

HUMAN RIGHTS DEFENSE CENTER,

Plaintiff,

v.

KENNEBEC COUNTY, MAINE COUNTY

COMMISSIONERS ASSOCIATION, and

MAINE COUNTY COMMISSIONERS

ASSOCIATION RISK POOL,

Defendants.

**FIRST AMENDED APPEAL FROM
DENIAL OF ACCESS TO PUBLIC
RECORDS (1 M.R.S. § 409(1))**

The Human Rights Defense Center (“HRDC”) appeals the denial of access to public records by Kennebec County, a political subdivision of the State of Maine, Maine County Commissioners Association, an instrumentality of Maine counties, and Maine County Commissioners Association Risk Pool pursuant to 1 M.R.S. §409(1) as follows:

INTRODUCTION

1. This is a challenge to the decision by Kennebec County, the Maine County Commissioners Association, and the Maine County Commissioners Association Risk Pool to keep secret public records documenting the terms under which civil cases against it were resolved.
2. HRDC was established in 1990 as an advocacy organization dedicated to addressing problems in the criminal legal system. HRDC carries out its mission, in part, by acquiring information about the operations of jails, prisons, police departments, and sheriffs’ departments, and then

disseminating that information to the public through reports and through its monthly magazines, *Prison Legal News* and *Criminal Legal News*.

3. In June 2021, HRDC requested disclosure of records from Kennebec County, under Maine's public records law, concerning the settlement of a claim against Kennebec County and the Kennebec County Sheriff's Office, including documents showing the amounts paid to resolve the claim.
4. The payment of money from the public fisc is an important matter of public concern, which is of interest both to taxpayers generally and to those connected to the criminal justice system more specifically. As such, documentation concerning payments and terms of payment by public entities to private parties to resolve legal claims are almost always subject to disclosure under state public records laws.
5. Kennebec County, and its agents, responded by producing the complaint, answer, and a general release. They did not produce—and still have not produced—the settlement agreement reflecting the terms of payment and other contract terms associated with resolving the case.

PARTIES AND JURISDICTION

6. HRDC is a Washington state non-profit, charitable corporation headquartered in Florida. HRDC publishes an internationally-distributed monthly journal called *Prison Legal News*, which contains news and analysis about prisons, jails, and other detention facilities, prisoners' rights, court opinions, management of prison facilities, prison conditions, and other matters pertaining to the rights of incarcerated individuals, as well as a second magazine, *Criminal Legal News*, which reports on developments in criminal law related to prosecutors, policing, and sentencing. Since 1990, HRDC has reported on news, court decisions, settlements, and other developments relating to the civil and human rights of people involved with the criminal legal

system in the United States and abroad. HRDC's publications have thousands of subscribers, and its website receives hundreds of thousands of visitors monthly. Its work is supported through subscriptions, charitable donations, and (occasionally) attorney fees from successful litigation.

7. Kennebec County is a political subdivision of the State of Maine, with a county seat in Augusta.
8. Maine County Commissioners Association is an instrumentality of Maine counties under 30-A M.R.S. §909. It operates the Maine County Commissioners Association Self-Funded Risk Management Pool ("Risk Pool"), which insures Maine counties, including Kennebec County, for, among other things, liability related to claims against employees.
9. Maine County Commissioners Association Self-Funded Risk Management Pool was established by the Maine County Commissioner Association pursuant to 30-A M.R.S. §2253, and it is not a separate corporate entity. Upon information and belief, the Risk Pool is an instrumentality of the Maine County Commissioners Association, and employees of the Risk Pool are agents of the Maine County Commissioners Association.
10. The Superior Court has jurisdiction over this action pursuant to 1 M.R.S. §409(1) and other applicable law.
11. Venue is proper in Kennebec County pursuant to 14 M.R.S. §505.

PRIORITY OF FOAA APPEAL

12. This FOAA case has statutory priority such that it "may be advanced on the docket and receive priority over other cases when the court determines that the interest of justice so require" pursuant to 1 M.R.S. §409(1).

RIGHT TO INSPECT AND COPY JAIL SETTLEMENT RECORDS UNDER FOAA

13. The purpose of the FOAA is to promote transparency in government by, inter alia, making records of the transaction of governmental business “open to public inspection.” 1 M.R.S. §401.
14. The Legislature declared that the FOAA “shall be liberally construed and applied to promote its underlying purposes and policies. . . .” 1 M.R.S. §401.
15. Under Maine law, “a corollary to such liberal construction of the Act, is necessarily a strict construction of any exceptions to the required public disclosure.” *Guy Gannett Pub. Co. v. Univ. of Maine*, 555 A.2d 470, 471 (Me.1989) (quoting *Moffett v. City of Portland*, 400 A.2d 340, 348 (Me. 1979)).
16. The FOAA guarantees to every person the right to request that an agency make public records available for inspection and copying. 1 M.R.S. §408-A.
17. The FOAA recognizes that “public proceedings exist to aid in the conduct of the people’s business,” and the records of actions from such proceedings “be open to public inspection.” 1 M.R.S. §401; *Citizens Commc'ns Co. v. Att’y Gen.*, 2007 ME 114, ¶ 9, 931 A.2d 503, 505.
18. The burden of proving “just and proper cause for the denial of a FOAA request” falls on the government entity denying the request. *See MaineToday Media v. State of Maine*, 2013 ME 100, ¶ 9, 82 A.3d 104.
19. If a court determines, after a trial de novo “with taking of evidence and other testimony as determined necessary,” that a refusal to permit inspection and copying “was not for just and proper cause” the court shall enter an order for disclosure. *See* 1 M.R.S. §409(1).
20. Because of their recognition of the compelling public interest in keeping a watchful eye on how political subdivisions spend taxpayer money, and how political subdivision manage risk by documenting and analyzing actions that result in unforeseen expenditures of taxpayer

funds, settlement documents, including material prepared as a part of settlement negotiations, are not privileged from disclosure under FOAA. *See Citizens Commc'ns Co. v. Att'y Gen.*, 2007 ME 114, ¶ 12, 931 A.2d 503, 506 (holding that Maine FOAA does not provide for an exemption shielding disclosure of draft settlement documents).

21. The interest in public access to settlement documents related to the criminal legal system is particularly compelling because of the authority granted to officers in that system to restrict the liberty of people within the state. Public awareness of whether government entities, such as Kennebec County, Maine County Commissioners Association, and the Risk Pool, are engaged in effective oversight and risk mitigation related to its criminal legal system serves as a vital check on corruption and malfeasance—an interest at the core of FOAA's purpose.

FACTS

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22. On July 6, 2020, Jonathan Afanador filed suit against Kennebec County and Nathan Willhoite, a Kennebec County jail guard, in U.S. District Court in Maine, accusing Officer Willhoite of using excessive force and accusing Kennebec County of failing to provide adequate training and supervision of Officer Willhoite.
23. Mr. Afanador is a Black man, and he accused Officer Willhoite of using pepper spray against him without justification and referring to him by an opprobrious racial epithet. Mr. Afanador further accused Officer Willhoite of placing him in isolation and not permitting him an opportunity to remove the pepper spray from his skin.
24. Mr. Afanador accused Kennebec County of knowing that Officer Willhoite had a history of behaving in a racially discriminatory manner and that it did not take appropriate steps to address this problem.

25. On or about March 3, 2021, Kennebec County and Officer Willhoite agreed to a pretrial settlement of Mr. Afanador's federal civil rights case.
26. On March 3, 2021, Mr. Afanador signed a document entitled "GENERAL RELEASE AND AGREEMENT TO DEFEND, INDEMNIFY, AND HOLD HARMLESS," in which he agreed to "knowingly and voluntarily release and forever discharge" any known or unknown claims he might presently or in the future have against Office Willhoite, Kennebec County, and the Maine County Commissioners Association Self-Funded Risk Management Pool, in exchange for "One Dollar and Other Good and Valuable Consideration."
27. Mr. Afanador further agreed not to disparage or discredit Officer Willhoite or Kennebec County, or to repeat any derogatory rumors or comments about them.
28. Mr. Afanador agreed to hold the facts of the settlement "in strict and complete confidence" and not to disclose the actual amount of the consideration given to anyone, with some limited exceptions.
29. On April 7, 2021, Kennebec County, Officer Willhoite, and Mr. Afanador stipulated to dismissal of Mr. Afanador's federal civil rights case with prejudice and without costs, interest, or attorney's fees for any party.
30. On May 3, 2021, the Portland Press Herald reported that Kennebec County and Mr. Afanador had reached a settlement. The newspaper reported that lawyers representing the parties in the case either did not respond to inquiries, or else said that they could not talk about the case. A copy of the May 3 article is attached as EXHIBIT 1.
31. The newspaper reported that the manager of the county's insurer, an employee of the Maine County Commissioners Association, said that the settlement amount is \$30,000.
32. The newspaper reported that the Kennebec County Sheriff said that Officer Willhoite did a great job while he was employed by Kennebec County but that he no longer worked there.

MAY 7 FOAA REQUEST

33. On May 5, 2021 HRDC learned of the settlement and dismissal of Mr. Afanador's case from the article in the Portland Press Herald, including that the parties seemed determined to keep the terms of settlement secret by, for example, refusing to discuss the settlement with the press.
34. On May 7, 2021, HRDC filed a FOAA request with Kennebec County seeking records related to *Afanador v. Kennebec County et al.*
35. Specifically, HRDC asked for records sufficient to show the names of all parties involved, the case or claim number, and jurisdiction in which the case was brought, the date of resolution, the amount of money involved in the resolution, and to whom the money was paid.
36. HRDC also specifically requested the "settlement agreement . . . that resolved the case." A copy of the May 7 request is attached as EXHIBIT 2.

MAY 20 FOAA RESPONSE

37. On May 20, 2021, Kennebec County responded to the FOAA request. A copy of that response is attached as EXHIBIT 3.
38. In its response, Kennebec County denied access to documents that are not considered public records, without identifying any documents that it was withholding as excluded from the definition of public records.
39. In its response, Kennebec County also indicated that it was denying the request as to any documents "privileged, protected, or not subject to public disclosure" without identifying any documents allegedly covered by privilege or the referencing the applicable privileges themselves.
40. Kennebec County produced four documents along with its May 20 response: Mr. Afanador's federal civil rights complaint; Kennebec County's answer to that complaint; Officer Willhoite's

answer to that complaint; and a copy of the General Release and Agreement to Defend, Indemnify, and Hold Harmless executed by Mr. Afanador on March 3, 2021. Copies of these documents are identified as Attachments A-D to EXHIBIT 3.

JUNE 16 FOAA FOLLOW UP

41. On June 16, 2021, HRDC reached out to counsel for Kennebec County reiterating their request for the settlement agreement between Mr. Afanador and Kennebec County or, in the alternative, an explanation for why their request was being denied. A copy of this email request and the response from Kennebec County is attached as EXHIBIT 4.
42. Kennebec County responded on June 16 that “the settlement agreement was included in our response.”
43. HRDC replied on June 16 that the Portland Press Herald had reported the existence of a \$30,000 settlement, and that HRDC was requesting “any agreement related to” what was reported in the article. HRDC pointed out that the document provided only referenced a \$1 settlement.
44. Kennebec County replied on June 16 that the General Release “is the only document which contains the terms of the settlement.”

REQUEST TO THE MAINE COUNTY COMMISSIONERS ASSOCIATION

45. On June 18, 2021, HRDC sent a follow-up request to the Risk Pool, an agent of Kennebec County for purposes of the *Afanador* settlement, seeking documents in its possession related to payments in connection with *Afanador v. Kennebec County et al.* A copy of this follow-up request is attached as EXHIBIT 5.
46. In a series of email responses between June 18-21, 2021, Malcolm Ulmer responded on behalf of Maine County Commissioners Association Risk Pool, that the General Release (indicating that the case was being dismissed in exchange for “one dollar and other valuable

consideration”) was the only settlement agreement, but that the actual settlement amount was \$30,000. The Maine County Commissioners Association Risk Pool did not produce any additional documents. A copy of this email exchange is attached as EXHIBIT 6.

JULY 2 CONFIRMATION LETTER

47. HRDC has made public records requests for records related to litigation in nearly every state in the country, and it has litigated denial of access to records in numerous states.
48. In HRDC’s experience, governments do not settle lawsuits without generating a significant number of documents related to the terms of settlement, and insurance companies and risk pools do not make payments to settle lawsuits without documentation of the amount of settlement.
49. In particular, the amount paid to settle case is typically reflected in a settlement agreement signed by all parties.
50. Also, insurance companies and risk pools typically maintain accounting records of amounts paid to cover settlements, and these payment amounts are also typically included in emails and cover letters sent among individuals at the insurance company or risk pool and the parties to the settlement.
51. Finally, material prepared as a part of settlement negotiations are not privileged from disclosure under FOAA. *See Citizens Commc'ns Co. v. Att'y Gen.*, 2007 ME 114, ¶ 12, 931 A.2d 503, 506 (holding that Maine FOAA does not provide for an exemption shielding disclosure of draft settlement documents).
52. In light of this, HRDC sent a confirmation letter to Kennebec County and the Risk Pool on July 2, 2021 requesting that they perform an adequate search for documents and produce all responsive documents. A copy of this letter is attached as EXHIBIT 7.

53. The letter requested that Kennebec County and the Risk Pool “provide all responsive documents by Friday, July 9, 2021.” If a complete response was not provided by that date, HRDC stated it would “interpret the failure as a denial or refusal pursuant to 1 M.R.S. § 409(1) and proceed accordingly.”
54. On July 3, 2021, Kennebec County responded that the “Release” document produced “is the only document that contains the terms of the settlement, refers to the terms of settlement, or otherwise relates to the terms of the settlement.” Kennebec County’s attorney offered to review his files for additional responsive documents. No mention was made of any Kennebec County officials reviewing their files or emails for additional responsive documents. A copy of this email is attached as EXHIBIT 8.
55. On July 6, 2021, the Risk Pool responded that “the signed release” was “the only settlement release document.” A copy of this email is attached as EXHIBIT 9.
56. No additional documents were received from Kennebec County, the Maine County Commissioners Association, or the Risk Pool. Accordingly, as of July 9, 2021, HRDC interpreted the failure to respond as a denial of access to records under FOAA.
57. Kennebec County did not agree to settle a federal civil rights lawsuit for \$30,000, and the Risk Pool did not pay \$30,000 to effectuate that settlement, without recording that amount and the purpose for which it was being paid, in a document of some type. Claiming otherwise is evidence of bad faith sufficient to support an award of attorney’s fees pursuant to 1 M.R.S. §409(4).
58. Kennebec County, the Maine County Commissioners Association, and (to the extent that the Court finds it to be a separate entity) the Risk Pool have not performed an adequate search for responsive documents as required under FOAA.

59. Kennebec County, the Maine County Commissioners Association, and (to the extent that the Court finds it to be a separate entity) the Risk Pool have not disclosed all documents responsive to HRDC's request and they have established no just and proper cause for having withheld the missing records.

60. Kennebec County, the Maine County Commissioners Association, and (to the extent that the Court finds it to be a separate entity) the Risk Pool have not justified the withholding of any particular documents under a recognized FOAA exemption.

COUNT I
FAILURE TO DISCLOSE RESPONSIVE RECORDS WITHOUT JUST AND PROPER CAUSE

61. Plaintiff realleges and incorporates by reference the forgoing paragraphs of this Appeal as if fully set forth herein.

62. Kennebec County, the Maine County Commissioners Association, and the Risk Pool did not disclose all public records responsive to HRDC's FOAA request without just and proper cause in violation of FOAA.

63. Kennebec County, the Maine County Commissioners Association, and the Risk Pool performed an inadequate search for responsive records.

64. Kennebec County, the Maine County Commissioners Association, and the Risk Pool improperly withheld responsive records that are not exempt from disclosure under FOAA.

CONCLUSION

HRDC respectfully requests that the Court grant this appeal and enter judgment for Plaintiff and enter:

A. an order for disclosure of responsive records pursuant to 1 M.R.S. §409(1);

- B. an order that Kennebec County, the Maine County Commissioners Association, and the Risk Pool conduct an adequate search for any and all documents discussing the settlement of *Afanador v. Kennebec County, et al.*;
- C. an order for disclosure of an exceptions log for any withheld documents;
- D. an award to the HRDC its costs and reasonable attorney's fees pursuant to 1 M.R.S. §409(4);
and
- E. such other and further relief as the Court deems just and proper.

Dated at Portland, this 1st day of October, 2021, and respectfully submitted,

/s/ Zachary L. Heiden

Zachary L. Heiden (Maine Bar No. 9476)

/s/ Emma E. Bond

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