

STATE OF MAINE
PENOBSCOT, ss

SUPERIOR COURT
CIVIL ACTION
Docket Nos. CIV-2021-13; CIV-
2021-67

BANGOR PUBLISHING CO., INC.)

Plaintiff,)

v.)

STATE OF MAINE,)

Defendant.)

**AMICUS CURIAE BRIEF OF
AMERICAN CIVIL LIBERTIES UNION
OF MAINE FOUNDATION IN
SUPPORT OF PLAINTIFFS**

MTM ACQUISITION, INC., D/B/A/
PORTLAND PRESS HERALD/MAINE
SUNDAY TELEGRAM,)

Plaintiff,)

v.)

STATE OF MAINE,)

Defendant.)

**AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MAINE
FOUNDATION IN SUPPORT OF PLAINTIFFS**

The American Civil Liberties Union of Maine Foundation (“ACLU of Maine”) files this amicus curiae brief in support of Plaintiffs Bangor Publishing Company (“Bangor Daily News”) and MTM Acquisition, Inc., d/b/a Portland Press Herald/Maine Sunday Telegram (“Portland Press Herald”) in this consolidated Appeal of Denial of Access to Public Record, pursuant to 1 M.R.S. § 409(1) and Rule 80(B) of the Maine Rules of Civil Procedure.¹

¹ On April 7, 2021, ACLU of Maine filed an unopposed motion for leave to file an amicus curiae brief in support of plaintiffs, which was granted on the same day.

INTEREST OF AMICUS CURIAE

ACLU of Maine is a nonprofit membership organization with extensive experience advocating for Maine residents' right to access to records through the Freedom of Access Act ("FOAA"), as well as under the analogous federal Freedom of Information Act ("FOIA"). That experience includes participation in numerous cases involving public access to government records, as both party and amicus curiae, in Maine state and federal courts. As a 60-year old membership organization, the ACLU of Maine represents thousands of people across the state of Maine who are committed to ensuring that residents have a broad access to public records, and ensuring the accountability of the government to citizens of the state. The organization, on behalf of its members, files this amicus curiae brief in the hopes that it will assist the court in resolving the disputed issues in this case and will complement the briefs of the parties.

STATEMENT OF FACTS

Amicus curiae adopts the Statement of Facts as set forth in the plaintiffs' brief.

DISCUSSION

The Court should require the State to conduct a complete search and disclosure of its records on police misconduct. This outcome is supported by the purposes of Maine's open records law, the importance of transparency with regard to police misconduct, and the development of the law in federal and state courts across the country. Finally, to the extent the State seeks to evade its obligations under the FOAA by relying on provisions in contracts with police unions, the legal mandate of the statute must control.

1. FOAA should be broadly interpreted and applied consistent with the public's interest to the greatest extent possible.

In passing the Freedom of Access Act ("FOAA"), the Maine Legislature explicitly intended to open public records to the public. 1 M.R.S.A. § 401. Under FOAA, "[p]ublic records

are subject to the right of the public to inspect and copy,” and FOAA is to be “liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.”” *Medical Mut. Ins. Co. of Me. v. Bureau of Ins.*, 866 A.2d 117, 120 (Me. 2005) (quoting 1 M.R.S.A. § 401). The purpose of FOAA is “to open to the public the conduct of public proceedings and the records of public activities.” *Id.*

Consistent with this purpose, it is the duty of courts interpreting FOAA to ensure that, “to a maximum extent the public’s business must be done in public.” *Moffett v. City of Portland*, 400 A.2d 340, 347-348 (Me. 1979). In its application and interpretation, “[t]he most effective right-to-know law should assist the public in gaining access to information that is open to the public.” Anne C. Lucey, Comment, *A Section-By-Section Analysis of Maine’s Freedom of Access Act*, 43 Me. L. Rev. 169, 224 (1991) (arguing that “[t]he benefits to both the agency and public outweigh the expense an open government brings”). Any analysis of a request to copy public records should, therefore, begin with the premise that access to public records must be maximized. Any claimed exemptions to disclosure must be “narrowly construed to serve [the FOAA’s] larger purpose of transparency in government.” *MaineToday Media, Inc. v. State*, 2013 ME 100 ¶ 29 n.19, 82 A.3d 104, 115.

2. The public has a strong interest in disclosure of the records at issue.

The priority of transparency embodied in the FOAA is particularly important when it comes to records of police misconduct, like the records at issue in this case. Interest in this topic is driven by a growing awareness that some individuals and communities are more at risk of being subjected to police misconduct than others. Black people, for example, are disproportionately killed by police. Between January 1, 2015 and June 30, 2020, police shot and

killed 5,442 people nationwide; 23.9% of those killed were Black, even though Black people account for only 13% of the U.S. population.²

People with disabilities are also disproportionately the victims of police violence. In 2014, Professor Harold Braswell documented fatal police encounters with three individuals with disabilities across the country who were suspected of committing minor crimes.³ In all three cases, the police claimed that the individuals were resisting arrest, but Braswell concluded that any resistance to arrest was “largely a product of [the deceased’s] disability, which made it impossible for him to fully understand and comply with police requests. Police officers overreacted, with fatal results.” *Id.* In Maine, it is well-documented that many of the people killed by police have mental health disabilities.⁴

Police misconduct has a deleterious effect on virtually every aspect of society, including the communities that the police are ostensibly meant to serve and protect.⁵ Racial disparities in

² See ACLU Research Report, *The Other Epidemic: Fatal Police Shootings in the Time of COVID-19* (2020), 4 (available at <https://www.aclu.org/report/other-epidemic-fatal-police-shootings-time-covid-19>); Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 Proc. of the Nat’l Acad. of Sci. 16793, 16793–94 (Aug. 2019) (available at <https://www.pnas.org/content/pnas/116/34/16793.full.pdf>).

³ See Harold Braswell, *Why do police keep seeing a person’s disability as a provocation?*, WASH. POST (Aug. 25, 2014), (available at <https://www.washingtonpost.com/posteverything/wp/2014/08/25/people-with-mental-disabilities-get-the-worst-and-least-recognized-treatment-from-police>) (describing fatal police encounters between Ezell Ford and the LAPD, Kajieme Powell and St. Louis police officers, and Ethan Saylor and Maryland officers).

⁴ Almost a decade ago, a comprehensive review in Maine found that 58% of those who died in police shootings experienced mental illness. *Deadly Force: Policy & the Mentally Ill*, Portland Press Herald, (2012) available at https://www.pressherald.com/interactive/maine_police_deadly_force_series_final/. The report also found that “most of the officers who pulled the trigger lacked training that might have averted those tragedies.” *Id.* In 2019, another review of deadly shootings found that the vast majority (8/10) of the cases involved individuals “living with mental health challenges.” *Report of the Attorney General’s Task Force to Review Deadly Force Incidents by Police* (Jan. 28, 2019), available at <http://www.maine.gov/tools/whatsnew/attach.php?id=1033393&an=1>.

⁵ See S. Alang et al., *Police brutality and black health: Setting the agenda for public health scholars*, Am. J. Public Health 107, 662–665 (2017); Geller et al, *Aggressive policing and the mental health of young urban men*, Am. J. Public Health 104, 2321–2327 (2014).

the use of force, as well as other police practices, are thought to have contributed to a significant decline in public trust in the police.⁶

Maine is not impervious to national trends. Plaintiffs and other media outlets have already uncovered numerous and persistent forms of police misconduct, which—prior to their investigations—went largely unknown and unpunished. One example is former Oxford County Sheriff Wayne Gallant, who, despite a systemic record of sexual misconduct towards female subordinates, retained his position as Sheriff for 11 years. In 2020, Bangor Daily News conducted an exposé and revealed that, despite the credible testimony of the survivors of Gallant’s harassment and a large amount of evidence of his misdeeds, Gallant was never charged by the Maine Police Academy.⁷ The Maine Police Academy failed to open an investigation into Gallant’s behavior because they “really thought there were bigger things going on.” *See id.* This coverage has prompted a conversation in Maine about the practice of allowing officers who are fired or resign under investigation to keep their badges and apply for other law enforcement jobs. *See id.*

This case provides yet another example of the importance of transparency to meaningful public discussions about the role of policing in our society. We have already seen this trend as the availability of videos and other technology have led to increased public awareness and outrage about police misconduct.⁸ Viral videos depicting police misconduct activated widespread

⁶ *See Public Trust and Law Enforcement—A Discussion for Policymakers*, Congressional Research Service (July 13, 2020), 2-3 (available at <https://fas.org/sgp/crs/misc/R43904.pdf>) (hereinafter “Public Trust”).

⁷ *See* Erin Rhoda, “A Maine sheriff resigned after sexting his officers. The full story is even darker,” Bangor Daily News (January 12, 2021) (available at <https://bangordailynews.com/2020/11/30/maine-focus/a-maine-sheriff-resigned-after-sexting-his-officers-the-full-story-is-even-darker/>).

⁸ *See, e.g.*, Kimberly Kindy, et al., *In protests against police brutality, videos capture more alleged police brutality*, Washington Post (June 5, 2020) (available at

conversations about use of force and excessive policing.⁹ To continue this conversation, police departments across the country must be required to share public information; voluntary compliance is not enough. Indeed, although the FBI requests data on police violence from all law-enforcement agencies across the country, this request is not mandatory and only approximately 40% of agencies participate.¹⁰ As a result, there is no comprehensive and reliable official US data on the number of persons affected by police misconduct.¹¹

To ensure transparency into police misconduct in Maine, it is critical that the State provide complete responses to Plaintiffs' public records requests. Plaintiffs are Maine's two largest newspapers, and their requests for records regarding police misconduct are made in furtherance of the broadest public interest: keeping the public informed so that they may effectively and responsibly carry out their democratic responsibilities. *See Bos. Globe Media Partners, LLC v. Dep't of Pub. Health*, 482 Mass. 427, 451, 124 N.E.3d 127, 146 (2019) (quoting Thomas Jefferson's 1787 letter to Edward Carrington, which observed, "[t]he basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter").

https://www.washingtonpost.com/national/protests-police-brutality-video/2020/06/05/a9e66568-a768-11ea-b473-04905b1af82b_story.html).

⁹ Ted Hesson, et al., *Videos of alleged police misconduct went viral. Then what happened?*, Reuters (June 23, 2020) (available at <https://www.reuters.com/article/us-minneapolis-police-protests-videos-in/videos-of-alleged-police-misconduct-went-viral-then-what-happened-idUSKBN23U1KU>).

¹⁰ See Kimberly Adams, *FBI says new data on police use of force is coming this summer* (June 1, 2020) (available at <https://www.marketplace.org/2020/06/01/fbi-police-use-of-force-database/>) (reporting that fewer than half of law enforcement officers nationwide are submitting information to a national database designed to track when they use lethal force).

¹¹ Public Trust, *supra* n.6., at 22-24 (documenting "a lack of comprehensive and reliable data on law enforcement officers' use of force" and observing that better data "could provide insight into whether the use of excessive force is the result of a few bad apples or is more of a systemic issue").

Plaintiffs’ investigations into police misconduct—the subject of the requests at issue in this case—have resulted in instructive and illuminating reporting, and the public can and should expect additional edification from reporting based on the records currently being withheld.¹²

3. Other jurisdictions have interpreted their public records laws consistent with the plaintiffs’ interpretation.

Authority from other jurisdictions confirms that disclosure is required. For example, New Hampshire’s public records law provides that, as in Maine, every citizen “has the right to inspect all governmental records in the possession, custody, or control of” public bodies and agencies during the regular or business hours of those agencies. N.H. Rev. Stat. Ann. § 91-A:4. And, as in Maine, New Hampshire courts have held that exceptions to this general principle of openness are to be construed narrowly. *See e.g., Goode v. N.H. Legis. Budget Assistant*, 148 N.H. 551, 554 (2002); *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997); *Orford Teachers Ass’n v. Watson*, 121 N.H. 118, 427 (1981). Germane to the court’s analysis here, New Hampshire law includes an exception for “internal personnel practices,” and the City of Portsmouth attempted to use this exception to deny access to an arbitration decision related to the termination of a police officer. *See Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 329, 239 A.3d 946, 948 (2020). Recognizing that the exception had been previously interpreted in a manner inconsistent with the Act’s purpose, and with the manner in which other exceptions were interpreted and applied, the New Hampshire Supreme Court vacated a lower court decision approving of the withholding of the documents. *See id.* at 343-44.

¹² *See, e.g.,* Callie Ferguson, Matt Byrne, and Erin Rhoda, *Behind the scenes of investigating the Maine State Police*, Bangor Daily News, April 20, 2021 (available at <https://bangordailynews.com/2021/04/20/maine/maine-focus/behind-the-scenes-of-investigating-the-maine-state-police/>) (summarizing Portland Press Herald and Bangor Daily News reporting on Maine State Police misconduct) (hereinafter “Behind the Scenes”).

In addition, the Oregon Supreme Court considered whether to allow the Eugene Police Department to shield records concerning police misconduct sought pursuant to the Oregon Right-to-Know law, ORS 192.420(1), which grants members of the public the right to inspect any public records. *See Am. Civil Liberties Union of Or., Inc. v. City of Eugene*, 360 Or. 269, 271, 380 P.3d 281, 283 (2016). Oregon's statute requires courts to balance the public's interest in disclosure with the interest in confidentiality. *See id.* at 281. In striking this balance, the Oregon Supreme Court recognized that there is special import to questions of transparency when it comes to the operations of police departments generally and the handling of police misconduct cases more specifically:

Every day we, the public, ask police officers to patrol our streets and sidewalks to protect us and to enforce our laws. Those officers carry weapons and have immense power. Some members of the public fear the abuse of that power. By the same token, police officers are themselves vulnerable. Many of those who drive our streets and walk our sidewalks also carry weapons. Some officers fear their use of those weapons and their resistance to legal authority. When our system of justice works as we expect it to, officers use their authority legitimately, members of the public comply with their instructions, and the dangers of escalating violence are avoided. But for our system to work as we expect it to, the public must trust that officers are using their authority legitimately, and officers must trust that the people they stop will respond appropriately. Without mutual trust, the police cannot do their work effectively and the public cannot feel safe.

Id. at 298. The Supreme Court of Oregon concluded that the intermediate appellate court had not given sufficient weight to the public's interest in disclosure, and vacated its decision.

Finally, in response to requests for documents concerning the torture of prisoners by the Central Intelligence Agency, the government attempted to claim that the disclosure of these photographs through official channels (though the photos had already been published) would constitute an unwarranted invasion of privacy against the individuals pictured, and that the photos were therefore exempt from disclosure under exceptions 6, 7(c), and 7(f) of the federal

Freedom of Information Act, 5 U.S.C. §552 *et seq.* See *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 569 (S.D.N.Y. 2005).¹³ The Court rejected the government's arguments for categorically withholding the records—including arguments that disclosure of the photographs would be used as propaganda against the United States and that they could lead to violence against soldiers. *Id.* at 577-78. While acknowledging the seriousness of these risks, the District Court held that there was greater danger in attempting to keep truthful records secret. "Suppression of information is the surest way to cause its significance to grow and persist. Clarity and openness are the best antidotes, either to dispel criticism if not merited or, if merited, to correct such errors as may be found." *Id.* at 578. The District Court concluded its analysis by quoting the United States Supreme Court on the nexus between public disclosure and informed democracy.

In its most recent discussion of FOIA, the Supreme Court commented that "FOIA is often explained as a means for citizens to know what 'their Government is up to.' The sentiment is far from a convenient formalism. It defines a structural necessity in a real democracy."

Id. at 578–79 (quoting *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 171-72 (2004)).

4. The state cannot bargain away its obligations under the FOAA.

The drafters of FOAA were aware that government employees might want to shield certain communications from public view—an outcome that can be avoided only by holding the government to its burden to justify any denial of records. See *MaineToday Media, Inc. v. State*, 2013 ME 100, ¶ 7, 82 A.3d 104. This is true whether the denial arises from a failure to conduct an adequate search or from improper redaction—both of which are present here. In evaluating

¹³ As explained by the plaintiffs, Maine courts look to FOIA to "inform [their] analysis of Maine's FOAA." *Blethen Maine Newspapers, Inc. v. State*, 2005 ME 56, ¶ 13, 871 A.2d 523.

the State’s justification for the withholding, moreover, the Court should disregard any procedures under union contracts that are in conflict with the requirements of the FOAA.¹⁴

An employer may not enter into an agreement with a union that violates state law. As the Law Court explained in one case, parties to a collective bargaining agreement are not granted “the ability to contract for what is illegal under state law.” *Nadeau v. Twin Rivers Paper Co., LLC*, 2021 ME 16, ¶ 64, 247 A.3d 717. Other courts have held the same, including in contexts even more applicable to this one. In the *City of Schenectady v. New York State Public Employment Relations Board*, the New York Court of Appeals held that collective bargaining about police discipline was a prohibited subject of bargaining when other provisions of state law supplied the applicable disciplinary rules. 30 N.Y.3d 109, 114, 86 N.E.3d 536, 539 (2017) (explaining “[the] tension between the strong and sweeping policy of the State to support collective bargaining... and a competing policy—here, the policy favoring strong disciplinary authority for those in charge of police forces” (internal citations and quotation marks omitted)). Likewise here, the State cannot rely on union procedures authorizing the removal of discipline records from personnel files, in an attempt to avoid the public disclosure required by 5 M.R.S.A. § 7070(E) with respect to employee misconduct. The statute—and the statutory obligation for disclosure—must control.

CONCLUSION

For these reasons, amicus curiae ACLU of Maine respectfully requests that the Court grant the relief sought by Plaintiffs

¹⁴ As explained by the plaintiffs, the State Police have claimed that “[u]nder a union contract, some public records of discipline are destroyed.” *Behind the Scenes*, *supra* n. 12.

Respectfully submitted,

May 13, 2021

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