

STATE OF MAINE
KENNEBEC, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AUGSC-CV-
2021-131

HUMAN RIGHTS DEFENSE CENTER,

Plaintiff,

v.

MAINE COUNTY COMMISSIONERS

ASSOCIATION RISK POOL,

Defendant.

RESPONSE TO DEFENDANT’S

MOTION TO DISMISS

Plaintiff the Human Rights Defense Center (“HRDC”) hereby submits its Response to Defendant’s Motion to Dismiss pursuant to M.R. Civ. P. 12(b)(6). In support thereof, Plaintiff states as follows:

INTRODUCTION

This is a case about piercing through the obfuscatory tactics that government entities sometimes engage in to try to hide the terms of legal settlements. This case concerns documents related to the settlement terms of a federal civil rights case brought against Kennebec County—terms that are described in the only document so-far produced as “One Dollar and Other Good and Valuable Consideration.” No documents documenting the agreed-upon the amount, or documenting that the money has actually been paid, have been produced by the Defendant. Instead, the Defendant attempts to have this case dismissed on the basis of its filing being untimely.

Defendant's argument must fail because Plaintiff's October 25, 2021 amendment relates back to its timely filed initial Complaint. Permitting Defendant to evade judicial review in this case would reward them for confusion that is, at least in part, of their own making.

FACTS

This case was originally filed on July 27, 2021 against Kennebec County and the Maine County Commissioners Association ("MCCA"). The Maine County Commissioners Association Self-Funded Risk Management Pool ("Risk Pool") was not originally named as a Defendant because Plaintiff believed that they were not a separate legal entity. Heiden Affidavit ¶¶ 4-7. Plaintiff was aware that Malcolm Ulmer had been the recipient of the Freedom of Access Act request under appeal, but Plaintiff believed that Mr. Ulmer worked for the MCCA: he is identified a staff member of the MCCA on the organization's website and in the minutes of meetings of the MCCA Board of Directors; he uses a "mainecounties.org" work email address; and the physical address for the Risk Pool is the same as the MCCA. Heiden Affidavit ¶¶ 3, 6.¹ In addition, the Maine Secretary of State's Office has no record of the Risk Pool being organized as a business entity under the laws of the State of Maine. Heiden Affidavit ¶ 5. Mr. Ulmer was provided a copy of the complaint, and Plaintiff attempted to effectuate service to him at the time of the initial filing. Heiden Affidavit ¶¶ 10-12. On October 1, a motion to add the Risk Pool as an additional party was filed with the Court, and the Court subsequently granted that motion.

ARGUMENT

A. Plaintiff's amendment relates back to its original Complaint and is therefore timely.

FOAA requires a party seeking records to file suit within thirty days of receiving written notice that its request for records has been denied. 1 M.R.S. § 409(1). Plaintiff received

¹ *Maine County Commissioners Association*, <https://www.mainecounties.org/contact-us.html> (last visited Mar. 15, 2022).

Defendant's original written denial on July 6, 2021, and the original complaint in this matter was filed on July 27, 2021. Defendant was formally added as a party on October 25, 2021. Nonetheless, Plaintiff's amendment of its Complaint to add Defendant must be deemed timely because it relates back to Plaintiff's original Complaint.

An amendment to a pleading relates back to the date of the original pleading when the claim asserted in the amended pleading "arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading." M.R. Civ. P. 15(c)(2). When an amendment changes the name against whom a claim is brought, the amendment will still relate back so long as to the requirements of Rule 15(c)(2) are met and:

within the period provided by Rule 3 for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

M.R. Civ. P. 15(c)(3).

The Rule is intended to "prevent parties against whom claims are being made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." Advisory Committee's Notes (1993).

According to M.R. Civ. P. 3, when a plaintiff files a complaint prior to effecting service, it must demonstrate that service has been effected within ninety days of the complaint being filed. M.R. Civ. P. 3.

Thus, an amendment to add a claim against a party relates back to the original filing if 1) the amendment arises out of the same occurrence as alleged in the original pleading; 2) the added party received sufficient notice of the action within 90 days of the filing of the original pleading;

and 3) the added party knew or should have known that but for a mistake, a claim would be brought against it. Plaintiff's October 25 amendment meets these requirements.

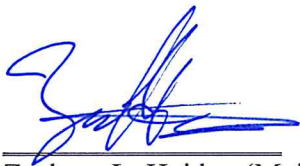
First, there can be no dispute that Plaintiff's Amended Complaint asserted a claim which arose out of occurrence set forth in its original pleading. Plaintiff's Amended Complaint made minimal changes to the substance of the original Complaint, and did not put forth any new factual allegations not present in the original Complaint, except to assert that Defendant should now be a party. Plaintiff's Amended Complaint rested, just as its original Complaint rested, on Defendant's July 6 denial of records and Kennebec County's preceding denial of records. The first requirement of M.R. Civ. P. 15(c)(3) is easily met.

In addition, Defendant was provided with ample notice of the original Complaint within the timeframe permitted by Rule 3, and knew or should have known that but for a mistake, Defendant would have been a party to the original Complaint. Mr. Ulmer was provided an electronic copy of the original complaint on July 28, 2021. Heiden Affidavit, ¶ 10. Plaintiff also attempted to provide Mr. Ulmer with a physical copy of the complaint, along with a summons, on July 29, 2021. Heiden Affidavit ¶ 11. On August 27, 2021, Malcolm Ulmer—undisputedly a contractor for Defendant and the person Defendant designated as its M.R.C.P. 30(b)(6) deponent—emailed counsel for Plaintiff stating he was aware of “your FOAA appeal.” Heiden Affidavit ¶ 12. On September 5, 2021, Mr. Ulmer advised Plaintiff's counsel that he had assisted the Maine County Commissioners Association (“MCCA”) in retaining counsel for this matter. *Id.* On September 30, 2021—sixty-five days after the original Complaint was filed—counsel for Plaintiff advised Mr. Ulmer via email that Defendant would be added as a party and asking the best address for service to be effectuated.

For Plaintiff's amendment to relate back, Defendant must have received sufficient notice of this suit by October 25, 2021. By that date, Defendant was aware that this suit was filed, aware that the suit was related to Defendant's FOAA denial, and aware that Plaintiff sought to add Defendant as a party. Defendant does not argue—and cannot argue—that it was in any way barred from asserting a defense on the merits in this matter. Furthermore, it is clear that Defendant knew that, but for confusion related the relation of the MCCA and the Risk Pool, it would have been named originally as a party to this action. Thus, Plaintiff's amendment meets the requirements imposed by M.R. Civ. P. 15, its amendment relates back to the date the original Complaint was filed, and is therefore timely for the purposes of FOAA.

Therefore, Plaintiff respectfully requests that the Court deny Defendant's Motion to Dismiss.

Dated this 16th day of March, 2022, and respectfully submitted,



Zachary L. Heiden (Maine Bar No. 9476)
/s/ Anahita D. Sotoohi
Anahita D. Sotoohi (Maine Bar No. 10120)
American Civil Liberties Union of Maine Foundation
PO Box 7860
Portland, Maine 04112
(207) 619-6224
zheiden@aclumaine.org

STATE OF MAINE
KENNEBEC, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AUGSC-CV-
2021-131

HUMAN RIGHTS DEFENSE CENTER,

Plaintiff,

v.

MAINE COUNTY COMMISSIONERS

ASSOCIATION SELF-FUNDED RISK

MANAGEMENT POOL,

Defendant.

AFFIDAVIT OF ZACHARY L. HEIDEN

I, Zachary L. Heiden, being duly sworn, depose and say the following:

1. I am an attorney in Maine, and I am counsel to the Plaintiff in the above captioned matter.
2. On July 2, 2021, I sent a letter by regular and electronic mail to Peter Marchesi (counsel for Kennebec County) and Malcolm Ulmer, for the purpose of reiterating plaintiff's public documents request and informing them that plaintiff would be pursuing litigation if they were not provided with additional responsive documents that Plaintiff believed existed; this letter has previously been filed in this case as Exhibit 7 to Plaintiff's First Amended Complaint.
3. I sent a physical copy of the letter to Mr. Ulmer to 2 Gabriel Drive, Suite 2, Augusta, Maine 04330, and I emailed a copy to him at mlu@mainecounties.org because these were the addresses provided for him on the Maine County Commissioners Association website, a copy of which is attached as "Heiden Affidavit, Exhibit 1." The "mainecounties.org" email

address is also used by Lauren Haven, the administrator of the Maine County Commissioners Association.

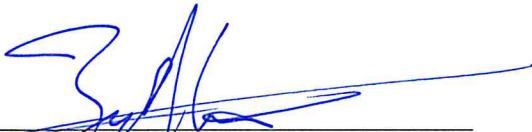
4. In anticipation of the filing of this lawsuit, I researched whether the Maine County Commissioners Association Self-Funded Risk Management Pool (“Risk Pool”) was an entity with a distinct legal personality, such that it was capable of being sued, or else whether it was simply a project or program of the Maine County Commissioners Association.
5. As part of that research, I conducted a search for any entity named, “Maine County Commissioners Association Self-Funded Risk Management Pool” or any entity containing the words “Maine County Commissioners Association,” “Risk Management Pool,” “Risk Pool” in their title, on the Corporations Division website of the Office of the Maine Secretary of State, which contains records of all Maine business corporations, non-profit corporations, limited partnerships, limited liability partnerships, general partnerships, and cooperatives. I was able to find a record of the Maine County Commissioners Association’s registration as a Maine non-profit corporation, but I was not able to find record of an entity with the name “Maine County Commissioners Association Self-Funded Risk Management Pool” organized to do business in Maine.
6. I then reviewed the minutes of a number of Maine County Commissioners Association Board of Directors meetings, which are available on the Maine County Commissioners Association website, for information about the Risk Pool. In those minutes, Mr. Ulmer was consistently identified in the “Staff Present” section of the minutes, and the operations of the Risk Pool were presented to the board for discussion.

7. From this, I concluded that the Risk Pool was a part of the Maine County Commissioners Association and not a separate legal entity that could be independently sued.
8. On July 28, 2021, I emailed Mr. Ulmer and Mr. Marchesi informing them that Plaintiff had filed this case and asking with Mr. Marchesi or some other lawyer would be acting as counsel to Kennebec County and the Maine County Commissioners Association. A copy of that email is attached as “Heiden Affidavit, Exhibit 2.”
9. Later that day, Mr. Ulmer responded and requesting that I provide him with a copy of the Complaint for his review to assist him with his decision about who to retain as counsel. A copy of that email is attached as “Heiden Affidavit, Exhibit 3.”
10. I responded by email and provided Mr. Ulmer with a copy of the complaint later that day. A copy of that email is attached as “Heiden Affidavit, Exhibit 4.”
11. In addition, on July 29, 2021, I sent a copy of the complaint, along with the summons and service acknowledgment, to Mr. Ulmer at the “2 Gabriel Drive” address provided for him on the Maine County Commissioners Association website, by certified mail, return receipt requested. That package was returned to my office as undeliverable on August 26, 2021. A copy of that returned mail notice is attached as “Heiden Affidavit, Exhibit 5.”
12. On August 27, 2021, Mr. Ulmer emailed me that he would work with the Maine County Commissioners Association to ensure that the acknowledgment of service was completed. I emailed a copy of the service acknowledgement form to Mr. Ulmer on August 30, 2021. Mr. Ulmer responded on September 5, 2021, that he was assisting the Maine County Commissioners Association with retaining counsel, and that once counsel was retained they would complete service. A copy of that email is attached as “Heiden Affidavit, Exhibit 6.”

13. On October 1, I filed a motion to amend to add “Maine County Commissioners Association Self-Funded Risk Management Pool” as an additional defendant. While I had, and have, concerns about the nature of the Risk Pool’s legal personality, as well as their relationship to the Maine County Commissioners Association, unraveling that was not my client’s primary interest in this case.

I declare under penalty of perjury that the foregoing is true and correct, and that I am competent to testify.

Dated at Portland, Maine this 16th of March, 2022.



Zachary L. Heiden

STATE OF MAINE
CUMBERLAND, SS

Personally appeared the above named *Zachary L. Heiden*, known to me, this *16th* day of *March 2022*, and swore that the above statement to be true and, based on his personal knowledge, except where stated to be on information and belief, in which case, he believes the statements true,

Before me,

 16 0004448

Carol J. Garvan
ATTORNEY AT LAW, Maine Bar No.

Heiden Affidavit

Exhibit 1



- Home
- COVID Relief
- About Us
- Calendar of Events
- Contact Us
- Convention of Maine Counties
- County Gov Day
- Directory of Maine Counties
- Job Opportunities & RFPs
- Legislative Information
- Links and Contacts
- Maine Counties
- Newsletters and Articles
- Meeting Agendas and Minutes
- NACo
- Resources & Training

Maine County Commissioners Association

MCCA Staff

Lauren Haven

Administrator
 4 Gabriel Drive, Suite 2
 Augusta, Maine 04330
 Phone: (207) 623-4697
 Cell: (207) 213-3384
 Fax: (207) 512-2124
 lauren.haven@mainecounties.org



What Does Lauren Do?

Risk Management Pool



Malcolm Ulmer

Director of Operations
 MCCA Risk Pool
 4 Gabriel Drive, Suite 2
 Augusta, Maine 04330
 Phone: (207) 894-7166
 Fax: (207) 221-1750
 Email: mlu@mainecounties.org

MCCA Contracted Lobbyist



Lobbying services are provided by Verrill. MCCA is very fortunate to have James Cohen heading up the team assisting counties with bills which will impact counties. His mission is to help our organization achieve our legal and policy goals before state and local regulatory agencies and legislative bodies. His experience in public service and leadership positions on multiple business and nonprofit boards gives him a deep understanding of government and a broad range of connections within Maine's business and political community.

Would you like to see something added to the website?

This resource is for county representatives.
Tell us how we can help you!

Send MCCA Staff a Message Here:

** Indicates required field*

Name *

First

Last

Email *

Comment *

Submit

Maine County Commissioners Association

4 Gabriel Drive, Suite 2
Augusta, ME 04330
Phone: (207) 623-4697
Fax: (207) 512-2124

Heiden Affidavit

Exhibit 2

Subject: Re: Human Rights Defense Center FOAA follow-up
Date: Wednesday, July 28, 2021 at 8:51:40 AM Eastern Daylight Time
From: Zach Heiden
To: Malcolm L. Ulmer, Peter Marchesi
CC: Emma Bond

Malcolm and Peter,

We filed a FOAA appeal in Kennebec County Superior Court yesterday in this matter, and I'm writing to inquire 1) if Peter is going to be representing both Kennebec County and the Maine County Commissioners Association, and 2) if so, do you agree to accept service on their behalf. If the answer to these questions is yes, I'll email a copy of the complaint and get the paperwork in the mail to you today.

Thanks very much, and I hope your summers are going well.

warm regards,

Zach

Zachary L. Heiden
pronouns: he/him/his
Chief Counsel
American Civil Liberties Union of Maine
PO Box 7860
Portland, ME 04112
■ office: [207-774-5444](tel:207-774-5444)
■ direct: [207-619-6224](tel:207-619-6224)
■ zheiden@aclumaine.org
www.aclumaine.org

From: Malcolm L. Ulmer <mlu@mainecounties.org>
Sent: Tuesday, July 6, 2021 11:36 AM
To: Zach Heiden <heiden@aclumaine.org>
Cc: Emma Bond <ebond@aclumaine.org>; Peter Marchesi <peter@wheelerlegal.com>
Subject: Re: Human Rights Defense Center FOAA follow-up

EXTERNAL MESSAGE:

Zach:

Thanks for your e-mail message shown below. It is my understanding that Peter Marchesi, Esq. has already responded to your inquiry, but I am writing to ensure that you receive a separate response from the Risk Pool. I previously advised Samantha Beauvais that it is my understanding that the signed release provided to her by Mr. Marchesi is the only settlement release document and I also advised her of the settlement amount.

Regards,

Malcolm L. Ulmer
MCCA Risk Pool

From: Zach Heiden [<mailto:heiden@aclumaine.org>]
Sent: Friday, July 2, 2021, 4:45 PM

To: Peter Marchesi <peter@wheelerlegal.com>, Mal <mlu@mainecounties.org>
Cc: Emma Bond <ebond@aclumaine.org>
Subject: Human Rights Defense Center FOAA follow-up

Malcolm and Peter,
Please see attached.
Have a nice holiday,
Zach

Zachary L. Heiden
pronouns: he/him/his
Chief Counsel
American Civil Liberties Union of Maine
PO Box 7860
Portland, ME 04112
office: [207-774-5444](tel:207-774-5444)
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✉ zheiden@aclumaine.org
www.aclumaine.org

Heiden Affidavit

Exhibit 3

Subject: Re: Human Rights Defense Center FOAA follow-up
Date: Wednesday, July 28, 2021 at 1:29:24 PM Eastern Daylight Time
From: Malcolm L. Ulmer
To: Zach Heiden
CC: Emma Bond, Peter Marchesi
Attachments: Kennebec County settles excessive force lawsuit against jail guard.pdf

EXTERNAL MESSAGE:

Zach:

I can't speak to why Maine County Commissioners Association's website is set up the way it is. All I can do is to indicate that it reflects incorrect or outdated information with respect to its relationship with the Risk Pool and to tell you again that it's a separate entity from the Risk Pool and that it isn't involved in the operations of the Risk Pool. Further, while I can see that they may possibly refer to me as "staff," I am not employed by Maine County Commissioners Association.

Getting back to the more important issue at hand, I'm still trying to understand why litigation is being pursued when your client has already been informed of the settlement and the amount of the settlement. Attached please find a newspaper article that I e-mailed to your client on June 18, 2021 (the same day that your client first e-mailed me regarding this matter). While the article incorrectly refers to me as an attorney in the second paragraph ("An attorney for the county's insurer said the settlement amount is \$30,000."), the article subsequently indicates that I "confirmed the amount of the settlement" (as \$30,000). Your client obviously knows that the Afanador case was settled for \$30,000, so I don't understand why a lawsuit has been filed, but I remain willing to try to be helpful to the extent appropriate and in a manner that is consistent with my role on behalf of the Risk Pool. Again, if there is a specific document or specific other information that you are seeking, in addition to what was previously provided your client or to you either by the Risk Pool or Attorney Marchesi, please identify for me the specific document or information and I will determine whether such document or information exists and, if so, whether we are able and willing to voluntarily provide said document or information to you.

While it remains difficult for me to understand why your office has filed a lawsuit in this matter, given my prior immediate responses to your client on June 18, 2021 and June 21, 2021, I can't make any decisions regarding who will be retained as defense counsel until I have had an opportunity to review the Complaint. I would appreciate you e-mailing me a copy of the Complaint at your earliest convenience. I am also requesting that you voluntarily dismiss your pending legal action against Maine County Commissioners Association, as there is no reasonable basis for litigation being pursued against this entity (or against the Risk Pool or Kennebec County at this time) due to its lack of involvement in this matter and because it appears that this matter has already been resolved or likely will be resolved to the extent you and your client request specific additional documents or information that actually exist and are likely subject to disclosure under the FOAA.

Thank you for your consideration of my comments. I look forward to receiving your response at your earliest convenience and to seeing this matter resolved without unnecessary litigation.

Regards,

Malcolm L. Ulmer
MCCA Risk Pool

From: Zach Heiden [<mailto:heiden@aclumaine.org>]
Sent: Wednesday, July 28, 2021, 12:33 PM

To: Malcolm L. Ulmer <mly@mainecounties.org>
Cc: Emma Bond <ebond@aclumaine.org>, Peter Marchesi <peter@wheelerlegal.com>
Subject: Human Rights Defense Center FOAA follow-up

Malcolm,

Thank you for the response. We named the Maine County Commissioners Association, as I was unable to find any documentation about the existence of the Risk Pool as an entity having an independent legal personality and because you are listed as an employee of the Maine County Commissioners Association on their website.

As for the request itself, our client never received any documents showing that \$30,000 was paid to resolve the case, and they believe (based on their experience requesting and obtaining records related to settlements in other jurisdictions) that such documents must exist somewhere.

Please let me know at your earliest convenience whether Peter will be representing the Maine County Commissioners Association.

thank you,
Zach

Zachary L. Heiden
pronouns: he/him/his
Chief Counsel
American Civil Liberties Union of Maine
PO Box 7860
Portland, ME 04112
■ office: [207-774-5444](tel:207-774-5444)
■ direct: [207-619-6224](tel:207-619-6224)
■ zheiden@aclumaine.org
www.aclumaine.org

From: Malcolm L. Ulmer <mly@mainecounties.org>
Sent: Wednesday, July 28, 2021 10:13 AM
To: Zach Heiden <zheiden@aclumaine.org>
Cc: Emma Bond <ebond@aclumaine.org>; Peter Marchesi <peter@wheelerlegal.com>
Subject: Re: Human Rights Defense Center FOAA follow-up

EXTERNAL MESSAGE:

Zach:

Good morning. I'm writing on behalf of the Risk Pool only and will leave any response on behalf of Kennebec County to Peter Marchesi.

Please let me know what I'm missing and why the Risk Pool has apparently been named in your FOAA lawsuit (presumably you have named the Risk Pool and not Maine County Commissioners Association, which is a separate entity). I previously responded to your client, Ms. Beauvais at the Human Rights Defense Center, and confirmed for her the settlement amount in the Afanador v. Kennebec County case and also that the settlement release provided to her by Attorney Marchesi was a copy of the actual settlement release. I subsequently responded to your e-mail and letter dated July 2, 2021 (see my e-mail to you dated July 6, 2021 shown below). In response to my e-mail dated July 6, 2021, you responded as follows:

From: Zach Heiden [<mailto:heiden@aclumaine.org>]
Sent: Tuesday, July 6, 2021, 11:49 AM
To: Malcolm L. Ulmer <mclu@mainecounties.org>
Cc: Emma Bond <ebond@aclumaine.org>, Peter Marchesi <peter@wheelerlegal.com>
Subject: Human Rights Defense Center FOAA follow-up

Thanks very much. Yes, I saw those responses.
regards,
Zach

Zachary L. Heiden
pronouns: he/him/his
Chief Counsel
American Civil Liberties Union of Maine
PO Box 7860
Portland, ME 04112
☎ office [207-774-5444](tel:207-774-5444)
☎ direct [207-619-6224](tel:207-619-6224)
✉ zheiden@aclumaine.org
www.aclumaine.org

Based on your response, it was my impression that your inquiry was resolved and that no further was required by the Risk Pool. If there is something further that you are seeking from the Risk Pool, please specify the information that you are seeking and I will be pleased to let you know whether such information exists and, if so, whether the Risk Pool will voluntarily provide the relevant information or document to you. This approach strikes me as a more reasonable and more efficient approach to handling this situation than litigating an issue that seems to have already been resolved or, if not, is likely easily resolved.

Thank you for your consideration of my comments. I look forward to receiving your response at your earliest convenience.

Regards,

Malcolm L. Ulmer
MCCA Risk Pool

From: Zach Heiden [<mailto:heiden@aclumaine.org>]
Sent: Wednesday, July 28, 2021, 8:51 AM
To: Malcolm L. Ulmer <mclu@mainecounties.org>, Peter Marchesi <peter@wheelerlegal.com>
Cc: Emma Bond <ebond@aclumaine.org>
Subject: Human Rights Defense Center FOAA follow-up

Malcolm and Peter,

We filed a FOAA appeal in Kennebec County Superior Court yesterday in this matter, and I'm writing to inquire 1) if Peter is going to be representing both Kennebec County and the Maine County Commissioners Association, and 2) if so, do you agree to accept service on their behalf. If the answer to these questions is yes, I'll email a copy of the complaint and get the paperwork in the mail to you today.

Thanks very much, and I hope your summers are going well.
warm regards,
Zach

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To: Zach Heiden <heiden@aclumaine.org>
Cc: Emma Bond <ebond@aclumaine.org>; Peter Marchesi <peter@wheelerlegal.com>
Subject: Re: Human Rights Defense Center FOAA follow-up

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MCCA Risk Pool

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To: Peter Marchesi <peter@wheelerlegal.com>, Mal <mLU@mainecounties.org>
Cc: Emma Bond <ebond@aclumaine.org>
Subject: Human Rights Defense Center FOAA follow-up

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■ zheiden@aclumaine.org

www.aclumaine.org

Heiden Affidavit

Exhibit 4

Subject: Re: Human Rights Defense Center FOAA follow-up
Date: Wednesday, July 28, 2021 at 7:49:35 PM Eastern Daylight Time
From: Zach Heiden
To: Malcolm L. Ulmer
CC: Emma Bond, Peter Marchesi
Attachments: HRDC_complaint.pdf

Hi Malcolm,

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. They did not receive any documents that referred to any amount of money other than the \$1 referred to in the Release form, and they believe that there is something else.

A copy of the complaint that we filed yesterday is attached. I'm going to mail a copy along with the summons and acknowledgement to the Maine County Commissioners Association and Kennebec County tomorrow, unless you and/or Peter give me the name of another lawyer who can accept service.

Have a nice evening,

Zach

Zachary L. Heiden
pronouns: he/him/his
Chief Counsel
American Civil Liberties Union of Maine
PO Box 7860
Portland, ME 04112
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From: Malcolm L. Ulmer <mlu@mainecounties.org>
Sent: Wednesday, July 28, 2021 1:29 PM
To: Zach Heiden <heiden@aclumaine.org>
Cc: Emma Bond <ebond@aclumaine.org>; Peter Marchesi <peter@wheelerlegal.com>
Subject: Re: Human Rights Defense Center FOAA follow-up

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Zach:

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Getting back to the more important issue at hand, I'm still trying to understand why litigation is being pursued when your client has already been informed of the settlement and the amount of the settlement. Attached please find a newspaper article that I e-mailed to your client on June 18, 2021 (the same day that your client first e-mailed me regarding this matter). While the article incorrectly refers to me as an attorney in the second paragraph ("An

attorney for the county's insurer said the settlement amount is \$30,000."), the article subsequently indicates that I "confirmed the amount of the settlement" (as \$30,000). Your client obviously knows that the Afanador case was settled for \$30,000, so I don't understand why a lawsuit has been filed, but I remain willing to try to be helpful to the extent appropriate and in a manner that is consistent with my role on behalf of the Risk Pool. Again, if there is a specific document or specific other information that you are seeking, in addition to what was previously provided your client or to you either by the Risk Pool or Attorney Marchesi, please identify for me the specific document or information and I will determine whether such document or information exists and, if so, whether we are able and willing to voluntarily provide said document or information to you.

While it remains difficult for me to understand why your office has filed a lawsuit in this matter, given my prior immediate responses to your client on June 18, 2021 and June 21, 2021, I can't make any decisions regarding who will be retained as defense counsel until I have had an opportunity to review the Complaint. I would appreciate you e-mailing me a copy of the Complaint at your earliest convenience. I am also requesting that you voluntarily dismiss your pending legal action against Maine County Commissioners Association, as there is no reasonable basis for litigation being pursued against this entity (or against the Risk Pool or Kennebec County at this time) due to its lack of involvement in this matter and because it appears that this matter has already been resolved or likely will be resolved to the extent you and your client request specific additional documents or information that actually exist and are likely subject to disclosure under the FOAA.

Thank you for your consideration of my comments. I look forward to receiving your response at your earliest convenience and to seeing this matter resolved without unnecessary litigation.

Regards,

Malcolm L. Ulmer
MCCA Risk Pool

From: Zach Heiden [<mailto:heiden@aclumaine.org>]
Sent: Wednesday, July 28, 2021, 12:33 PM
To: Malcolm L. Ulmer <mly@mainecounties.org>
Cc: Emma Bond <ebond@aclumaine.org>, Peter Marchesi <peter@wheelerlegal.com>
Subject: Human Rights Defense Center FOAA follow-up

Malcolm,

Thank you for the response. We named the Maine County Commissioners Association, as I was unable to find any documentation about the existence of the Risk Pool as an entity having an independent legal personality and because you are listed as an employee of the Maine County Commissioners Association on their website.

As for the request itself, our client never received any documents showing that \$30,000 was paid to resolve the case, and they believe (based on their experience requesting and obtaining records related to settlements in other jurisdictions) that such documents must exist somewhere.

Please let me know at your earliest convenience whether Peter will be representing the Maine County Commissioners Association.

thank you,
Zach

Zachary L. Heiden
pronouns: he/him/his
Chief Counsel
American Civil Liberties Union of Maine
PO Box 7860
Portland, ME 04112
■ office: [207-774-5444](tel:207-774-5444)
■ direct: [207-619-6224](tel:207-619-6224)
■ zheiden@aclumaine.org
www.aclumaine.org

From: Malcolm L. Ulmer <mLU@mainecounties.org>
Sent: Wednesday, July 28, 2021 10:13 AM
To: Zach Heiden <zheiden@aclumaine.org>
Cc: Emma Bond <ebond@aclumaine.org>; Peter Marchesi <peter@wheelerlegal.com>
Subject: Re: Human Rights Defense Center FOAA follow-up

EXTERNAL MESSAGE:

Zach:

Good morning. I'm writing on behalf of the Risk Pool only and will leave any response on behalf of Kennebec County to Peter Marchesi.

Please let me know what I'm missing and why the Risk Pool has apparently been named in your FOAA lawsuit (presumably you have named the Risk Pool and not Maine County Commissioners Association, which is a separate entity). I previously responded to your client, Ms. Beauvais at the Human Rights Defense Center, and confirmed for her the settlement amount in the Afanador v. Kennebec County case and also that the settlement release provided to her by Attorney Marchesi was a copy of the actual settlement release. I subsequently responded to your e-mail and letter dated July 2, 2021 (see my e-mail to you dated July 6, 2021 shown below). In response to my e-mail dated July 6, 2021, you responded as follows:

From: Zach Heiden [<mailto:heiden@aclumaine.org>]
Sent: Tuesday, July 6, 2021, 11:49 AM
To: Malcolm L. Ulmer <mLU@mainecounties.org>
Cc: Emma Bond <ebond@aclumaine.org>, Peter Marchesi <peter@wheelerlegal.com>
Subject: Human Rights Defense Center FOAA follow-up

Thanks very much. Yes, I saw those responses.
regards,
Zach

Zachary L. Heiden
pronouns: he/him/his
Chief Counsel
American Civil Liberties Union of Maine
PO Box 7860
Portland, ME 04112
■ office: [207-774-5444](tel:207-774-5444)
■ direct: [207-619-6224](tel:207-619-6224)
■ zheiden@aclumaine.org
www.aclumaine.org

Based on your response, it was my impression that your inquiry was resolved and that no further was required by the Risk Pool. If there is something further that you are seeking from the Risk Pool, please specify the information that you are seeking and I will be pleased to let you know whether such information exists and, if so, whether the Risk Pool will voluntarily provide the relevant information or document to you. This approach strikes me as a more reasonable and more efficient approach to handling this situation than litigating an issue that seems to have already been resolved or, if not, is likely easily resolved.

Thank you for your consideration of my comments. I look forward to receiving your response at your earliest convenience.

Regards,

Malcolm L. Ulmer
MCCA Risk Pool

From: Zach Heiden [<mailto:heiden@aclumaine.org>]
Sent: Wednesday, July 28, 2021, 8:51 AM
To: Malcolm L. Ulmer <mLU@mainecounties.org>, Peter Marchesi <peter@wheelerlegal.com>
Cc: Emma Bond <ebond@aclumaine.org>
Subject: Human Rights Defense Center FOAA follow-up

Malcolm and Peter,

We filed a FOAA appeal in Kennebec County Superior Court yesterday in this matter, and I'm writing to inquire 1) if Peter is going to be representing both Kennebec County and the Maine County Commissioners Association, and 2) if so, do you agree to accept service on their behalf. If the answer to these questions is yes, I'll email a copy of the complaint and get the paperwork in the mail to you today.

Thanks very much, and I hope your summers are going well.

warm regards,

Zach

Zachary L. Heiden
pronouns: he/him/his
Chief Counsel
American Civil Liberties Union of Maine
PO Box 7860
Portland, ME 04112
■ office: [207-774-5444](tel:207-774-5444)
■ direct: [207-619-6224](tel:207-619-6224)
■ zheiden@aclumaine.org
www.aclumaine.org

From: Malcolm L. Ulmer <mLU@mainecounties.org>
Sent: Tuesday, July 6, 2021 11:36 AM
To: Zach Heiden <heiden@aclumaine.org>
Cc: Emma Bond <ebond@aclumaine.org>; Peter Marchesi <peter@wheelerlegal.com>
Subject: Re: Human Rights Defense Center FOAA follow-up

EXTERNAL MESSAGE:

Zach:

Thanks for your e-mail message shown below. It is my understanding that Peter Marchesi, Esq. has already responded to your inquiry, but I am writing to ensure that you receive a separate response from the Risk Pool. I previously advised Samantha Beauvais that it is my understanding that the signed release provided to her by Mr. Marchesi is the only settlement release document and I also advised her of the settlement amount.

Regards,

Malcolm L. Ulmer
MCCA Risk Pool

From: Zach Heiden [<mailto:heiden@aclumaine.org>]

Sent: Friday, July 2, 2021, 4:45 PM

To: Peter Marchesi <peter@wheelerlegal.com>, Mal <mlu@mainecounties.org>

Cc: Emma Bond <ebond@aclumaine.org>

Subject: Human Rights Defense Center FOAA follow-up

Malcolm and Peter,
Please see attached.
Have a nice holiday,
Zach

Zachary L. Heiden
pronouns: he/him/his
Chief Counsel
American Civil Liberties Union of Maine
PO Box 7860
Portland, ME 04112
■ office: [207-774-5444](tel:207-774-5444)
■ direct: [207-619-6224](tel:207-619-6224)
■ zheiden@aclumaine.org
www.aclumaine.org

Heiden Affidavit

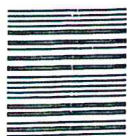
Exhibit 5



7020 1290 0000 2163 6753



1005



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U.S. POSTAGE PAID
PM 1 Day
PORTLAND, ME
04101
JUL 29, 21
AMOUNT
\$14.15
R2305E125467-22

*Notified
8-2-21*

AGLU

Maine

PO Box 7859, Portland, ME 04112

1st NOTICE AUG - 2 2021
2nd NOTICE
ESTIMATED
AUG 17 2021

W. Swinners Assoc.

AGLU

RETURN TO SENDER

ATTEMPTED NOT KNOWN
 INSUFFICIENT ADDRESS
 NO SUCH NUMBER
 TEMPORARILY UNDELIVERABLE AS ADDRESSED
 NO SUCH STREET
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 INCANT

NO SUCH NUMBER
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 INCANT

Augus

NAME W
1ST NOTICE 8/20
2ND NOTICE _____
RETURN _____

Heiden Affidavit

Exhibit 6

Monday, March 14, 2022 at 13:32:08 Eastern Daylight Time

Subject: Re: Human Rights Defense Center FOAA follow-up
Date: Saturday, August 28, 2021 at 2:48:19 PM Eastern Daylight Time
From: Malcolm L. Ulmer
To: Zach Heiden
CC: Emma Bond, Peter Marchesi

EXTERNAL MESSAGE:

See below, which was apparently sent to an old e-mail address for you..

From: Malcolm L. Ulmer [<mailto:mlu@mainecounties.org>]
Sent: Friday, August 27, 2021, 10:49 AM
To: Zachary Heiden <heiden@mclu.org>
Cc: Emma Bond <ebond@aclumaine.org>, Peter Marchesi <peter@wheelerlegal.com>
Subject: Human Rights Defense Center FOAA follow-up

Zach:

It is my understanding that you contacted Jim Cohen, Esq. regarding the above-captioned matter. Mr. Cohen provides lobbying services to MCCA, but does not serve as its legal counsel.

I previously contacted MCCA to see if it had received your FOAA appeal and I was advised that it had not received anything from your office. This seems to be consistent with your comments to Mr. Cohen.

While I remain surprised that formal action is being pursued by your office in this matter, I'm certainly willing to try to assist you with moving this forward. If you will e-mail me an acknowledgment form, I will contact MCCA and will work with that entity to get the acknowledgment form signed and returned to you.

Have a nice weekend.

Regards,

Malcolm L. Ulmer
MCCA Risk Pool