may be open to the public provided both parties agree to conduct negotiations in open sessions. Discussion of labor contracts and proposals and meetings between a public agency and its negotiators may be held in an executive session.

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

1. So in original. No subpar. (2) was enacted.

clearly place the State, municipality or other public agency or person at a substantial disadvantage.

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.

§ 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.

§ 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 [sic] 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.

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 made 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.

§ 408. Public records available for public inspection

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; provided that, whenever inspection cannot be accomplished without translation of mechanical or electronic data compilation into some other form, the person desiring inspection may be required to pay the State in advance the cost of translation and both translation and inspection 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 record sought and provided further that the cost

of copying any public record to comply with this section shall be paid by the person requesting the copy.

§ 409. Appeals

1. Record. 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.

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 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 devo, 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.

3. Proceedings not exclusive. The proceedings authorized by this section shall not be exclusive of any other civil remedy provided by law.

§ 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.

Anne C. Lucey