STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Ken-22-420

HUMAN RIGHTS DEFENSE CENTER,
Appellee

v.

MAINE COUNTY COMMISSIONERS ASSOCIATION SELF-FUNDED RISK MANAGEMENT POOL,
Appellant

On Appeal from the Superior Court, Kennebec County
Docket No. CV-21-31

BRIEF OF APPELLEE HUMAN RIGHTS DEFENSE CENTER

Carol J. Garvan, Bar No. 4448
Zachary L. Heiden, Bar No. 9476
Anahita D. Sotoohi, Bar No. 10120
American Civil Liberties Union of Maine Foundation
P.O. Box 7860
Portland, ME 04112
Telephone: 207-619-8687

Loree Stark, West Virginia Bar No. 12936
Motion for *pro hac vice* admission pending
Human Rights Defense Center
1201 South Congress Ave, Ste. 200
Boynton Beach, FL
Telephone: 913-393-4614

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

This is a case about how the government spends public money. Maine's Freedom of Access Act is borne of a fundamental truth: government exists to "aid in the conduct of the people's business," and that the democratic process only functions if people know what their government is doing. 1 M.R.S. § 401. Appellee Human Rights Defense Center ("HRDC") sought public records in the possession of the Appellant Maine County Commissioners Association Self-Funded Risk Management Pool ("Risk Pool"), but found themselves thwarted at every turn. When HRDC's extensive efforts at informal resolution failed, they sought accountability in the courts.

The Risk Pool sought dismissal of HRDC's complaint, but the trial court correctly found that HRDC's complaint was timely. Appendix ("A") 8-12. After an evidentiary hearing, the trial court correctly rejected the Risk Pool's renewed timeliness arguments. A16-18. The court further held that the Risk Pool violated the law because it had plainly responsive documents in its possession at the time it received HRDC's Freedom of Access Act ("FOAA") request, and yet it refused to disclose those documents as required by FOAA. A18-21. The trial court found that the Risk Pool's refusal was in bad faith, meriting an award of attorney fees and costs to HRDC. A21-24. The trial court's rulings should be upheld.

II. FACTS AND PROCEDURAL HISTORY

A. Human Rights Defense Center seeks public records about the settlement of an excessive force case against Kennebec County jail.

HRDC is a non-profit organization that advocates for progressive changes in the criminal justice system, including the humane and constitutional treatment of prisoners and others impacted by the criminal justice system. Sept. 29, 2022, Hearing Transcript ("Tr.") at 24-25. As part of its advocacy, HRDC publishes *Prison Legal News,* a nationally circulated news magazine that reports on court rulings, legislation, and legal updates about conditions in prisons and jails across the country. *Id.* As part of HRDC's investigative reporting, the organization regularly makes public records requests—over a hundred in a typical year—for information on settlements and verdicts in lawsuits involving prison and jail conditions and police misconduct. Tr. 30. HRDC's goal in seeking and publishing information about the criminal legal system is "to better inform the public, including policy makers, impacted people and their advocates about what is happening within the criminal justice system." Tr. 28. HRDC does not rely on others' reporting for information about legal proceedings, but rather obtains "the original documents" and then "report[s] the outcomes or the case information based on the document." Tr. 39.

To further its investigatory and advocacy mission, HRDC sought to learn more about the settlement of a federal excessive force lawsuit brought by Jonathan

Afanador against Kennebec County and its agents. Mr. Afanador, who is Black, alleged that while he was detained at the Kennebec County jail, he was subjected to racial slurs, pepper-sprayed, and beaten by corrections officers. A107-114. HRDC first became aware of the Afanador case from a *Portland Press Herald* article, which reported that the case had settled for $30,000 according to the Risk Pool manager. A100-101. HRDC then sought to obtain the underlying records related to the excessive force case and settlement and submitted a FOAA request to the Risk Pool on June 18, 2021 seeking "any documents showing payments disbursed [to Afanador or his lawyers]. . . . This includes but is not limited to payment documentation." A13-14, A140, A143-44.

B. HRDC makes repeated efforts to follow up on its records request to the Risk Pool, but is met with refusals and obfuscation.

In response to HRDC's June 18, 2021, FOAA request, the Risk Pool's long-time Director Malcolm Ulmer responded by email that the "settlement amount is $30,000," and referenced a previously provided "General Release" document stating that the Afanador case had settled for "One Dollar and Other Good and Valuable Consideration." A133-34, A143. Noting the inconsistency between the "One Dollar" and "$30,000" amounts, HRDC followed up by email requesting "any documentation that shows the $30,000 amount." A143. Risk Pool Director Ulmer then produced the *Portland Press Herald* article citing Mr. Ulmer's statement that the *Afanador* case had settled for $30,000. A14, A142. The Risk

Pool did not, however, produce any records documenting the payments made to Mr. Afanador or his attorneys. A14. HRDC followed up yet again, asking for "a copy of the actual agreement that shows $30,000." A14, A142. Mr. Ulmer provided no documents in response, but instead reiterated that the case had settled for $30,000. *Id.*

On July 2, 2021 HRDC sent a follow-up records request to the Risk Pool through counsel, explaining that the Risk Pool's response was deficient because it had not produced documents "that show that $30,000 was paid to Mr. Afanador [or] showing payment to any attorneys involved in the case." A14-15, A145-47. The letter gave specific examples of the kinds of records that would be responsive to HRDC's request:

> Other documents that are potentially responsive to the FOAA request include accounting records, a copy of a cover letter that was sent with payment, emails between individuals in county government and officials in the sheriff's office, or memoranda suggesting that officers not engage in whatever conduct led to the filing of the litigation in the first place.

A147. HRDC's July 2, 2021 request further explained that the Risk Pool's refusal to provide responsive documents would be interpreted as a denial of the FOAA request. A15, A147. On July 6, 2021, the Risk Pool responded that it had already "advised [HRDC] of the settlement amount," and again referenced the General Release document stating the case had settled for "One Dollar." A149. The Risk Pool did not provide any documents responsive to HRDC's request—no

"accounting records," no copies of "a cover letter that was sent with payment," no "emails between individuals in county government and officials in the sheriff's office," and no "memoranda suggesting that officers no engage in whatever conduct led to the filing of the [Afanador] litigation in the first place." A149. As of today, HRDC still has not received the requested documents.

C. After multiple unsuccessful attempts to obtain responsive public records from the Risk Pool, HRDC files suit under FOAA.

On July 27, 2021, HRDC filed suit against Kennebec County and the Maine County Commissioners Association ("MCCA"), claiming that their responses to HRDC's FOAA requests violated the Act. A15, A25-36. The next day, HRDC's counsel informed Mr. Ulmer by email of the lawsuit. A82. Mr. Ulmer responded, noting that the Maine County Commissioners Association was a different organization from the Maine County Commissioners Association Self Funded Risk Management Pool. A86. HRDC's counsel responded that MCCA had been named in the suit because, based on publicly available information and corporate records, it did not appear to be a separate legal entity from the Risk Pool. A86. HRDC's attorney could not find any documentation showing that the Risk Pool was a separate legal entity, and Mr. Ulmer was identified as an employee of the Maine County Commissioners Association on the association's website. A86.

On October 1, 2021, HRDC sought leave to amend its Complaint to add the Risk Pool as a party. A38. The trial court granted the motion to amend. A3 (11/10/2021 docket entry, "motion to amend pleading granting").

D. The trial court denies the Risk Pool's attempt to have the case dismissed as untimely.

On February 28, 2022, the Risk Pool sought dismissal under M.R. Civ. P. 12(b)(6) on timeliness grounds, arguing that:

> The deadline for Plaintiff to have filed a FOAA claim against the Risk Pool was August 5, which is 30 days after the Risk Pool's July 6 response to the second FOAA request. . . . Plaintiff's proposed amended complaint adding the Risk Pool as a party is dated in October and the Court granted leave to amend that same month. Plaintiff's claim as to the Risk Pool is therefore outside the 30-day deadline established by [FOAA].

A71-72. The trial court refused to dismiss the case, finding that HRDC's amendment related back to the date of its original Complaint (filed July 27, 2021) and was therefore timely as to the Risk Pool. A10-11, A15. In a detailed Order, the trial court accepted the Risk Pool's timeline and characterization of the parties' pre-litigation communications. *Id.* The trial court agreed with the Risk Pool that HRDC's July 2, 2021 request was a second FOAA request and that HRDC was obligated to file its appeal by August 5, 2021—30 days from the Risk Pool's July 6, 2021 response to that request. *Id.*

The trial court acknowledged the parties' post-filing correspondence about the relationship between the Risk Pool and MCCA, but nonetheless found that

there was "good reason" for HRDC's counsel to be confused as to the relationship because the lines between the two entities were "blurry at best" and not easily understood with publicly accessible information. *Id.* The court reasoned that the "significant intermingling of Risk Pool and MCCA business, the lack of any public facing information that would inform a person that the Risk Pool is a distinct entity,"[1] and the fact that HRDC's counsel was "actively seeking to determine whether the Risk Pool truly existed as a separate entity" demonstrated that there was "a clear mistake concerning the identity of the proper party." A11-12. The court therefore concluded that HRDC's amendment related back to the date of its original Complaint under M. R. Civ. P. 15(c). A12.

E. Following an evidentiary hearing, the trial court determines that the Risk Pool failed to produce responsive documents in violation of FOAA and acted in bad faith.

The trial court held an evidentiary hearing on HRDC's FOAA complaint on September 29, 2022, admitting documentary evidence and hearing live testimony from two witnesses: Risk Pool Director Ulmer and HRDC Executive Director Paul Wright.

[1] As evidence of this "significant intermingling," the trial court observed that "[t]here is no organization going by the Risk Pool's name registered as any kind of business entity with the Maine Secretary of State, unlike the MCCA"; "The MCCA lists Mr. Ulmer as "staff" in their meeting minutes, and Risk Pool business is presented to the MCCA's Board of Directors for discussion"; and "Mr. Ulmer uses a "mainecounties.org" email address, the same one used by staff members of the MCCA." A11-12 (citations omitted).

At the start of the hearing, the Risk Pool attempted to reargue its motion to dismiss, asserting for the first time (and before any evidence was presented) that HRDC's filing deadline was July 21, 2021 and that the Risk Pool's final denial of HRDC's FOAA request was on June 21—over two weeks earlier than the Risk Pool had stated in its Motion to Dismiss. Tr. 17-18. The Risk Pool further argued that HRDC's July 2 letter to the Risk Pool was not a second FOAA request (as the Risk Pool had stated in its Motion to Dismiss) but rather an "entry of appearance." Tr. 167-69.

Mr. Ulmer testified that when the Risk Pool received HRDC's FOAA request, it did, in fact, possess documents related to payments made in the *Afanador* case, such as canceled checks. Tr. 117-18. Mr. Ulmer testified that he had a claim file related to the *Afanador* case, which contained "material related to the settlement of the Afanador matter." A8, Tr. 118. These documents included records showing the amount that was paid to Mr. Afanador, as well as claim records, banking records, documents that are prepared in order to request payment, and documents created by individuals and entities outside the Risk Pool. A8, Tr. 118-19. Mr. Ulmer testified that he had not believed HRDC was requesting those (or any) documents in its document request—only that it was interested in information. Tr. 116-119, 136.

After receiving post-hearing briefing from both parties, the trial court issued a thorough twelve-page Order on December 1, 2022 finding in HRDC's favor on all three issues: (1) HRDC's complaint was timely, (2) the Risk Pool's FOAA response was inadequate, (3) the Risk Pool withheld documents in bad faith, meriting an award of attorneys' fees to HRDC. A13-24. **First**, the trial court rejected the Risk Pool's timeliness arguments on two alternative grounds. The court held that the Risk Pool was estopped from belatedly asserting that HRDC's filing deadline was July 21, 2021, a position that was "clearly inconsistent" with its prior position and would allow the Risk Pool to gain the "unfair advantage of suddenly changing its timeline at this late stage of proceedings." A16-18. The court further held that even if the Risk Pool were not estopped from taking this plainly contrary position, the Risk Pool gave the court no reason to revisit its earlier ruling that HRDC's July 2, 2021 letter was a second FOAA request to which the Risk Pool responded on July 6, 2021, rendering HRDC's August 5, 2021 complaint timely. The court observed that the Risk Pool's "belated argument that this [July 2, 2021] letter should be completely disregarded is absurd" and reminded defense counsel of the requirements of Rule 11. A18 & n.4.

Second, the court found that the Risk Pool had failed to adequately respond to HRDC's FOAA request. The court held that the Risk Pool's response providing a copy of a *Portland Press Herald* article was "clearly not an adequate response to

HRDC's request," reasoning that "FOAA does not ensure a right to assurances from public officials" but rather guarantees "a right to public documents." A19. The court further found that the Risk Pool had plainly responsive documents in its possession (including a "claim file" with accounting records showing the actual amount paid in settlement), and even though "Mr. Ulmer knew that he had responsive documents," he "decided to prevaricate and obfuscate rather than disclose them." A20-21. Finally, the court rejected each of the Risk Pool's asserted excuses, finding not "credible" Mr. Ulmer's testimony that he did not think he had to disclose the claim file records and rejecting the Risk Pool's "semantic gamesmanship" in "clear abuse of the FOAA process." A21.

Third, the court found that the Risk Pool withheld documents in bad faith, meriting an award of attorney's fees and costs to HRDC. The court catalogued the Risk Pool's "absurd, blatantly untrue, and inconsistent legal positions" and "bizarre interpretations," and concluded that this "obfuscation and prevarication undermines the basic purpose of FOAA." A23. Given the Risk Pool's "deceptive and abusive" behavior, the Court found that an award of attorney's fees to HRDC was warranted. A23.

The Risk Pool filed a post-judgment motion for amended findings of fact under M.R. Civ. P. 52(b), which the trial court denied. A7 (2/6/2023 docket entry, "Motion Alter/Amend Order/Judg Denied").

This appeal followed.

III. SUMMARY OF ARGUMENT

The trial court's rulings should be affirmed in all respects. **First**, the trial court properly held that HRDC's appeal was timely because their Amended Complaint related back to the date of its original Complaint. **Second**, the court correctly concluded that the Risk Pool was estopped from changing its position on timing and in any event the court's original ruling on timing was correct. **Third**, the trial court properly determined that the Risk Pool illegally withheld responsive public records in its possession. And **Fourth**, the trial court correctly concluded the Risk Pool's conduct in this case amounted to "bad faith" because no reasonable party would have behaved as they did, justifying an award of attorney's fees to HRDC.

IV. ARGUMENT

A. The trial court did not abuse its discretion in finding that HRDC's amended FOAA appeal related back to its original complaint.

The trial court correctly found that HRDC's October 1, 2021 amendment related back to its original July 27, 2021 Complaint. Although the Risk Pool had informed counsel for HRDC that MCCA was a separate entity from the Risk Pool, HRDC was justified in its misunderstanding given the inconsistency between the statements of the Risk Pool and the public record. And, any skepticism HRDC

might have harbored about the veracity of statements from the Risk Pool was vindicated by the Court in its ultimate decision on the merits.

On appeal, the Risk Pool relies on *Wilson* and *Garland* to assert that because Mr. Ulmer informed Attorney Heiden that the Risk Pool was a separate entity from MCCA, there was no "mistake" within the meaning of M.R. Civ. P. 15(c). Alternatively, the Risk Pool asserts that even if HRDC made a mistake, no evidence shows that the Risk Pool knew or should have known that but for the mistake, the action would have been brought against the Risk Pool. The undisputed record contradicts the Risk Pool on both counts.

Rulings on motions to amend under Rule 15 are "committed to the sound discretion of the trial court. One seeking to overturn such a determination on appeal must demonstrate a clear and manifest abuse of that discretion." *Glynn v. S. Portland*, 640 A.2d 1065, 1067 (Me. 1994). "An abuse of discretion may be found where an appellant demonstrates that the decisionmaker exceeded the bounds of reasonable choices available to it." *Forest Ecology Network v. Land Use Reg. Comm'n*, 2012 ME 36, ¶ 28, 39 A.3d 74.[2]

The Risk Pool relies on *Garland* and *Wilson* to assert that HRDC did not make a "mistake" within the meaning of Rule 15(c) but rather made a conscious

[2] The governing standard of review is the standard applicable to M.R. Civ. P. 15(c). The trial court's Order on the Motion to Dismiss relied exclusively on Rule 15(c). A8-12. Likewise, the Risk Pool's Motion to Dismiss relied on Rule 15(c).

choice to sue one party over another, but that reliance is misplaced.[3] In both *Garland* and *Wilson*, the plaintiffs did not assert that they had ever been confused as to the proper defendant. Instead, in both cases, the plaintiffs simply changed their minds over who to sue. *Garland v. Sherwin*, 2002 ME 131, ¶¶ 3, 8, 804 A.2d 354; *Wilson v. U.S. Gov't*, 23 F.3d 559, 562 (1st Cir. 1994). In *Wilson*, the First Circuit found that the amended complaint could not relate back because the plaintiff "merely lacked knowledge of the proper party. In other words, Wilson fully intended to sue GEGS, he did so, and GEGS turned out to be the wrong party." *Id.* Similarly, Garland's attempt to relate back his amendment failed because he made "[a] conscious choice to sue one party rather than another." *Garland*, 2002 ME ¶ 8, 804 A.2d 354.

The trial court did not abuse its discretion in concluding that HRDC made no such conscious choice here. Instead, before initiating litigation, HRDC's counsel investigated the status of the two organizations and concluded that they were likely one and the same. A73-74. The trial court correctly found that this mistake was easy to make, given the "significant intermingling" of the two entities and the absence of "any public facing information" suggesting the entities were distinct.

[3] The Risk Pool emphasizes that HRDC knew "that Risk Pool was a separate entity" because it sent FOAA requests to both Kennebec County and the Risk Pool. Brief of Appellant at 11-12. There is no dispute that the Risk Pool and Kennebec County are separate entities. The issue is whether HRDC knew the MCCA Self-Funded Management Risk Pool is a separate entity from MCCA.

A11. Among other things, the Risk Pool is not registered as a business entity with the Maine Secretary of State; Risk Pool Director Ulmer is identified as "staff" on the MCCA website and in MCCA's meeting minutes; and Mr. Ulmer uses a "mainecounties.org" email address just like staff-members of MCCA. A11-12, A73-75, A79-80. Unlike in *Garland* and *Wilson*, there was no conscious choice to sue one entity over another; rather, there was a reasonable, good faith belief, founded on a wealth of publicly available information, that there was only one entity to be sued. This falls easily into the definition of a "mistake."

The Risk Pool next argues that even if there was a good-faith mistake, the Risk Pool neither knew nor should have known that but for the mistake, suit would have been brought against the Risk Pool. The trial court correctly rejected this argument. A11-12. Mr. Ulmer was on notice (via email) that HRDC believed MCCA and the Risk Pool to be the same. A86. After receiving that notice, he responded at length discussing the FOAA request sent to Risk Pool, explaining why the Risk Pool had responded as it had, and requesting a copy of the Complaint. A85. He explicitly requested that MCCA be dismissed from the case "as there is no reasonable basis for litigation being pursued against this entity." *Id.* It is obvious that Mr. Ulmer understood that HRDC sought to hold Risk Pool liable and knew that the action would have been brought against the Risk Pool but for HRDC's mistaken belief that the Risk Pool was not a separate legal entity.

The trial court properly found that HRDC's amendment related back to the date of original filing because HRDC made a genuine mistake as to the proper defendant and the Risk Pool knew that but for the mistake, it would have been sued. Therefore, HRDC's appeal as to the Risk Pool was timely. The Risk Pool has not demonstrated any error in the court's ruling, let alone met its high burden to show that the court's Rule 15(c) findings were an abuse of discretion.

B. The trial court properly rejected the Risk Pool's late-breaking attempt to take a directly contradictory position on timeliness.

At the evidentiary hearing last fall, the Risk Pool asserted for the first time that HRDC's appeal was untimely because the Risk Pool's final denial of the FOAA request purportedly occurred on June 21, 2021, rather than on July 6, 2021 as the Risk Pool had previously claimed in its Motion to Dismiss. The trial court properly found that the Risk Pool was estopped from changing its position regarding the correct timing of the appeal, and that even if it were not estopped, the Risk Pool had offered no reason for the court to revisit its earlier ruling that HRDC's July letter was a second FOAA request. A16-18. On appeal, the Risk Pool argues that it was not estopped from changing its position to assert that HRDC was obligated to file its appeal by July 21, 2021, because its Motion to Dismiss was denied and because its change in position was based on supposed new evidence admitted at hearing. These arguments must be rejected.

1. The Risk Pool is estopped from taking clearly inconsistent positions on the timing of HRDC's FOAA Request and the Risk Pool's response.

This case fits squarely within the doctrine of judicial estoppel. Judicial estoppel "applies when a party takes positions that are clearly inconsistent with each other, the party in the previous action successfully convinced the court to accept the inconsistent position in the previous action, and the party gained an unfair advantage due to the change in position." *State Tax Assessor v. TracFone Wireless, Inc.*, 2022 ME 36 ¶ 17 n. 6, 276 A.3d 521 (quotations omitted); Brief of Appellant at 17.

All three requirements for judicial estoppel are met here. The Risk Pool's two positions on timing are clearly contradictory. The Risk Pool originally stated in its Motion to Dismiss that HRDC's July 2, 2021 request was a separate FOAA request and that "[t]he deadline for Plaintiff to have filed a FOAA claim against the Risk Pool was August 5, which is 30 days after the Risk Pool's July 6 response." A8, A16-17. Then, the Risk Pool later claimed at the evidentiary hearing that HRDC's July 2 request was not a request at all but just an "entry of appearance," and that the appeal deadline was July 21, 2021, which is 30 days after the Risk Pool's June 21, 2021 response. Tr. 17-18, 167-69. The Court accepted the Risk Pool's previous position in its Order on the Motion to Dismiss. A8, A16-17. The Risk Pool would gain an unfair advantage if not estopped as it would be permitted to change its position depending on its needs at any time during this

case, wasting judicial resources and making it impossible for HRDC to advance arguments fairly based on the Risk Pool's earlier representations. HRDC would be further disadvantaged because it litigated this case for months in reliance on the position advanced by the Risk Pool—and accepted by the Court—that the Risk Pool's final refusal or denial occurred on July 6, 2021.

The Risk Pool misinterprets the judicial estoppel standard, conflating whether its motion to dismiss was successful with whether its position regarding timing was successful. It is irrelevant, for judicial estoppel purposes, whether the Risk Pool's motion to dismiss was granted. "Success" in the estoppel context means not a party's ultimate success on the merits, but a party's success in convincing the court to accept its prior inconsistent position. *TracFone Wireless, Inc.*, 2022 ME 36, ¶ 17 n. 6, 276 A.3d 521; *Lovell v. Lovell*, 2020 ME 139, ¶ 5, 243 A.3d 887. This is demonstrated by the Risk Pool's own cited case, *New Hampshire v. Maine*, in which the Supreme Court stated that estoppel is important because it prevents "inconsistent court determinations [and] protect[s] the integrity of the judicial process." *New Hampshire v. Maine*, 532 U.S. 742, 749, 755 (2001) (quotations and citations omitted). That inconsistency is avoided by holding parties to positions accepted by the court; it is not avoided by permitting parties to take contradictory positions whenever their motions are not granted. The Risk Pool's initial position regarding timeliness, as presented in its Motion to Dismiss, was

therefore "successful" because the trial court accepted it, concluding (at the Risk Pool's urging) that HRDC's July 2, 2021 request was a separate FOAA request, that the Risk Pool's July 6, 2021 email response was a final refusal or denial, and that the 30-day filing deadline was August 5, 2021. A8, A16-17. The Risk Pool was properly estopped from changing its position on these points.

The Risk Pool next argues that it was not estopped from taking directly contrary positions because it learned "new information" at the evidentiary hearing and changed its position accordingly. This argument is contradicted by both the record and law. First, the Risk Pool made its contradictory timeliness argument in its opening statement at the hearing, before any evidence was presented. Tr. 17-18. Second, judicial estoppel does not cease to apply when a party uncovers new evidence (assuming *arguendo* that the Risk Pool did)—rather, when new evidence requires a different result, a party is free to file a motion under M.R. Civ. P. 60(b).[4] Third, the evidence the Risk Pool relies on to defend its changed position does not actually support the change. Mr. Wright simply testified that Mr. Ulmer's June 21, 2021 email to HRDC "looked like he was done responding." Tr. 101. The trial court did not interpret this as new evidence justifying a sudden change in the Risk Pool's position, but rather correctly found that even with this statement, "no new

[4] It is worth noting that the Risk Pool did file a lengthy post-judgment motion for amended findings of fact under Rule 52(b), and the trial court denied that motion. A7.

information . . . came out in the hearing." A18. Mr. Wright's testimony does not allow the Risk Pool to escape estoppel.

Finally, the Risk Pool mistakenly relies on *Lighthouse Imaging* to assert that a party cannot be estopped by a position it takes in a motion to dismiss. But in *Lighthouse*, the positions at hand were not actually inconsistent (merely different), and so there was no threat of inconsistent judicial determinations. *Lighthouse Imaging, LLC v. OneBeacon Am. Ins. Co.*, No. 2:13-cv-237-JDL, 2014 WL 12726313, at *9 (D. Me. June 25, 2014) ("Here, the plaintiff's position in this declaratory judgment action is simply not inconsistent with its motion to dismiss in the underlying action."). HRDC does not dispute that a party may take *different* positions at different stages of litigation. But here, the Risk Pool's two positions are distinctly opposed and cannot be reconciled with one another: adopting the Risk Pool's later position would have required the trial court to issue an opinion squarely inconsistent with its earlier order. The trial court properly found that the Risk Pool was estopped from changing its position on timeliness.

2. Even if the Risk Pool is not estopped, HRDC's appeal was timely.

Even absent estoppel, the trial court correctly found that HRDC's appeal was timely because it was filed within 30 days of the Risk Pool's final refusal of the FOAA request on July 6, 2021, and the trial court's factual findings on this point are entitled to substantial deference.

"Factual findings of the trial court are reviewed for clear error." *State v. Milliken*, 2010 ME 1, ¶ 19, 985 A.2d 1152. On appeal, this Court "will vacate a court's finding according to the clear error standard of review only if that finding is not supported by competent record evidence, is based on a clear misapprehension by the trial court of the meaning of the evidence, or is so against the great preponderance of the believable evidence that . . . the finding does not represent the truth and right of the case." *In re Alijah K.*, 2016 ME 137, ¶ 15, 147 A.3d 1159 (quotations omitted). Under this well-established standard, this Court should accept the trial court's factual finding that the July 2, 2021 letter from HRDC to the Risk Pool was a second FOAA request, and the Risk Pool's July 6, 2021 response was a final denial of that request. A16. The Risk Pool has not demonstrated that the trial court's factual finding was in error, let alone so unfounded as to meet the clear error standard. The court's factual finding was fairly based on the Risk Pool's own statements and on the court's review of the record before it. *Id.*

But even if this Court accepts the Risk Pool's new characterization of HRDC's July 2, 2021 letter to the Risk Pool as a "follow up" (Appellant Brief at 4, 15), the Risk Pool's timing argument still fails.[5] FOAA explicitly acknowledges

[5] Notably, this is the third position the Risk Pool has taken on the nature of HRDC's July 2021 correspondence. A70 (Motion to Dismiss) ("On July 2, 2021, Plaintiff, through the ACLU of Maine, made a second FOAA request to the Risk Pool."); Tr. 169 (labeling the July correspondence an "entry of appearance"); Brief of Appellant at 15 (labeling the July correspondence "a follow up letter"). Of course, if this Court classifies the July 2, 2021 correspondence as a second FOAA request (in accordance with the trial court and the Risk

that a requester and a government agency may need to have a dialogue to clarify a request. 1 M.R.S. § 408-A(3). HRDC's July 2, 2021 letter was labeled "HRDC FOAA Follow-Up" and stated that if records were not provided, that would be interpreted as a denial or refusal. A145-47. It is clear from the text of the July 2, 2021 letter that HRDC did not believe it had received a final denial or refusal from the Risk Pool. A146-47. In its July 6, 2021 response, Mr. Ulmer made no request for clarification and did not dispute the letter's characterization of the parties' communications. A149. The Risk Pool had every opportunity to clarify what it considered to be its final refusal and instead accepted HRDC's position that as of July 2, 2021, that refusal had not yet happened. The Risk Pool's most recent position—that Mr. Ulmer's June 2021 email to HRDC was the Risk Pool's final refusal that started to run the FOAA clock—is contradicted by the undisputed written record.

Moreover, the Court should not permit the Risk Pool to now claim that its dialogue with HRDC, which included multiple letters and emails exchanged over the roughly three-week period between June 18, 2021 and July 6, 2021, actually concluded not with the Risk Pool final response on July 6, 2021 but with its penultimate response on June 26, 2021. Adopting the Risk Pool's position would

Pool's original position), then there is no question that HRDC's original Complaint was timely filed.

incentivize future FOAA defendants to engage in extensive back-and-forth dialogue, deny the FOAA request, and then claim in subsequent litigation that the final denial actually occurred earlier than the plaintiff would reasonably have understood. Such a ruling could also incentivize future FOAA requesters to rush to the courthouse to file an appeal at the first whiff of denial, lest they miss the deadline. Both of these outcomes would result in unnecessary litigation and a waste of judicial resources. The Risk Pool's stated policy concern—that FOAA requesters might be motivated to send follow ups for years and extend the deadline to appeal—should be rejected as absurd. FOAA requesters are motivated to receive the documents they are looking for; there is no motivation to extend the deadline for appeal instead of making every effort to obtain documents. Likewise, most entities receiving FOAA requests would likely prefer a serious effort at informal resolution over a rush to litigation.

The trial court's holding that HRDC's complaint was timely filed should be upheld.

C. The Risk Pool failed to respond adequately to HRDC's FOAA request.

Notably, the Risk Pool's brief on appeal focuses on timeliness and bad faith, but does not even attempt to argue that it responded adequately to HRDC's FOAA request. As the trial court noted, "[t]he Risk Pool presumably reaches to invent a new timeliness argument because their argument on the merits is so weak." A18.

The court correctly concluded that the Risk Pool illegally withheld responsive public records in its possession. A18-20.

There is no dispute that HRDC requested "payment documentation," "any documents showing payments disbursed," and "any documentation that shows the $30,000 amount." A13-14, A140-143. There is likewise no dispute that HRDC then sent a letter to the Risk Pool, through counsel, explaining that the response thus far had been deficient because HRDC has not yet received documents "that show that $30,000 was paid to Mr. Afanador [or] showing payment to any attorneys involved in the case," and providing examples of responsive records. A14-15, A147. And, as long-time Risk Pool Director Malcolm Ulmer himself admitted at the hearing, the Risk Pool maintains a claim file for each case it settles that contains documents showing the amounts actually paid in each case, including Mr. Afanador's case claim records, banking records, and documents prepared to request payment. A8, Tr. 117-118. Finally, it is undisputed that the Risk Pool did not provide HRDC with any of the claim file documents in its possession showing the amounts paid in the Afanador case, nor did it claim that any of these documents were privileged or subject to any FOAA exemption. The Risk Pool's refusal to provide HRDC with plainly responsive documents in its possession is a clear violation of FOAA.

D. The Risk Pool acted in bad faith.

The written record and the testimony adduced at the evidentiary hearing amply support the trial court's finding that the Risk Pool did not act in good faith when responding to HRDC's FOAA request, but instead withheld plainly responsive documents in bad faith. 1 M.R.S. § 409(4). The trial court correctly found bad faith based on a litany of examples of the Risk Pool "taking baseless positions or otherwise abusing legal process, and adopting "absurd, blatantly untrue, and inconsistent legal positions" in litigation. A13-23.

On appeal, the Risk Pool struggles to construct an argument that it did not act in bad faith, asserting that its contradictory timeliness arguments were a good faith dispute; that Mr. Ulmer purported interpretations of HRDC's FOAA request were not in bad faith; and that the Risk Pool's post-filing conduct is irrelevant to the determination of bad faith under FOAA. These arguments are all unpersuasive. The legislature clearly meant something when it included the "bad faith" standard in 1 M.R.S. §409(4). *See Cobb v. Board of Counseling Prof'ls Licensure*, 2006 ME 48, 896 A.2d 271, 275 ("All words in a statute are to be given meaning, and none are to be treated as surplusage if they can be reasonably construed.") If "bad faith" means anything, it must encompass the actions of the Risk Pool.

1. The trial court correctly interpreted the bad-faith standard.

Although this Court has not previously interpreted the bad-faith standard under FOAA, the Court adopts the traditional tools of statutory interpretation, looking "to the plain language of the statute; legislative intent; related Maine cases; and case law from other jurisdictions." *Despres v. Moyer*, 2003 ME 41, ¶ 15, 827 A.2d 61 (citations omitted).[6] These interpretive tools support the bad-faith standard the trial court applied: bad faith exists under FOAA when a party takes "baseless positions or "abus[es] legal processes, when a party "adopt[s] absurd, blatantly untrue, and inconsistent legal positions," or when a party engages in behavior that is "deceptive and abusive of the FOAA process" to a significant degree. A22-23.

The Court looks first to the plain language of the statutory phrase "bad faith," which—contrary to the Risk Pool's assertion—has a clear, commonsense meaning. In short, a party acts in bad faith if it takes a position that has no reasonable basis or if it acts deceptively. "Bad faith" carries this same meaning across multiple areas of Maine law. *See* 14 M.R.S. § 8701(3)(A)(6), (7) (defining bad faith in the patent infringement context as a party undertaking meritless or deceptive actions); *Cimenian v. Lamb*, 2008 ME 107, ¶ 11, 951 A.2d 817 (noting action may be brought in bad faith if it is baseless). Black's Law Dictionary also offers a single definition ("dishonesty of belief, purpose, or motive") which aligns

[6] The Risk Pool notes, in passing, that the trial court interpreted FOAA's bad-faith provision incorrectly but offers no alternative interpretation. Brief of Appellant at 22.

with Maine's definitions. *Bad faith*, Black's Law Dictionary, (11th ed. 2019). Merriam-Webster's single definition ("lack of honesty in dealing with other people") similarly aligns with both Black's and with Maine law.[7] *See Searle v. Bucksport*, 2010 ME 89, ¶ 10, 3 A.3d 390 (using Black's and Merriam-Webster definitions to interpret a statute). The trial court properly adopted precisely this standard.

Further, even if the Court were to look beyond the plain language and case law to the legislative history relied on by the Risk Pool (the only legislative history discussing bad faith in the FOAA context), that history only further bolsters the trial court's statutory interpretation. Representative Priest explicitly conflated bad faith in the FOAA context with "sanctions against lawyers who bring frivolous or bad faith actions." 2 Legis. Rec. H-623 (1st Reg. Sess. 2009). The trial court evidently had this same standard in mind when it concluded that the Risk Pool acted in bad faith. *See* A18, n. 4 (reminding the Risk Pool's attorney of their obligations of Rule 11); *see also* A18, n. 6 (reiterating that reminder).

Similar cases from other jurisdictions further support the trial court's statutory interpretation. For example, under Mississippi's public records law a government agency acts in bad faith when its denial of records is based on an utterly unjustified legal position and when it presents numerous, inconsistent

[7] *Bad Faith*, Merriam-Webster, https://www.merriam-webster.com/dictionary/bad%20faith.

justifications for its withholding of records. *Miss. Dep't of Wildlife, Fisheries & Parks v. Miss. Wildlife Enf't Officers' Ass'n*, 740 So.2d 925 (Miss. 1999). Similarly, under Tennessee's public records law, bad faith exists when the government entity relies on a baseless, invalid privilege to refuse disclosure. *Schneider v. Jackson,* 226 S.W.3d 332 (Tenn. 2007).

The bad-faith standard applied by the trial court matches the commonsense dictionary definition of "bad faith," properly reflects the legislative history, and echoes the bad-faith standard already extant across multiple areas of Maine's procedural and substantive law.

2. The trial court properly found that the Risk Pool acted in bad faith.

The trial court correctly found that the Risk Pool acted in bad faith based on two separate sets of facts: first, the Risk Pool's irrational and willfully obtuse interpretation of the FOAA request in abuse of the FOAA process, A22, and second, the Risk Pool's adoption of "absurd, blatantly untrue, and inconsistent" positions in this FOAA litigation. A23. Either of these sets of facts independently support a finding of bad faith.

First, the trial court properly found bad-faith conduct based on Mr. Ulmer's irrational interpretation of HRDC's FOAA request, finding that "Mr. Ulmer abused the FOAA clarification process to invent a pretext to justify his refusal to disclose responsive documents, never even admitting that he had those documents." A22.

Attempting to escape this conclusion, the Risk Pool clings to its argument that Mr. Ulmer merely misinterpreted the request and this misinterpretation was not in bad faith. But the trial court expressly found Mr. Ulmer's testimony about his interpretation of the FOAA request not credible, concluding that "[a]ny reasonable person in Mr. Ulmer's position would have understood that HRDC was seeking additional public records confirming that Mr. Afanador was actually paid $30,000, and Mr. Ulmer knew he had these documents in his custody." A20, *see also* A22. This Court defers to a trial court's "determination of witnesses' credibility" even if "an alternative finding also finds support in the evidence." *Gordon v. Cheskin*, 2013 ME 113, ¶ 12, 82 A.3d 1221. The Risk Pool has no answer for the trial court's interpretation of Mr. Ulmer's testimony, nor does it have any argument for why this Court ought to prefer the Risk Pool's self-serving interpretation of its own Director's testimony over the trial court's.

The Risk Pool further argues at length that a mere failure to disclose records is not bad faith. HRDC agrees: most FOAA disputes—about whether a search for records is sufficiently thorough, or about whether an exemption to disclosure might apply—do not involve bad faith. But the Risk Pool did not merely fail to disclose records here. As the trial court found, "instead of forthrightly discussing what documents it did have to clarify the HRDC's request, [it] apparently decided to engage in semantic gamesmanship to avoid disclosing that it even possessed

responsive documents. This approach is a clear abuse of the FOAA process." A21. The Risk Pool's "deliberate attempt to withhold" falls precisely within the definition of "bad faith" that the Risk Pool relies on. Brief of Appellant at 23 (citing FOAA legislative history).

Lastly, the Risk Pool baselessly argues that Mr. Ulmer was willing to provide a response if only HRDC had specifically identified the document it wanted. *Id.* at 24-25. But FOAA does not require any "magic words": there are no grounds in statute or case law for the Risk Pool's position that a FOAA requester must specifically name the documents it seeks. In any FOAA case, there is a dramatic information imbalance between the public entity (with all the information about the records in its possession, including where and how they are stored) and the requester (with very little information about what the entity possesses). Requiring FOAA requesters, with their limited knowledge, to identify by name the specific documents they want would fatally undermine the Act. Mr. Ulmer's ostensible willingness to provide documents if only they were specifically identified is not an act of good faith—it is a willful attempt to rewrite FOAA in a way that would make it extraordinarily difficult for the public to obtain records about their government's activities.

But even more troubling, HRDC *did* specifically identify the documents it wanted, and even then the Risk Pool failed to produce the documents and

continued to deny their existence. A140 (June 2021 FOAA request, seeking "any documents showing payments disbursed . . . . including payment documentation"); A143 (email correspondence between HRDC and the Risk Pool, stating "Do you have any documentation that shows the $30,000 amount?"); A147 (correspondence between HRDC's counsel and the Risk Pool, stating "Other documents that are potentially responsive to the FOAA request include accounting records," and listing other responsive records); A84 (correspondence between HRDC's counsel and the Risk Pool, stating "our client never received any documents showing that $30,000 was paid to resolve the case"); A90 (correspondence between HRDC's counsel and the Risk Pool, stating "Our client is interested in the actual documents that discuss or refer to the settlement agreement, and not simply the information contained in those documents.").

As the trial court found, despite HRDC's explicit and repeated requests, the Risk Pool failed to turn over or even acknowledge the existence of responsive records that it knew it had in its possession. If this is not bad faith, it is hard to imagine what is.

Second, the trial court properly found bad faith based on the Risk Pool's adoption of absurd, untruthful, and inconsistent legal positions in this FOAA litigation. A23. As the trial court found, the Risk Pool's deliberately evasive tactics in litigation undermine the fundamental purpose of the open records law:

> At every stage of the FOAA process, the Risk Pool and Mr. Ulmer adopted bizarre interpretations of HRDC's request to avoid disclosure, despite knowing from the beginning that they were in possession of responsive documents. This type of obfuscation and prevarication undermines the basic purpose of the FOAA, which is to enable the public to be informed about what their government is up to.

Id. The Risk Pool has no answer to the trial court's factual findings that the Risk Pool took baseless positions in litigation—including the Risk Pool's patently false claim that HRDC had never requested the records it did, in fact, explicitly request. A23. And, the Risk Pool's evasive litigation behavior is plainly relevant to the court's analysis of whether it acted in bad faith. Indeed, even if there was no specific authorization in FOAA for an award of attorney fees, such an award would still have been appropriate based on the Risk Pool's frivolous behavior during litigation. *Walker v. Heber*, 534 A.2d 969, 970 (Me. 1987) (quotation omitted); *Tuell v. Nicholson*, 2014 ME 118, ¶ 11, 103 A.3d 207 (affirming trial court's imposition of attorney fees as sanction for frivolous motion). The Risk Pool cannot choose to adopt baseless and untrue positions in litigation, but then escape any responsibility for those evasive tactics. The trial court properly found bad faith based on the Risk Pool's conduct.

V. CONCLUSION

The trial court properly found that HRDC's FOAA appeal was timely, that the Risk Pool inadequately responded to HRDC's FOAA request, and that the Risk Pool acted in bad faith. The trial court's decision should be affirmed, and this

Court should award HRDC their reasonable attorney's fees and costs for this appeal.

Respectfully submitted this 10th day of April, 2023,

/s/ Carol J. Garvan
Carol J. Garvan, Bar No. 4448
cgarvan@aclumaine.org
207-619-8687

/s/ Zachary L. Heiden
Zachary L. Heiden, Bar No. 9476
zheiden@aclumaine.org
207-619-6224

/s/Anahita D. Sotoohi
Anahita D. Sotoohi, Bar No. 10120
asotoohi@aclumaine.org
207-613-4350

American Civil Liberties Union of Maine Foundation
P.O. Box 7860
Portland, ME 04112
Telephone: 207-619-8687

/s/ Loree Stark
Loree Stark
West Virginia Bar No. 12936
Motion for *pro hac vice* admission pending
Human Rights Defense Center
1201 South Congress Ave., Ste. 200
Boynton Beach, FL 33426
lstark@humanrightsdefensecenter.org
914-393-4614

Attorneys for Appellee Human Rights Defense Center

CERTIFICATE OF SERVICE

I, Zachary L. Heiden, Attorney for Human Rights Defense Center, certify that on April 10, 2023, I served this brief via email and mail on:

Jeffrey T. Edwards
jedwards@preti.com
Preti, Flaherty, Beliveau & Pachios, LLP
One City Center
P.O. Box 9546
Portland, ME 04112
Counsel for Appellant Maine County Commissioners Association Self-Funded Risk Management Pool

/s/ Zachary L. Heiden
Zachary L. Heiden