STATE OF MAINE
PENOBSCOT, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-2021-00042

BANGOR PUBLISHING COMPANY,
Plaintiff,

v.

STATE OF MAINE,
Defendant.

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

Plaintiff,

v.

STATE OF MAINE,

Defendant

ORDER

Before the Court is Plaintiffs' FOAA Appeal and Plaintiffs' Motion to Access the Affidavit of Christopher Parr. The parties have fully briefed the issues and a hearing was held via Zoom video conferencing software.

I. Background information

The following facts are taken from the Joint Statement of Facts. ("JSF.") The Bangor Daily News is a daily newspaper published by Bangor Publishing Company. (JSF ¶ 1.) The Portland Press Herald is a daily newspaper published by MTM Acquisitions. (JSF ¶ 2.) On May 29, 2020, a reporter for the Bangor Daily News submitted a request to the Maine Department of Public Safety pursuant to the Maine Freedom of Access Act ("FOAA") for "all final written disciplinary decisions or dispositional findings regarding personnel investigations into current and former

Maine State Police employees since Jan. 1, 2015" and "all settlement agreements reached between the Maine State Police and its employees since Jan. 1, 2015." (JSF ¶ 5.) On December 29, 2020, in response to the request, the State produced 53 pages of documents, 12 of which included some redaction. (JSF ¶ 6.) On January 7, 2021, the State issued a second response, the only difference being two pages contained fewer redactions. (JSF ¶ 7.) On January 23, 2021, a staff attorney for Maine State Police ("MSP") explained the redacted portions of the records contained information that was exempt from disclosure pursuant to 5 M.R.S § 7070 and declined to provide justification on a redaction by redaction basis. In its view, providing the specific statutory section would in effect disclose the information it sought to protect. (JSF ¶¶ 8-9.) On January 28, 2021, Bangor Publishing Company filed a complaint against the State of Maine appealing the State's response to the May 29, 2020 request. (JSF ¶ 10.)

Between February 2020 and February 2021, a staff writer for the Portland Press Herald submitted three FOAA requests to the State Police for employee discipline documents. (JSF ¶¶ 12, 14, 17.) The third request was made on February 2, 2021 and was described as a "unifying request" which sought "1) records of final discipline for sworn employees or former employees of the Maine State Police dated between Jan. 1, 2015 and ending July, 2020; 2) any settlement documents between employees or former employees, sated between Jan. 1, 2015 and July, 2020; and 3) a privilege log or so-called Vaughn index, for any redacted or withheld records responsive to items 1 and 2, identifying the specific exception relied upon as a basis for redacting or not disclosing any records." (JSF ¶ 17.) The request was ultimately narrowed to relevant documents between January 1, 2015 to May 29, 2020. (JSF ¶ 19.) The State produced responsive documents on three occasions. (JSF ¶¶13-16.)

On February 11, 2021 MSP responded to the February 2, 2021 request with 85 pages of records concerning 18 State Police personnel. (JSF ¶¶ 20-21.) 14 of the 85 pages contained redactions. (JSF ¶ 22.) On March 3, 2021 the State produced signed copies of documents that were previously produced as unsigned versions. (JSF ¶ 23.) While the State responded and produced documents on more than two occasions, the February 11, 2021 and March 3, 2021 productions consist of all of the documents produced in response to the February 2, 2020 "unifying request" and all of the documents at issue in this case. (JSF ¶ 24.)

Several documents produced refer to other final disciplinary records, which were not produced. (JSF ¶¶ 28-42.) For example, a Settlement Agreement dated April 4, 2016, pertaining to Trooper Coflesky refers to a "final disciplinary letter" and states "in addition to the final discipline a LAST CHANCE letter will also be signed" but the productions did not include a "final discipline letter" nor a "LAST CHANCE letter" related to Trooper Coflesky. (JSF ¶¶ 32-33.) The State represents no "last chance letter" appeared in the electronic system and therefore it believes no such letter was ever created. (JSF ¶ 45.) The State provided similar explanations for other documents that similarly appeared to be missing from the productions. (JSF ¶¶ 44-46.) On February 23, 2021, MTM filed a complaint against the State of Maine challenging its response to the February 2, 2021 FOAA request. (JSF ¶ 27.)

The State represents it did not withhold any public records that were responsive to the FOAA request at issue in this appeal. (JSF ¶ 46.) To locate responsive documents, the State conducted a search of Maine State Police personnel records, which are maintained by the Department of Administrative and Financial Services, Security and Employment Human Resources Service Center ("HR"). (JSF ¶¶ 25-26.) Staff from the MSP Office of Professional Standards ("OPS") utilized a list of employees for the time period requested to search its electronic

database, where all case files created during a personnel investigation are listed. (JSF ¶ 26.) OPS staff searched the database by employee name to determine which sworn employees should have active discipline in their personnel files. [1] (JSF ¶ 26.) The names of those employees were then given to HR staff who manually searched paper personnel files for final disciplinary records, including settlement agreements. (JSF ¶ 26.) For "civilian" employees, HR used a listed of employees to manually search paper files and MSP's staff attorney checked with the Office of Employee Relations regarding pending grievances to determine whether disciplines for certain employees were final. (JSF ¶ 26.)

During the relevant time period, the State of Maine had agreements in effect with several unions including the Maine State Law Enforcement Association, Maine State Troopers Association, and Maine State Employers Association SEIU 1989. (JSF ¶¶ 48-59.) The agreements include provisions allowing for the removal of some disciplinary documents from an employee's personnel file after a given period of time. (*Id.*)

Concerning the Plaintiffs' motion, the parties stipulated to the submission of unredacted records to the Court for *in camera* review. The State submitted the documents with an affidavit of a Maine State Police staff attorney, Christopher Parr, which provided a specific statutory justification on a redaction-by-redaction basis.[2] The State argues that providing Plaintiffs with redaction-by-redaction justification could, in effect, disclose the information the redactions are intended to protect. The Court has reviewed the Parr Affidavit and is mindful of the argument that disclosing such an affidavit could risk revealing the information that redactions are intended to

[1] Meaning discipline records that had not been removed from an employee's file pursuant to the collective bargaining agreement. (JSF ¶ 26.)

[2] Nine pages of redactions were submitted for *in camera* review. Of the original fourteen pages that contained redactions, three contained redactions of only an employee number. Two pages of redactions were subsequently removed two and reproduced by the State. (State Opp. at 11 n. 2).

protect and finds that argument is valid with regard to the medical redactions. Concerning the other redactions described in the Parr Affidavit, it is less likely that release of the specific redaction information would in effect disclose the information the redactions are intended to protect, but for reasons to be described herein, the redactions are deemed inappropriate and are stricken anyway. Requiring that the specific redactions be provided to the plaintiffs during the *in camera* inspection has the effect of rejecting the State's position without hearing and could result in the dissemination of confidential information prior to the Court's ruling on that ultimate issue. The Motion is Denied.

II. Analysis

The Freedom of Access Act, 1 M.R.S. §§ 400-414, provides public records are to be available for public inspection and copying, unless otherwise provided by statute. 1 M.R.S. § 408-A. "Public record" means in relevant part any written matter "that is in the possession or custody of an agency or public official of this State or any of its political subdivisions . . . and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business." 1 M.R.S. § 402(3). That definition is subject to several exceptions including documents "which have been designated confidential by statute." 1 M.R.S. § 402(3)(A). With regard to personnel records, confidential documents include "complaints, charges, accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action." 5 M.R.S. § 7070(2)(E). However, "[i]f disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. . . For purposes of this paragraph, 'final written decision' means:

> 1) the final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or
> 2) if the final written decision is appealed to arbitration, the final written decision of a neutral arbitrator."

Id.

FOAA is to be "liberally construed and applied to promote its underlying purpose." *Guy Gannett Pub. Co. v. University of Maine*, 555 A.2d 470, 471 (Me. 1989) (quoting 1 M.R.S. § 401). Any exception must be strictly construed. *Id.* The exception found in "section 7070(2)(E) is narrowly drawn" and it "does not protect all information pertaining to misconduct." *Id.* at 472. While complaints and mere allegations are clearly protected, details of actions that led to the imposition of discipline are not and are "specifically deemed no longer confidential by section 7070(2)(E)." *Anctil v. Dep't. of Corr.*, 2017 ME 233, ¶ 10, 175 A.3d 660. The agency from which the information is sought has the burden to "establish just and proper cause for the denial of a FOAA request." *Doyle v. Town of Falmouth*, 2014 ME 151, ¶ 8, 106 A.3d 1145 (quoting *MaineToday Media, Inc. v. State*, 2013 ME 100, ¶ 9, 82 A.3d 104.)

Before evaluating the legitimacy of each redaction, the threshold question for the Court is whether the settlement agreements constitute "final disciplinary documents." The State's productions of documents consist of a variety of document types including "Record of Employee Discipline forms", final disciplinary decision letters, memos, and settlement agreements between the applicable union and the State Police. In some cases, a settlement agreement was produced in addition to another document such as a letter, form, or memo. In others, the only document produced as a result of disciplinary action is a settlement agreement and, in others, no settlement agreement was produced. The State contends the settlement agreements should only be treated as a final written decision in cases where there is no other documentation of final disciplinary action. Plaintiffs argue the settlement agreements are part of the final written decision and therefore are no longer confidential pursuant to 5 M.R.S. §7070(2)(E) regardless of whether another disciplinary document was produced.

In several instances, records related to disciplinary actions include both a settlement agreement and some other final disciplinary document.[3] All of the settlement agreements reference and effectively incorporate the other discipline documents and discipline imposed by MSP in the corresponding action. For example, in the case of Cpl. Pelletier, the State produced both a settlement agreement and a letter of final discipline. The settlement agreement states, "The Bureau of State Police and the Maine State Troopers Association hereby enter into the following agreement as it pertains to Cpl. Kyle Pelletier and the final outcome of IA2019-009. . . both parties agree to the following stipulations in addition to the final discipline imposed in IA2019-009." This language is used in all of the settlement agreements produced related to other employees. In addition to the terms of the agreement between the applicable union and employee and MSP, the settlement agreements include the underlying violation, some description of the incident that led to the imposition of discipline, and the discipline ultimately imposed. Nothing in the agreements constitutes a complaint, charge, accusation of misconduct, reply thereto or information that may result in disciplinary action. In each case final disciplinary action was actually imposed and confirmed in the agreements. For these reasons, the Court finds the settlement agreements in this case constitute "final written decisions." As such, the agreements are no longer confidential. To hold otherwise in this case would allow the State Police to easily circumvent the public records disclosure laws and effectively shield disciplinary documents from public inspection.

A. Redactions

The fact that a document is no longer deemed confidential does not mean that it cannot be properly redacted to protect confidential information contained therein. The Law Court has instructed "[w]hen a public record contain[s] information that is not subject to disclosure under

[3] See for example the cases of Pelletier, Fowlie, and Murray.

FOAA, the information may be redacted to prevent disclosure." *Doyle v. Town of Falmouth*, 2014 ME 151, ¶ 9, 106 A.3d 1145. Plaintiffs challenge the redactions and argue the State has interpreted several exceptions to FOAA too broadly. The State explained generally that all redactions are justified pursuant one of three provisions under 5 M.R.S. § 7070.

i. 5 M.R.S. §7070(2)(E)

The State redacted portions of six settlement agreements pursuant to § 7070(2)(E). In doing so, it attempted to couch the following categories of information within that narrowly drawn statutory section: 1. information contained in the agreements between the employee and their union and the State Police that were entered into in addition to the final written decision related to disciplinary action, 2. proposed but not ultimately imposed discipline, 3. alleged conduct that did not result in discipline,[4] and 4. information potentially related to *Garrity* protections. The Court reviewed each redaction in combination with the Parr affidavit.

Portions of the Pelletier, Fowlie, and Murray agreements, were redacted on the basis of containing "additional details from investigation about the allegation or accusation of misconduct not included in the separate disciplinary decision." The Court notes the settlement agreements do contain additional details of misconduct from the investigation that were not included in other final disciplinary documents. However, in the cases of Pelletier and Fowlie, when compared to the accompanying disciplinary letter, the additional detail contained in each agreement describes the exact conduct each officer was ultimately disciplined for. Similarly, in the case of Murray, two sentences were redacted, one of which contained additional detail regarding the misconduct Murray was ultimately disciplined for.[5] The other was nearly identical to the description of the

[4] The Parr Affidavit does not identify any redactions on the basis of alleged conduct that did not result in discipline.

[5] This additional sentence stated, "Following this incident, you also failed to notify your chain of command" and appears to be related to the discipline imposed.

allegation contained in the discipline letter. None of the information redacted from these agreements constitutes charges, allegations, complaints or information regarding misconduct that may result in discipline or replies thereto. The Court finds the narrow exception in 5 M.R.S. § 7070(2)(E) does not protect additional information related to misconduct which the employee was ultimately disciplined for. Therefore, this information was not redacted for just and proper cause and must be disclosed. The Court hereby orders the State to remove redactions made to paragraph 4 of the Fowlie agreement, paragraph 4 of the Pelletier agreement, and paragraph 3 of the Murray agreement and produce copies of the same to Plaintiffs.

The State also redacted paragraphs 5 and 7 of the Gay settlement agreement pursuant to §7070(2)(E) on the basis that it contained information concerning "discipline that was proposed but not ultimately imposed." Narrowly construing the plain language of the exception, as the Court must, "proposed but ultimately not imposed discipline" is not an allegation, charge, accusation or reply thereto, and final discipline was ultimately imposed. The redaction pertains to the type of final discipline imposed and is public. The plain language of the statute does not create an exception for this type of information and therefore it was not redacted for just and proper cause. *See Anctil v. Dep't. of Corr.*, 2017 ME 233, ¶ 11, 175 A.3d 660. Accordingly, the State must produce an unredacted copy of the Gay settlement agreement.

Finally, paragraph 6 of the Coflesky agreement and paragraph 5 of the Murray agreement were redacted as replies "to allegation or accusation of misconduct in which there is a potential for criminal charges." The Court is not aware of, and the State has not provided any authority in the realm of public disclosure law which implicates the protection provided in *Garrity v. N.J*, 385 U.S. 493 (1967). With that said, because the redacted information is directly related to the conduct for which the troopers were disciplined, the redactions were not made for just and proper cause.

Therefore, the State must remove the redactions applied to paragraph 6 in the Coflesky agreement, paragraph 5 of the Murray agreement and produce those documents to the plaintiffs.

ii. Medical and personal information

Confidential information appropriate for redaction also includes "medical information of any kind" and "personal information" such as an employee's "mental or physical disability." 5 M.R.S. § 7070 (2)(A), (D-1)(4). The State redacted paragraph 5 of the Coflesky agreement, paragraph 4 of the Murray agreement, and paragraph 4 of the Fisk agreement on the basis of protecting confidential medical or personal information. In doing so, the State argues the definition includes medical treatment such as counseling, therapy, and evaluations, general treatment, or evaluation of a perceived or potential medical condition or disability or to detect or diagnose a medical condition or disability as well as to treat a particular diagnosed condition. Plaintiffs argue this interpretation is too broad and as an exception, it must be narrowly construed.

Pursuant to 5 M.R.S. § 7070(2)(A) "[m]edical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders" is confidential. 5 M.R.S. § 7070(2)(A). The "statutory section protecting medical information 'of any kind' is broadly drawn." *Guy Gannet Pub. Co. v. University of Maine*, 555 A.2d 470, 471 (Me. 1989). In applying this exception, the Law Court has explained

> even with the rule of strict construction that we must apply to exceptions to the Freedom of Access Act, we conclude that, when a document objectively viewed describes expressly or by clear implication aspects of an employee's medical condition or medical treatment, it contains medical information within the meaning of the statutory exception.

Id. Accepting as accurate the State's expansive definition as encompassing not only an employee's medical condition, but also medical treatment, including counseling, therapy, and evaluations, the Court is satisfied the redacted information constitutes "[m]edical information of any kind,

including information pertaining to diagnosis or treatment of mental or emotional disorders" and describes expressly or by clear implication aspects of the employee's medical condition or treatment and as such is confidential pursuant to 5 M.R.S. §7070(2)(A) and (2)(D-1). The redactions made to paragraph 5 of the Coflesky agreement, paragraph 4 of the Murray agreement and paragraph 4 of the Fiske agreement were made for just and proper cause and shall remain.

The last redaction is found in paragraph 3 of the Harriman agreement. The redaction was imposed pursuant to 5 M.R.S. § 7070(2)(b) on the basis that it contains information related to a work plan or performance issue of another employee. Though there does not appear to be a dispute over this redaction, the Court finds it is justified and may remain in place.

B. The State's search for documents was inadequate.

Plaintiffs contend finally the search was insufficient to retrieve all responsive documents for two reasons. First, as previously mentioned, several settlement agreements produced by the State refer to other seemingly responsive disciplinary documents, which were not produced. (JFS ¶¶ 28-47.) Second, the search was insufficient because it was limited to "active" disciplinary records and therefore was incapable of identifying or retrieving records related to "inactive" discipline during the relevant time period. Because the collective bargaining agreements covering employee disciplinary records allow employees to request that certain documents be "removed from their personnel filed" as soon as one year after discipline, Plaintiffs argue, it is possible records generated between January 1, 2015 and May 29, 2019 were removed and therefore beyond the scope of the State's search.

The State has outlined the steps it took in responding to the FOAA requests and contends it conducted a thorough search for responsive documents. The State further contends any documents referenced in a settlement agreement that were not produced, must have never existed.

The State further explained while the collective bargaining agreements in the record provide for "removal" of disciplinary records from the employee's file, it is possible the documents were actually destroyed.

It is not clear to the Court at this time whether any of these documents ever existed, still exist somewhere, or have been destroyed. The State is hereby ordered to perform a supplemental search for the "missing documents" which shall include records of final discipline and settlement agreements for the period described in Plaintiffs' FOAA request. To the extent possible, the State must search the personnel files of the specific employees whose records included reference to other final disciplinary documents which were not produced, those being Christopher Gay, David Muniec, David Coflesky, Andre Paradis, Christopher Rogers, Christopher Harriman, and Tom Fiske.

Additionally, The State must search the personnel records of employees who were disciplined during the relevant time period, including inactive disciplinary actions, and documents related to final disciplinary action that may have been removed from the employee file pursuant to a bargaining agreement. To the extent the State is able to locate these additional documents, it must turn them over in a manner consistent with this Order. If the State is unable to locate the documents after reasonably diligent efforts and has good reason to believe they no longer exist, or never existed, the State is ordered to provide the Court and Plaintiffs an account of the efforts made to locate the missing documents and what those efforts revealed as to the status of the missing documents.

5/26/22
Dated

William Anderson, Justice
Maine Superior Court